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; HIS MAJESTY THE KING 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' REPLY FACTUM

Contents

OVERVIEW

1. In its responding factum, Ontario raised three issues not raised by SON in this appeal: breach of honour of the Crown, breach of treaty, and Crown immunity. SON responds to these in this factum.

2. SON also replies in this factum to arguments made by Canada and Ontario about fiduciary duty, including about the relation between honour of the Crown, treaty promises and fiduciary duty, as well as the criteria for and limitations of fiduciary duty.

3. Finally, SON replies to some points made by Canada or Ontario concerning the creation of the Peninsula as a reserve and SON's motivations for Treaty 72.

STANDARD OF REVIEW

4. Canada and Ontario rely on *Williams Lake Indian Band v. Canada*[1] in support of their positions about standard of review. Canada notes that *Williams Lake* says that the question of existence and breach of fiduciary duty attracts a standard of palpable and overriding error.[2] *Williams Lake* is explicit that where specific legal questions arise, less deference is owed. [3] SON has identified such questions where the standard is correctness.[4]

5. Ontario suggests "the determination under the *sui generis* fiduciary duty of whether the Crown 'fairly reconciled' Indigenous and non-Indigenous interest is a question of law reviewable on a standard of correctness". They propose that this is analogous to legal principles of treaty

---

[1] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 38.
[2] Ontario's factum, para 49; Canada's factum, para 13.
[3] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4*,* at paras 35, 38.
[4] See SON's factum, paras 10, 40

interpretation, which requires a court to choose the interpretation of a treaty that **best reconciles** the interests of the parties.[5] SON submits that both the question Ontario suggests and the standard of review proposed for it are incorrect.

6. SON submits the relevant substantive question to ask in determining whether the *sui generis* fiduciary duty was met is whether the Crown acted with ordinary prudence.[6]

7. If, alternatively, the question of "fair reconciliation" is engaged, SON submits that this would be in the course of determining if there was a breach of *sui generis* fiduciary duty. That is a question of mixed fact and law, reviewable on a standard of palpable and overriding error unless there is an extricable question of law. The review of treaty interpretation on a correctness standard is not analogous. In *Williams Lake,* the analysis of whether the Crown did enough to fulfill its fiduciary duty, including whether it reconciled interests fairly that were at play in that case, was dealt with as a heavily fact-based inquiry, with deference to the Specific Claims Tribunal.[7]

BREACH OF THE HONOUR OF THE CROWN

8. The Trial Judge issued a declaration that the "pre-Confederation Crown breached the honour of the Crown in relation to the fulfillment of Treaty 45 ½." She came to this conclusion because she found that the Crown did not act diligently to protect the Peninsula from the encroachments of the whites,[8] in spite of its promise in Treaty 45 ½[9] and in spite of the fact that it had tools at its disposal to do so.[10] This promise was the main benefit SON received for

---

[5] Ontario's factum, paras 50, 106-107.
[6] SON's factum, paras 104-106, and below, paras 41-47.
[7] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 100.
[8] Reasons, para 928.
[9] Reasons, para 713.
[10] Reasons, para 773.

surrendering 1.5 million acres of land south of the Peninsula.[11] The Crown received the benefit of this land, which it opened for the use of white settlers. The key question in this case is: was the Crown required to keep its end of the bargain too?

9. Although it did not cross-appeal the Trial Judge's declaration that the Crown breached its honour in relation to the fulfillment of Treaty 45 ½, Ontario seeks to challenge that declaration in this appeal. The judgment specifically states that the honour of the Crown was breached "in relation to the fulfillment of Treaty 45 ½ after 1836," and Ontario makes arguments inconsistent with that judgment in this appeal. SON submits that Ontario's arguments must be rejected. The Trial Judge applied the correct test governing the honour of the Crown in the implementation of treaty promises. Her findings of fact about the extent of squatting on the Peninsula and the Crown's capacity (but unwillingness) to act to address squatting on the Peninsula were well supported by the record. Ontario has pointed to no reversible error concerning these points.

Law on Honour of the Crown

10. The Trial Judge found that the Crown breached its honour by failing to act diligently to implement the promise to protect the Peninsula. In coming to this conclusion, she applied the correct legal test: she held that key question was "What did the Crown do to diligently fulfill the treaty obligation to protect the Peninsula, and was it enough?"[12]

11. The honour of the Crown is a foundational principle of Canada's constitutional structure. Among other things, it governs the interpretation and implementation of the Crown's treaty promises to First Nations.[13] When implementing these solemn promises, the Crown is required to

---

[11] Reasons, paras 3, 701, 713
[12] Reasons, para 910.
[13] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 73; *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 232, 241.

(1) take a broad and purposive interpretation of the promises and (2) act diligently to implement them.[14] On the second branch, dealing with implementation, the key question is whether the Crown's conduct, taken as a whole, shows that it acted diligently to implement the promise in a way that would achieve its objectives.[15] The honour of the Crown does not permit the Crown, through its inaction, to leave First Nations with an "empty shell of a Treaty promise."[16]

12. Ontario suggests that because the Crown "paid attention" to the problem of squatting, it satisfied the requirement of diligent implementation.[17] This cannot be correct. The honour of the Crown requires not only awareness of a treaty promise, but also diligent *action* to fulfill the promise *with a view to achieving its purpose*. "Paying attention" to or being aware of the problem of squatting[18] without action to address it cannot hope to achieve the objective of the promise: preventing the "encroachments of the whites" on the Peninsula.[19]

13. Ontario further asserts that the Trial Judge erred by suggesting that the Crown is not entitled to take competing obligations into account when it implements treaty promises.[20] However, the Trial Judge's comment was not about treaty promises *generally,* but rather the specific nature of the promise in Treaty 45 ½, which expressly committed to protect the Peninsula for SON from the encroachment of the whites. In this context, the Crown was not permitted to favour the interests of the white population on the Peninsula *over* SON's interests. There is no error in this analysis.

---

[14] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 75-80.
[15] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 97.
[16] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 80.
[17] See Ontario's factum, paras 125-126.
[18] See the description at paras 915-917 of the Reasons, where the Trial Judge found that the Crown was well aware of the problems with squatting on the Saugeen Peninsula and the conditions that fostered these
[19] Reasons, paras 914-915.
[20] Ontario's factum, para 126

In addition, Ontario's argument is moot, because the Trial Judge also found "the evidence does not show that the Crown weighed choices regarding the protection of the Peninsula with other competing demands".[21] Whether and how to consider competing demands therefore had no impact on the Trial Judge's conclusion that the Crown breached its duties.

14. Finally, Ontario argues that the Trial Judge erred by holding that the Crown was not sufficiently diligent because this implies "there was some degree of diligence" and any degree of diligence is enough to satisfy the Crown's honour.[22] This argument would make the honour of the Crown practically non-justiciable. In fact, after a close review of the Crown's actions to implement the Treaty[23] and of the tools available to the Crown to protect the Peninsula,[24]the Trial Judge's reasons state clearly that "the course of Crown conduct after Treaty 45 ½ does not show that the Crown made a diligent effort to fulfill the solemn treaty promise."[25] In light of this, the use of the words "does not show a sufficiently diligent effort" earlier in the reasons must be read to mean that the Crown did not act with diligence as was required by the honour of the Crown.[26]

Facts about the Honour of the Crown

15. Ontario also argues that the Trial Judge made "errors of fact" in concluding that there was significant encroachment on the Peninsula" and "errors of mixed fact and law" in concluding the Crown did not do what it should have done to protect the Peninsula. SON submits that the Trial Judge did not err in coming to these conclusions, which were well supported by the record.

---

[21] Reasons, para 922.
[22] Ontario's factum, para 127.
[23] Reasons, para 920.
[24] Reasons, para 921.
[25] Reasons, para 928.
[26] Reasons, para 908.

16. Ontario points to comments made by the Supreme Court in *Mitchell v Minister of National Revenue* to argue that findings of fact may be set aside in Aboriginal rights cases.[27] This is true, but only where the trial judge has made a palpable and overriding error. Here, the inferences and findings the Trial Judge made about the extent of squatting on the Peninsula rested on a sound evidentiary record.[28] There is no basis to disturb the Trial Judge's findings on appeal.

EVIDENCE OF SQUATTING

17. The Trial Judge made a series of careful findings of fact about the extent of squatting on the Peninsula and the surrounding islands between 1836, when the Crown promised to protect those lands from squatters, and 1854, when the Crown took a surrender of the vast majority of the Peninsula. She concluded that, for the purposes of the promise in Treaty 45 ½, "encroachment" or "squatting" included timber theft, trespass and semi-permanent and permanent forms of settlement.[29] She also concluded that encroachment by white squatters was a "significant" and "escalating" problem on the Peninsula between 1836 and 1854.[30] SON submits that there is no error in these conclusions.

18. The Trial Judge's findings on the extent of squatting on the Peninsula and the surrounding islands are well supported by the record. This evidence included both a series of government reports that identify that squatting on Indigenous lands is a major issue throughout Upper Canada (including on the Peninsula),[31] and many specific complaints by SON about squatters on the

---

[27] Ontario's factum, para 51.
[28] Reasons, paras 789-845.
[29] Reasons, para 718.
[30] Reasons, paras 786, 789, 793, 843-844.
[31] Reasons, paras 793-807. These included the Durham Report (1839) Exhibit 1284 at pp. 106-107 [PDF 109-110]; Report of the Executive Council of Upper Canada (1840); submissions to the Bagot Commission Report by Acting Superintendent of Indian Affairs Keating (1839),

Peninsula and the surrounding islands.[32] Ontario's own expert, Dr. Gwen Reimer, accepted that timber theft was a problem on the Peninsula between 1836 and 1854 and that there was evidence of other forms of squatting on the Peninsula in this period as well.[33] For example:

(a) In 1838, the Chief Superintendent of Indian Affairs reported that SON leaders had objected to white fishermen in their waters and white settlers on their hunting grounds.[34]

(b) At a General Council of Ojibway in 1840, SON told the Chief Superintendent that white people had attempted to order them out of their own hunting grounds.[35]

(c) In 1843, a SON Chief wrote to the Crown to complain about "white people coming to their lands" and trying to settle.[36]

(d) In 1846, a person of mixed descent sought permission from the Superintendent of Indian Affairs to remain on the Saugeen reserve on the Peninsula, where he was squatting. In his application, he referred to several other white and Métis people being present there.[37]

Superintendent of Indian Affairs T.G. Anderson (1840), and Chief Superintendent of Indian Affairs Jarvis (1843) all commented on the extensive squatting on Indigenous lands throughout the colony, Exhibit 1447 [PDF 35, 67, 105, and 164] see also, Exhibit 1508 [PDF 6, 44]; Report of the Executive Council of Upper Canada, (1840), Exhibit 1314, pp. 27-52 [PDF 26 – 50], especially at 35-40 [PDF 33-38]; S.P Jarvis to Committee of the Executive Council, July 13, 1843, Exhibit 1431 at p. 5 [transcript] [PDF 4]; Committee of the Executive Council of Upper Canada to Charles Metcalfe, Governor General, July 21, 1843, Exhibit 1434 at p.4 [transcript] [PDF 4].

[32] Reasons, paras 805-845.

[33] Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11604, lines 1-14, p. 11615, lines 5-10.

[34] Reasons, para 813

[35] Reasons, para 813.

[36] Reasons, para 814; Letter from Chief Wahbadik to Chief Secretary, June 10, 1843, Exhibit 1427. See also Reasons, paras 815-819.

[37] Reasons, para 821.

(e) Also in 1846, SON petitioned Lord Elgin for assistance so "that they may be safe from any **further** encroachments of the whites" on the Peninsula [emphasis added].[38]

(f) In 1847, SON complained about illegal fishing and squatters on their islands in Lake Huron and Georgian Bay.[39]

(g) In 1848, SON complained about the illegal occupation of their Fishing Islands on the west side of the Peninsula.[40]

(h) In 1850, SON wrote to the Crown Land Agent about timber to "call [his] attention to the ways in which parties here are plundering our Lands of Timber."[41]

(i) In 1852, John McLean (a Crown Land Commissioner) wrote to Col. Bruce (Superintendent General of Indian Affairs) about SON complaining of parties cutting timber and squatting on the Peninsula, asking what he should do in response.[42] McLean also wrote to a William Harrison noting that SON had complained about him being involved in "the illicit appropriation of timber" from and trespassing on the Peninsula. [43]

---

[38] Reasons, para 823.

[39] David Sawyer to T.G. Anderson and Henwick, October 25, 1847, Exhibit 1682; Dr. Gwen Reimer, "Volume 2: Aboriginal Use and Occupation of the Lake Claim Area, CA 900-1900" (as revised 2019), Exhibit 4702, p. 66 [PDF 78].

[40] Chief Alexander Madwayosh to T.G. Anderson, December 7, 1848, Exhibit 1732; T.G. Anderson, Superintendent, to T. Campbell, Superintendent General of Indian Affairs, August 4, 1848, Exhibit 1725.

[41] Reasons, paras 824-826; Chiefs Madwayosh and Mittigwob to John Clark, Crown Lands Agent, September 14, 1850, Exhibit 1791.

[42] Reasons, para 831; John McLean to Robert Bruce, Superintendent General Indian Affairs, October 15, 1852, Exhibit 1952.

[43] Reasons, para 833; John McLean to William Harrison, October 28, 1852, Exhibit 4829; John McLean to William Harrison, November 18, 1852, Exhibit 4830.

(j) On March 8, 1854, Indian Superintendent T.G. Anderson reported to Bruce and referred to SON's constant complaints about "pillaging of timber and squatting" on the Peninsula.[44]

(k) In his report of the October 1854 Treaty Council, Laurence Oliphant wrote that SON was "compelled to admit that squatters were, even then, locating themselves without permission either from themselves or the department" on the reserve [Peninsula]."[45]

19. As the Trial Judge observed, and as Ontario's and Canada's experts testified, squatting was illegal and therefore, by its nature, somewhat clandestine. There are no official statistics about how many squatters there were, or where they were located. As a result, the full extent of squatting on the Peninsula was "not well documented."[46] However, the Trial Judge also held that there was a clear record of SON complaining about encroachments of whites on their territory.[47] Government officials noted SON's repeated complaints about squatting and timber theft over the course of many years.[48] Based on the nature of squatting and the clear evidence that the problem was widespread across Indian lands, the Trial Judge concluded that these specific complaints were "a small part of the illicit activity that was actually going on" and "The more general government

---

[44] Reasons, para 838; see also, T.G. Anderson, Superintendent Indian Affairs to Robert Bruce, Superintendent General Indian Affairs, March 8, 1854, Exhibit 2060, p. 12 [PDF 12] of original transcript.

[45] Reasons, para 840; Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, October 14, 1854, Exhibit 2175, p. 4 [PDF 3].

[46] Reasons, paras 808, 790; Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7541, line 1 to p. 7546, line 2; Evidence of Dr. Gwen Reimer, Transcript vol 90, March 5, 2020, p. 11573, line 1 to p. 11579, line 22.

[47] Reasons, para 808.

[48] T.G. Anderson, Superintendent Indian Affairs to Robert Bruce, Superintendent General Indian Affairs, March 8, 1854, Exhibit 2060, p. 12 [PDF 12] of original transcript; Reasons, para 838.

reports better illustrate the extent of squatting across the settlement frontier."[49] This inference was available to her on the evidence and she made no error in making it. In addition, it is difficult to understand what evidence Ontario expects to see of incidents of squatting that SON did not report, beyond the general references by Crown officials to SON's **many** complaints.[50]

20. Ontario also suggests that incursions of squatters onto the Peninsula occurred primarily with the consent of individual members of SON.[51] This assertion is not supported by evidence. While some of the squatters and timber thieves may have had agreements with individual members of SON, the evidence suggests many did not. For example, as noted above, Oliphant wrote in October 1854 that SON was "compelled to admit that squatters were, even then, locating themselves **without permission** either from themselves or the department on the reserve" [emphasis added].[52] In any event, this argument is beside the point: a private arrangement with an individual member of SON is not the consent of SON as a nation, nor does it relieve the Crown of its promise under Treaty 45 ½ to protect the land from the "encroachment of the whites."

THE CROWN DID NOT ACT DILIGENTLY TO PROTECT THE PENINSULA

21. Ontario also argues that the Crown did act diligently to protect the Peninsula. The Trial Judge concluded otherwise, based on a comprehensive review of the record. There is no basis to set her finding aside.

22. Ontario's argument rests largely on its repeated assertion that the Crown was not aware of squatting on the Peninsula, and that the problem of squatting was "not perceivable" on the

---

[49] Reasons, para 844.
[50] See Ontario's factum, para 135.
[51] See: Ontario's factum, paras 130.
[52] Copies of Extracts of recent Correspondence respecting Alterations in the Indian Department in Canada: Laurence Oliphant Report, October 14, 1854, Exhibit 2175, p. 4 [PDF 3].

Peninsula.[53] Ontario does not provide any reference to the record or reasons to support this assertion. That is not surprising, since it is directly contradicted by the evidence of Ontario's own expert,[54] and by the Trial Judge's findings of fact.[55] For example, the Trial Judge found as fact that there were many instances where SON's complaints about squatting on their lands came to the attention of or were made directly to a Crown official. The problem was therefore manifestly "perceivable" by those officials. [56]

23. Ontario argues that the Peninsula was "vast" so the Crown should not be held to its express promise to protect it.[57] The fact that the Peninsula was vast is irrelevant to the promise. The Peninsula was 450,000 acres when the Crown made its promise to protect the Peninsula, and it was 450,000 acres when it was time to fulfil that promise.

24. The evidence at trial and the findings of the Trial Judge were that squatting moved close to existing settlement "zones", such that squatting likely began in the southern portion of the Peninsula and then later moved further north. [58] The Trial Judge also found as fact, based on the testimony of Canada's expert, that squatters were "not hard to find if one went looking for them" because squatters "would use the same roads and tracks as everyone else".[59] The size of the Peninsula was therefore not a meaningful barrier to diligent action to address squatting. The Trial

---

[53] Ontario's factum, para 130; see also, paras 114, 136.
[54] Ontario expert Dr Gwen Reimer, for instance, testified about SON's complaints to Crown officials about squatting and timber theft: Evidence of Dr. Gwen Reimer; Transcript vol 90, March 5, 2020, p. 11604, lines 1-14; p. 11615, lines 5-10.
[55] Reasons, paras 792-793, 813-817, 820-826, 828-829, 832-833, 838
[56] Reasons, paras 792-793, 813-817,820-826, 828-829, 832-833, 838
[57] Ontario's factum, para 130.
[58] Reasons, paras 765, 843, 905, 916, 1057.
[59] Reasons, para 873; Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7559 to p.7566, especially p.7566, lines 2-6.

Judge made no reviewable error when she concluded that the Crown could and should have done more to protect it.[60]

25. Ontario argues that it was difficult for the Crown to remove people from the Peninsula when at least SON members wanted them there.[61] Ontario refers to no evidence to support this proposition. SON submits that the best evidence of what SON wanted to do about squatters on the Peninsula was its repeated pleas to the Crown to address squatting and timber theft on its lands.[62] There is no reason to conclude SON would not have supported Crown action to do precisely what it was asking.

26. Ontario also suggests, without citing any evidence, that "the squatting evidence shows the limited Crown capacity to keep Europeans off the Peninsula."[63] In fact, the Trial Judge found that the Crown had tools to address squatting on the Peninsula, but did not use them.[64] She also found that if the civilian law enforcement tools and other tools that were available had been used appropriately, it would not have been necessary to go further and rely on military resources.[65] There was capacity. It was not used.

27. In addition, Ontario argues that the Trial Judge failed to consider the evidence of John Weaver that the "only feasible weapon against squatting and speculating in Indian Territory was a flat, unequivocal refusal to issue any unenforceable interest" to squatters.[66] Weaver was not an expert in the trial. His opinion was before the Court insofar as it was adopted by Canada's expert

---

[60] Reasons, paras 809, 850.
[61] Ontario's factum, para 130
[62] See, generally, Reasons, paras 808-845.
[63] Ontario's factum, para 23.
[64] Reasons, paras 773, 867, 891, 921.
[65] Reasons, para 921(iii).
[66] Ontario's factum, para 140.

historian, Dr. Douglas McCalla.[67] The failure to specifically mention each and every article to which an expert witness referred in a trial of 100 days with more than 5000 exhibits is not a palpable and overriding error.[68] In any event, Dr. McCalla explained that Weaver's central point was that the Crown did **not** take the step of issuing a flat, unequivocal refusal to recognize squatter's rights in most places, and that Weaver's book is an effort to explain why this was the case.[69] Dr. McCalla also explained that to his knowledge such a "flat unequivocal refusal" to reward squatting was not tried on the Peninsula.[70] In fact, the Trial Judge found that squatters, including on the Peninsula, often received compensation for their improvements if they could not keep their land.[71]

28. Finally, Ontario suggests that "leniency" in policing is a "fact of law enforcement" and should not be considered automatically to be a failing when it came to protecting the Peninsula.[72] Similarly, Ontario urges "deference" to government policy decisions around policing.[73] There is no evidence to support the assertion that leniency is a norm of policing, either today or in Upper Canada in the mid 19th century. Even if there was, how policing operates or operated generally does not have any bearing on the Crown's obligations to fulfill a specific treaty promise. The case law Ontario cites in favour of "deference" to government policy do not address the obligations the

---

[67] Sopinka, *The Law of Evidence in Canada*, 5th Ed: 12.227

[68] "A trial judge is not obliged to refer to each and every piece of evidence in the course of his or her reasons": *Saumur v Antoniak,* 2016 ONCA 851 at para 15, leave to appeal refused at [2017] S.C.C.A. No. 24; see also, *Housen v Nikolaisen,* 2002 SCC 33 at para 46; *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at paras 46-51.

[69] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7488, line 6 to p. 7489 line 14.

[70] Evidence of Prof. Douglas McCalla, Transcript vol 58, October 31, 2019, p. 7491, line 15 to p 7492, line 6.

[71] Reasons, paras 802-803, 806.

[72] Ontario's factum, para 137.

[73] Ontario's factum, para 115.

Crown has to implement a treaty.[74] A treaty represents an exchange of "solemn promises"[75], and the Crown must act diligently to implement those promises with a view to achieving their purposes.[76]

Conclusion on Breach of the Honour of the Crown

29. Ontario has failed to demonstrate that the Trial Judge made any palpable and overriding errors in her conclusions about the extent of squatting on the Peninsula, or about the Crown's capacity to address it. Her conclusions were well founded on the evidence before her. There is no basis to overturn her findings on appeal.

BREACH OF TREATY

30. For the same reasons she found the Crown had breached its honour, the Trial Judge also concluded the Crown breached Treaty 45 ½. Ontario has failed to demonstrate any palpable and overriding error in her analysis or finding, and so the Trial Judge's finding must stand.

FIDUCIARY THEORY

Relation of Treaties, Honour, and Fiduciary Duty

CONTOURS OF THE RELATION

31. SON agrees that the concepts of treaty promise, honour of the Crown, *ad hoc* fiduciary duty, and *sui generis* fiduciary duty are different.[77] However, there are significant overlaps between them as well. For example:

---

[74] Ontario's factum, para 115.
[75] *R. v Badger,* [1996] 1 SCR 771 at para 41.
[76] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 80, 97; *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 87, 241, 250, 253, 497.
[77] Contrary to the suggestions that SON is conflating these concepts in Ontario's factum paras 54, 91-93, and 105.

(a) The honour of the Crown can result in an obligation to make treaties.[78]

(b) The honour of the Crown can also lead to a fiduciary duty.[79]

(c) The same event can result in both an *ad hoc* fiduciary duty and a *sui generis* fiduciary duty. The Royal Proclamation has been treated both as fulfilling the undertaking element of the *ad hoc* fiduciary duty,[80] and as giving rise to a *sui generis* fiduciary duty.[81]

(d) The seminal Crown-Indigenous fiduciary duty cases, *Guerin*[82] and *Wewaykum*[83], speak simply of fiduciary duty, without distinguishing *ad hoc* fiduciary duty from *sui generis* fiduciary duty. That distinction was first made in 2013 by *Manitoba Métis Federation*.[84]

32. A common thread through all this is that if the Crown: (1) makes a promise, (2) has discretion about how to fulfil it, and (3) a First Nation's interests can be affected by this exercise of discretion, this gives rise to a binding and enforceable fiduciary duty.[85] Contrary to Canada's argument at paragraphs 85-86 of its factum, the Crown's fiduciary duty to Indigenous people has not been displaced by a rather vague honour of the Crown.[86] The honour of the Crown has a

---

[78] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20.
[79] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18.
[80] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 48.
[81] *Southwind v Canada,* 2021 SCC 28 at para 57.
[82] *Guerin v The Queen,* [1984] 2 SCR 335.
[83] *Wewaykum Indian Band v Canada*, 2002 SCC 79.
[84] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 49-50.
[85] *Guerin v The Queen,* [1984] 2 SCR 335 at pp 383-384; *Southwind v Canada,* 2021 SCC 28 at paras 57-62.
[86] Most recently made plain by *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 and *Southwind v Canada,* 2021 SCC 28.

broader scope and encompasses more things, but the Crown's fiduciary duty to Indigenous peoples remains.

FIDUCIARY DUTY AND HONOUR OF THE CROWN

33. Canada asserts that whether fiduciary duty has something to add to the obligations that would flow from the honour of the Crown is an appropriate analytic test for the existence of fiduciary duty.[87] SON says this is inappropriate for the following reasons:

(a) Such a test is fundamentally inconsistent with *Southwind*, which ruled that a fiduciary duty arises where the Crown exercises control over treaty rights,[88] that reserve land is an important and essential Indigenous interest, and that the importance of reserve land is heightened when it was set apart pursuant to a treaty obligation.[89] SON says all these factors are present in this case.

(b) The only case that analyzed what would be added to obligations under the honour of the Crown by imposing a fiduciary duty is this Court's decision in *Restoule*.[90] Such a criterion is absent from prior Supreme Court of Canada authorities.[91]

(c) Further, the analysis in *Restoule* is premised on a breach of the honour of the Crown leading to "remedies aimed at ensuring that the Crown fulfills its treaty promises."[92] There

---

[87] Canada's Factum, para 85, relying on *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 256-258 (per Lauwers and Pardu JJA).
[88] *Southwind v Canada,* 2021 SCC 28 at para 62.
[89] *Southwind v Canada,* 2021 SCC 28 at para 63.
[90] *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 256-258 per Lauwers and Pardu JJA.
[91] For example, *Guerin v The Queen,* [1984] 2 SCR 335; *Wewaykum Indian Band v Canada,* 2002 SCC 79; and *Southwind v Canada,* 2021 SCC 28.
[92] *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 257 and 270 per Lauwers and Pardu JJA; at 418 and 492 per Strathy CJO and Brown JA; and at 508 per Hourigan JA (concurring with Lauwers and Pardu JJA on honour of the Crown).

has not yet been any case that provided a remedy for a breach of the Crown's honour that **ensured** such fulfilment (i.e. one beyond granting a declaration of a breach[93]). Nor has there been any case awarding compensation for a breach of the Crown's honour. In fact, *Manitoba Métis Federation* seems to suggest that since honour of the Crown is not a cause of action, the only remedy available for a historic breach of honour of the Crown would be a declaration.[94] *Restoule* suggests some remedies might be available for a breach of honour of the Crown involving treaty promises,[95] but *Restoule* is under appeal, so it cannot be considered settled that substantive enforceable remedies for a breach of the honour of the Crown exist. This gap calls into question the appropriateness of reasoning that fiduciary duty would not add anything to the honour of the Crown.

(d) In the alternative, even on a narrow view of the scope of Crown fiduciary duty to Indigenous peoples, where reserve property is involved, a fiduciary duty has been recognized.[96] SON says that applies to the case now before this Court.

---

[93] Note that Lauwers and Pardu JJ in *Restoule* agree with the scepticism of the trial judge in that case, who expressed no confidence that a "simple declaration without more judicial direction would trigger good faith negotiations": *Restoule v Canada (Attorney General),* 2021 ONCA 779 at para 276.

[94] *Manitoba Métis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at paras 73 and 143.

[95] *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 257 and 270 per Lauwers and Pardu JJA; at 418 and 492 per Strathy CJO and Brown JA; and at 508 per Hourigan JA (concurring with Lauwers and Pardu JJA on honour of the Crown); Ontario's factum, para 124.

[96] *Restoule v Canada (Attorney General),* 2021 ONCA 779 at para 240 per Lauwers and Pardu JJA. See also Reasons, para 1124.

FIDUCIARY DUTY AND TREATY PROMISES

34. Ontario argues that interests created by treaties are not capable of giving rise to a *sui generis* fiduciary duty,[97] and that such a duty must be established independently of treaty obligations.[98] SON says this is much overstated. Ontario relies on a paragraph in *Williams Lake* for this proposition, which falls short of the proposition Ontario draws from it. That paragraph discusses *Manitoba Métis Federation*. At issue in *Manitoba Métis Federation* was the children's grant in s. 31 of the *Manitoba Act*. This was an individual interest created by a statute. The Court held that it could not be an Aboriginal interest because it was held individually rather than collectively.[99] SON's interest in the Peninsula was entirely different from the children's grant in s. 31 of the *Manitoba Act*. SON says their interest in the Peninsula was that of a reserve, or, in the alternative, was a collective and pre-existing interest rooted in prior occupation. In fact, the Trial Judge was prepared to assume that SON's interest in the Peninsula satisfied the requirement of a specific legal interest for the purposes of a *sui generis* fiduciary duty.[100]

35. Further, the statement in *Williams Lake* (which is a quote from *Manitoba Métis Federation*) about a statute, ordinance or treaty not being a proper foundation for an Aboriginal interest sufficient for a *sui generis* fiduciary duty originated in *Guerin*. In that context it was meant to distinguish from a line of "political trust" cases. In those cases, the interests advanced were based

---

[97] Ontario accepts that a treaty promise may give rise to an *ad hoc* fiduciary duty – Ontario's factum, para 63.
[98] Ontario's, factum paras 91-92, relying on *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 53.
[99] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 53.
[100] Reasons, para 1130, and see the elaboration of the support for this at SON's factum, para 93.

"entirely on statute, ordinance or treaty."[101] The political trust cases cited involved war booty in India, war reparations from Germany, a grant to a railway company, and mining royalties in a south Pacific Island.[102] *Guerin* immediately followed the statement about statutes or treaties not being a proper source for an interest that could found a fiduciary duty by saying "The situation of the Indians is entirely different" because their interest was pre-existing.[103]

36. Given this context, SON submits that, at most, *Williams Lake* and *Manitoba Métis Federation* mean that an interest created by a treaty out of nothing does not qualify as a "specific Aboriginal interest." They do not mean if an Aboriginal interest becomes protected by treaty, it ceases to be an Aboriginal interest.

37. The most recent Supreme Court of Canada decision on the Crown's fiduciary duty to First Nations, *Southwind,* confirms that a treaty can be the means by which the Crown undertakes discretionary control over a specific Aboriginal interest. *Southwind* emphasized that there is a strong fiduciary duty when the Crown is exercising control over Aboriginal and treaty rights.[104]

The Criteria for Fiduciary Duty

38. Canada and Ontario say that, in assessing the *ad hoc* fiduciary duty, it is not appropriate for the Court to tailor an undertaking about protecting the Peninsula rather than considering the undertaking given.[105] This misconstrues SON's argument.[106] SON is not saying the Court should

---

[101] *Guerin v The Queen,* [1984] 2 SCR 335 at pages 378-379, referring to *Kinloch v Secretary of State for India in Council* (1882), 7 App Cas 619, and *Tito v Waddell (No. 2)*, [1977] 3 All ER 129.
[102] *Guerin v The Queen,* [1984] 2 SCR 335 at pages 351-352.
[103] *Guerin v The Queen,* [1984] 2 SCR 335 at page 379.
[104] *Southwind v Canada,* 2021 SCC 28 at para 62.
[105] Canada's factum, para 108; Ontario's factum, para 69.
[106] SON's factum, para 58f.

tailor the undertaking. Rather, in Treaty 45 ½, **the Crown** tailored its undertaking to the particular risk that SON faced. Being precise about the scope of an undertaking should not destroy the fiduciary nature of the undertaking. In Treaty 45 ½, the Crown unequivocally undertook to forsake the interests of whites in favour of SON. It was exactly on that point where the Crown fell short.

39. SON argues that the discretion of a fiduciary need not be unilateral, and that vulnerability is not rebutted by a "hypothetical ability to protect oneself," relying on *Hodgkinson v Sims*.[107] Ontario argues at paragraph 71 of its factum, that *Hodgkinson* is an early case and the Supreme Court has moved on since then.[108] That is incorrect. The Supreme Court reiterated this same point in *Williams Lake*,[109] which indeed quotes from *Hodgkinson* on this point, as noted at para 95 of SON's factum.

40. Ontario correctly notes that *Galambos* criticized the use of "reasonable expectations" in imposing a fiduciary duty, but that was in the context that the Court below had based a fiduciary duty **solely** on reasonable expectations, in the absence of any undertaking, express or implied.[110] SON does not argue that the fiduciary duty the Crown owed to them was based solely on reasonable expectations.

The Limitations on Fiduciary Duty

41. The content of a fiduciary duty varies depending on the context in which the duty arises, including the nature and importance of the interest being protected and the nature of the

---

[107] SON's factum, paras 63-64.
[108] Ontario's factum, para 71.
[109] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at paras 59-60.
[110] *Galambos v Perez*, 2009 SCC 48 at paras 80-81.

relationship between the parties. [111] Canada and Ontario rely heavily on the idea that when the Crown owes a *sui generis* fiduciary duty to an Indigenous group, it may balance that duty with the competing interests of others.[112] This fails to acknowledge some important limits.

42. *Wewaykum,* which first articulated the idea that the Crown's other "hats" may influence the scope of its fiduciary duties to First Nations, dealt only with the application of the "many hats" principle **prior** to reserve creation,[113] and outside the traditional territory of the affected bands.[114] In that circumstance, the Supreme Court held it was appropriate to attenuate the content of the Crown's fiduciary duty by considering other interests – including, in that specific case, the interests of a neighbouring First Nation. The Supreme Court explicitly placed a condition on this kind of balancing:

> At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians [emphasis in original].[115]

43. *Wewaykum* elaborated on the scope of fiduciary duties imposed on the Crown prior to reserve creation:

> to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter

---

[111] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 86 and *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 46.
[112] It seems to be common ground that this principle does not apply to an *ad hoc* fiduciary duty. See *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para 55.
[113] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 96.
[114] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 77.
[115] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 96.

> and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries.[116]

44. By contrast, *Wewaykum* went on to elaborate that after reserve creation the duty expanded to include the protection and preservation of a First Nation's legal interest in their reserve.[117] An application of this was *Jim Shot Both Sides,* where the Court found putting the interests of the white leaseholders ahead of those of the Blood Tribe was a breach of the Crown's fiduciary duty to preserve and protect the reserve.[118]

45. In *Williams Lake*, the Crown was found to have a fiduciary duty to protect an Indigenous interest in land against the interests of white settlers, even before a reserve was created.[119]

46. SON submits that the balancing principle has a limited scope. It is inappropriate to simply defer to a Crown decision if the Crown can point to some conflicting interest.[120] This would empty the fiduciary duty of its meaning.

47. SON has already argued that the facts of this case are similar to, and in fact stronger than the facts in *Williams Lake,*[121] where the Crown was found in breach of its fiduciary duty to protect Indigenous lands. In the case at bar, the Crown expressly promised to protect the Peninsula for SON from the encroachments of the whites. SON paid dearly for this with the surrender of 1.5 million acres of land. This was already an enormous concession by SON and represents a

---

[116] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 97; see also para 86.
[117] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 86 and 98-104.
[118] *Jim Shot Both Sides v Canada*, 2019 FC 789 at para 377, rev'd other grounds *Canada v Jim Shot Both Sides,* 2022 FCA 20.
[119] *Williams Lake Indian Band v Canada*, 2014 SCTC 3 at paras 201, 327-328, 338-340, (rev'd on other grounds on judicial review 2016 FCA 63), aff'd on appeal of judicial review, 2018 SCC 4 at paras 55, 97, per Wagner J (as he then was).
[120] *Southwind v Canada,* 2021 SCC 28 at paras 12 and 103.
[121] SON's factum, para 96.

fundamental re-balancing of the interests of SON and white settlers in 1836. What SON kept was the Peninsula and the Crown's promise to protect it. This places SON's case in an entirely different category than those cases relied on by the Crowns about balancing interests:

(a) ***Williams Lake* Dissent**: Ontario has chosen to rely repeatedly on the **dissent** in *Williams Lake*, either directly or indirectly through *Restoule*.[122] As noted, the majority decision in *Williams Lake* supports SON's position.

(b) ***Restoule***: In *Restoule,* the Court concluded the Crown did not have a fiduciary duty to the signatory First Nations in relation to an annuity augmentation clause in the Robinson-Huron and Robinson-Superior treaties. The clause stipulated that the annuity provided to treaty signatories would increase if the revenues received from the territory permitted the government to do so without incurring loss.[123] The Court interpreted this as a revenue sharing clause that obligated the Crown to increase the annuity whenever net resource-based revenues permitted it to do so without incurring a loss.[124] The First Nations were to receive a fair share. Thus, in *Restoule,* there was an inherent balancing **within** this treaty promise about how the revenues were to be shared: on one side, the interests of the First Nations, and on the other, the interests of the Crown on behalf of the settler public. SON submits that the unequivocal Peninsula protection promise they received is very different from the Robinson treaties' promise, which requires some balancing of interests by its internal structure. Another important distinction is that the promise in SON's case was to

---

[122] Ontario's factum, paras 57, 73, 96, and 97.
[123] *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 61 and 63, per the entire Court.
[124] *Restoule v Canada (Attorney General),* 2021 ONCA 779 at paras 75-76, 86, per the entire Court; at 115-123, per Lauwers and Pardu JJA.

protect SON's pre-existing interest in its territory on the Peninsula. In *Restoule*, the treaty created a new benefit of revenue sharing.

(c) ***Osoyoos***: Ontario notes, referring to *Osoyoos*, that if no balancing of interests were permitted, it would not be possible to expropriate Indian reserve land.[125] SON does not dispute that it is legally possible to expropriate reserve lands. However, expropriation raises unique considerations. In general, for expropriation to take place, there needs to be some compelling public interest, usually some public infrastructure project such as a highway or a railway. Lands may not be expropriated simply to sell them to settlers. Balancing Indigenous interests in reserves with the need for essential public infrastructure is entirely different than balancing Indigenous interests in reserves with the private interests of settlers who simply want more land. If the latter were permissible, no reserve lands would be safe, and the Crown's duty to protect and preserve reserve lands would have no meaning.

(d) ***Elder Advocates***: Canada correctly notes that *Elder Advocates* says that it is rare for the Crown to be a fiduciary because that is at odds with its duty to act in the interests of society as a whole.[126] *Elder Advocates*, however, specifically noted the unique exception to this principle is the Crown's fiduciary duty to Indigenous peoples.[127]

---

[125] Ontario's factum, para 100.
[126] Canada's factum, para 101.
[127] *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at paras 25, 38-40, 48, and 50.

Other Fiduciary Issues

48. Canada argues at paragraph 120 of its factum that there is no general duty on the Crown to protect the physical land base of a reserve from trespassers. They rely on *Fairford First Nation* and *Wewaykum*. This is incorrect for the following reasons:

(a) *Fairford First Nation* was a Federal Court trial decision in 1998 about reserve flooding.[128] If it means what Canada argues it does, it was overtaken by *Wewaykum* (SCC 2002)[129] and by *Southwind* (SCC 2021)[130]; the latter is also a reserve flooding case where Canada **was** held to be in breach of fiduciary duty.

(b) The paragraph in *Wewaykum* cited by Canada does not support Canada's proposition. It says there is no Crown fiduciary duty "at large", but only exists in relation to "specific Indian interests," and notes that fiduciary protection **has** been recognized when Indigenous land interests were involved.[131] In the next paragraphs, it goes on to list a large number of cases where fiduciary duty was claimed, and observed that not all obligations between the parties to a fiduciary relationship are fiduciary.[132] Of note, **none** of those examples given involved land. *Wewaykum* went on to say:

> Once a reserve is created, the content of the Crown's fiduciary duty expands to include the **protection and preservation of the band's quasi-proprietary interest in the reserve** from exploitation [emphasis added].[133]

---

[128] *Fairford First Nation v Canada (Attorney General)*, [1999] 2 FC 48.
[129] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 86 and 98-104.
[130] *Southwind v Canada,* 2021 SCC 28.
[131] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81.
[132] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 82-83
[133] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 86. See also paras 98-104.

49. At paragraph 192 of its factum, Canada seems to be arguing that a surrender of the Peninsula was a way of "preserving SON's legal interest in the land." A surrender does not preserve a "legal interest in land" – it destroys it. Any compensation provided by a surrender is not a "legal interest in land" – it is something quite different.

50. Canada and Ontario argue that there is substantive difference between "diligence" and "prudence", and that the standard for the *sui generis* fiduciary duty is the lower standard of "ordinary prudence."[134] SON says there is no such distinction. Neither Canada nor Ontario have cited any authority which makes a distinction between these concepts. Usually, they are used as a doublet: "prudence and diligence."[135] Other times, including in the Aboriginal law context, they are used to define one another: "The standard of care and **diligence** required of the Crown was that of a man of ordinary **prudence** in managing his own affairs [emphasis added]."[136] Far from supporting the distinction advanced by Ontario, the cited paragraph from *Wewaykum* uses both "prudence" and "diligence" to describe the Crown's duty, without any suggestion that they have a different meaning.[137] A few recent cases have used the term "diligence" to describe the obligations flowing from the honour of the Crown. That does not change the standard of care required of the Crown as fiduciary.

51. At paragraph 74 of its factum, Ontario argues that SON is conflating the standard of care for *ad hoc* and *sui generis* fiduciary duties. SON says that Ontario is confusing the fiduciary

---

[134] Canada's factum, para 180, Ontario's factum, para 105.
[135] For example, *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 at para 67.
[136] *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at para 39. See also para 57.
[137] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 94.

standard of conduct and standard of care.[138] The line between these two standards is functional and cuts across both *ad hoc* and *sui generis* fiduciary duties:

(a) The fiduciary **standard of conduct** involves honesty, utmost good faith, undivided loyalty and conflict avoidance.[139] This includes full disclosure.[140]

(b) The fiduciary **standard of care** involves prudence and diligence "that of a [person] of ordinary prudence in managing [their] own affairs."[141]

(c) These standards cut across different manifestations of fiduciary duty. A trustee of a trust fund, for example, would violate the standard of conduct by borrowing the money themselves. If that trustee, on the other hand, simply invested the money recklessly or without due diligence, that would violate the standard of care, but not the standard of conduct.

(d) Both of these standards are applicable in the case at bar, in relation to different actions and omissions. As argued in SON's factum:

(i) The Crown's failure to take the steps it could and should have taken to protect the Peninsula is a breach of the standard of care.[142]

(ii) To the extent that this failure was due to preferring the interests of settlers, this is a breach of the standard of conduct.[143]

---

[138] See L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at 303 [PDF 327].
[139] L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at 303ff [PDF 327]
[140] L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at 323ff [PDF 347].
[141] L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at 354 [PDF 378], citing *Fales v Canada Permanent Trust Co.*, [1977] 2 SCR 302 at page 315.
[142] SON's factum, paras 104-105.
[143] SON's factum, para 106.

(iii) Anderson's breach of the duty of good faith and full disclosure was a breach of the standard of conduct.[144]

(iv) Oliphant's breach of full disclosure was a breach of the standard of conduct.[145]

52. At paragraph 65 of its factum, Ontario argues that an *ad hoc* fiduciary duty would require the Crown to "take all possible steps" to protect the Peninsula without regard to public safety of national security. Again, this is misstating the **standard of care** for this duty: it is that of a person of ordinary prudence in managing their own affairs. A person of ordinary prudence would not disregard public safety or national security.

53. At paragraph 104 of its factum, Ontario argues that there was no breach of duty since the Crown acted the same way to protect the Peninsula as it did in relation to Crown lands (that is to say, often by tolerating or even encouraging it).[146] This is a false analogy for two reasons:

(a) The Trial Judge found that enforcement steps which **were taken** in other areas of Upper Canada were **not taken** in relation to the Peninsula.[147]

(b) The standard of care is not what the fiduciary **actually** does in respect of his or her own property, but "that of a **[person] of ordinary prudence** in managing [their] own

[144] SON's factum, paras 107-108.
[145] SON's factum, paras 109-114.
[146] Reasons, para 807.
[147] Reasons, para 788.

affairs."[148] The standard of care is objective, not subjective. A trustee may act recklessly with their own property, but they are held to a higher standard than that for trust property.

CREATION OF THE RESERVE

54. Both Canada and Ontario say that the Peninsula was not a reserve, arguing that there was no intention on the part of the Crown to create a legal reserve. Canada asserts that Treaty 45 ½ "did not create formal, legal reserve *with added obligations,*" and that there was no evidence of intention for there to be the legal consequences that follow the creation of a reserve – for example, application of specific laws or added obligations similar to what is imposed under the *Indian Act* – nor evidence about the extent to which the Crown was involved in the direct administration of the Peninsula.[149] Ontario argues the same, saying that neither Treaty 45 ½ nor subsequent acts such as the 1847 Declaration created a reserve, but rather simply restated the "status quo" of SON's continued possession of the Peninsula.[150]

55. These assertions ignore the fact that there was indeed legislation and a suite of legal obligations that were applicable to the Peninsula that flowed from its status as a reserve after 1836. It is the same legislation and legal obligations applicable to reserve lands or lands referred to as Indian Lands, including:

(a) *An Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury*, *1839*:[151] this legislation was about unlawful activity on "Lands appropriated

---

[148] L.I. Rotman, *Fiduciary Law*, (Toronto: Carswell, 2005) at 354 [PDF 378], citing *Fales v Canada Permanent Trust Co.*, [1077] 2 SCR 302 at page 315.
[149] Canada's factum, paras 30-34, 154-158.
[150] Ontario's factum, paras 14, 19-20.
[151] *An Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury*, *1839,* Exhibit 1301.

for the residence of certain Indian Tribes in this Province", providing for removal of persons unlawfully occupying those lands.[152]

(b) *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, 1850, Cap. LXXIV:*[153] this law set out it was illegal for non-Indigenous persons to settle on "any lands belonging to or occupied by any portion of Tribe of Indians within Upper Canada" unless they had permission from the Crown, and the legislation set out punishments for contravening its provisions.[154] This Act was proclaimed to apply to the Peninsula in 1851.[155]

56. These and other subsequent pieces of legislation dealing with Indians and Indian lands were eventually consolidated after confederation and ultimately into the first *Indian Act* in 1876. The suite of obligations and specific legal responsibilities about the protection of Indian lands set out in these pre-confederation statutes were consolidated into the 1876 *Indian Act,* mainly in ss. 11-22 (Protection of Reserves).[156]

SON'S MOTIVATIONS FOR TREATY 72

57. Ontario misstates the motivations for SON's entering into Treaty 72. The Trial Judge said that "SON's key interests in Treaty 72 were to maintain their communities, culture and

---

[152] Reasons, paras 774-776.
[153] *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, 1850, Cap. LXXIV,* Exhibit 1784.
[154] Reasons, paras 782-783.
[155] Reasons, para 783; *Proclamation placing certain tracts of Land set apart for the Indians under the provisions of the Act,* 13&14 Vict. Ch. 74, November 7, 1851, Exhibit 1895.
[156] *An Act to amend and consolidate the laws respecting Indians,* SC 1876, c. 18 (39 Vict), see 'Protection of Reserves' at ss 11-22.

economy."[157] She made clear that economic reasons "were not SON's primary motivation for the treaty, contrary to a suggestion in some evidence."[158]

58. Despite this, Ontario incorrectly insists that SON had debts that they needed to pay and this was a motivation for entering Treaty 72.[159] This suggestion was raised by Ontario at trial. However, on cross examination, Ontario's expert Dr. Gwen Reimer conceded that the examples she cited on this point did not actually demonstrate that SON was in debt at the time Treaty 72 was concluded, or were motivated by such debts or financial considerations in deciding to surrender of the Peninsula.[160] In addition, Dr. Reimer agreed there is no mention of SON raising concerns about debts to Laurence Oliphant in October 1854, or of Oliphant raising this as a reason SON should enter Treaty 72.[161]

CROWN IMMUNITY

59. At Schedule C of its factum, Ontario argues that it is immune from SON's claim for breach of fiduciary duty because no legislation has clearly and unequivocally removed Crown immunity from such claims.[162] Ontario courts have rejected Ontario's analysis on Crown immunity – in *Slark*, *Seed*, *Cloud*, *Restoule 2,* and *Barker.*[163] Ontario submits, however, that these decisions are

---

[157] Reasons, para 1013.
[158] Reasons, para 1014.
[159] Ontario's factum, para 112.
[160] 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. 150 [PDF 160]; Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11859, line 19 to p. 11870, line 3 and p. 11884, line 15 to p. 11885, line 21.
[161] Evidence of Dr. Gwen Reimer, Transcript vol 92, March 9, 2020, p. 11885, line 23, to p. 11886, line 4.
[162] Ontario's factum, Schedule C, paras 9, 10, and 14.
[163] *Slark (Litigation Guardian of) v Ontario*, [sub nom. *Dolmage v Ontario*] 2010 ONSC 1726, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.); *Seed v Ontario*, 2012 ONSC 2681; *Cloud v*

wrong and should not be followed.[164] Ontario asserts that these cases are inconsistent with the Supreme Court of Canada's decision in *Canada (Attorney General) v Thouin*.[165]

60. SON submits that Ontario's reliance on this defence amounts to asking that this Court put it above the law. Ontario would have this Court conclude – after 28 years of litigation – that it can hear SON's claim for breach of fiduciary duty but cannot find Ontario liable.

61. The idea of Crown immunity to causes of action against the state is medieval.[166] It was out of place in the 20th century – when the *Proceedings Against the Crown Act* ("*PACA*")[167] was introduced – and is even more so today.[168]

62. Ontario asserts that the correct way to interpret *PACA* is for a court to consider the state of the law as it was prior to September 1, 1963, and answer whether a court at that time would have enforced an action for breach of fiduciary duty to proceed by way of petition of right.[169] To reply to Ontario's position, SON will first set out the historic availability of equitable relief against the

---

Canada (Attorney General) (2003), 65 OR (3d) 492 (Div. Ct.) at para 10, rev'd on other grounds (2004), 73 O.R. (3d) 401 (Ont. C.A.); *Restoule v Canada (Attorney General)*, 2020 ONSC 3932, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779; *Barker v Barker*, 2020 ONSC 3746, varied without comment on this point in *Barker v Barker*, 2022 ONCA 567.

[164] Ontario's factum, Schedule C, paras 7 and 14.

[165] Ontario's factum, Schedule C, para 14, citing *Canada (Attorney General) v Thouin*, 2017 SCC 46.

[166] *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726, at paras 115-116, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).

[167] *Proceedings Against the Crown Act, 1962-63*, SO 1962-63, c. 109. This Act was consolidated in 1970, in the *Proceedings Against the Crown Act*, RSO 1970, c. 365 ("PACA 1970"). All subsequent references to *PACA* refer to the provisions of PACA 1970, for consistency with the jurisprudence.

[168] *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726, at paras 115-116, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).

[169] Ontario's factum, Schedule C, paras 12 and 13

Crown. Second, SON will outline the impact of *PACA* on equitable claims in Ontario. Third, SON will provide its position on this Court's decision in *Barker* and demonstrate that the Supreme Court of Canada's decisions in *Thouin* and *Rudolph Wolff* are no bar to SON's claim of breach of fiduciary duty. Finally, SON will make submissions on this Court's jurisdiction to rule on Crown immunity and the role of the honour of the Crown in the interpretation of *PACA*.

Equitable Relief Against the Crown

63. Contrary to Ontario's position, the scholarly consensus is that historically a claim for equitable relief, including for breach of fiduciary duty, could have been pursued by way of petition of right.[170] In *Slark*, Cullity J. conducted a detailed review of the history of Crown immunity and the development of the petition of right regime. He found that:

> (a) In Holmested's *Ontario Judicature Act*, 1915, (at page 1395) it was indicated that, despite earlier uncertainty, the petition of right procedure was in practice available in this jurisdiction to enforce equitable rights.
>
> (b) In Holmested & Langton, *Ontario Judicature Act* (5th edition, 1940) cases in which petitions of right were available were summarized quite narrowly without distinguishing between common law and equitable rights. The learned authors accepted the possibility that a court might declare that a plaintiff was entitled to restitution – or compensation in lieu of it – for goods or money that had found its way into the hands of the Crown.

---

[170] *Restoule v Canada (Attorney General),* 2020 ONSC 3932 at paras 32-37, and para 81, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779, citing Walter Clode, *The Law and Practice of Petition of Right* (London: William Clowes and Sons, 1887); W.S. Holdsworth, "The History of Remedies Against the Crown" (1922) 38 LQR 140; W.S. Holdsworth, *A History of English Law*, 3rd Ed. Vol. 9 (London: Methuen & Co., 1926); Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown*, 3rd Ed. (Toronto: Carswell, 2000).

(c) Any doubt whether declaratory relief could be granted in respect of equitable rights against the Crown was removed by the landmark decision in *Dyson v. Attorney-General.*[171] In *Dyson* it was held that declaratory relief against the Attorney-General – representing the Crown – could be granted in an exercise of the inherent equitable jurisdiction of the court without recourse to the petition of right procedure and the necessity of a fiat ("*Dyson* procedure").[172]

64. In *Restoule 2,* Hennessy J. rejected Ontario's position that the *Dyson* procedure precludes a request for declaratory relief that is coupled with a claim for damages. She concluded that: "[t]here is no authority for this proposition. In fact, s. 97 of the *Courts of Justice Act*,[173] specifically authorizes the Superior Court to make binding declarations whether or not any consequential relief is or could be claimed."[174]

65. SON relies on the reasoning in *Slark* and *Restoule 2*. SON submits that the fact that the declaration they seek regarding breach of fiduciary duty in Phase 1 of this action is coupled (if SON is successful) with a claim for damages at Phase 2 of this action is not a bar to the claim.

PACA and Equitable Claims Against Ontario

66. SON submits that *PACA* does not alter the availability of a claim for equitable relief against the Crown. The purpose of *PACA* was to abrogate Crown immunity for claims in tort and it does

---

[171] *Dyson v. Attorney-General,* [1911] 1 K.B. 410 (C.A.).
[172] *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726, at paras 109-111, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[173] *Courts of Justice Act,* R.S.O. 1990, c. C.43.
[174] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 100 [citations omitted], varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779.

not extend Crown immunity for all other wrongs.[175] Section 11(4) of the *Crown Liability and Proceedings Act, 2019*,[176] which establishes (or reiterates) Crown immunity, refers only to negligence and the duty to take reasonable care – i.e. the duty of care in negligence – and is silent on equitable claims.[177]

67. Section 29 (1) of *PACA* permits claims against the Crown that (a) existed on September 1, 1963; and (b) might have been enforced by petition of right if *PACA* had not been passed.

68. In *Slark*, *Seed*, *Cloud*, *Restoule 2,* and *Barker*, the Court considered whether equitable claims against the Crown based on facts pre-existing statutory reform are subject to Crown immunity. In *Slark,* Cullity J. held that it would be artificial to ask: "how equitable claims that were effectively unknown to the law before the decision in *Guerin* would have been treated if they had been considered by a court before 1st September, 1963."[178] Instead, the correct question is whether a court today would recognize an equitable claim against the Crown for breach of fiduciary duty had

---

[175] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 82, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779, citing "The Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no. 68 (March 27, 1963) at p. 2272, "Bill 127, An Act Respecting Proceedings Against the Crown", 1st reading, *Legislature of Ontario Debates*, 1-24, vol 27 (March 28, 1952) at B-11 (Hon D Porter); "The Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no. 68 (March 27, 1963) at pp. 2272-2273.

[176] *Crown Liability and Proceedings Act, 2019*, SO 2019, c. 7, Sched. 17, s 11(4)

[177] *Barker v Barker*, 2020 ONSC 3746, at paras 1271-1273, varied without comment on this point in *Barker v Barker*, 2022 ONCA 567.

[178] *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726 at para 117, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).

PACA not been passed.[179] In denying the leave to appeal the decision in *Slark*, Herman J. endorsed this analysis.[180] The approach set out by Cullity J. was followed in *Seed,*[181] and *Restoule 2.*[182]

69. Ontario suggests that this Court should take the opposite approach to Ontario courts (discussed above) and follow the direction of the British Columbia decisions in *Richard* and *Arishenkoff*, which propose asking whether a petition of right would have been granted before the enactment of that province's proceeding against the Crown legislation.[183]

70. Cullity J. in *Slark* and Henessy J. in *Restoule 2* distinguished the Ontario approach from that taken by British Columbia courts based on differences in the legislative schemes.[184]

71. SON submits that *Slark*, *Seed*, *Cloud*, *Restoule 2,* and *Barker* should be followed. SON's position is that none of their claims are barred by *PACA* given that their claim for breach of fiduciary duty could be enforced by way of petition of right if *PACA* had not been passed. In the alternative, SON submits that a claim for relief for breach of fiduciary duty is available to them under a *Dyson* procedure.

This Court's Decision in *Barker v Barker*

72. In *Barker v. Barker*, this Court held that *Guerin* leads to the conclusion that "where legislation imposes an obligation that gives rise to duties of a fiduciary nature on the Crown, it

---

[179] *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726 at para 118, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[180] *Dolmage v Ontario,* 2010 ONSC 6131 (Div. Ct.) [referred to herein as *Slark CA*] at paras 8-10.
[181] *Seed v Ontario*, 2012 ONSC 2681 at para 100.
[182] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 83, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779.
[183] Ontario's factum, Schedule C, paras 13-14.
[184] *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726 at para 82-84, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.); *Restoule v Canada (Attorney General)*, 2020 ONSC 3932, at paras 71-73, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779.

must be taken as waiving Crown immunity for breach of that obligation".[185] This Court also found that: "[a] fiduciary duty is founded on an undertaking of the fiduciary to act in the best interests of the beneficiary in relation to specific legal, or vital or substantial practical, interests…". For Ontario to remain "free within the scope of the fiduciary relationship to make policy choices that 'benefit some while causing harm to others' – is a contradiction in terms if those harmed are the beneficiaries of its fiduciary duty."[186] This Court found it unnecessary to consider whether Crown immunity could serve as a general bar to equitable claims.[187]

73. SON agrees with Ontario that the source of the fiduciary duty in this case differs from *Barker v Barker* in so far as the obligation is not imposed by statute. SON submits, however, that if Ontario is found to have breached its fiduciary duty to SON, then the consequence of imposing a general bar on equitable claims through Crown immunity would be the same as retroactively granting Ontario freedom to make "policy choices" that may harm beneficiaries of its fiduciary duty. Such an unjust and contradictory result should be rejected by this Court.

Thouin and *Rudolph Wolff* are no Bar to Claims of Fiduciary Duty

74. In *Thouin*, the Supreme Court considered the Crown's obligation to submit to pre-trial discovery in cases in which the Crown is not a party. Historical Crown immunity from discovery obligations was abrogated by the federal *Crown Liability and Proceedings Act,*[188] ("*CLPA*"), in instances where the Crown was a party. The language of the *CLPA*, however, did not extend such immunity to instances where the Crown was not a party. In *Thouin*, the Court found that historical

---

[185] *Barker v Barker*, 2022 ONCA 567 at para 93.
[186] *Barker v Barker*, 2022 ONCA 567 at para 97.
[187] *Barker v Barker*, 2022 ONCA 567 at para 91.
[188] *Crown Liability and Proceedings Act,* RSC 1985, c. C-50, s 27.

Crown immunity in cases where the Crown was not a party had not been clearly abrogated.[189] The Court held that it requires clear and unequivocal legislative language to override Crown immunity in this regard.[190]

75. SON submits that the decision in *Thouin* does not address the issues in this case. In this regard, SON relies on the distinctions drawn by Hennessy J. in *Restoule 2*.[191] In *Thouin,* the Supreme Court confronted the issue of the jurisdiction of the court to abrogate **existing and admitted** Crown immunity in the area of discovery. There is no admitted or existing Crown immunity to breaches of fiduciary duty in this case. The decision in *Thouin* does not determine whether Crown immunity did in the past or does now extend to equitable claims. Hence, the decisions in *Slark*, *Seed*, and *Cloud* are not inconsistent with *Thouin*; the decision in *Thouin* does not cast doubt on the decision in the *Slark* line of cases.

76. SON submits that that *Rudolph Wolff & Co.* stands for the proposition that general **jurisdiction** conferred on Canadian courts to hear claims against the federal Crown comes from the enactment of statutes such as the *Petition of Right Act*, SC 1875, c. 12, and subsequent federal legislation, and that only Parliament can enact such statutes with respect to the federal Crown.[192] *Rudolph Wolff & Co.*, does not address, however, the **availability** of remedies against the Crown.

---

[189] *Canada (Attorney General) v Thouin*, 2017 SCC 46, [2017] 2 SCR 184 at paras 3, 27 and 40.
[190] *Canada (Attorney General) v Thouin*, 2017 SCC 46, [2017] 2 SCR 184 at paras 1 and 19-20.
[191] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at para 78, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779.
[192] *Rudolph Wolff & Co v Canada*, [1990] 1 SCR 695 at pages 699-700. The Parliament of Canada has passed legislation that allows for provincial superior courts to hear claims against the federal Crown, except where the Federal Court has exclusive jurisdiction (see s. 21(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50, s 21, as amended by SC 1990, c. 8, s. 28 and SC 2001, c. 4, s. 45).

The Court's Jurisdiction to Rule on Crown Immunity

77. Ontario argues that "fundamental reform to the law" of Crown immunity is a subject that should be left to the legislature.[193] SON submits that courts can and do rule on the metes and bounds of Crown immunity. As noted above at paragraph 59, Ontario courts, including this Court, have already ruled on the applicability of Crown immunity.

78. Furthermore, an endorsement by this Court of Ontario's view that it is immune from suit for breach of fiduciary duty unless an obligation is imposed on it by statute is a far greater – and regressive – change to the law on Crown immunity than granting First Nations access to justice for newly established causes of action against the Crown.[194]

The Honour of the Crown Must Guide the Interpretation of *PACA*

79. On January 5, 2007, the Lieutenant Governor of Ontario, issued a Royal Fiat to SON for this action. The Royal Fiat provides (emphasis in original):[195]

…

> **NOW THEREFORE:**
>
> **LET RIGHT BE DONE in the Action as if it had been commenced as against Her Majesty the Queen in right of Ontario by way of petition of right, without prejudice to the right of the Crown to argue that some or all of the claims asserted in the Action are nevertheless subject to Crown immunity, and to raise any other defence, point of pleading or jurisdictional issue, or take any other position.**

---

[193] Ontario's factum, Schedule C, para 15.

[194] See *Slark (Litigation Guardian of) v Ontario,* 2010 ONSC 1726 at paras 115-116, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).

[195] Royal Fiat, Treaty Action, Exhibit 3911.

80. In *Restoule 2*, Hennessy J. observed that the Supreme Court of Canada has mandated that interpretations of treaties and statutory provisions that have an impact upon treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown.[196] Hennessy J. went on to find that: "both *PACA* and the *Limitations Act*, 1990 are legislation which bears on the Crown's Treaty promises to the Anishinaabek. … because the idea of Crown immunity as a response to a treaty claim is repugnant to the Crown's promises, any statutory provision designed to impose Crown immunity must therefore be interpreted with the principle of honour of the Crown at the core."[197]

81. SON submits that *PACA* and the Royal Fiat should be interpreted in a manner that upholds the honour of the Crown. To interpret them as allowing Ontario to assert Crown immunity with unfettered discretion to protect itself from any kind of equitable claim is contrary to those principles and reconciliation. The honour of the Crown demands that courts be able to adjudicate on the merits of a claim that the Crown has breached the fiduciary duties owed to Indigenous peoples, not just when the Crown unilaterally declares it is appropriate to do so.

All of which is respectfully submitted. Date: November 14, 2022

OLTHUIS KLEER TOWNSHEND LLP
250 University Avenue, 8th Floor
Toronto, ON M5H 3E5

H.W. Roger Townshend
Cathy Guirguis
Krista Nerland
Benjamin Brookwell

[196] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 229-232 and 234, varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779.
[197] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 229-232 and 234 [citations omitted], varied without comment on this point in *Restoule v Canada (Attorney General)*, 2021 ONCA 779.

SCHEDULE A

AUTHORITIES
Alberta v Elder Advocates of Alberta Society, [2011] 2 SCR
Barker v Barker, 2020 ONSC 3746
Barker v Barker, 2022 ONCA 567
Canada v Jim Shot Both Sides, 2022 FCA 2
Canada v South Yukon Forest Corporation, 2012 FCA 165
Canada (Attorney General) v Thouin, 2017 SCC 46, [2017] 2 SCR 184
Cloud v Canada (Attorney General) (2003), 65 OR (3d) 492
Dolmage v Ontario, 2010 ONSC 6131
Ermineskin Indian Band and Nation v Canada, 2009 SCC 9
Fairford First Nation v Canada (Attorney General), [1999] 2 FC 48
Galambos v Perez, 2009 SCC 48
Guerin v The Queen, [1984] 2 SCR 335
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73
Housen v Nikolaisen, 2002 SCC 33
Jim Shot Both Sides v Canada, 2019 FC 789
Manitoba Métis Federation Inc. v Canada (Attorney General), 2013 SCC 14
Osoyoos Indian Band v Oliver (Town), 2001 SCC 85
Peoples Department Stores Inc. (Trustee of) v Wise, 2004 SCC 68
R. v Badger, 1996 CanLII 236 (SCC), [1996] 1 SCR 771
Restoule v Canada (Attorney General), 2020 ONSC 3932
Restoule v Canada (Attorney General), 2021 ONCA 779
Rudolph Wolff & Co v Canada, [1990] 1 SCR 69
Saumur v Antoniak, 2016 ONCA 851
Seed v Ontario, 2012 ONSC 2681
Slark (Litigation Guardian of) v Ontario, 2010 ONSC 1726
Slark (Litigation Guardian of) v Ontario, 2010 ONSC 6131
Southwind v Canada, 2021 SCC 28
Wewaykum Indian Band v Canada, 2002 SCC 79

Williams Lake Indian Band v Canada, 2014 SCTC 3
Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4
SECONDARY SOURCES
Rotman, L.I,, *Fiduciary Law,* (Toronto: Carswell, 2005)
Sopinka, *The Law of Evidence in Canada,* 5th Ed. (LexisNexis, 2018)

SCHEDULE B

LEGISLATION INDEX

An Act to amend and consolidate the laws respecting Indians, SC 1876, c.18 (39 Vict), ss 11-22

An Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury, 1839

An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass 1850, Cap. LXXIV

Crown Liability and Proceedings Act, RSC 1985, c. C-50, s 21

Crown Liability and Proceedings Act, 2019, SO 2019, c. 7, Sched. 17, ss 11(4)

Proceedings Against the Crown Act, 1962-63, SO 1962-63, c. 109, ss 5(1), 27, 28, 30

Proceedings Against the Crown Act, RSO 1970, c. 365, ss 28-29

***An Act to amend and consolidate the laws respecting Indians*, SC 1876, c.18 (39 Vict), ss 11-22**

Protection of Reserves

11. No person, or Indian other than an Indian of the band, shall settle, reside or hunt upon occupy or use any land or marsh, or shall settle, reside upon or occupy any road, or allowance for roads running through any reserve belonging to or occupied by such band; and all mortgages or hypothecs given or consented to by any Indian, and all leases, contracts and agreements made or purporting to be made by any Indian, whereby persons or Indians other than Indians of the band are permitted to reside or hunt upon such reserve, shall be absolutely void.

12. It any person or Indian other than an Indian of the band, without the license of the Superintendent-General (which license, however, he may at any time revoke), resides or hunts upon or occupies or uses any such land or marsh ; or settles, resides upon or occupies any such roads or allowances for roads, on such reserve, or if any Indian is illegally in possession of' any lot or part of a lot in a subdivided reserve, the Superintendent-General or such officer or person as he may thereunto depute and authorize, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant signed and sealed, directed to the sheriff' of the proper county or district, or if the said reserve be not situated within any county or district, then directed to any literate person willing to act in the premises, commanding him forthwith to remove from the said land or marsh, or roads or allowances for roads, or lots or parts of lots, every such person or Indian and his family so settled, residing or hunting upon or occupying, or being illegally in possession of the same, or to notify such person or Indian to cease using as aforesaid the said lands, marshes, roads or allowances for roads ; and such sheriff or other person shall accordingly remove or notify such person or Indian, and for that purpose shall have the same powers as in

the execution of criminal process; and the expenses incurred in any such removal or notification shall be borne by the party removed or notified, and may be recovered from him as the costs in any ordinary suit:

Provided that nothing contained in this Act shall prevent an Indian or non-treaty Indian, if five years a resident in Canada, not a member of the band, with the consent of the band the approval of the Superintendent-General, from residing upon the reserve, or receiving a location thereon.

13. If any person or Indian, after having been removed or notified as aforesaid, returns to, settles upon, resides or hunts upon or occupies, or uses as aforesaid, any of the said land, marsh or lots, or parts of lots; or settles, resides upon or occupies any of the said roads, allowances for roads, or lots or parts of lots, the Superintendent-General, or any officer or person deputed and authorized as aforesaid, upon view, or upon proof on oath made before him, or to his satisfaction, that the said person or Indian has returned to, settled, resided or hunted upon or occupied or used as aforesaid any of the said lands, marshes, lots or parts of lots, or has returned to, settled or resided upon or occupied any of the said roads or allowances for roads, or lots or parts of lots, shall direct and send his warrant signed and sealed to the sheriff of the proper county or district, or to any literae person therein, and if the said reserve be not situated within any county or district, then to any literate person, commanding him forthwith to arrest such person or Indian, and commit him to the common gaol of the said county or district, or if there be no gaol in the said county or district, then to the gaol nearest to the said reserve in the Province or Territory there to remain for the time ordered by such warrant, but which shall not exceed thirty days.

14. Such sheriff or other person shall accordingly arrest the said party and deliver him to the gaoler or sheriff of the proper county, district, Province pr Territory, who shall receive such person or Indian and imprison him in the said gaol for the term aforesaid.

15. The Superintendent-General, or such officer or person as aforesaid, shall cause the judgment or order against, the offender to be drawn up and filed in his office, and such judgment shall not be removed by *certiorari* or otherwise, or be appealed from, but shall be final.

16. If any person or Indian other than an Indian of the band to which the reserve belongs, without the license in writing of the Superintendent-General or of some officer or person deputed by him for that purpose, trespasses upon any of the said land, roads or allowances for roads in the said reserve, by cutting, carrying away or removing therefrom any of the trees, saplings, shrubs, underwood, timber or hay thereon, or by removing any of the stone, soil, minerals, metals or other valuables off the said land, roads or allowances for roads, the person or Indian so trespassing shall, for every tree he cuts, carries away or removes, forfeit and pay the sum of twenty dollars ; and for cutting, carrying away or removing any of the saplings, shrubs, underwood, timber or hay, if under he value of one dollar, the sum of four dollars, but if over the value of one dollar, then the sum of twenty dollars; and for removing any of the stone, soil, minerals, metals or other valuables aforesaid, the sum of twenty dollars, such fine to be recovered by the Superintendent-General, or any officer or person by him deputed, by distress and sale of the goods and chattels of the party or parties fined: or the Superintendent General; or such officer or person, without proceeding by distress and sale as aforesaid, may, upon the non-payment of the said fine, order the party or parties to be imprisoned in the common gaol as

aforesaid, for a period not exceeding thirty days, when the fine does not exceed twenty dollars, or for a period not exceeding three months when the fine does exceed twenty dollars : and upon the return of any warrant or distress or sale, if the amount thereof has not been made, or if any part of it remains unpaid, the said Superintendent General, officer or person, may commit the party in default upon such warrant, to the common gaol as aforesaid for a period not exceeding thirty days if the sum claimed by the Superintendent-General, upon the said warrant does not exceed twenty dollars, or for a time not exceeding three months if the sum claimed does exceed twenty dollars : all such fines shall be paid to the Receiver-General, to be disposed f for the use and benefit of the band of Indians for whose benefit the reserve is held, in such manner as the Governor in Council may direct.

17. If any Indian, without the license in writing of the Superintendent-General, or of some officer or person deputed by him for that purpose, trespasses upon the land of an Indian who holds a location title, or who is otherwise recognized by the department as the occupant of such land, by cutting, carrying away, or removing therefrom, any of the trees, saplings, shrubs, underwood, timber or hay thereon, or by removing any of the stone, soil, minerals, metals or other valuables off the said land; or if any Indian, without license as aforesaid, cuts, carries away or removes from any portion of the reserve of his band for sale (and not for the immediate use of himself and his family) any trees, timber or hay thereon, or removes any of the stone, soil, minerals, metals, or other valuables therefrom for sale as aforesaid, he shall be liable to all the fines and penalties provided in the next preceding section in respect to Indians of other bands and other persons.

18. In all orders, writs, warrants, summonses and proceedings whatsoever made, issued or taken by the Superintendent-General, or any officer or person by him deputed as aforesaid, it shall not be necessary for him or such officer or person to insert or express the name of the person or Indian summoned, arrested, distrained upon, imprisoned, or otherwise proceeded against therein, except when the name of such person or Indian is truly given to or known **by** the Superintendent-General, or such officer or person, and if the name be not truly given to or known **by** him, he may name or describe the person or Indian by any part of the name of' such person or Indian given to or known by him; and if no part of the name be given to or known **by** him he may describe the person or Indian proceeded against in any manner by which he may be identified; *and all such proceedings containing or purporting to give the name or description of any such person or Indian as aforesaid shall *prima facie,* be sufficient.

1**9.** All sheriffs, gaolers or peace officers to whom any such process is directed by the Superintendent-General, or by any officer or person by him deputed as aforesaid, shall obey the same, and all other officers upon reasonable requisition shall assist in the execution thereof.

20. If any railway, road, or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve be done under the authority of any Act of Parliament, or of the legislature of any province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; the Superintendent-General shall in any case in which an arbitration may be had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case

shall be paid to the Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian having improvements thereon.

Special Reserves

21. In all cases of encroachment upon, or of violation of trust respecting any special reserve, it shall be lawful to proceed by information in the name of Her Majesty, in the superior courts of law or equity, notwithstanding the legal title may not be vested in the Crown.

22. If by the violation of the conditions of any such trust as aforesaid, or by the breaking up of any society, corporation, or community, or if by the death of any person or persons without a legal succession of trusteeship, in whom the title to a special reserve is held in trust, the said title lapses or becomes void in law, then the legal title shall become vested in the Crown in trust, and the property shall be managed for the band or irregular band previously interested therein, as an ordinary reserve.

***An Act for the protection of the Lands of the Crown in this Province, from Trespass and Injury,* 1839**

WHEREAS the Lands appropriated for the residence of certain Indian Tribes in this Province, as well as the unsurveyed Lands, and Lands of the Crown ungranted and not under location, or sold or held by virtue of any lease or license of occupation, have from time to time been taken possession of by persons having no lawful right or authority so to do: *And whereas* the said Lands have also been from time to time unlawfully entered upon, and the timber, trees, stone and soil, removed therefrom, and other injuries have been committed thereon: *And whereas* it is necessary to provide by law for the summary removal of persons unlawfully occupying the said Lands, as also to protect the same from future trespass and injury: *Be it therefore enacted* by the Queen's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled 'An Act for making more effectual provision for the Government of the Province of Quebec, in North America, and to make further provision for the Government of the said Province," and by the authority of the same, That it shall and may be lawful for the Lieutenant-Governor of the Province from time to time, as he shall deem necessary, to appoint two or more Commissioners under the Great Seal of this Province, to receive information, and to inquire into any complaint that may be made to them or any one of them, against any person for illegally possessing himself of any of the aforesaid Lands, for the cession of which to Her Majesty no agreement hath been made with the Tribes occupying the same, and who may claim title thereto; and also to inquire into any complaint that may be made to them or any one of them against any person for having unlawfully cut down or removed any timber, trees, stone or soil, on such Lands, or for having done any other wilful and unlawful injury thereon.

Preamble.

Commissioners may be appointed to inquire concerning trespasses committed upon Indian Lands, &c.

Commissioners, on finding illegal possession;

II. *And be it further enacted by the authority aforesaid,* That if such Commissioners or any one of them shall upon investigation of any complaint made as aforesaid, against any person for being unlawfully in possession of any of the Lands hereinbefore mentioned, find and determine that such person is unlawfully in possession of such Lands, it shall be lawful for the said Commissioners, or any one of them, to give notice to and require such person to remove from the occupation of such Lands, within not less than thirty days from the day of the service of such notice, and if the person so required to remove from the occupation of such Lands shall neglect to remove from the same within the time specified in the said notice, it shall be lawful for the said Commissioners, or any one of them, to issue a Warrant under their hands and seals, or the hand and seal of any one of them, directed to the Sheriff of the District wherein such Lands are situate, commanding him to eject and remove the person in such Warrant mentioned from the Lands so unlawfully occupied by him, which Warrant the Sheriff to whom the same is directed shall have full power and authority to execute, and shall execute and carry into effect, in the same manner as by law he is authorised to execute and carry into effect, Writs issued by Her Majesty's Courts of Law for restoring and delivering possession of Lands recovered in any action of trespass in this Province.

To give notice to intruder to remove within 30 days;

On neglecting to remove, warrant of ejectment may be directed to, and executed by the Sheriff.

Penalty for resuming possession after having been removed by virtue of this Act.

III. *And be it further enacted by the authority aforesaid,* That if any person who shall have been removed from the Lands and Tenements aforesaid, in manner hereinbefore mentioned, shall return and unlawfully resume the occupation thereof, or any part thereof, it shall be lawful for the said Commissioners, or any one of them, upon complaint made and satisfactory proof being adduced, that such person has returned and unlawfully resumed the occupation of the Lands and Tenements from which he had been removed as aforesaid, to order and direct that he be committed to the Common Gaol of the District in which such Lands are situate, for a term not exceeding thirty days, and that he pay a fine to Her Majesty, Her Heirs and Successors, not exceeding Twenty Pounds.

Penalty not exceeding £20, for unlawfully cutting and removing trees, quarrying, &c.;

IV. *And be it further enacted by the authority aforesaid,* That if any such Commissioners, or any one of them, shall upon investigation of any complaint made as aforesaid, against any person for having unlawfully cut down or removed any timber or trees, or for having quarried upon, or removed any stone or other materials from the Lands aforesaid, find the person charged with such offence guilty thereof, it shall be lawful for such Commissioners, or any one of them, to order and direct that he pay a fine to Her Majesty, not exceeding Twenty Pounds, and in default of

Imprisonment for default of payment.

V. *And be it further enacted by the authority aforesaid*, That it shall and may be lawful for the Commissioners aforesaid, or any one of them, to order and direct that all timber and trees unlawfully cut down, or any stone quarried upon the Lands aforesaid, and which have not been removed from off the same, be seized and detained, and to cause the same to be seized and detained, and afterwards to sell and dispose of the same, according to such instructions as they from time to time shall receive from the Lieutenant-Governor to that effect.

Timber, &c. cut but not removed, may be seized and sold.

VI. *And be it further enacted by the authority aforesaid*, That the Commissioners, or any one of them, appointed under and by virtue of this Act, shall have full power and authority to summon and call before them any person as a Witness, to give evidence upon the subject of any complaint or matter the said Commissioners by this Act are authorised to investigate, and to administer in the usual form to such Witness an oath, that he will true answer make to all such questions as shall be put to him in reference to the matter under investigation; and if such Witness shall be guilty of wilful false swearing in giving his evidence as aforesaid, he shall on conviction be deemed guilty of wilful and corrupt perjury, and be liable to be punished in the same manner as persons convicted of wilful and corrupt perjury are now by law liable to be punished.

Commissioners authorized to summon witnesses;

And examine upon oath;

False swearing under this Act, Perjury.

VII. *And be it further enacted by the authority aforesaid*, That all monies and fines levied and collected under and by virtue of this Act shall, after deducting the expenses of collecting the same, be paid into the hands of the Receiver-General, and accounted for as part of the hereditary revenues of the Crown in this Province, or appropriated for the benefit of the Indian Tribes in this Province, in such manner as the Lieutenant-Governor, by and with the advice and consent of the Executive Council of the Province shall direct, as the case may require.

Appropriation of monies, levied under this Act.

VIII. *And be it further enacted by the authority aforesaid*, That when any person shall be charged with any offence against the provisions of this Act, the Commissioner or Commissioners appointed to examine into the same shall, before entering upon the investigation of such charge, summon the party accused to appear before him or them, at a place to be named in the said summons; and if he shall not appear there, upon proof of the due service of such summons, by delivering the same to him per-

Person accused, to be summoned previous to investigation of charge;

On default of appearance, complaint may be determined *ex parte*.

sonally, the Commissioner or Commissioners may proceed to hear and determine the complaint *ex parte*.

Commissioners empowered to issue, and Sheriffs and other officers bound to execute their warrants.

IX. *And be it further enacted by the authority aforesaid,* That it shall be lawful for any Commissioner or Commissioners, duly appointed and acting under the authority of this Act, to issue any Warrant or Warrants under their hands and seals, directed to any Sheriff, Gaoler or Peace Officer, of the District in which any proceeding shall be had before them, commanding such Sheriff, Gaoler or Peace Officer, to carry into effect any order by them made in respect to any matter within their jurisdiction; and such Warrant or Warrants shall be executed by the Sheriff, Gaoler or Peace Officer, to whom the same may be directed, in the same manner as Warrants issued by any of Her Majesty's Justices of the Peace are executed.

Commissioners entitled to same protection as Justices of the Peace, &c.

X. *And be it further enacted by the authority aforesaid,* That the Commissioners appointed under and by virtue of this Act, and all others acting under their authority, shall be entitled to the same privileges and protection in respect of any action or suit that may be instituted against them for any act by them done, that by law is granted and secured to any Justice of the Peace, Sheriff, Gaoler or Peace Officer, against whom an action may be brought for any thing by him done in the execution of his office.

Appeal lies against Judgment of Commissioners to the Vice-Chancellor;

XI. *And be it further enacted by the authority aforesaid,* That in case any person shall be dissatisfied with the judgment or decision of the said Commissioners, it shall and may be lawful for him at any time, not exceeding three months from the date of such judgment or decision, upon giving fourteen days notice in writing of his intention to the said Commissioners, who shall thereupon transmit to the proper Officer of the Court, for the use thereof, a copy of their judgment, together with the evidence taken before them the said Commissioners, to appeal therefrom to the Court of Chancery of this Province; and the Vice-Chancellor is hereby authorised and empowered to revise, alter, affirm or annul, the decision of the said Commissioners, or to order such further inquiry to be made, or if he shall see fit, to direct an issue to be tried at law touching the matter in dispute, and to make such orders and directions therein for payment of costs, and other matters respecting the same, as to him shall seem just and reasonable; and the decree of the said Court of Chancery to be given on such appeal shall be binding and conclusive on the party appealing as well as on the said Commissioners.

Decision in Chancery, final.

***An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass* 1850, Cap. LXXIV**

Preamble.

WHEREAS it is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada*, and it is hereby enacted by the authority of the same, That no purchase or contract for the sale of land in Upper Canada, which may be made of or with the Indians or any of them, shall be valid unless made under the authority and with the consent of Her Majesty, Her Heirs or Successors, attested by an Instrument under the Great Seal of the Province, or under the Privy Seal of the Governor thereof for the time being.

Purchases of land from Indians not valid without the consent of the Crown.

II. And be it enacted, That if any person, without such authority and consent, shall in any manner or form, or upon any terms whatsoever, purchase or lease any lands within Upper Canada of or from the said Indians, or any of them, or make any contract with such Indians, or any of them, for or concerning the sale of any lands therein, or shall in any manner, give, sell, demise, convey or otherwise dispose of any such lands, or any interest therein, or offer so to do, or shall enter on, or take possession of, or settle on any such lands, by pretext or colour of any right or interest in the same, in consequence of any such purchase or contract made or to be made with such Indians or any of them, unless with such authority and consent as aforesaid, every such person shall, in every such case, be deemed guilty of a misdemeanor, and shall, on conviction thereof before any Court of competent jurisdiction, forfeit and pay to Her Majesty, Her Heirs or Successors, the sum of Two Hundred Pounds, and be further punished by fine and imprisonment, at the discretion of the Court.

Such purchase without consent to be a misdemeanor.

Penalty.

III. And be it enacted, That no person shall take any confession of Judgment or Warrant of Attorney from any Indian within Upper Canada, or by means thereof, or otherwise howsoever obtain any judgment for any debt or pretended debt, or upon any bond, bill, note, promise or other contract whatsoever, unless such Indian shall be seized in fee simple in his own sole right of real estate in Upper Canada, the title to which shall be derived directly or through others by Letters Patent from the Crown, and shall be assessed in respect of such real estate to the amount of twenty-five pounds or upwards.

Confessions of judgment, &c., not to be taken from Indians.

Exception.

IV. And be it enacted, That no taxes shall be levied or assessed upon any Indian or any person inter-married with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person inter-married with any Indian so long as he, she or they shall reside on Indian lands not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupations of Indians.

Taxes and assessments not to be levied on Indians.

V. And be it enacted, That notwithstanding any thing in this Act contained, Indians and persons inter-married with Indians, residing upon any such Indian lands and engaged in the pursuit af agriculture as their then principal means of support, shall be liable, if so directed by the Superintendent General, the Assistant Superintendent General, or by any Subordinate Superintendent of Indian Affairs, who may, for the time being,

As to performance of statute labour by Indians.

 be

be charged with the subordinate superintendence of such Indians and persons inter-married with indians as aforesaid, or by any such Commissioner or Commissioners, to perform labour on the public roads laid out or used in or through such Indian lands, such labour to be performed under the sole control of the said Superintendents or Commissioners, or of any or either of them, who shall have power to direct when, where, how and in what manner the said labour shall be applied, and to what extent the same shall be imposed upon Indians or persons inter-married with Indians, who shall be resident upon any of the said lands, and that the said Superintendents and Commissioners, and every of them, shall have the like power to enforce the performance of all such labor by imprisonment or otherwise as may now be done by any power or authority under any law, rule or regulation in force in this Province for the non-performance of Statute labour: Provided always, nevertheless, that the labour to be so required of any such Indian or person inter-married with an Indian, shall not exceed in amount or extent what shall or may be required of other inhabitants of Upper Canada, under the general laws requiring and regulating such labour and the performance thereof.

Proviso: as to amount of labour.

No spirituous liquors to be furnished to Indians.

VI. And be it enacted, That it shall not be lawful for any person to sell, barter, exchange or give to any Indian, man, woman or child, within this Province, any kind of spirituous liquors in any manner or way, or to cause or procure the same to be done for any purpose whatsoever; and that if any person shall so sell, barter exchange or give any such spirituous liquors to any Indian, man, woman or child as aforesaid, or shall cause the same to be done, he shall be deemed guilty of a misdemeanor,

Penalty.

and on conviction thereof shall be fined at the discretion of the Court, not exceeding five pounds for every such offence, and shall forfeit also the sum of one pound five shillings for every such offence, to be recovered as in an action of debt with costs in

How recovered and appropriated.

any Court of competent jurisdiction, by any one who will sue for the same, one moiety of every such last mentioned pecuniary penalty or forfeiture to go to the informer or prosecutor, and the other moiety thereof to be paid to Her Majesty, Her Heirs or Successors, or to some officer acting under Her authority, to be disposed of for the use and benefit of the Indians, as the Governor of this Province for the time being may be

Proviso.

pleased to direct: Provided always, nevertheless, that no such penalty shall be incurred by the furnishing to any Indian, in case of sickness, any spirituous liquor, either by a medical man or under the direction of any such medical man.

Pawns not to be taken for liquor.

VII. And be it enacted, That no pawn taken of any Indian for any spirituous liquor, shall be retained by the person to whom such pawn shall be delivered, but the thing so pawned may be sued for and recovered, with costs of suit, by the Indian who may have deposited the same, before any Court of competent jurisdiction.

Recital.

VIII. And whereas certain tribes of Indians in Upper Canada receive annuities and presents, which annuities, or portions thereof, are expended for and applied to the common use and benefit of the said Tribes, more especially for the encouragement of agriculture and other civilizing pursuits among them, although the articles so required or purchased out of such annuities, may be and often necessarily are, in the possession or control of some particular Indian or Indians of such Tribes, and it is important with a view to the progress and welfare of such Tribes, that the property thus acquired or purchased should be protected from seizure, distress or sale, under or by virtue of any

Indian presents not to be purchased from them.

process whatsoever: Be it therefore enacted, That none of such presents or of any property purchased or acquired with or by means of such annuities, or any part thereof, or otherwise howsoever, and in the possession of any of the Tribes or any of the Indians of such Tribes, shall be liable to be taken, seized or distrained for any matter or cause whatsoever.

Commissioners and Superintendents of Indians to be Justices of the Peace.

IX. And be it enacted, That the Commissioners appointed under the Acts of Parliament in the next section of this Act mentioned, or either of them, and the different Superintendents of the Indian Department, either now in office or who may hereafter be appointed to either of such offices shall, by virtue of their office and appointment, be Justices of the Peace within the County, or United Counties, within which, for the time being, they or any or either of them, may be resident or employed as such

Commissioners

Commissioners or Superintendents, without any other qualification; any law to the contrary notwithstanding.

Recital.

X. And whereas for the purpose of affording better protection to the Indians in the unmolested possession and enjoyment of their lands, it is expedient to give more summary and effectual powers to the Commissioners appointed or who may be appointed by virtue of the Act of the Province of Upper Canada, passed in the second year of Her Majesty's Reign, chaptered fifteen, and intituled, *An Act for the protection of the lands of the Crown in this Province from trespass and injury*, and also by virtue of the Act of this Province, passed in the twelfth year of Her Majesty's Reign, chaptered nine, and intituled, *An Act to explain and amend an Act of the Parliament of the late Province of Upper Canada, passed in the second year of Her Majesty's Reign, intituled, 'An Act for the protection of the lands of the Crown in this Province 'from trespass and injury, and to make further provision for that purpose,'* to enable them more efficiently to protect the said lands from trespass and injury, and to punish all persons trespassing upon or doing damage thereto: Be it therefore enacted, That it shall not be lawful for any person or persons other than Indians, and those who may be inter-married with Indians, to settle, reside upon or occupy any lands or roads or allowances for roads running through any lands belonging to or occupied by any portion or Tribe of Indians within Upper Canada, and that all leases, contracts and agreements made or to be made, purporting to have been or to be made, by any Indians, or by any person or persons inter-married with any Indian or Indians whereby any person or persons other than Indians shall be permitted to reside upon such lands, shall be absolutely void; and if any person or persons other than Indians, or those who may be inter-married with Indians as aforesaid, shall without the license of the said Commissioners or any or either of them, (which license, however, the said Commissioners or any of them, may at any time revoke,) settle, reside upon or occupy any such lands, roads or allowances for roads, it shall be the duty of the Commissioners or any or either of them, on complaint made to them or any of them, and on due proof of the fact of such settlement, residence or occupation, to issue their or his warrant under their hands and seals, or his hand and seal, directed to the Sheriff of the County, or Union of Counties in which the said lands may lie, or if the said lands may not be situated within any County or Union of Counties, then such warrant shall be directed to any literate person who may be willing to act in the premises, commanding him forthwith to remove all such persons settling, residing upon or occupying such lands, with his, her or their families, from the said lands or roads or allowances for roads, and it shall be the duty of such Sheriff, or other person accordingly, to remove such person or persons, and for that purpose he shall have and possess the same powers as in the execution of criminal process: Provided always, nevertheless, that the provisions in this and the two following sections of this Act contained, shall extend and be construed to extend to such Indian lands only as the Governor of this Province for the time being shall from time to time, by Proclamation under the Great Seal thereof, think fit to declare and make subject to the same, and so long only as such Proclamation shall remain unrevoked and in full force.

U. C. 2 Vict. c. 15.

Canada. 12 Vict. c. 9.

None but Indians or those inter-married with them to reside on Indian lands.

Provision for the removal of persons contravening this section.

Proviso: to what lands this section shall extend.

XI. And be it enacted, That so often as any person or persons after being or having been removed as aforesaid, shall return to settle, reside upon or occupy any of the said lands or roads or allowances for roads, the said Commissioners or any or either of them, upon their or his view, or upon proof by any witness or witnesses on oath, to be made or taken before the Commissioners or any or either of them, and upon their or his being satisfied that the said person or persons has or have returned to, settled, resided upon or occupied any of the said lands or roads or allowances for roads, then and in every such case, such Commissioners or Commissioner shall direct and send their or his warrant, under their hands and seals or his hand and seal, to the Sheriff of the County or Union of Counties within which such lands may lie, or to any literate person there, or if the said lands shall not be situated within any County or Union of Counties, then to any literate person, commanding him forthwith to arrest such person or persons, and

Proceedings if persons so removed return to such lands.

to commit him, her or them to the Common Gaol of the said County or Union of Counties in which the said lands may lie, or to the Common Gaol of the nearest County or United Counties to the said lands, if the said lands shall not be within any County or United Counties, there to remain for such time as shall be ordered by the Commissioners or by any or either of them, not exceeding thirty days; and such Sheriff or other person shall accordingly arrest the said party or parties, and deliver him, her or them to the Gaoler or Sheriff of the said County or United Counties as aforesaid, who are hereby required to receive such person or persons, and the said person or persons to confine and imprison in the said Common Gaol for the term aforesaid, there to remain without bail and without being entitled to the liberties of the limits of the said Gaol; and such Commissioners or any of them shall cause the judgment or order against such person or persons to be drawn up, and no such judgment shall be liable to be removed by *Certiorari* or otherwise, or to be appealed from, but shall be deemed and taken to be final.

Arrest of such person.

No certiorari allowed.

Punishment of persons cutting timber on and doing damage to Indian lands.

XII. And be it enacted, That if any person without the license in writing of the Commissioners or of any or either of them, shall hereafter trespass upon any of the said lands or roads or allowances for roads, by cutting any trees, saplings, shrubs, underwood or timber thereon, or by carrying away or removing any of the trees, saplings, shrubs, underwood or timber therefrom, or by removing any of the stone or soil of the said lands, roads or allowances for roads, each person so trespassing shall for every tree he shall cut, carry away or remove, forfeit and pay the sum of five pounds, and for cutting, carrying or removing any of the saplings, shrubs, underwood or timber, under the value of five shillings, the sum of one pound, but if over the value of five shillings, then the sum of five pounds, and for removing any of the stone or soil aforesaid, the sum of five pounds, such fine to be imposed and recovered by the said Commissioners or any or either of them, by distress and sale of the goods and chattels of the party or parties fined, or the said Commissioners may, without proceeding by distress and sale as aforesaid, upon the non-payment of the said fine, order the party or parties to be imprisoned in the Common Gaol as aforesaid, for a period not exceeding thirty days, when the fine shall not exceed five pounds, or for a period not exceeding three calendar months, when the fine shall exceed the sum of five pounds; and upon the return of any warrant for distress or sale, if the amount thereof have not been made, or if any part of it may remain unpaid, the said Commissioners or any or either of them, may commit the party or parties who may be in default upon such warrant or warrants to the Common Gaol as aforesaid, for a period not exceeding thirty days, if the sum claimed by the said Commissioners upon the said warrant do not exceed five pounds, or for a time not exceeding three calendar months, if the sum claimed do exceed five pounds; all which fines shall be paid to Her Majesty, Her Heirs or Successors, or to some officer acting under Her authority, to be disposed of for the use and benefit of the Indians, as the Governor of this Province for the time being may be pleased to direct.

Penalties.

Imprisonment if the penalty cannot be levied.

Application of penalties.

Recital.

XIII. And whereas great difficulty has been experienced by the said Commissioners in carrying into effect the several Acts relating to Indian lands, by reason of persons giving false names or concealing their names, and it is expedient that the Commissioners should be enabled to proceed without difficulty in this respect: Be it therefore enacted, That in all orders, writs, warrants, summonses and proceedings whatsoever to be made, issued or taken by the Commissioners or any or either of them, under this or any other Act whatsoever, it shall only be necessary for the Commissioners or such of them as may be acting, to insert or express the name or names of the person or persons summoned, arrested, distrained upon, imprisoned or otherwise proceeded against in any of such orders, writs, warrants, summonses or proceedings, when the name or names of such person or persons shall be truly given to or known by the said Commissioners, or such of them as may be acting in that behalf, and if the name or names be not truly given to or known by the Commissioners, then the Commissioners or such of them as shall be acting in that behalf, shall be at liberty to name or describe the person or persons by any part of the name or names of such person or persons

Provision where the name of any person to be proceeded against under this Act cannot be ascertained.

persons which may be given to or known by them, or such of them as may be so acting; but if no part of the name or names be given to or known by the said Commissioners, or such of them as shall be so acting, they or such of them as shall be acting may describe the person or persons proceeded against in any manner by which he, she or they may be capable of being identified; And it is hereby declared that all such proceedings as aforesaid, containing the name or description, or purporting to give the name or description of any such person as aforesaid, according to this Act, shall *primâ facie* be deemed to be sufficient; any thing to the contrary notwithstanding.

XIV. And be it enacted, That all Sheriffs, Gaolers and Peace Officers, to whom any such process shall be so directed by such Commissioners or any or either of them, are hereby required to obey the same, and all other Officers upon reasonable requisition to be aiding and assisting in the execution thereof. Sheriff, &c., to obey process.

***Crown Liability and Proceedings Act*, RSC 1985, c. C-50, s 21, 27**

Jurisdiction

Concurrent jurisdiction of provincial court

21(1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

Where proceedings pending in Federal Court

(2) No court in a province has jurisdiction to entertain any proceedings taken by a person if proceedings taken by that person in the Federal Court in respect of the same cause of action, whether taken before or after the proceedings are taken in the court, are pending.

Rules of court

27 Except as otherwise provided by this Act or the regulations, the rules or practice and procedure of the court in which proceedings are taken apply in those proceedings

***Crown Liability and Proceedings Act,* SO 2019, c.7, Sched. 17, ss 11(4)**

11 (4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter

***Proceedings Against the Crown Act, 1962-63*, SO 1962-63, c. 109, ss 5(1), 27, 28, 30**

5 (1) Except as otherwise provided in this Act and notwithstanding section 11 of *The Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
(a) in respect of a tort committed by any of its servants or agents;
(b) in respect of a breach of the duties that a person owes to his servants or agents by reason of being their employer;
(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute

27 No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the day on which this Act comes into force.

28 (1) A claim against the Crown existing when this Act comes into force that, if this Act had not been passed, might have been enforced by petition of right may be proceeded with by petition of right, subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.

(2) A claim arising under a contract with the Crown that was entered into before this Act comes into force may be proceeded with under subsection 1, but not otherwise.

(3) This Act does not affect proceedings against the Crown by petition of right that have been instituted before this Act comes into force, and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been left with the Provincial Secretary before this Act comes into force.

(4) Subject to subsections 1, 2 and 3, proceedings against the Crown by petition of right are abolished, and, except for the purposes of subsections 1, 2 and 3, the rules of court respecting petitions of right are revoked

30 This Act comes into force on the 1st day of September 1963

***Proceedings Against the Crown Act*, RSO 1970, c. 365, ss 28-29**

28 No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the 1st day of September 1963.

29 (1) A claim against the Crown existing on the 1st day of September 1963 that, if this Act had not been passed, might have been enforced by petition of right may be proceeded with by petition of right, subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.

(2) A claim arising under a contract with the Crown that was entered into before the 1st day of September 1963 may be proceeded with under subsection 1, but not otherwise.

(3) This Act does not affect proceedings against the Crown by petition of right that have been instituted before the 1st day of September 1963, and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been left with the Provincial Secretary before that date.

(4) Subject to subsections 1, 2 and 3, proceedings against the Crown by petition of right are abolished, and, except for the purposes of subsections 1, 2 and 3, the rules of court respecting petitions of right are revoked.

The Chippewas of Saugeen First Nation et al. Plaintiffs (Appellants)	and	The Attorney General of Canada and His Majesty the King 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

APPELLANTS' REPLY FACTUM

Olthuis, Kleer, Townshend LLP
250 University Ave, 8th Floor
Toronto, ON M5H 3E6
Tel: 416.981.9330

H.W. Roger Townshend (LSO 34916O)
Email: rtownshend@oktlaw.com

Cathy Guirguis (LSO 568083S)
Email: cguirguis@oktlaw.com

Krista Nerland (LSO 67574L)
Email: knerland@oktlaw.com

Benjamin Brookwell (LSO 67687G)
Email: bbrookwell@oktlaw.com

Counsel for the Appellants