COURT OF APPEAL FOR ONTARIO

CITATION: Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town), 2024 ONCA 884
DATE: 20241209
DOCKET: COA-23-CV-0491 & COA-23-CV-0511

George, Copeland and Dawe JJ.A.

DOCKET: COA-23-CV-0491

BETWEEN

Chippewas of Saugeen First Nation

Plaintiff
(Respondent)

and

The Town of South Bruce Peninsula*, His Majesty the King in Right of Ontario**, His Majesty the King in Right of Canada**, the Attorney General of Canada**, the Estate of Barbara Twining (by her Estate Executors, Brenda Joan Rogers and Gary Michael Twining)*, Alberta Lemon*, David Dobson, Sauble Beach Development Corporation, the Estate of William Eldridge, the Estate of Charles Albert Richards, and the Attorney General of Ontario**

Defendants
(Appellants*/
Respondents**)

Docket: COA-23-CV-0511

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(Respondent)

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The Town of South Bruce Peninsula***, His Majesty the King in Right of Ontario*, His Majesty the King in Right of Canada**, the Attorney General of Canada**, the Estate of Barbara Twining (by her Estate Executors, Brenda Joan Rogers and Gary Michael Twining)***, Alberta Lemon***, David Dobson, Sauble Beach Development Corporation, the Estate of William Eldridge, the Estate of Charles Albert Richards, and the Attorney General of Ontario*

Defendants
(Appellants*/Respondents by way of cross-appeal*/
Respondents**/Appellants by way of cross-appeal**/
Respondents***)

Nuri Frame, Mark Gibson, and Alexander DeParde for the respondent (COA-23-CV-0491 & COA-23-CV-0511), Chippewas of Saugeen First Nation

Jonathan C. Lisus, Zain Naqi, John Carlo Mastrangelo, and Andrew Winton for the appellants (COA-23-CV-0491) and the respondents (COA-23-CV-0511), the Town of South Bruce Peninsula, the Estate of Barbara Twining (by her Estate Executors, Brenda Joan Rogers and Gary Michael Twining), and Alberta Lemon

Richard Ogden, Stephanie Figliomeni, and Mohamed M. Salama for the respondents (COA-23-CV-0491) and the appellants/respondents by way of cross-appeal (COA-23-CV-0511), His Majesty the King in Right of Ontario and the Attorney General of Ontario

Michael Beggs, Janet Brooks, Barry Ennis, and Madeline Torrie for the respondents (COA-23-CV-0491) and the respondents/appellants by way of cross-appeal (COA-23-CV-0511), His Majesty the King in Right of Canada and the Attorney General of Canada

Brandon Kain and Bryn Gray for the intervener (COA-23-CV-0491 & COA-23-CV-0511), the Ontario Landowners Association

Heard: May 27-30, 2024

On appeal from the judgment of Justice Susan Vella of the Superior Court of Justice, dated June 30, 2023, with reasons reported at 2023 ONSC 2056 and 2023 ONSC 3928, and from the costs order, dated May 21, 2024, with reasons reported at 2024 ONSC 2827.

By the Court:

A. INTRODUCTION

[1] The respondent, Chippewas of Saugeen First Nation ("Saugeen"), contends that approximately 1.4 miles of coastline, known as *Chi-Gmiinh*, were improperly excluded from Saugeen Indian Reserve No. 29 (the "Reserve"). Saugeen brought this action seeking a declaration that the excluded coastline (the "Disputed Beach") forms part of the Reserve, that no third parties have any interest in the Disputed Beach, and that the honour of the Crown and its fiduciary duties were breached by the wrongful demarcation of the Reserve boundaries. Saugeen also sought damages for these breaches.

[2] Treaty 72 of 1854 (the "Treaty") specified that the eastern boundary of the Reserve was to run south in a "line drawn from a spot upon the coast at a distance of about (9 ½) nine miles and a half from the Western boundary". The trial judge found that Provincial Land Surveyor ("PLS") Charles Rankin, who surveyed the boundaries of the Reserve in 1855 and submitted his survey return to the Superintendent General of Indian Affairs in 1856, fixed the northern terminus of the eastern boundary of the Reserve approximately 1.4 miles south of the place

where it should have been located. In so doing, he deprived Saugeen of part of their unceded coastline. The trial judge found further that the Imperial Crown acted dishonourably and breached the Crown's fiduciary duty to Saugeen by failing to properly demarcate the Reserve's boundaries to include the Disputed Beach, and then by failing to protect and preserve Saugeen's unceded land in its entirety. The trial judge also found that Saugeen's claim to the Disputed Beach was neither barred nor extinguished by any defences, such as laches or the *bona fide* purchaser for value defence.

[3] The Attorney General of Ontario and His Majesty the King in Right of Ontario ("Ontario"), the Town of South Bruce Peninsula (the "Town"), and Alberta Lemon and the Estate of Barbara Twining (the "Families") appeal to this court, arguing that the trial judge misinterpreted the Treaty, misapprehended the *bona fide* purchaser for value defence, and erred by dispossessing landowners as a remedy for the Crown's breach and dishonourable conduct.

[4] The Attorney General of Canada and His Majesty the King in Right of Canada ("Canada") generally supported Saugeen's position at trial and conceded that it had breached its fiduciary duty and bore some share of responsibility for the breach of fiduciary duty by the Imperial Crown, but denied engaging in dishonourable conduct. Canada cross-appeals from the decision below, arguing that the trial judge erred in her determination of the Imperial Crown's pre-Confederation liability as between Canada and Ontario.

[5] Treaty 72 was entered into by the Imperial Crown, Saugeen, and Chippewas of Nawash ("Nawash") on October 13, 1854. The Treaty provides in part:

> For the benefit of the Saugeen Indians we reserve all that block of land bounded West by a straight line running due north from the river Saugeen at the spot where it is entered by a ravine immediately to the west of the village and over which a bridge has recently been constructed to the shore of Lake Huron. On the South by the aforesaid northern limits of the lately surrendered strip; on the east by a line drawn from a spot upon the coast at a distance of about (9 ½) nine miles and a half from the Western boundary aforesaid and running parallel thereto until it touches the aforementioned northern limits of the recently surrendered strip; and we wish it to be clearly understood that we wish the Peninsula at the mouth of the Saugeen river to the west of the western boundary aforesaid to be laid out in town & park lots and sold for our benefit without delay, and we also wish it to be understood that our surrender includes that parcel of land, which is in continuation of the strip recently surrendered, to the Saugeen River. [Emphasis added.]

[6] Saugeen argues that, under the terms of the Treaty, the northern terminus of the Reserve's eastern boundary was to be located in what is now known as lot 31, alongside the Disputed Beach, north of where Rankin placed the northern terminus between what are now lots 25 and 26. Given that Saugeen did not surrender the Disputed Beach, the beach should be part of Saugeen's Reserve land, and no defences, either at common law or in equity, should bar Saugeen's claim.

[7] On appeal, Ontario argues that the trial judge made several errors in both law and fact in her interpretation of the Treaty, including failing to reconcile the

Treaty parties' interests and choosing an interpretation that favoured Saugeen. The Town and Families submit that the trial judge erred by granting a remedy on an "unpleaded theory" that moves the entire eastern boundary of the Reserve further east and affects an unknown number of private landowners. The Families also contend that the trial judge misapplied their *bona fide* purchaser for value defence, and the Town appeals the trial judge's costs order. Lastly, Canada cross-appeals the trial judge's determination that it alone is responsible for the pre-Confederation Crown's liability.

[8] For the reasons that follow, we dismiss Ontario's appeal, dismiss the Town and Families' appeal, dismiss the Town's costs appeal, and allow Canada's cross-appeal.

B. FACTS

(1) The Parties

[9] Saugeen is an Indigenous Nation of Anishinaabe people whose traditional territory extends over much of what is now known as the Bruce Peninsula and historically as the Saugeen Peninsula. The Disputed Beach is located on the peninsula and forms part of what is now known as Sauble Beach.[1] The Saugeen have a sacred relationship with the land and water at the Disputed Beach. The

[1] A plan showing the area of the Disputed Beach is attached as Appendix A. The plan was prepared by one of Saugeen's experts, Izaak de Rijcke, in 1998 and appended to his expert report (Exhibit 1900, Appendix 3).

Saugeen traditionally used the Disputed Beach for sustenance fishing, in particular using a method called “seine” fishing, where fishermen would place nets in the shallow waters close to shore. At the time of Treaty formation, they were also continuing to invest in and develop commercial fishing activities.

[10] The Town was incorporated in 1999, amalgamating several smaller townships, including Amabel Township, which was the historical township neighbouring the Disputed Beach and Reserve.[2] Amabel Township had purchased quitclaim deeds to several of the lots abutting the Disputed Beach in the early 1970s. The Town is the successor in title to these quitclaim deeds. Amabel Township purchased the lots alongside the beach when it realized that it had an economic interest in developing Sauble Beach as a tourist destination.

[11] The Families, namely Alberta Lemon and the Estate of Barbara Twining, are private citizens who own property alongside the Disputed Beach. David Dobson, who was a party to the proceedings below but did not join the appeal, owns and operates a seasonal restaurant alongside the beach. His father and uncle purchased the property in 1948, and Mr. Dobson bought out their shares in the restaurant in the 1980s.

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[2] A sketch plan of part of Amabel Township, dated February 22, 1951, annotated by Canada to show the Reserve’s boundaries is attached as Appendix B (Exhibit 1196).

[12] Alberta Lemon inherited her property, along with the accompanying cottage, from her father in 1964. The deed indicates that their ownership extends to the water's edge. The Lemons have used the land along the Disputed Beach as a parking lot for visitors to the public beach. There have been no significant improvements made to the beachfront or the cottage, which sits across the road from the beach and is used as a seasonal recreational property.

[13] Title to the Twining property passed to Barbara Twining in 1977, following the passing of her father. The Twining property includes a cottage that the family uses recreationally during the summers. Like the Lemon cottage, this cottage is across the road from the Disputed Beach and is not at issue in this litigation. Similar to the Lemons, the Twinings have used the beachfront as a profit-generating parking lot.

(2) Treaty Negotiations

[14] Before 1854 the vast majority of the Bruce Peninsula, the territory north of the Saugeen River, had not been ceded to the Imperial Crown and belonged to Saugeen and Nawash. While Saugeen had previously agreed to surrender some land to the Crown under the Bond Head Treaty and Treaty 67, the Royal Proclamation of 1847 expressly acknowledged that the Saugeen Peninsula belonged to Saugeen and Nawash and would remain so until such time as the First Nations wished to surrender it.

[15] The Crown made numerous attempts to secure a further surrender of Saugeen territory between June 1852 and the signing of the Treaty in October 1854, driven by economic interests in the region and an increasing settler population.

[16] On October 11, 1854, the newly appointed Superintendent General of Indian Affairs, Laurence Oliphant, arrived at Saugeen's village, referred to as the Indian Village by the Crown, once again seeking a surrender of land. Oliphant and the Saugeen and Nawash leadership discussed the issue in a Treaty Council on October 12, 1854. Saugeen was represented by their *Ogimaa*, or Chief, alongside other leading men and representatives, including *Anikeogimaa*/Deputy Chief Alexander Madwayosh, who was vocally opposed to Oliphant's proposal. The Imperial Crown was represented by Oliphant, as well as Crown Land Agent Alexander McNabb and Rankin.

[17] Treaty 72 was signed in the early morning hours of October 13, 1854. In describing the negotiation process in his report to the Governor General (the "Treaty Report"), Oliphant suggested that some of the Saugeen leaders "came forward to stipulate for increased limits to their reserves and fresh privileges, in consideration of their readiness to adopt the views of Government" on land surrender. Oliphant appended a sketch map to his Treaty Report in which the limits

of the Reserve were defined as accurately as possible “without actual survey” (the “Sketch Map”).[3]

[18] The terms of the Treaty were handwritten by Oliphant, and then confirmed by an Order-in-Council on February 3, 1855.

(3) The Written Text of Treaty 72

[19] Two reserves were set aside for Saugeen under Treaty 72: Indian Reserve 29 and Chief’s Point Reserve. The passage in Treaty 72 that addresses the description of the two Saugeen reserves reads as follows:

> 1st. For the benefit of the Saugeen Indians we reserve all that block of land bounded West by a straight line running due north from the river Saugeen at the spot where it is entered by a ravine immediately to the west of the village and over which a bridge has recently been constructed to the shore of Lake Huron. On the South by the aforesaid northern limits of the lately surrendered strip; on the east by a line drawn from a spot upon the coast at a distance of about (9 ½) nine miles and a half from the Western boundary aforesaid and running parallel thereto until it touches the aforementioned northern limits of the recently surrendered strip; and we wish it to be clearly understood that we wish the Peninsula at the mouth of the Saugeen river to the west of the western boundary aforesaid to be laid out in town & park lots and sold for our benefit without delay, and we also wish it to be understood that our surrender includes that parcel of land, which is in continuation of the strip recently surrendered, to the Saugeen River.

[3] A copy of the Sketch Map is attached as Appendix C (Exhibit 324, at p. 14).

[20] The text explicitly describes the western, southern, and eastern Reserve boundaries. As the trial judge found, “both Treaty parties knew” Lake Huron’s shore was implicitly incorporated into the western Reserve boundary and the Saugeen River was implicitly incorporated into the southern Reserve boundary.

[21] The Treaty also reserved several islands for Saugeen’s use in each of Lake Huron and Georgian Bay.

(4) Surveying the Reserve

[22] Rankin began a preliminary survey of the Reserve’s boundaries in October 1854, shortly after the Treaty negotiations – at which he had been present – concluded. His initial task was to determine the Reserve’s boundaries and then report on the conditions of the surrendered lands. Rankin recorded his journey in his survey journal.

[23] According to the survey journal, Rankin set out on foot to traverse the Reserve’s boundaries on October 20, 1854. He completed his initial traverse on November 3, 1854. Rankin then surveyed other areas of the Saugeen Peninsula until December 1854, when snow limited his ability to continue.

(a) The western boundary and the Copway Road Amendment

[24] Beginning in May 1855, Rankin’s assistant, George Gould, conducted his own preliminary survey of the Reserve. Gould began his work by marking the western boundary of the Reserve in a line running “due north”. Saugeen formally

objected to this orientation in a band council resolution passed May 5, 1855. In this resolution, Saugeen argued that the western boundary should run along a dirt pathway that went towards Lake Huron in a roughly northwesterly direction, rather than due north. This pathway would later be referred to as Copway Road. In its petition, Saugeen stated:

> That the wording of the late Treaty is not in accordance with the map laid before the council the night the Treaty was discussed, which we are prepared to show.

[25] The "due north" western boundary (which effectively runs in a direct line north from the southwest corner of the Reserve to the shore of Lake Huron) would have shortened the amount of lakefront abutting the Reserve. This interpretation would have also had the effect of excluding from the Reserve homes built by the Saugeen on the other side of the "due north" western boundary.[4]

[26] As a result of this dispute, the Superintendent of Indian Affairs who succeeded Oliphant, Lord Bury, met with Saugeen and Nawash in a Grand Council called the Allenford Council on July 19, 1855. The parties came to an agreement at this meeting: Bury would ask the Governor General to approve a boundary change to reflect Saugeen's interpretation, and the First Nations would consent to the surveys proceeding. Rankin continued with the surveys and similarly recommended that the western boundary be changed to follow Copway Road

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[4] See Appendix B.

when submitting his completed plan of the town plot abutting the boundary. The adjustment was formally approved by an Order-in-Council on September 25, 1855 (the “Copway Road Amendment”).

[27] The trial judge found that it was reasonable to infer that the Copway Road Amendment to the western boundary was not reflective of the agreement reached at the original Treaty Council in October 1854, and that the Treaty’s promise that the Reserve’s total coastline be about 9.5 miles remained intact. According to the trial judge, the Copway Road Amendment was in addition to the Treaty-defined coastline, leading to a minor addition of coastline to the Reserve. This finding is grounded in the Order-in-Council, which stated that the Reserve would be “bounded instead by the Indian Path called the Copway Road…. This change will give the Saugeen Indians a small increase of frontage on Lake Huron”. As the trial judge observed, this Order-in-Council makes no mention of altering any other Reserve boundary or otherwise changing the terms of the Treaty.

(b) Surveying the eastern boundary and identifying the northern terminus

[28] On September 4, 1855, Rankin commenced his official survey of the eastern boundary. Rankin began at lot 31, where he planted a post. Rankin then walked south along the eastern boundary. According to the Treaty, as quoted above, the Reserve’s eastern boundary was to follow a line drawn south from a “spot upon

the coast" of Lake Huron, about 9.5 miles from its western boundary. While expert witnesses agreed that the "spot upon the coast" fell within the vicinity of lot 31, there was a dispute about whether Rankin planted the post exactly upon the spot. The appellants' expert witnesses, Dr. Brian Ballantyne and Stephen Fediow, testified that the post was planted further inland from the "spot", while Saugeen's expert witness, Izaak de Rijcke, testified that the post marked the "spot".

[29] Rankin located the "spot upon the coast" on wet sand. The trial judge found that Rankin planted the post 1.5 to 2 chains[5] (about 30 to 40 metres) from the water's edge. While the spot was located within lot 31, Rankin planted the post inland to protect it from the lakeshore. Significantly, the trial judge found there was a concavity in the shoreline of Lake Huron alongside the Disputed Beach, which Rankin confronted when surveying the eastern boundary. While Rankin was able to walk along the wet sand from the "spot upon the coast", the concavity presented an obstacle to marking the boundary on dry land, pursuant to the hierarchy of boundary evidence which he had been following. As the trial judge noted, the "hierarchy of boundary evidence" provides "an analytical approach surveyors use when determining how best to run a boundary on the ground".

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[5] A "chain" is a measure of distance used by surveyors, equal to 66 feet, or approximately 20 metres.

[30] Pursuant to this hierarchy, and given the concavity, Rankin exercised his discretion as a surveyor to move the northern terminus from the “spot upon the coast” at lot 31 to the road allowance at lots 25 and 26.

(5) Treaty Implementation and Post-Treaty Conduct

(a) The Trace Map and discussions with ‘Alexander’

[31] In May 1856, Rankin concluded his report on the survey of the Saugeen Peninsula. Rankin attached a hand-drawn map (the “Trace Map”) to this report, referred to as “Saugeen Indians trace shewing their proposed alterations in the boundary of their Reserve”.[6] This map was prepared following Rankin’s discussion with “Alexander”, whom the trial judge presumed to be Alexander Madwayosh, one of the Saugeen leaders present at the October 1854 Treaty Council.

[32] The trial judge found that the Trace Map did not provide any evidence of Saugeen’s intentions, or the common intention of the parties, when the Treaty was signed.

(b) Patenting, subdivision, and sale of abutting lots

[33] Rankin’s survey was submitted to Indian Affairs on May 22, 1856. The Imperial Crown then determined that it would proceed with auctioning the surveyed lots to private owners. Lots 26-31 were all sold by the end of two public auctions

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[6] A copy of the Trace Map is attached as Appendix D (Exhibit 523).

in September 1857. Lot 28 was patented that same year, while the remaining lots were patented between 1881 and 1910.

[34] Several of these lots, including those now owned by the Families, were subdivided in 1927. The subdivision plans for these lots did not include the Disputed Beach. As the trial judge found, “none of the subdivision plans … show any of the cottage lots extending to Lake Huron. Rather the west boundary for these subdivided lots is shown as ending at Huron Lane, or what is now called Lakeshore Boulevard North, which runs between the beach portion of Sauble Beach on the west and the cottages or improved properties on the east.”

(c) Complaints by Saugeen to the Crown

[35] Saugeen first raised documented concerns about the northern terminus and eastern boundary in 1877, taking issue with the placement of the northern terminus of the eastern boundary at the road allowance between lots 25 and 26 rather than the Treaty-defined “spot upon the coast” at lot 31. Saugeen made these complaints following the passage of both the *Indian Act*, S.C. 1876, c. 18, and the *Fishery Act*, S. Prov. C. 1857 (20 Vict.), c. 21,[7] which restricted Saugeen’s fishing and governance rights. The encroachment of the settler population on the Saugeen

[7] The 1857 *Fishery Act* was repealed and replaced by the *Fishery Act*, S. Prov. C. 1858 (21 & 22 Vict.), c. 86. The legislation was further amended with the passage of the *Fisheries Act*, S. Prov. C. 1865 (29 Vict.), c. 21. After Confederation, Parliament enacted the *Fisheries Act*, S.C. 1868, c. 60.

Peninsula led to further pressure on Saugeen's ability to fish and use the Disputed Beach.

[36] Saugeen made several further public declarations expressing their dissatisfaction with the Reserve's coastal boundary, including a series of band council resolutions passed between 1886 and 1930. Local Crown agents were aware of Saugeen's complaints. As Indian Agent Don Robertson noted in 1930, "there is some dispute with [Saugeen] as to how far up the Sa[u]ble beach the reserve runs".

[37] In 1931, Indian Affairs instructed Ontario Land Surveyor ("OLS") and Dominion Land Surveyor ("DLS") Walter Russell White to re-survey the Reserve's eastern boundary. This re-survey was completed in July 1931. While this survey was largely conducted "on-the-ground", White relied on Rankin's field notes when surveying along the Disputed Beach, rather than physically surveying it himself. He was instructed to determine the location of the boundary based on Rankin's survey, but not based on the Treaty. According to the trial judge, "White interpreted Rankin's field notes from the preliminary traverse [to mean] that the post planted within Lot 31 was intended by Rankin to refer to the south limit of Lot 31 and not the 'spot upon the coast' referenced in the Treaty." White concluded that the eastern boundary terminated at the road allowance between lots 25 and 26, which he reported to Indian Affairs on December 31, 1931.

[38] Saugeen rejected White's re-survey and requested permission to use its band funds to re-survey the eastern boundary itself. This request was rejected by Indian Affairs, which controlled the administration of band funds at this time pursuant to the *Indian Act*, R.S.C. 1927, c. 98. Saugeen registered several further complaints, with responding paper-based investigations occurring again in 1951, 1954, and 1956.

[39] Finally, a further "on-the-ground" survey was conducted by OLS and DLS Guenter Bellach in 1974. According to Bellach's report on the re-survey of the eastern boundary, filed on February 18, 1975, Rankin had excluded the Disputed Beach from the Reserve because the beach was too narrow to be considered "valuable enough at the time to create it as a unit of land". This had the effect of reducing the Reserve's coastline by 1.4 miles.

[40] Bellach's findings were later affirmed in a report prepared for Canada by Professor David Lambden.

C. THE TRIAL JUDGMENT

(1) The Phasing Order

[41] This litigation is proceeding in two phases in accordance with a phasing order issued by the trial judge (the "Phasing Order"). Pursuant to that order, Phase 1 of the trial – which is the subject of these appeals and cross-appeal – was to address Saugeen's claim to the Disputed Beach, Crown breaches of its fiduciary

duties and duties flowing from the honour of the Crown, and various defences. Phase 2 of the trial – which will occur after any appeals from the Phase 1 trial have been disposed of – will determine any remaining issues, including damages and the parties' remaining cross claims and counterclaims.

(2) The Disputed Beach

[42] The trial judge concluded that Rankin excluded a wet sand strip, the Disputed Beach, from the land set aside for the Reserve. Upon confronting the concavity in the beach, Rankin prioritized the hierarchy of boundary evidence principles over a strict application of the Treaty text. In so doing, he reduced the total coastline of the Reserve by roughly 1.4 miles. The trial judge found that Rankin's decision led to a Treaty breach.

[43] The trial judge's review of the evidence led her to conclude that the Treaty parties' common intention was for the Reserve to include the coastline extending to the "spot upon the coast", which was described in the Treaty as "about (9 ½) nine and a half miles" from where the lower western boundary met the Lake Huron coastline. This distance places the "spot" within what is now lot 31, Concession D, Town of South Bruce Peninsula. The trial judge accepted the historians' evidence that at the time of the Treaty, Saugeen knew the location of this "spot", due to their "intimate knowledge of the coastline."

[44] The trial judge found further that it was extremely important to Saugeen that they retain this much of the beachfront as part of the Reserve, since they used the beach for fishing and to launch their canoes. In contrast, the Imperial Crown had little interest in acquiring any coastline other than the mouth of the Sauble River, which it wanted to use as a mill site and a transportation route.

[45] The trial judge found as fact that when Rankin was conducting his survey in 1855, he correctly located the "spot upon the coast" in accordance with the Treaty partners' common intention. She explained:

> PLS Rankin properly located the "spot upon the coast" when he initially planted a post within Lot 31 and called it the northeast angle of the Indian reserve on September 4, 1855, though he planted the post further inland from Lake Huron to prevent it from being washed out by the wave action.

The trial judge determined that Rankin planted his post 1.5 to 2 chains inland from the water's edge (i.e., to the east of the shoreline). In her view, this would have been "an appropriate place to mark the north terminus of the east boundary", with the Reserve's eastern boundary running south from this post.[8]

[46] The trial judge found further that when Rankin began surveying south from the "spot", as the Treaty required him to do to establish the Reserve's eastern

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[8] The trial judge observed that marking the northern terminus of the eastern boundary at this post would have "resulted in a short north boundary", but "in light of the latent ambiguity that arose in the Treaty's description of the 'spot upon the coast'", Rankin could have identified "a necessarily implied boundary consistent with the necessarily implied water boundaries".

boundary,[9] he encountered a "latent ambiguity which arose when he was marking the boundary on the ground." She explained:

> Rankin found that in order to run his survey line south in a straight line from the "spot" at Lot 31, he crossed wet sand between Lot 31 and 26 (the Disputed Beach), which he likely deemed to be unusable land to Saugeen. The latent ambiguity arose as a result of the concavity of Lake Huron's coastline which curved inland east to Lot 30 before curving back westward at around Lot 25/26 road allowance.

[47] Rankin may not have considered it acceptable for the eastern boundary of the Reserve run over wet sand. The trial judge explained:

> PLS Rankin had two choices to rectify the latent ambiguity. He could either create a short north boundary to connect the east and west boundaries and move the "spot" slightly inland to his post or he could move the "spot" further south to a point where the east and west boundaries intersected and he could mark the boundary due south on dry land. PLS Rankin chose the second option. He exercised his discretion to resolve the latent ambiguity by moving the "spot upon the coast" south by approximately 1.4 miles, in accordance with acceptable boundary principles of the day as applied to deeds. However, in so doing, he deprived Saugeen of their unsurrendered reserve coastline promised in Treaty 72 (though the movement of the east boundary south resulted in some additional interior lands).

[48] While the trial judge identified these two options as ones Rankin could have adopted while he was conducting his survey, she noted that he also had a third

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[9] As set out above, the Treaty stated that the eastern boundary was to run parallel to the western boundary, which was defined to be a "straight line running due north" from a location on the Saugeen River.

option: namely, stopping his survey and seeking instructions from his instructing client about how to proceed. Alternatively, Rankin could have completed his survey but later drawn the Imperial Crown's attention to the problem presented by the concave coastline and to his proposed solution. However, the trial judge concluded that:

> When faced with this ambiguity, PLS Rankin failed to seek further instructions from the Imperial Crown due to the time pressure the Crown imposed on him to finish the survey so that the surrendered lands could be put up for public auction. He also did not alert the Crown to his decision to demarcate the north terminus of the east boundary further south along the coast. Nonetheless, the Crown *de facto* sanctioned Rankin's decision when the Crown Lands Department accepted Rankin's final Plan of Survey and his records for deposit as marking the boundaries of [the Reserve].

[49] The trial judge concluded:

> Saugeen did not surrender the Disputed Beach and thus, this beach is Saugeen reserve land. Under the terms of Treaty 72 Saugeen was entitled to have the east boundary of [the Reserve] extend up to a point along the coastline that is within Lot 31, Concession D, Township of Amabel.

(3) Honour of the Crown and Fiduciary Duty

[50] The trial judge found that the Imperial Crown expressly promised to protect the Reserve from encroachment, and that this promise engaged the honour of the Crown and gave rise to a fiduciary duty. The Crown acted in a manner contrary to the honour of the Crown by failing to ensure that Rankin properly followed the

Treaty-defined Reserve boundaries. The trial judge held that in confronting the latent ambiguity presented by the concave shoreline, Rankin should have exercised his discretion in a manner that conformed to the Treaty's terms, and not according to the hierarchy of boundary evidence applicable to ordinary deeds.

[51] With respect to the Crown's fiduciary duty, the trial judge found that the "Crown was obliged to 'manage the process to advance the best interests of the First Nation'; in this case that process was the marking of the reserve boundary": quoting *Southwind v. Canada*, 2021 SCC 28, [2021] 2 S.C.R. 450, at para. 64. The Imperial Crown breached its fiduciary duty by accepting Rankin's decision to place the northern terminus of the Reserve at lots 25 and 26. According to the trial judge, the Crown: (i) failed to ensure the Reserve's boundaries were faithfully marked in accordance with the Treaty; and (ii) failed to protect and preserve the Disputed Beach as Reserve land.

[52] The trial judge found further that Canada assumed the Imperial Crown's duty to protect and preserve the Reserve upon Confederation, but failed to do so. She held, however, that Ontario did not owe a fiduciary duty to Saugeen and "did not act in a manner inconsistent with the honour of the Crown in relation to Rankin's survey or the subsequent failure to preserve and protect Saugeen's reserve."

(4) Defences

[53] The trial judge found that Saugeen's claim was not barred by any defences. She held that the patents issued along the Disputed Beach could not extinguish Saugeen's Treaty right to the Reserve land, given they did not demonstrate a plain and clear intention to extinguish the Treaty right, pursuant to the Supreme Court's direction in *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.

[54] The trial judge similarly found that the *bona fide* purchaser for value defence did not bar Saugeen's exclusive right of use and possession of the Disputed Beach. The Town's reliance on this defence was barred given it had actual notice of Saugeen's claims at the time it acquired its deeds to land alongside the Disputed Beach. The Families similarly failed in advancing this defence, albeit for a different reason: the trial judge found that, because Ms. Lemon and Ms. Twining had inherited their interest in the property, they were not purchasers for value. Relying on this court's decision in *Benzie v. Hania,* 2012 ONCA 766, 112 O.R. (3d) 481, the trial judge held that Ms. Lemon and Ms. Twining were "disentitled from relying on the defence of *bona fide* purchaser for value without notice" because they had not themselves paid valuable consideration. By contrast, Mr. Dobson – who did not participate in the appeal – was not barred on this basis, given that he paid consideration in the form of a vendor take back mortgage on his property.

[55] The trial judge proceeded to apply the principles set out by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 63, and balance Saugeen's Aboriginal rights in the land with the rights of the innocent landowners. She conducted this balancing exercise in relation to all three Families, even though she had already concluded that Ms. Lemon and Ms. Twining were barred from relying on the *bona fide* purchaser for value defence.

[56] The trial judge considered the fact that Mr. Dobson had a financial interest in his restaurant and that the Lemon and Twining families had a financial interest in using the vacant beach as a profit-making parking lot. She also acknowledged their sentimental attachments to their properties. She contrasted those interests with Saugeen's constitutionally-protected Treaty rights and the sacred cultural connection between Saugeen and the lakeshore.

[57] After conducting this balancing exercise, the trial judge concluded that, under the overarching principle of reconciliation, "it would be inequitable to apply the defence of *bona fide* purchaser without notice to deprive Saugeen of their reserve interest in the Disputed Beach".

[58] Finally, the trial judge concluded that Saugeen's claim was not barred by either a limitations period or the doctrine of laches. First, as recently reaffirmed in *Ontario (Attorney General) v. Restoule,* 2024 SCC 27, 494 D.L.R. (4th) 383

("*Restoule (SCC)*"), at para. 70, a treaty is *sui generis* and distinct from a traditional contract. An interest in reserve land is not the same as an interest in privately or Crown-owned land and is not subject to statutory limitation periods.

[59] Second, according to the trial judge, the doctrine of laches did not apply because Saugeen was "anything but passive" in registering their complaints about the Reserve's coastal boundary.

(5) Doctrines of Dedication and Proprietary Estoppel

[60] Ontario sought a declaration that the Disputed Beach was subject to a public right of recreational use under the doctrine of dedication. Ontario also relied on the doctrine of proprietary estoppel.

[61] The trial judge rejected these arguments, finding that the estoppel argument was based on the assumption that the federal Crown, as an "agent" of Saugeen, made assurances to the landowners that Saugeen had no interest in the Disputed Beach. This argument failed, however, given the Crown was neither Saugeen's agent nor in a position to make such assurances given its lack of consultation with Saugeen. Further, following this court's decision in *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (C.A.), at pp. 400-1, leave to appeal refused, [1994] S.C.C.A. No. 63, the trial judge held that the doctrine of dedication cannot apply to reserve lands because of the *sui generis* nature of these Aboriginal rights.

(6) Pre-Confederation Crown Liability

[62] Following her finding that the Imperial Crown had breached its fiduciary duty to Saugeen, and notwithstanding the Phasing Order deferring the allocation of pre-Confederation liability to Phase 2 of the trial, the trial judge observed that it was "important to determine whether the federal Crown also effectively 'inherited' liability for the Imperial Crown's failings". She concluded that it had – and, further, that 100 percent of the liability fell to Canada, with no liability falling to Ontario. The trial judge explained:

> In my view, the perspective of Indigenous peoples in relation to their dealings with the "Crown" as explained in *Williams* and *Mitchell* applies with equal vigour to civil actions, including Saugeen's. Indigenous peoples did not distinguish between the Imperial Crown, the Province of Canada, or the federal Crown when it comes to asserting Treaty rights and promises in the historical context. This perspective supports an imposition of liability on the federal Crown for the Imperial Crown's failures relating to Treaty promises regarding reserve interests and the related honour of the Crown.

[63] The trial judge reasoned that, upon Confederation, the federal Crown assumed the Imperial Crown's liabilities relating to the protection and preservation of reserve lands under s. 91(24) of the *Constitution Act, 1867*. In her view, "[t]his is consistent with the concept of Crown fiduciary duty and the honour of the Crown being indivisible as between the Imperial Crown and the federal Crown insofar as the Crown's *sui generis* fiduciary relationship with First Nations is concerned."

(7) Costs

[64] The trial judge awarded Saugeen their costs on a partial indemnity scale in the amount of $3,221,802.54. She apportioned liability for Saugeen's costs at 50 percent to the Town, 10 percent to Canada, and 40 percent to Ontario. In arriving at these percentages, the trial judge reasoned that apportionment should be assessed bearing in mind the positions and time taken by the defendants on the various issues raised at trial, as well as the outcome. She rejected the Town's argument that it should not be liable for any of Saugeen's costs, concluding that the Town took a leading role in resisting Saugeen's claim, advanced several technical defences, and was not an innocent party, as it had acquired title to parts of the Disputed Beach after having received notice of Saugeen's claim.

[65] The trial judge also made a Sanderson order[10] requiring the Town to pay 50 percent of Canada's partial indemnity costs, which she fixed at $470,000 after excluding costs for the Town's successful motion to strike Canada's proposed property law expert (the "Sanderson Order"). Applying the two-part test set out by this court in *Moore v. Wienecke*, 2008 ONCA 162, 90 O.R. (3d) 463, she determined that: (i) it was not unreasonable for Saugeen to have named all the defendants in one action; and (ii) a Sanderson order in Canada's favour was just and fair in all the circumstances.

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[10] See *Sanderson v. Blyth Theatre Co.*, [1903] 2 K.B. 533 (Eng. C.A.).

[66] Finally, the trial judge rejected the Town's claim for costs against Canada, finding that the Town's submissions conflated the function of costs with the function of damages.[11] She also refused to defer the issue of these costs to Phase 2, reasoning that the Town did not seek costs against Canada in its pleadings, except for its indemnification claim in the event it is ordered to pay any portion of Saugeen's costs. The trial judge did, however, make the costs award without prejudice to the Town seeking indemnity for its share of Saugeen's costs as part of its cross claim in Phase 2.

(8) The Formal Judgment

[67] In her formal judgment (the "Judgment"), issued a few months after the trial reasons, the trial judge made declaratory orders that the Imperial Crown and Canada had acted in a manner inconsistent with the honour of the Crown, and had breached their fiduciary duties owed to Saugeen:[12]

> 1. … [B]oth the Imperial Crown and Canada acted in a manner that was inconsistent with the honour of the Crown, and … liability for the Imperial Crown's dishonourable conduct falls to Canada.
>
> 2. … [B]oth the Imperial Crown and Canada breached their fiduciary duties owed to the Saugeen First Nation and … liability for the Imperial Crown's breaches falls to Canada.

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[11] The trial judge noted that the Families' costs were not expressly distinguished from those of the Town.
[12] The terms of the formal Judgment are also set out near the end of the trial judge's reasons.

[68] She declared further that *Chi-Gmiinh* is part of the Reserve and that no third parties have any interest in it:

> 3. … [T]he entire portion of the valuable fish landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 and known to Saugeen First Nation as "*Chi-Gmiinh*", which includes a substantial portion of what is now called Sauble Beach, was and continues to be reserved for the sole use and benefit of the Chippewas of Saugeen First Nation and today forms part of Saugeen Indian Reserve No. 29;
>
> 4. … [N]o third parties have any interest in *Chi-Gmiinh*, also known as the reserve portion of Sauble Beach.[13]

D. ISSUES

[69] In these reasons, we address the following issues:

1) Whether the trial judge erred in her interpretation of the Treaty by misapplying the principles of treaty interpretation;
2) Whether the trial judge erred in her interpretation of the Treaty by making factual errors in her analysis of the cultural and historical record;
3) Whether the trial judge erred in her interpretation of the Treaty by granting judgment on an unpleaded theory and issuing a declaration that affects the interests of nearby property owners who did not participate in these proceedings;

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[13] The trial judge issued a separate costs order as costs were determined after the formal Judgment was issued and entered.

4) Whether the trial judge erred by misapprehending the *bona fide* purchaser for value defence and dispossessing innocent landowners in order to remedy the Crown's breach;

5) Whether the Town should be granted leave to appeal the costs order and, if leave is granted, whether the trial judge erred in her award of costs; and

6) Whether the trial judge denied procedural fairness by determining responsibility for pre-Confederation Crown liability in Phase 1 of the trial or, alternatively, erred in finding that Canada inherited the entirety of the pre-Confederation Crown liability.

E. ISSUE #1 – THE TRIAL JUDGE DID NOT MISAPPLY THE PRINCIPLES OF TREATY INTERPRETATION

(1) Overview

[70] Ontario's grounds of appeal fall broadly into two categories, both related to the interpretation of the Treaty. The first category involves arguments that the trial judge made errors in law regarding the legal principles applicable to treaty interpretation. The second category involves arguments that the trial judge made factual errors in assessing the record of the historical and cultural context relevant to the interpretation of the Treaty. We consider first the argument that the trial judge misapplied the principles of treaty interpretation.

[71] Ontario focused on two arguments in support of its position that the trial judge made errors of law regarding the principles applicable to treaty interpretation. First, Ontario argues that the trial judge erred in law by choosing an interpretation of the Treaty that favours Saugeen rather than choosing an interpretation that best reconciles the interests of both Saugeen and the Crown. Second, Ontario submits that the trial judge erred by relying on principles of treaty interpretation set out in the dissenting reasons of McLachlin J. (as she then was) in *R. v. Marshall*, [1999] 3 S.C.R. 456. In particular, Ontario argues that the trial judge gave excessive weight to the Treaty text.

[72] As we explain below, we reject Ontario's arguments that the trial judge misapplied the principles of treaty interpretation. The issue of whether the trial judge erred with respect to the legal principles applicable to treaty interpretation is reviewable on the correctness standard because it is a question of law: *Restoule (SCC)*, at para. 89.

[73] We are not persuaded that the trial judge erred regarding the legal principles applicable to treaty interpretation. She summarized the applicable law comprehensively and correctly. One sentence of her summary of the law could have been more clearly expressed. But when this sentence is read in the context of her summary of the law and the reasons as a whole, we conclude that the trial judge correctly understood the applicable principles of treaty interpretation. More

importantly, her application of the principles shows that she correctly applied the legal principles.

(2) Analysis

(a) The principles of treaty interpretation

[74] The principles of treaty interpretation are well-established.

[75] Treaties constitute a unique type of agreement. They represent a solemn and sacred exchange of promises between the Crown and First Nations signatories. As such they attract special principles of interpretation: *Restoule (SCC)*, at paras. 70, 79; *Marshall*, at para. 14, *per* Binnie J., and at para. 78, *per* McLachlin J. (dissenting, but not on this point); and *Badger*, at para. 41.

[76] The treaty-making process with First Nations always engages the honour of the Crown. The interpretation of treaties must be approached in a manner that maintains the integrity of the Crown. In searching for the common intention of the parties, the integrity and honour of the Crown is always presumed: *Restoule (SCC)*, at paras. 71-73; *Marshall*, at para. 78, *per* McLachlin J. (dissenting, but not on this point); and *Badger*, at para. 41.

[77] In interpreting a treaty, the court's task is to identify possible interpretations of the common intention of the parties at the time the treaty was made, and to choose from among those possible interpretations the one that best reconciles the interests of the First Nations and the Crown: *Restoule (SCC)*, at paras. 78-81;

Marshall, at para. 14, *per* Binnie J., and at para. 78, *per* McLachlin J. (dissenting, but not on this point).

[78] When engaging in this task, the court must consider the written text of the treaty and evidence about the context and surrounding circumstances in which the treaty was negotiated. While the treaty text serves as a starting point, the court can consider extrinsic evidence even in the absence of an ambiguity: *Restoule (SCC)*, at paras. 78-81; *Marshall*, at para. 11, *per* Binnie J., and at para. 81, *per* McLachlin J. (dissenting, but not on this point).

[79] A technical, strict, or contractual approach to interpretation should be avoided. The court must take a purposive approach to the interpretation of a treaty obligation, informed by the honour of the Crown and recognizing that treaty promises are “solemn promises” and that treaties are sacred: *Restoule (SCC)*, at paras. 70, 78-81, and 96; *Marshall*, at para. 14, *per* Binnie J., and at para. 78, *per* McLachlin J. (dissenting, but not on this point); and *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 28. Treaties should be liberally construed, and ambiguities or doubtful expressions should be resolved in favour of the Indigenous signatories: *Restoule (SCC)*, at paras. 78-79; *Marshall*, at para. 78, *per* McLachlin J. (dissenting, but not on this point); and *Badger* at paras. 41, 52.

[80] Because a court interpreting a treaty must consider both the words of the treaty and the historical and cultural context, it is useful to approach treaty interpretation using the two-step process outlined by McLachlin J. in *Marshall*, at paras. 82-83, which was recently endorsed by the Supreme Court in *Restoule (SCC)*, at para. 80 (quoting *Marshall*):

> First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger*, *supra*, at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.
>
> At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right. [Citations omitted.]

(b) The trial judge applied the correct principle by identifying her task as choosing the interpretation of the Treaty that best reconciled the interests of Saugeen and the Crown

[81] Ontario argues that after considering possible interpretations of the Treaty (based on the text and cultural and historical context), the trial judge erred in law by choosing the interpretation that favours Saugeen rather than choosing an interpretation that best reconciles the interests of both Saugeen and the Crown.

[82] We do not accept this argument. As we explain, Ontario's argument relies primarily on a single sentence at para. 46 of the trial judge's reasons. Reading the reasons as a whole, we are satisfied that the trial judge understood and applied the correct legal principles in interpreting the Treaty.

[83] The trial judge began her analysis of the Treaty with a comprehensive summary of the legal principles applicable to treaty interpretation. Her summary quoted the nine principles enumerated by McLachlin J. at para. 78 of *Marshall* and referenced the two-step approach endorsed by McLachlin J. at paras. 82-83 of that decision. The trial judge's summary of the applicable principles also drew on the majority decision in *Marshall*, other decisions of the Supreme Court, and this court's decision in *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 1 ("*Restoule (ONCA)*"), rev'd in part, 2024 SCC 27, 494 D.L.R. (4th) 383 (the Supreme Court's decision in *Restoule (SCC)* had not yet been released

at the time of the trial judgment). In her summary of the principles, the trial judge repeatedly described her ultimate task as to consider the various possible interpretations of the Treaty based on the text of the Treaty and the cultural and historical context, and to choose the interpretation which best reconciles the "common intention" of the First Nation and the Crown.

[84] Near the end of her correct summary of the principles of treaty interpretation, the trial judge wrote: "After going through this exercise [i.e., consideration of the text and the cultural and historical context], the court is to choose from the available reasonable interpretations the one that reflects the most generous reading of the treaty in favour of the First Nation."

[85] If one reads the sentence above in isolation and as a statement of the ultimate task of treaty interpretation, it is not a correct statement of the law. However, the impugned sentence must be read in context. The sentence ends with a footnote with pinpoint paragraph references to six Supreme Court of Canada cases, which all confirm the proposition that treaties relating to First Nations that contain ambiguous expressions should be resolved in favour of the First Nations. It is clear, therefore, from the references in the footnote that in the impugned sentence the trial judge was referring to the principle that if terms of a treaty remain ambiguous after considering the text and cultural and historical context, the ambiguity should be resolved in favour of the First Nation. This principle was also recently reaffirmed by the Supreme Court in *Restoule (SCC)*, at paras. 79, 164;

see also *Badger*, at paras. 9, 52; *R. v. Simon*, [1985] 2 S.C.R. 387, at p. 402; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1035; and *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 64.

[86] Further, in addition to these references in the footnote, the impugned sentence must be read in the context of the trial judge's otherwise correct statement of the principles applicable to treaty interpretation – the principles she in fact applied – and in the context of her reasons as a whole. In her summary of the applicable principles, the trial judge said seven times – either in her own words or in quotations from decisions of the Supreme Court or this court – that the goal of treaty interpretation was to look for the "common intention" of the parties. The trial judge could have expressed herself more clearly in the impugned sentence. But her summary of the applicable law makes clear that she understood that from the various possible interpretations of the Treaty, she was required to choose the one which best reconciles the common intention of the parties based on the text and the cultural and historical record.

[87] Reading the trial judge's reasons as a whole, we are also satisfied that the trial judge applied the correct principles of treaty interpretation.

[88] Ontario relies on two sentences of the trial judge's reasons in relation to the Rankin survey to argue that rather than consider whether a possible interpretation of the eastern boundary of the Reserve under the Treaty reconciled the common

intention of the parties, she instead asked herself whether a possible interpretation was in Saugeen's favour. These sentences are found at paras. 400 and 404 of the reasons for judgment, and address the trial judge's factual finding that when Rankin conducted his survey south from the "spot upon the coast" and found himself initially travelling on wet sand, he chose to move the northern terminus of the eastern boundary further south, resulting in Saugeen losing approximately 1.4 miles of beach. The sentences read as follows:

> In so doing, Rankin failed to discharge his surveying task and resolve the ambiguity arising from marking the Treaty boundaries on the ground with regard to the best interests of the Saugeen and the common intention of the Treaty parties.
>
> …
>
> Rankin applied the reserve description in the Treaty in a way that was neither liberally construed in favour of Saugeen nor did he resolve the latent ambiguity in favour of Saugeen.

[89] We do not accept Ontario's argument that the trial judge focused on finding an interpretation that favoured Saugeen rather than an interpretation that reconciled the common intention of the First Nation and the Crown. Ontario's argument parses individual sentences, and in some cases, words, rather than reading the judgment as a whole. Rather than repeat our summary of the substance of the trial judge's interpretation of the Treaty based on its text and the cultural and historical record, we focus on the portion of the reasons where the trial judge explained her conclusion that as a result of the treatment of the northern

terminus of the eastern boundary of the Reserve in Rankin's survey, Saugeen did not receive the Reserve promised under the Treaty. This is the portion of the reasons where the passages Ontario relies on for this argument are found.

[90] In our view, two aspects of this portion of the trial judge's reasons make clear that she correctly chose the interpretation of the Treaty based on the text and the cultural and historical context that best reconciled the common intention of the parties.

[91] First, after concluding that the Treaty created the Reserve's boundaries rather than set out a process for the creation of the boundaries, the trial judge turned to the interests of each of the Treaty parties relevant to the boundaries as a factor in discerning their common intention about the boundaries. The trial judge found that the historical and ethnohistorical evidence showed that Saugeen wanted to reserve as much of the coastline as possible in light of its importance to Saugeen's culture, sustenance, and commercial economy, which were significantly based on fishing. The Imperial Crown wanted to secure land bordering the Sauble River for a mill site and mill lots to process timber for transfer. The Imperial Crown also wanted to secure sufficient coastline to establish a water transportation route to transport commodities (in particular, timber) to the United States.

[92] The fact that the trial judge considered not only the interests of Saugeen but also those of the Crown supports the conclusion that she was not looking for an interpretation of the Treaty that favoured Saugeen. Rather, she was looking for the interpretation that best reconciled the intentions of both parties in forming the Treaty.

[93] Second, in this portion of the reasons, the trial judge repeatedly referred to the "common intention of the Treaty parties", as she did throughout her reasons and her outline of the relevant legal principles. Indeed, the first passage Ontario relies on, at para. 400 of the trial judge's reasons, does not refer to "the best interests of the Saugeen" in isolation, but rather links it to the common intention of the parties to the Treaty:

> In so doing, Rankin failed to discharge his surveying task and resolve the ambiguity arising from marking the Treaty boundaries on the ground with regard for the best interests of the Saugeen and the common intention of the Treaty parties. [Emphasis added.]

[94] In other passages of this portion of the reasons, the trial judge wrote:

> Accordingly, the common intention of the Treaty parties was that the north terminus was to be the spot upon the coast as they understood it at the time they entered into the Treaty, which was about nine and a half miles from the Treaty-defined west boundary.
>
> …
>
> However, had Rankin continued the west boundary north along Lake Huron's shore, as per the Treaty, to about 9 ½ miles from the original west boundary, and then joined

> it with the "spot upon the coast" at a point slightly inland from the lake, then he would have achieved the common intention of the Treaty parties as reflected by their respective interests at the time of Treaty and resolved the latent ambiguity in a manner consistent with the honour of the Crown.
>
> …
>
> One of the options was to add a small north boundary to account for the inward curve of Lake Huron's coastline. This would have achieved the common intention of the Treaty parties at the time of treaty formation. [Emphasis added.]

[95] The trial judge's ultimate conclusion on the effect of Rankin's survey was as follows:

> The Imperial Crown acted in a manner that was contrary to the honour of the Crown by failing to endeavour to ensure that Rankin's survey faithfully followed the Treaty-defined boundaries and that the latent ambiguity was resolved in a manner that preserved the about 9 ½ mile shoreline from the Treaty-defined west boundary to the "spot upon the coast" when that result was achievable under the Treaty…. [Rankin] relied on the hierarchy of boundary evidence applicable to ordinary deeds, and chose the option that was least advantageous to Saugeen and contrary to the common intentions of the Treaty parties, rather than choosing the option available to him that would have fulfilled the Treaty promise and the honour of the Crown. [Emphasis added.]

[96] Our point is not to count up the references to common intention of the Treaty parties. We use these examples simply to show that when one reads this portion of the reasons and the reasons as a whole, they demonstrate that the trial judge correctly guided herself by considering the text and the cultural and historical

context of the Treaty and seeking the interpretation of the Treaty that best reconciles the common intention of the First Nation and the Crown.

[97] In sum, we conclude that the trial judge understood that her task was to interpret the Treaty in light of its text and the cultural and historical context and to choose the meaning that best reconciles the interests of the First Nation and the Crown. Her reasons demonstrate that she applied the correct principles in arriving at her interpretation of the Treaty.

(c) The trial judge did not err in relying on the summary of principles in the dissent in *Marshall* and did not focus on the Treaty text to the detriment of cultural context and history

[98] Ontario argues that, by relying on the dissenting reasons of McLachlin J. in *Marshall*, the trial judge erred in her summary of the legal principles applicable to treaty interpretation. Ontario argues that some of the principles stated in the dissent in *Marshall* are not reflected in the majority decision in *Marshall*, and thus it was error to rely on them. In particular, Ontario focuses on para. 78(8) of the *Marshall* dissent and argues that the statement that "courts cannot alter the terms of a treaty by exceeding what is 'possible on the language' or realistic" is inconsistent with the majority in *Marshall* and is not the governing law. Ontario argues that in relying on the dissent in *Marshall*, the trial judge limited her consideration of possible interpretations of the Treaty to those ascertained through

examination of the Treaty text. In other words, Ontario argues that the trial judge gave excessive weight to the text of the Treaty, to the detriment of consideration of the cultural and historical context.

[99] This argument has two branches. First, it asserts that some of the statement of the legal principles applicable to treaty interpretation by McLachlin J. in dissent in *Marshall* do not reflect the law. Second, it asserts that the trial judge improperly limited her consideration of the evidence of cultural and historical context in relation to the Treaty in favour of the text of the Treaty. We disagree with both propositions.

[100] The Supreme Court's recent decision *Restoule (SCC)* clearly rejects the suggestion that the principles of treaty interpretation stated by McLachlin J. in her dissent in *Marshall* do not reflect the law. Jamal J., writing for the court, held that McLachlin J.'s statement of the principles applicable to treaty interpretation in her dissent in *Marshall* "reflects the current state of the law": at para. 81. He also noted that McLachlin J.'s enunciation of the applicable principles of interpretation in dissent in *Marshall* has repeatedly been cited, alongside the majority reasons in *Marshall*, by the Supreme Court and by appeal courts across Canada, including in this court's decision in *Restoule (ONCA)*: *Restoule (SCC)*, at para. 81.

[101] With respect to the specific issue of the balance between the text of a treaty and evidence of cultural and historical context as tools of interpretation, both the majority and dissent in *Marshall* recognized that depending on the wording of a

treaty in a particular case and the available evidence of cultural and historical context, some interpretations will not be available. Binnie J. noted that generous rules of interpretation should not be "confused with a vague after-the-fact largesse": *Marshall,* at para. 14. McLachlin J. noted that while language of a treaty must be construed generously, "courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic": *Marshall*, at para. 78(8). In *Restoule (SCC)*, the Supreme Court approved both of these propositions: at paras. 78-79. This is not surprising, as they amount to different formulations of the same point – that a court interpreting a historic treaty must consider both the text and the cultural and historical context.

[102] Further, it is clear that McLachlin J.'s statement of the legal principles in her dissent in *Marshall* do not suggest that interpretations of a treaty are limited to those that are possible from the text alone, regardless of the cultural or historical context. Rather, she explained that the text is the starting point, but that the cultural and historical context may support different interpretations. In describing the second step of the analysis, at para. 83 of *Marshall*, McLachlin J. expressly stated that the cultural and historical context surrounding a treaty may lead to interpretations that are not apparent from the treaty text alone:

> A consideration of the historical background may suggest laten ambiguities or alternatives <u>not detected at first reading.</u> Faced with a possible range of interpretations, courts must rely on the historical context to determine

> which comes closest to reflecting the parties' common intention. [Emphasis added.]

[103] Thus, the trial judge did not err by relying on the enunciation of the principles of treaty interpretation by McLachlin J. in dissent in *Marshall*.

[104] Nor do we accept Ontario's submission that the trial judge placed undue emphasis on the text of the Treaty, to the detriment of the historical and cultural record. Ontario's argument on this ground again relies on pointing to isolated passages of the reasons rather than reading the reasons as a whole. The trial judge's reasons demonstrate that she appropriately considered the text of the Treaty in the context of the cultural and historical record before the court.

[105] We begin with a passage of the trial judge's reasons, at para. 42, where the trial judge summarized the two-step approach from paras. 82 and 83 of McLachlin J.'s dissenting reasons in *Marshall*. In that passage, the trial judge summarized that the treaty text should be first examined to identify the "facial meaning", noting any "patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences." The trial judge then stated, "Through this exercise the possible interpretations will be ascertained."

[106] Ontario argues that in this passage the trial judge limited the "possible interpretations" which could be considered as best reconciling the common intention of the parties to interpretations available from the Treaty text alone. In other words, Ontario argues that the trial judge limited the role of cultural and

historical context to choosing between the limited range of interpretations of the Treaty that are available based on the Treaty text alone. Ontario argues that this is a legal error because it unduly limits possible interpretations.

[107] This argument has no merit.

[108] In the same paragraph of her reasons, the trial judge summarized the second step outlined by McLachlin J. in para. 83 of *Marshall*, considering the treaty's cultural and historical context. In doing so, the trial judge specifically instructed herself: "This latter step may lead to 'latent ambiguities' or 'alternative interpretations' not evident on its first reading" (emphasis added). Further, in the portion of the reasons where the trial judge began her consideration of the historical and cultural context surrounding the Treaty, she stated that "the Treaty text is a starting point and will provide a preliminary, but not necessarily determinative, framework for the historical context inquiry". These are express statements by the trial judge that she was not limiting herself to interpretations of the Treaty which could be based on the text alone.

[109] The structure of the trial judge's reasons as a whole, and their substance, demonstrate that she did not give the text undue weight over cultural and historical context or limit herself to interpretations of the Treaty that are available on the text alone. Rather, she carefully considered the extensive cultural and historical record before her. Specifically:

i) After setting out the legal principles governing treaty interpretation, the trial judge began by considering the portion of the Treaty text which described the boundaries of the Reserve and how that portion of the text fit within the Treaty as a whole;

ii) She then considered the ethnohistorical context of Saugeen's culture and way of life. This included Saugeen's traditional system of government, and their fishing (both sustenance and commercial), hunting, trapping, and harvesting activities on the Saugeen Peninsula and in particular in the area around the Disputed Beach. She placed particular emphasis on Saugeen's herring fishery on the Disputed Beach using seine fishing in the shallow waters and using the beach to dry fish;

iii) She then considered the archival record from 1836 leading up to the negotiation of the Treaty. This included other treaties negotiated in the Saugeen Peninsula prior to the Treaty at issue, the Royal Proclamation of 1847, the Free Trade Agreement of 1854 between the Imperial Crown and the United States, and previous attempts by the Imperial Crown to negotiate a surrender of the Saugeen Peninsula;

iv) She then considered the written record of the Treaty negotiations; and

v) Finally, she considered the historical record after the Treaty was concluded, including the initial survey of the Reserve boundaries, complaints and petitions by Saugeen about the survey and the boundaries, the Allenford Council of July 1855 and subsequent Order-in-Council in September 1855 changing the western boundary of the Reserve (the Copway Road Amendment), and the subsequent conduct of the parties to the Treaty after the final plan of survey was completed.

[110] Ontario argues that the trial judge conflated the text of the Treaty with its substance. Ontario bases this argument on the trial judge at times referring to the Treaty text as "the Treaty". We understand Ontario's objection to be the failure of the trial judge to specify each time "the Treaty text" when she was referring to the text. Ontario points to four paragraphs of the trial judge's reasons which address the Copway Road Amendment: paras. 181, 191-92, and 194.

[111] We do not accept this argument. The trial judge's reasons make clear that she considered the text of the Treaty and the cultural and historical context in arriving at the interpretation that she found best reconciled the common intention of the parties. Specifically dealing with the Copway Road Amendment, contrary to Ontario's submission, the trial judge did not base her conclusion about that boundary only on the Treaty text. Rather, she considered the text of the Treaty (that stated that the western boundary would run "due north") as well as the cultural and historical context. In particular, she considered the complaints of Saugeen about the issue when Rankin began surveying the western boundary in May 1855; the subsequent Allenford Council in July 1855, where an additional grant of land for the Reserve to address the Copway Road boundary issue was agreed to; and the text of the September 27, 1855 Order-in-Council which implemented the additional grant of land for the Reserve to address the Copway Road boundary issue.

[112] Considering all of these factors – the text and the cultural and historical context – the trial judge found that the Copway Road Amendment was not part of the Treaty bargain, but rather was the product of subsequent negotiations between the parties at the Allenford Council. The trial judge did not conflate the text of the Treaty standing alone with the Treaty promise.

[113] Finally, Ontario's argument that the trial judge limited herself to interpretations that were available on the Treaty text alone, and only used the

cultural and historical background to choose between the limited interpretations available from the text alone, founders on the trial judge's ultimate interpretation of the Treaty. The Treaty text only makes reference to three boundaries – "west", "south", and "east". Yet the trial judge found that an interpretation of the Treaty that would have reconciled the common intention of the parties, taking into consideration not only the text but also the cultural and historical context, would have involved "implying a small north boundary to connect the east and west boundaries" by joining the northern end of the eastern boundary to the coast, which ran the rest of the way to the lower western boundary.

[114] In sum, the trial judge applied the correct legal principles and did not give undue weight to the text of the Treaty over the cultural and historical context.

F. ISSUE #2 – THE TRIAL JUDGE DID NOT MAKE PALPABLE AND OVERRIDING FACTUAL ERRORS IN HER TREATY INTERPRETATION ANALYSIS OF THE CULTURAL AND HISTORICAL RECORD

(1) Overview

[115] In addition to alleged errors in law regarding the legal principles applicable to treaty interpretation, the second category of Ontario's arguments asserts that the trial judge made palpable and overriding factual errors in her analysis of the cultural and historical record relevant to the interpretation of the Treaty.

[116] Ontario argues that the trial judge erred in finding that Saugeen knew the location of the “spot upon the coast”, in failing to find that the Trace Map reflected the Treaty parties’ common intention, and in finding that Saugeen could not have referred to a copy of the Sketch Map in a petition sent to the Governor General dated June 26, 1855.

[117] We are not persuaded by these arguments. The findings made by the trial judge were open to her on the record. Ontario has shown no basis for this court to disturb the trial judge’s factual findings.

[118] The standard of review in relation to factual findings is deferential. Factual findings by the trial judge underpinning her interpretation of the Treaty, including findings of historical fact, attract deference and are reviewable only for palpable and overriding error: *Restoule (SCC)*, at paras. 114-19.

[119] Many of the submissions of factual error raised by Ontario involve arguments that the trial judge failed to consider certain aspects of the evidence because they were not expressly referred to in her reasons. In considering these arguments, it is important to bear in mind that trial judges are not required to refer to every piece of evidence in their reasons. The fact that a particular piece of evidence is not referred to is not sufficient to establish factual error: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 24, 32; a principle that should be emphasized in this appeal, given the voluminous trial record.

(2) Analysis

(a) Ontario's position on the interpretation of the Reserve boundaries in the Treaty

[120] As context for Ontario's arguments that the trial judge made palpable and overriding factual errors in her consideration of the cultural and historical record surrounding the Treaty, it is helpful to understand Ontario's position about how the Reserve boundaries in the Treaty should be interpreted (which the trial judge rejected).

[121] Ontario submits that the Treaty text incorrectly records the Treaty parties' common intention about the western boundary of the Treaty. As a result, Ontario contends, the Treaty text incorrectly records the eastern boundary (because the Treaty text uses the western boundary as a reference in describing the eastern boundary). In particular, Ontario argues that the Copway Road Amendment, as reflected in the September 1855 Order-in-Council, was not an additional grant of Reserve land to Saugeen beyond what was agreed to in the Treaty, but rather reflects the Treaty agreement, which was incorrectly recorded in the Treaty text.

[122] Ontario's position is that the common intention of the Treaty parties at the time they entered the Treaty was that the western boundary of the Reserve would run northwesterly alongside Copway Road rather than "due north" as described in the Treaty text. As a result, the eastern boundary, which the Treaty text describes

as running “parallel” to the western boundary, would not run due north, but rather would also run northwest. Ontario’s position is that the “spot upon the coast” referred to in the Treaty text was not intended to refer to an independently identifiable point, such as a geographical marker. Instead, the “spot upon the coast” was agreed to be 9.5 miles from the western boundary. Because of Ontario’s position that the Treaty partners had actually meant for the western boundary to run northwest along Copway Road rather than due north, as stated in the Treaty text, Ontario argues that the “spot upon the coast” should be understood as properly located 9.5 miles along the Lake Huron coast from the end of Copway Road, at a location further south than found by the trial judge. If so, the eastern boundary of the Reserve would start about halfway up Sauble Beach, rather than within lot 31 as found by the trial judge. (We pause to note that if Ontario were correct about this interpretation of the Treaty, such that the eastern boundary should have been drawn to run parallel to Copway Road, this would imply that the southeastern terminus of the Reserve boundary should have been located a considerable distance further east than it now is. As a result, a massive amount of land would be scooped into the Reserve – land no other party has contended is part of the Reserve under the Treaty.[14])

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[14] While the Town argues that the trial judge’s reasons imply that some additional land east of the existing eastern boundary of the Reserve was never surrendered by Saugeen (an argument we reject), on the Town’s interpretation, this land would be no more than a narrow strip running along the existing eastern

(b) The trial judge did not err in finding that Saugeen knew the location of the "spot upon the coast"

[123] Ontario argues that the trial judge erred in finding that Saugeen knew the location of the "spot upon the coast". Ontario contends that there was "no evidence" that Saugeen knew the location of the "spot upon the coast" referred to in the Treaty text.

[124] Ontario argues that this error is material to the result because if there was not an independent basis to determine the location of the "spot upon the coast" (i.e., Saugeen's knowledge of the spot, and the Imperial Crown's interest in the mill site and ability to transport timber on the river), then the location of the spot would be determined solely by reference to the western boundary, which would, according to Ontario, run along Copway Road and not "due north".

[125] We reject Ontario's argument that there is "no evidence" that Saugeen knew the location of the "spot upon the coast". There was ample evidence to support the trial judge's finding that Saugeen knew the location of the "spot upon the coast" referred to in the Treaty text as describing the northern terminus of the eastern boundary. This evidence came primarily from the historians Dr. Heidi Bohaker and Dr. Gwen Reimer in relation to the fishing practices of Saugeen and the historical

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boundary. In contrast, Ontario's argument would potentially require that much more land beyond the existing eastern boundary be recognized as part of the Reserve.

accounts of the negotiations between Saugeen and the Imperial Crown leading up to the Treaty agreement in October 1854.

[126] The historical and cultural evidence before the court supported the finding that Saugeen knew the Lake Huron coast in the area of Sauble Beach between the Saugeen and Sauble Rivers well because it was territory that they used for their sustenance and commercial fishery. They also knew the inland territory through their hunting, trapping, and harvesting activities – together with the fishing referred to as their "seasonal rounds". Of particular relevance to Saugeen's knowledge of the beach was the herring fishery. Fishing for herring was done by seine fishing. This involved placing nets in the shallow waters of Lake Huron, which the Saugeen entered from the beach. This beach was vital for the fishery for placing nets, drying fish, and provided an exit and landing place for canoes, as contrasted with rocky cliffs elsewhere along the coast.

[127] The historical and cultural evidence also supported the finding that Saugeen knew the whole area of Sauble Beach well, between at least Chief's Point to the north and the Saugeen River to the south, including the area of the mouth of the Sauble River at the north end of the beach. Chief's Point was an important burial place, social meeting area, and fishing location. The mouths of the Saugeen and Sauble Rivers were important locations for catching fish that spawned in the spring, including pickerel, pike, and sucker. All of this evidence supported the trial judge's finding that Saugeen knew the coast in the area of Sauble Beach

“intimately” and, as such, knew the location of the spot upon the coast referred to in the Treaty text.

[128] The history of negotiations between Saugeen and the Imperial Crown leading up to October 1854 also supported the finding that Saugeen had intimate knowledge of the coast. We focus on 1853 and 1854. In 1853 and the spring of 1854, the Imperial Crown made various proposals for the surrender of the majority of the Saugeen Peninsula. These were rejected by Saugeen. In July 1854, the Crown made a proposal for surrender of land at the Sauble River. This too was rejected by Saugeen. Later, in August 1854, the Crown inquired as to the willingness of Saugeen and Nawash to surrender the Saugeen Peninsula subject to reserve lands being carved out and guaranteed. In response, Saugeen and Nawash said they wanted to maintain “all the coast” on Lake Huron “as far north as … the Fishing Islands” across from Chief’s Point (as well as all the coast on Georgian Bay as far north as Colpoy’s Bay). The historical and cultural evidence supported that the Saugeen wanted to preserve their coastline on Lake Huron to the greatest extent possible from the Indian Village (by the Saugeen River) in the south, to Chief’s Point in the north, in order to sustain their fishery and also provide a travel route connecting those two communities.

[129] Although Saugeen ultimately agreed in the Treaty that there would be two reserves and the area to be surrendered would include land at the mouth of the Sauble River, to address the Crown’s interest in a mill site and transportation of

timber, the specificity of Saugeen's negotiating positions over time supports that the reference to the spot upon the coast in the Treaty text referred to a location known to Saugeen.

[130] In addition to the evidence about Saugeen's fishing and cultural practices and the history of negotiations, Dr. Bohaker and Dr. Reimer both provided evidence that Saugeen knew the location of the spot upon the coast. In her trial testimony, Dr. Bohaker testified that Saugeen "had an understanding" about the location of the spot upon the coast. Dr. Bohaker based this conclusion on the fact that the Saugeen were present on the ground, carrying out activities such as fishing and harvesting, when Rankin carried out his survey. The Saugeen could see various posts Rankin placed along the land. They communicated their disagreements to the Crown following their own governance process when they disagreed (for example, about the western boundary). But they raised no objection to Rankin's placement of the post in lot 31 during the survey of the eastern boundary.

[131] In her written report, Dr. Reimer opined as follows about the various reference points in the Treaty text, including the "spot upon the coast": "Plausibly these were reference points understood by the Saugeen First Nation delegates."

[132] We acknowledge that Dr. Reimer's evidence was inconsistent on this issue between her report and her trial evidence. In her trial evidence, Dr. Reimer said

that “a lot of thought has gone into what was meant by those words ‘a spot on [*sic*] the coast’” and whether the spot upon the coast referred to “a particular spot on the coast” or to “an intersection spot where one boundary met the Lake Huron coastline”. Dr. Reimer testified that she had come to the conclusion that “it simply means an intersection spot or an intersection point on the east boundary of the Saugeen Reserve with the Lake Huron coastline.” She based this conclusion on the absence of documentary evidence describing a unique feature in terms of economic or cultural value about the spot upon the coast or any area around that spot.

[133] The trial judge was entitled to consider Dr. Reimer’s evidence in the context of all of the evidence and accept some, none, or all of it. It was up to the trial judge to decide whether to accept Dr. Reimer’s evidence in her report that the spot upon the coast was a reference point understood by the Saugeen delegates, or her trial evidence that it was just an intersection point. The trial judge’s reasons are clear that although she accepted some of Dr. Reimer’s evidence, she preferred the evidence of Dr. Bohaker where Dr. Reimer’s opinion differed. The trial judge explained that she found Dr. Bohaker’s evidence to be more reliable “in light of [her] inclusion of the ethnohistorical context that tells a more well-rounded story about the Saugeen, pre-treaty, than does the archival record which Dr. Reimer placed more emphasis upon.” The trial judge was entitled to accept the evidence of Dr. Reimer in her written report that Saugeen understood the location of the spot

upon the coast, rather than her trial evidence that it was simply an intersection point, a conclusion that appears to be at odds with her written report.

[134] Ontario relies on Dr. Bohaker's acceptance in cross-examination that the Treaty refers to a "spot upon the coast" rather than to a particular natural feature along the coastline as evidence that Saugeen did not know the location of the spot upon the coast. In our view the fact that the Treaty uses the words "a spot upon the coast", as opposed to a reference to a specific natural landmark, does not undermine the trial judge's conclusion that Saugeen knew the location of the "spot upon the coast" referred to in the Treaty text. There was evidence supporting the trial judge's finding that Saugeen knew the location of the "spot upon the coast". There was no necessity that the Treaty text refer to a specific natural physical landmark in order for the trial judge to find that Saugeen knew what the "spot upon the coast" in the Treaty text referred to.

[135] In any event, even if the trial judge had erred about Saugeen knowing the location of the spot on the coast, which we do not accept, this would not rise to the level of an overriding error. Ontario's position is that the Treaty text incorrectly described the western boundary as "due north" when, according to Ontario, the parties agreed that the western boundary would run along Copway Road and not "due north". Ontario argues that if one starts from the edge of the western boundary at Lake Huron (using Copway Road) and travels 9.5 miles along the coast, the

northern terminus of the eastern boundary of the Reserve is south of the road allowance in lots 25 and 26, rather than in lot 31.

[136] However, the trial judge considered the issue of whether Copway Road was intended as the western boundary according to the Treaty. She accepted that Saugeen may have misunderstood the trajectory of the western boundary as following Copway Road to Lake Huron's shore. The Crown added that land to the Reserve by the September 1855 Order-in-Council. But the trial judge found that in adding that area at the southern end of the Reserve, neither Treaty party intended to change the northern terminus of the eastern boundary of the Reserve or to reduce the amount of coast included at the northern end of the Reserve. Thus, even if the trial judge had erred in finding that Saugeen knew the location of the spot upon the coast in the Treaty text, she found that the addition of the land up to Copway Road to the Reserve in 1855 was not intended by either Treaty party to change the northern terminus of the eastern boundary. This latter finding was one that was open to her on the evidence.

[137] The finding by the trial judge that Saugeen knew the location of the "spot upon the coast" referred to in the Treaty text was also open to her on the record. We see no palpable and overriding error in this conclusion.

(c) The trial judge did not err in rejecting the argument that the Trace Map reflects the parties' common intention

[138] Ontario argues that the trial judge erred in finding that there was "nothing in the archival record" to suggest that Madwayosh thought the Trace Map's eastern boundary represented the eastern boundary agreed to in the Treaty between Saugeen and the Imperial Crown. Ontario argues that the Trace Map is evidence that Saugeen did not agree to a "due north" eastern boundary in the Treaty and that the Trace Map represents Saugeen's understanding of where they had agreed in the Treaty regarding the eastern boundary. Ontario also argues that the Trace Map supports the conclusion that the determining factor in describing the eastern boundary was that Saugeen had agreed that the southern boundary would be six miles long.

[139] Ontario argues that the trial judge "ignored" three pieces of archival evidence relevant to whether the Trace Map represented Saugeen's understanding of what they had agreed to in the Treaty regarding the eastern boundary of the Reserve: (i) extracts from Rankin's survey journal; (ii) two petitions by Saugeen on March 17, 1856 and August 13, 1856; and (iii) what Ontario describes as a "report" or "article" in the *Daily Globe*, dated July 16, 1855.

[140] Ontario argues that the trial judge's failure to find that the Trace Map represents the eastern boundary agreed to by Saugeen and the Imperial Crown is

a material error because it undermines the trial judge's conclusion that the Treaty text accurately recorded the substance of the agreement between Saugeen and the Imperial Crown.

[141] We see no palpable and overriding error in the trial judge's finding that the Trace Map does not represent the common intention of the Treaty parties or in her treatment of the pieces of evidence Ontario refers to, and on which it relies. On its face, in showing the eastern boundary, the Trace Map draws a distinction between the "Boundary according to Treaty", which is a straight line in a due north direction, and the "Boundary desired by Alexander" (likely Alexander Madwayosh), which is drawn in a northwest direction. Thus, it draws a distinction between what was agreed to in the Treaty (a boundary running due north) and the "Boundary desired by Alexander" (one running northwest). The trial judge considered the Trace Map in the context of all the evidence and rejected Ontario's argument that it showed an intent by Saugeen to sacrifice coastline at the north end of the Reserve in exchange for more inland territory to the southeast. In particular, she noted that when Rankin returned the survey to the Crown, he included at copy of the Trace Map "at the request of the Saugeen Indians". He described the map as showing "an alteration" desired by Saugeen to the eastern boundary of the Reserve, but recommended against accepting the proposed alteration, describing it as "unreasonable". The trial judge found that if Rankin had understood there to be a dispute about the eastern boundary under the Treaty, as opposed to a proposed

alteration to it, he would have said so in his report to the Crown. She further found that if Rankin had understood the “Boundary desired by Alexander” to be what had been agreed to when the Treaty was negotiated, he would not have called it “unreasonable” and declined to recommend it.

[142] Ontario argues that although the trial judge did consider Rankin’s survey journal, she did not consider it as archival evidence supporting the proposition that the Trace Map represents the boundaries Saugeen agreed to in the Treaty. There is no merit to this submission. It is simply a disagreement with the findings made by the trial judge. The reasons for judgment show that the trial judge carefully considered Rankin’s survey journal in the context of the evidence as a whole on the issue of whether the Trace Map cast light on the common intention of the parties when the Treaty was negotiated.

[143] Ontario argues that the trial judge also failed to consider Saugeen’s March and August 1856 petitions. In particular, Ontario points to language in the petitions referring to a six-mile southern boundary. Ontario argues that the reference to six miles for the southern boundary is consistent with the boundary indicated by the line marked “boundary desired by Alexander” on the Trace Map and the southern boundary on the Trace Map.

[144] As noted above, trial judges are not required to enumerate every piece of evidence they have considered. The trial judge in this case considered the

historical record extensively. She referred to several petitions from Saugeen to the Imperial Crown. It is true that the trial judge did not specifically reference the March and August 1856 petitions, but that is not sufficient to show palpable and overriding factual error.

[145] Finally, Ontario argues that the trial judge erred by failing to consider the "report" published in the *Daily Globe* on July 16, 1855. Ontario relies on the following statement in this document in relation to Saugeen's objections in the spring of 1855 to Rankin's survey at the southern end of the Reserve described in the Treaty: "Eventually Mr. Rankin gave the Chiefs (for transmission to His Excellency) a sketch of the land, with the boundaries marked, both as they stand by treaty, and as they are wanted by Alexander, at the same time informing them that in two weeks his survey would reach the land in dispute".

[146] It is true that the trial judge did not refer to the *Daily Globe* document in her reasons for judgment. However, we find no palpable error in this. As noted above, a trial judge is not required to refer to every piece of evidence in their reasons. The absence of a reference to the *Daily Globe* document in the reasons for judgment does not, in itself, demonstrate error.

[147] In any event, while we do not accept that the trial judge failed to consider the *Daily Globe* document, even if she had done so this would not have been an overriding error, because it is difficult to see a reason to give this document

significant evidentiary weight. Ontario describes this extract from the *Daily Globe* as a “report” in its factum, and an “article” in oral submissions. It is neither. It is an anonymously authored letter to the editor: it is addressed “To the Editor of the Globe”, and the writer signs their name anonymously as “Truth”. Further, the content of the letter is not in the nature of neutral, objective reportage; rather, the anonymous author seems quite opinionated. There is no basis for the court to assess the anonymous author’s claim that they have “good means of knowing” the factual propositions they assert in the letter.

[148] Indeed, Dr. Reimer, Ontario’s historical expert, recognized the anonymous nature of the letter made it “problematic” to rely on:

> If the article in the newspaper had been signed by an official who we knew had some authority from the Indian Department, or we knew had worked with Rankin, or who we knew had attended some of the Councils that Rankin attended, I think the newspaper article would have much greater veracity. As it stands, it’s a problematic document. It’s unsigned. It’s signed, “Truth.” There’s a lot of speculation about who wrote it. But the fact that it can be correlated with events that are documented in the archival record does give it some additional strength, but not enough to be certain.

[149] Given these red flags about placing any weight on this letter, it was not a palpable and overriding error for the trial judge not to expressly refer to it in her reasons .

(d) The trial judge did not err in finding that Saugeen could not have referred to a copy of the Sketch Map in its June 1855 petition

[150] Ontario argues that the trial judge erred by not considering evidence that it was likely that Saugeen had a copy of Oliphant's Sketch Map, and that this was the map it referred to in its June 1855 petition to the Governor General. Ontario argues that in finding that it was unlikely that Saugeen had a copy of the Sketch Map (and, as a result, that the Sketch Map could not be the map Saugeen referred to in the June 1855 petition), the trial judge failed to consider evidence that Oliphant gave a copy of the Sketch Map to Rankin.

[151] Ontario argues that these errors are overriding because they would remove the basis on which the trial judge concluded that Saugeen could not have been referring to a copy of the Sketch Map in their June 1855 petition.

[152] Ontario also argues that the trial judge failed to consider evidence of the Sketch Map's accuracy: in particular, that in his report Oliphant said the Sketch Map depicted the reserves "as accurately as was possible without actual survey", and that Oliphant told Rankin that the Sketch Map "explained" the "terms of the surrender".

[153] Ontario argues that these errors are overriding because the Sketch Map shows the eastern boundary of the Reserve intersecting Lake Huron, which it

argues is inconsistent with there being a short northern boundary connecting the northern end of the eastern boundary with the lake.

[154] We see no merit in these submissions. The trial judge carefully considered in her reasons both the issue of whether Saugeen at any point had a copy of Oliphant's Sketch Map and the issue of its accuracy. She made no palpable error in her reasoning.

[155] The trial judge was not required to explicitly advert to evidence that Oliphant gave Rankin a copy of the Sketch Map as a possible route for the Sketch Map to have come into Saugeen's hands. She accepted that a map was shown to the Saugeen leadership during the Treaty negotiations, but found it was uncertain whether it was the Sketch Map. She accepted that the Sketch Map "may" have been drawn during Treaty negotiations, but she was unable to make a definitive finding. Ultimately, whether or not the Saugeen leadership were shown a copy of the Sketch Map was of no moment because the trial judge found that the lack of scale and accuracy of the map made it of little value in pinpointing the "spot upon the coast" referred to in the Treaty text.

[156] Contrary to Ontario's submission, the trial judge did not fail to consider potential evidence of the Sketch Map's accuracy. Indeed, she quoted the language Ontario refers to in Oliphant's Treaty Report that the Sketch Map depicted the reserves "as accurately as [was] possible without actual survey". Having

considered this language, she noted that the Sketch Map does not have a scale, does not purport to be drawn to scale, and does not claim to be an accurate map or a survey. She concluded: “Very little, in my view, can be concluded from this sketch map, drawn by a layperson with access to no reliable pre-existing maps of this region other than Bayfield’s hydrographic map which is of limited utility given its purpose.” This finding was open to her on the record, as was her finding that when Rankin later conducted his survey, he encountered a concavity in the coastline that he was not expecting, and thus was unlikely to have been shown on the Sketch Map.

[157] Finally, quite apart from the trial judge finding that she could place only limited weight on Oliphant’s Sketch Map because of its lack of scale and accuracy, the Sketch Map does not support Ontario’s contention that the Treaty provided for the western boundary of the Reserve to go northwest along Copway Road, rather than due north (and as a result, for the eastern boundary to run in a northwest, rather than due north, direction from the Reserve’s southern boundary and end further south than lot 31). The Sketch Map shows the western boundary as going due north from Saugeen River west of the Indian Village (similar to what Rankin ultimately surveyed). Thus, it does not support Ontario’s position that the western boundary in the Treaty was meant to run northwest along Copway Road. It shows the eastern boundary as oriented due north and ending south of the Sauble River (although as the trial judge found, because it is not to scale it is not of assistance

in locating the exact endpoint of the eastern boundary of the Reserve). The Sketch Map does not support Ontario's position of the western and eastern boundaries in the Treaty as being on a northwest angle. Nor does it support Ontario's position of the Reserve including significant additional land to the east of Lakeshore Boulevard, which would be required if the eastern boundary does not run due north-south.

G. ISSUE #3 – THE TRIAL JUDGE DID NOT GRANT JUDGMENT ON AN UNPLEADED THEORY AND ISSUE A DECLARATION AFFECTING NON-PARTY LANDOWNERS

(1) Overview

[158] The Town and Families[15] took a common position on this appeal, and argue that the trial judge erred by granting judgment on an unpleaded theory that will add to the Reserve a narrow strip of land along the entirety of the existing eastern boundary, thus impacting many landowners who were not parties to the litigation.

[159] The Town and Families do not dispute the trial judge's findings of fact about how Rankin conducted his 1855 survey, and about the circumstances that led to him locating the northern terminus of the eastern boundary at the road allowance between lots 25 and 26, thereby excluding the Disputed Beach from the Reserve.

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[15] As noted above, the Families are the Estate of Barbara Twining and Alberta Lemon. David Dobson, who participated in the trial proceedings, has not appealed.

They also do not challenge the trial judge's conclusion that the Crown's subsequent ratification of this decision did not accord with the common intention of the Treaty partners, which was for Saugeen to retain the entire length of beach up to the "spot upon the coast", or her conclusion that the exclusion of the Disputed Beach from the Reserve breached the honour and fiduciary duties of the Crown.

[160] However, the Town and Families interpret the trial judge's declaration about the status of *Chi-Gmiinh*, when viewed in light of her reasons, as effectively granting a remedy that Saugeen and Canada "neither pleaded nor asked for". According to the Town and Families, the trial judge's reasons imply not only that the northern terminus of the existing eastern Reserve boundary must now be moved further north in order to bring the Disputed Beach within the boundaries of the Reserve, but also that the entire eastern boundary should have been situated some distance further to the east, which would have resulted in an additional narrow strip of land of undefined width running the length of the existing eastern boundary being included in the Reserve. The Town and Families maintain that since moving the boundary further east would affect an unknown number of private landowners whose properties abut or lie close to the existing eastern boundary, most of whom are not parties to the current proceedings, there will now have to be a new trial at which a court can decide whether the eastern boundary should be redrawn and, if so, where the revised boundary should run.

[161] The Town and Families contend that it does not matter that Saugeen has never asked for the eastern boundary to be moved further east, and has disclaimed any intention of claiming land east of the existing eastern boundary. According to the Town and Families, the trial judge's reasons imply that the land some distance east of the existing eastern boundary is also unsurrendered territory, and the *Indian Act*, R.S.C. 1985, c. I-5, requires the status of this land to be dealt with now and definitively.

[162] However, the Town and Families argue that the need for protracted further litigation nobody wants could be avoided if we were to allow their appeal, set aside the trial judge's remedial order recognizing the Disputed Beach to be unsurrendered land, and substitute an order that awards Saugeen the alternative remedy of equitable monetary damages, payable by the Crown.

[163] As we will explain, we do not accept the Town and Families' argument about the import of the trial judge's decision. The declaration about the status of *Chi-Gmiinh* mirrors the claim for relief set out in Saugeen's pleadings and does not affect land south of the road allowance between lots 25 and 26 or east of Lakeshore Boulevard. Moreover, we do not interpret the trial judge's reasons as implying that the entire eastern boundary must now be moved further east, even though she identified this as one of the ways Rankin could have dealt with the problem of the concavity in the coastline he encountered when conducting his

1855 survey, which she found he instead improperly addressed by moving the northern terminus of the eastern boundary further south.

(2) Analysis

(a) The declaration made by the trial judge does not affect land south of the road allowance between lots 25 and 26 or east of the western edge of Lakeshore Boulevard

[164] The Town and Families' position about the trial judge's declaration depends on the court accepting their argument that the declaration casts doubt on the legal status of land to the east of the current eastern Reserve boundary for its entire length, as well as land east of Lakeshore Boulevard between lots 26 and 31.

[165] For the reasons set out below, we reject this argument. Read in the context of the trial judge's reasons, the pleadings, and the wording of the Judgment, the declaration only affects land west of Lakeshore Boulevard, between a point in the road allowance between lots 25 and 26 and up to a point in lot 31, to the north.

[166] Although the Reserve boundaries will have to be resurveyed in accordance with the trial judge's declaration, there is no danger that lands either south of the road allowance between lots 25 and 26, or east of Lakeshore Boulevard, will be affected. The Town and Families' appeal on this issue fails because the declaration made by the trial judge is not as geographically broad as they contend. Moreover, as we will discuss, we do not interpret the trial judge's reasons as implying that a

more expansive declaration is necessary to give effect to the Treaty partners' intention that the Reserve include the Disputed Beach.

(i) Law on interpretation of court orders

[167] Appeals are from orders, not from reasons: see *R. v. Laba,* [1994] 3 S.C.R. 965, at p. 978; *Kerk-Courtney v. Security National Insurance Company (TD General Insurance Company)*, 2024 ONCA 676, at para. 24; and John Sopinka, Mark A. Gelowitz & W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th ed. (Toronto: LexisNexis, 2022), at §1.03. As a result, the Town and Families' arguments require that we begin by interpreting the declaration made by the trial judge at para. 3 of the formal Judgment – in particular, its geographic scope.

[168] A court considering the interpretation of a court order must consider "the language of the order in the context of the pleadings, the proceedings in the action that led to the order, the circumstances surrounding the making of the order, and the reasons given for making the order, if any": *Giesbrecht v. Stettner*, 2023 SKCA 52, at para. 6; see also *Greenwood v. Greenwood*, 2023 SKCA 87, 487 D.L.R. (4th) 668, at paras. 26-27; *Sutherland v. Reeves*, 2014 BCCA 222, 61 B.C.L.R. (5th) 308, at para. 31; and *Kuang v. Young*, 2023 ONSC 2429, at paras. 7-12.

[169] In our view, considering the wording of the declaration in the context of the reasons and the pleadings leads to the conclusion that it does not affect land south of the road allowance between lots 25 and 26, or east of Lakeshore Boulevard.

[170] We reproduce again the relevant portion of the declaration, with portions underlined on which we comment below:

> 3. … [T]he entire portion of the valuable fish landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 and known to Saugeen First Nation as "*Chi-Gmiinh*", which includes a substantial portion of what is now called Sauble Beach, was and continues to be reserved for the sole use and benefit of the Chippewas of Saugeen First Nation and today forms part of Saugeen Indian Reserve No. 29. [Emphasis added.]

[171] The language of the declaration was taken directly from Saugeen's statement of claim. We return to this point below in discussing the impact of the pleadings on the interpretation of the declaration.

[172] In accordance with the case law on interpreting court orders, our analysis considers the trial judge's reasons, the pleadings, and then returns to the wording of the Judgment. There is some overlap in the discussion of each of these issues.

(ii) The reasons for judgment

[173] Four aspects of the reasons for judgment are particularly important in interpreting the geographic scope of the declaration, and show that it does not affect lands east of Lakeshore Boulevard or south of the road allowance between

lots 25 and 26: (i) the way the trial judge framed the issue before her; (ii) her definition of the "Disputed Beach" at the start of her reasons; (iii) her reference back to the defined term "Disputed Beach" in the paragraph near the end of the reasons where she states the declarations ordered; and (iv) other portions of the reasons that show the trial judge was not considering lands east of Lakeshore Boulevard or south of the road allowance between lots 25 and 26.

[174] At the start of her reasons, the trial judge described the issue before her, *inter alia*, as:

> At issue is 1) how much of the coastline was reserved to Saugeen under the terms of Treaty 72, and 2) what did Saugeen receive under the final Plan of Survey of Amabel done by Provincial Land Surveyor ("PLS") Charles Rankin in 1856. In particular, is Saugeen entitled to a strip of beach comprised of approximately 1.4 miles at the north end of Indian Reserve 29 ("IR 29") between Lots 26 and 31 (Concession D, Amabel Township), known to Saugeen as *Chi-Gmiinh* and referred to as (north) Sauble Beach, under the Treaty? [Emphasis added.]

[175] This statement of the issue before the court clearly limits the land in dispute to "coastline", namely "a strip of beach" of "approximately 1.4 miles" in length "between Lots 26 and 31". This language shows that the trial judge was only considering land along the beach between lots 26 and 31. It is perhaps stating the obvious, but the existing Reserve boundary already includes the beach south of the road allowance between lots 25 and 26. Accordingly, land south of the road allowance between lots 25 and 26 and east of the current Reserve is inland, not

beach. Thus, the references to “coastline” and “a strip of beach” reinforce the references to the lot numbers as defining the land at issue.

[176] This conclusion is made clearer by the trial judge defining the term “Disputed Beach” two paragraphs later, at para. 5, where she states her ultimate conclusion, still in the opening paragraphs of the reasons for judgment:

> The excluded coastline from (and including) Lot 26 to the approximate mid-way point of Lot 31, Concession D, in the Town of South Bruce Peninsula, and lying to the west of Lakeshore Boulevard North, Sauble Beach (the “Disputed Beach”), is reserve land that was never surrendered by Saugeen. The various defences fail. [Emphasis added.]

[177] This portion of the reasons is important for three reasons. First, it clearly states the geographic boundaries of the land that the trial judge found to be unsurrendered and thus part of the Reserve under the Treaty. It sets out that the unsurrendered land at issue does not include land south of the road allowance between lots 25 and 26 or east of Lakeshore Boulevard.

[178] Second, when the trial judge refers to “Disputed Beach” throughout the reasons for judgment, she is referring to the defined term from para. 5 of the reasons. This is clear from the fact that she chose to define the term “Disputed Beach” and that she capitalizes the term throughout the reasons for judgment. It does not have an indeterminate meaning as the Town and Families submit.

[179] Third, and perhaps most importantly, the trial judge refers back to this definition of “Disputed Beach” at the end of her reasons when she states the declaration in relation to the beach. At para. 696 of the reasons for judgment, the trial judge states the various declarations, including the one that is contained in para. 3 of the Judgment. We reproduce this subparagraph because it contains a footnote which assists in understanding the meaning of para. 3 of the Judgment (we include the footnote in square brackets and underline for clarity and so as not to lead to confusion with footnotes in this court’s reasons):

> (c) The entire portion of the valuable fish landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 and known to Saugeen First Nation as “*Chi-Gmiinh*”, which includes a substantial portion of what is now called Sauble Beach [FN 188: Referred to throughout this judgment as the “Disputed Beach”.], was and continues to be reserved for the sole use and benefit of the Chippewas of Saugeen First Nation and today forms part of Saugeen Indian Reserve No. 29. [Emphasis added.]

[180] Footnote 188[16] directly links the language used in the declaration to the definition of “Disputed Beach” set out by the trial judge at the start of the reasons for judgment. This makes clear that the area covered by the declaration, which continues to form part of the Reserve, is the “Disputed Beach” as defined by the trial judge.

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[16] In some publications of the reasons for judgment, this appears as footnote 187.

[181] Finally, the last aspect of the reasons for judgment that supports the conclusion that the declaration does not affect land south of the road allowance between lots 25 and 26 or east of Lakeshore Boulevard are other places in the reasons where the trial judge expressly describes the land she is considering in a way that excludes land south of the road allowance between lots 25 and 26 and/or east of Lakeshore Boulevard. As these portions of the reasons span various different legal issues, we simply list the references by issue and by paragraphs in the judgment:

i) Para. 20 (discussing the results of the proceedings): "Saugeen did not surrender the Disputed Beach and thus, this beach is Saugeen reserve land. Under the terms of Treaty 72 Saugeen was entitled to have the east boundary of [the Reserve] extend up to a point along the coastline that is within Lot 31, Concession D, Township of Amabel." [Emphasis added.]
   - This passage clearly refers to the defined "Disputed Beach" as the Reserve land subject to the Judgment. It also refers to extending the "east boundary" "up to a point along the coastline that is within Lot 31" (i.e., northward), but makes no reference to moving the boundary further east.

ii) Para. 23 (discussing the results of the proceedings): "In the circumstances of this dispute between neighbours, reconciliation will best be achieved by returning the Disputed Beach to Saugeen as reserve land."
   - The "Disputed Beach" (a defined term as discussed above) is what is to be returned to Saugeen as Reserve land.

iii) Paras. 29 and 525 (discussing the land owned by the Estate of Barbara Twining, which is part of lot 26): "The Estate of Barbara Twining is the registered owner in fee simply to part of Lot 26 and asserts that its title includes part of the Disputed Beach. The Estate owns a cottage which is located on the east side of Lakeshore Boulevard North, inland from the Disputed Beach, which fronts the cottage on the west side of that road…. The only part of the Disputed Lot that is at issue in this litigation

is the beachfront – not the arcade, cabins, cottage or stone house which are all located to the east (inland) of Lakeshore Boulevard North." [Emphasis added.]

- These passages are clear that only the portion of lot 26 on the west side of Lakeshore Boulevard North is in dispute and forms part of the Disputed Beach. Land on the east side of Lakeshore Boulevard North (inland) is not in issue.

iv) Paras. 30 and 532 (discussing the land owned by Alberta Lemon, which is also part of lot 26): "Alberta Lemon is the registered owner in fee simple of part of Lot 26, adjacent to the Twining property, and asserts that her title includes part of the Disputed Beach. She also owns a cottage on the east side of Lakeshore Boulevard North, inland from the Disputed Beach which fronts the cottage on the west side of Lakeshore Boulevard North…. The [Lemon] cottage is on the east or inland side of Lakeshore Boulevard North. The Disputed Beach is to the west of Lakeshore Boulevard North." [Emphasis added.]

- These passages are clear that only the portion of lot 26 on the west side of Lakeshore Boulevard North forms part of the Disputed Beach. Land on the east side of Lakeshore Boulevard North (inland) is not in issue.[17]

[182] We next turn to the pleadings, in particular Saugeen's statement of claim, which provides further support for this reading of the declaration made by the trial judge.

(iii) The pleadings

[183] Saugeen's statement of claim supports the interpretation of the declaration as limited to land on the west side of Lakeshore Boulevard between the mid-point of lot 31 and the road allowance between lots 25 and 26.

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[17] The trial judge further noted, at para. 594, that the cottages of the Twining Estate and the Lemon family, which are on the east side of Lakeshore Boulevard, "are not at risk".

[184] The key paragraphs of the statement of claim relevant to interpreting the trial judge's declaration are paras. 1(a) and 11. Para. 1(a) of the statement of claim is identical to the language the trial judge used for the declaration in para. 3 of the Judgment:

> 1. The Plaintiff claims as against the Defendants:
>
> > a) a declaration that the entire portion of the valuable fish landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 and is known to Saugeen First Nation as "Chi-Gmiinh," which includes a substantial portion of what is now called Sauble Beach, was and continues to be reserved for the sole use and benefit of the Chippewas of Saugeen First Nation ("Saugeen First Nation" or the "First Nation"), and today forms part of Saugeen Indian Reserve No. 29 (the "Reserve");
>
> …
>
> 11. When lots in Amabel Township bordering the Reserve were originally patented, the lots were not given a "metes and bounds" description. Instead, the original lot descriptions are very vague. The lots that abut Chi-Gmiinh were identified as Lots 26-31, Concession D. [Emphasis added.]

[185] Three points are important. First, the land claimed in para. 1(a) of the statement of claim is defined as "valuable fishing ground fronting on Lake Huron". This would not include land east of the current Reserve boundary south of the road allowance between lots 25 and 26. South of the road allowance between lots 25 and 26, the beach already forms part of the Reserve. Any further land to the east of the current Reserve boundary would be inland, not "fronting on Lake Huron".

Thus, Saugeen's claim, which the trial judge based the declaration on, did not extend south of the road allowance between lots 25 and 26 or east of the current Reserve boundary.

[186] Second, para. 11 of the statement of claim provides a clear definition of *Chi-Gmiinh* by referencing the lots that abut it: "The lots that abut Chi-Gmiinh were identified as Lots 26-31, Concession D". This makes clear both that *Chi-Gmiinh* is being defined as land fronting on Lake Huron that abuts lots 26-31, and that Saugeen's claim is limited to this land.

[187] This is important for interpreting the declaration made by the trial judge, because she incorporated directly the language from para. 1(a) of the statement of claim into the declaration she made at para. 3 of the Judgment. The trial judge's reference to the land covered by the declaration being "known to Saugeen First Nation as '*Chi-Gmiinh*'" must be understood as incorporating the geographical limits to *Chi-Gmiinh,* defined in the statement of claim as land abutting lots 26-31.

[188] Finally, the third point that the pleadings make clear is that Saugeen pleaded this case as a treaty interpretation case, not a surveying case. Saugeen sought a declaration that, under the Treaty, the beach was reserved from surrender. There is thus no merit to the Town and Families' argument that the trial judge erred by granting judgment on an unpleaded theory that the Reserve's boundaries are based on what Rankin should have done during his survey rather than what he

actually did in the ground. Saugeen's case is and always has been about the interpretation of the Treaty and, as set out in para. 1(a) of the statement of claim, whether "the valuable fishing landing ground fronting on Lake Huron that was reserved from surrender by Saugeen First Nation in Treaty 72 … was and continues to be reserved for [its] sole use and benefit".

(iv) The wording of the declaration

[189] As noted, the declaration made by the trial judge mirrors the claim for relief in para. 1(a) of Saugeen's statement of claim. As a result, the same points can be made about its wording. The language in the declaration of "valuable fish landing ground fronting on Lake Huron" speaks to beachfront land, not interior land. This would exclude land further to the east and south of the road allowance between lots 25 and 26, because the beach south of the road allowance already forms part of the Reserve. Any land further to the east of the existing Reserve boundary would be interior land.

[190] Further, as noted above, because the trial judge adopted the language for the declaration from para. 1(a) of Saugeen's statement of claim, including the reference to the land covered by the declaration being "known to the Saugeen First Nation as '*Chi-Gmiinh*'", it must be read as incorporating the geographical limit on *Chi-Gmiinh* in the statement of claim at para. 11: i.e., that it abuts lots 26-31.

(v) Conclusion on the geographic scope of the declaration

[191] The geographic area of the declaration in para. 3 of the Judgment is the area the trial judge defined as the "Disputed Beach" in para. 5 of her reasons for judgment: "[t]he excluded coastline from (and including) Lot 26 to the approximate mid-way point of Lot 31, Concession D, in the Town of South Bruce Peninsula, and lying to the west of Lakeshore Boulevard North, Sauble Beach".

[192] The declaration does not have an impact on non-party landowners south of lot 26 or east of Lakeshore Boulevard. Although the Reserve boundaries must be resurveyed in accordance with the trial judge's declaration, there is no danger that the resurvey will affect non-parties.

[193] We discuss further below the portions of the reasons for judgment in which the trial judge said that Rankin should have started his survey further to the east when he encountered the latent ambiguity of the inward curve of the Lake Huron shore, south of what is now lot 31. But those portions of the reasons do not affect our conclusion on the geographic scope of the declaration. In our view, given the aspects of the reasons, the pleadings, and the wording of the declaration, discussed above, the trial judge's comments about how Rankin should have conducted the survey cannot be understood as expanding the geographic location of the declaration she made.

[194] We would add as a final note that common sense also must form a part of interpreting the declaration made by the trial judge. The trial judge was well aware which parties were before the court. Her analysis of the defences, in particular the *bona fide* purchaser for value defence discussed later in our reasons, required her to engage in fact-specific consideration of how the interests of affected landowners interacted with Saugeen's Treaty rights. The notion that the trial judge made a declaration that has an indeterminate impact on an unknown number of landowners who are not parties to the litigation, without expressly adverting to doing so in her reasons for judgment, is an unreasonable interpretation of the declaration and the reasons.

(b) The trial judge's finding that starting the survey further to the east within lot 31 would have fulfilled the Treaty promise does not require the entire eastern boundary of the Reserve to now be moved further east

[195] Our finding that the declaration made by the trial judge does not extend south of the road allowance between lots 25 and 26 or east of Lakeshore Boulevard is sufficient to dispose of the Town and Families' argument on appeal on this issue. No non-parties are impacted by the declaration. However, both in its written materials and in oral submissions, the Town and Families argued that the trial judge's statements about how Rankin should have conducted the survey in 1855 raise concerns about title for landowners east of Lakeshore Boulevard,

including those south of lot 26. In their factum, the Town and Families argued that "[t]he effect of the decision is to cast a cloud over the title of an indeterminate number of non-party landowners, who had no notice that their land would be implicated by the judgment."

[196] We disagree. The issue before the trial judge was not what approach to surveying the eastern Reserve boundary should have been employed in 1855. Rather, her task was to decide whether the Disputed Beach – the approximately 1.4 miles between the mid-point of lot 31 and the road allowance between lots 25 and 26 – was meant to be unsurrendered and included in the Reserve according to the common intention of the Treaty parties. The trial judge recognized that surveying the eastern boundary further to the east – so that the survey line could have been run entirely over dry land – was one method which would have achieved the common intention of the Treaty parties and fulfilled the Treaty promise. But she also recognized that it was not the only method.

[197] The trial judge found that Saugeen's claim has always been for the Disputed Beach because of its historical and cultural value as a fishing ground at the time the Treaty was negotiated. She found that in order for the Treaty promise to be fulfilled, the Disputed Beach must be included in the Reserve. Given the changes in the beach due to accretion and the resultant uncertainty both about the exact location of the shoreline at the time of the Treaty and where a survey could have been conducted entirely on dry land, the trial judge appropriately placed the

remedial focus on ensuring that Saugeen receives the amount of coastline promised in the Treaty, and not how that promise could have been actualized in a survey in 1855.

(i) The dispute over the trial judge's finding as to where in lot 31 Rankin began to survey southward

[198] The parties dispute whether the trial judge found that in starting the survey southward in lot 31, Rankin began at the water's edge, or 1.5 to 2 chains inland, where he planted the post.

[199] In our view, it is not necessary to resolve this issue to consider the impact of the trial judge's statements that the Treaty promise could have been fulfilled by Rankin beginning his survey further to the east so that he could have surveyed southward entirely on dry land.

[200] All of the parties agree that the place where Rankin began running his survey line to the south in lot 31 lies directly north of the existing northeastern terminus of the Reserve (in the road allowance between lots 25 and 26), on the line that can be drawn by projecting the existing eastern boundary north into lot 31.

[201] However, the parties disagree about whether Rankin's starting point in lot 31 was the "spot" at the water's edge or his planted post, and about what finding of fact the trial judge made on this question.

[202] Part of the reason for this confusion is that it is no longer possible to independently identify the locations of either the water's edge in 1855 or the place further to the east where Rankin planted his post. Due to accretion, the beach and shoreline have both moved some distance west of where they were in 1855, and the shape of the coastline has very likely also changed. Although the trial judge found as fact that in 1855 Saugeen knew the location of the "spot upon the coast", this knowledge has since been lost, in part because the coastline has moved west, resulting in the "spot upon the coast" now being some unknown distance inland of the water. Likewise, the post that Rankin planted further inland from the "spot" has long since vanished.

[203] Ultimately, the dispute of whether Rankin began the survey at the water's edge in lot 31 or at the post in lot 31 is something of a red herring, in view of the trial judge's express and unambiguous findings on certain other factual issues, which the Town and Families, Saugeen, and Canada all now accept.

[204] Specifically, the trial judge made express findings that:

i) Rankin began surveying his line to the south from a point located in what is now lot 31;

ii) The spot in lot 31 where Rankin began surveying was a distance of approximately 9.5 miles from the spot on the Lake Huron coast where the lower part of the western boundary of the Reserve met the coast (having run due north from the Saugeen River, west of the Indian Village, as the Treaty provided);

iii) Because of the concavity of the shoreline, his survey line initially ran over wet sand, but he did not actually have to enter the water as he went south;

iv) As he continued further south, Rankin emerged onto dry land around what is now the road allowance between lots 25 and 26;

v) Relying on the "hierarchy of boundary evidence", Rankin opted to mark the northern terminus of the eastern boundary of the Reserve at the point where his survey southward from lot 31 first ran continuously on dry land, which was due south of his starting point;

vi) Rankin's decision to exclude the wet sand he crossed between lot 31 and the road allowance between lots 25 and 26 was based on his "colonial view of [its] economic value" because it had no farming potential, and his failure to consider "the economic and cultural value of the coastline to Saugeen for its fishing endeavours";

vii) As a result of Rankin's surveying decision, the length of coastline that came to be included within the Reserve boundaries, as it was identified by the Imperial Crown, was approximately 1.4 miles shorter than what the Treaty's negotiators had agreed to;

viii) In view of the importance of this coastline to Saugeen, denying them this part of their Treaty bargain "was not commensurate with the honour of the Crown";

ix) Rankin could have avoided depriving Saugeen of the full amount of coastline to which they were entitled under the Treaty if he had made a different surveying choice, and had moved the starting point of his survey southward from lot 31 further to the east, to a point where it could have started on and continued over dry land. However, he did not do this; and

x) If Rankin had moved his starting point 1.5 to 2 chains further east, he would also have had to "imply a short north boundary segment" to connect his starting point – which on this counterfactual would also have become the northeastern corner of the Reserve boundary – to the "spot upon the coast" specified in the Treaty.

[205] In view of these factual findings, the question of whether Rankin's starting point in lot 31 was his post or the "spot upon the coast" is ultimately of no

consequence. The trial judge unambiguously found – and the parties agree – that Rankin's starting point lay on the line that can be drawn by projecting the existing eastern boundary further to the north. She also unambiguously found that in 1855, much of the land between Rankin's starting point and the existing northern terminus of the eastern Reserve boundary between lots 25 and 26 was wet sand. Accordingly, whether she identified Rankin's starting point as the water's edge in lot 31 or his post in lot 31 does not affect her factual finding that he would have needed to start his survey further east than he actually did in order to run his southern survey line entirely on dry land. Exactly how much further east he would have had to move cannot be determined precisely, since the coastline has now moved west and its exact location and shape in 1855 is unknown.

(ii) The remedial implications of the trial judge's factual findings

[206] As we have discussed, the trial judge concluded that Rankin's decision to place the northern terminus of the eastern Reserve boundary in the road allowance between lots 25 and 26 – which, on her factual findings, was the place where his survey south from lot 31 emerged from wet sand onto dry land – had the effect of depriving Saugeen of approximately 1.4 miles of coastline they were entitled to retain under the Treaty. She also discussed at length how this outcome could have been avoided if Rankin had taken a different approach to addressing the latent ambiguity of the concave coastline south of the "spot upon the coast", by instead moving the starting point of his southern survey line further east to a point where

he could have gone south entirely on dry land. If Rankin had done this, the eastern Reserve boundary would have been set slightly further east of its present location, which would have added to the Reserve a narrow strip of land running the length of the current eastern boundary, as well as additional shoreline to the north of the existing northern terminus.

[207] All parties agree that the trial judge's declaratory orders with respect to the Disputed Beach necessarily imply that the Reserve boundaries must be resurveyed to bring the beach into the Reserve. This plainly requires that the northern terminus of the eastern boundary be moved further north from its present location. However, we do not agree with the Town and Families that the trial judge's reasons for judgment imply that there is also land to the east of the existing boundary south of lot 26 that must also now be recognized as unsurrendered territory, or that the boundary that must now be drawn from the existing northern terminus to lot 31 must be situated to the east of a northern projection of the existing boundary, which lies to the west of Lakeshore Boulevard.

(iii) The trial judge's reasons do not imply that land east of the existing Reserve boundary is unsurrendered land

[208] On the trial judge's findings of fact, which are entitled to substantial appellate deference, the Reserve boundaries that were drawn in 1856 based on Rankin's 1855 survey do not properly reflect the intentions of the Treaty parties, since they

failed to give Saugeen the full length of coastline to which they were entitled under the Treaty.

[209] The trial judge also found as fact that when Rankin conducted his survey in 1855, the only way he could have run a straight survey line due south from lot 31 that was entirely on dry land would have been to start from a point that was some unspecified further distance east of his actual starting point. This is a finding of historical fact that is also owed appellate deference.

[210] However, the trial judge's conclusions about what Rankin could have done to address the latent ambiguity of the concave coastline south of the "spot upon the coast", as well as her opinions about what he should have done, lie on a somewhat different footing. To the extent that her views about Rankin's options were informed by her findings about the situation he was confronted with on the ground, her findings of historical fact attract appellate deference. On the other hand, her opinions about what Rankin should have done differently, but did not do, are not properly viewed as findings of fact *per se*. Indeed, in her reasons, the trial judge recognized that starting the survey further east was not the only option available to fulfil the Treaty promise about the length of coastline that would remain unsurrendered.

[211] The trial judge found that Rankin could have addressed the latent ambiguity he faced, in accordance with the rules of surveying, by moving the starting point of

his survey line further east to keep the line on dry land. This method of addressing the latent ambiguity caused by the concavity of the shoreline would have required him to imply a short northern boundary connecting his new starting point to the "spot upon the coast". This was also the option the trial judge thought Rankin should have adopted. However, she recognized that this was not his only choice, finding that Rankin also had the further options of either seeking instructions from the Imperial Crown before he completed his survey or, alternatively, finishing his survey but afterwards drawing the Crown's attention to the problem he had encountered, and how he had resolved it. She found his failure to do any of these things "troubling", although explainable by the "urgent time pressures" he was under.

[212] The important point is that if Rankin had raised the issue of how to address the latent ambiguity with his superiors, either before or after he completed his survey, the Imperial Crown would have been able to choose from a wider range of potential solutions to the problem than Rankin could have adopted on his own initiative. If the directing minds of the Imperial Crown had properly recognized that it was an important part of the Treaty bargain that Saugeen retain the full length of beach that had been agreed to, there were other ways they could have arranged for Saugeen to retain the Disputed Beach, other than moving the eastern boundary further east for its entire length.

[213] For instance, one option would have been to negotiate a change in the description of the eastern boundary, defined in the Treaty to be a straight north-south line from the “spot upon the coast” to the southern boundary, in order to add a curved segment that arced around the concave shoreline on dry land from the “spot upon the coast”, in what is now lot 31, until it reached the point on dry land due south of the “spot”, in what is now the road allowance between lots 25 and 26.

[214] A second option would have been to simply dispense with any rule of surveying that might have ordinarily required the eastern boundary to run entirely on dry land. While Rankin may have been obliged to follow the principles of land surveying, these rules would not have been strictly binding on the Imperial Crown. Moreover, while the trial judge appears to have assumed that Rankin considered himself obligated to locate the northeast corner of the Reserve at a place where a survey line running due south would run entirely over dry land, the expert evidence at trial did not squarely address whether the principles of surveying recognized in 1855 would have precluded the Reserve boundary being drawn so that it ran over wet sand from lots 25/26 to the “spot upon the coast” in lot 31.

[215] As it was, Rankin did not bring the problem of the concave shoreline south of the “spot” to his superiors’ attention. It is impossible to know how they would have responded if he had done so. If they had approached the problem in a manner that accorded with the honour of the Crown and the promises that had been made to Saugeen, it may be that they would have decided that the simplest solution

would be to move the eastern boundary a short distance further east along its full length, and also add a short northern boundary to join the eastern boundary to the "spot upon the coast". However, they might also have arrived at a different solution, in consultation with Saugeen. There is no reason to think that Saugeen would have objected to a solution that ensured that they retained the full length of coastline specified in the Treaty, but that did not move the eastern Reserve boundary further east for its entire length.

[216] The important point is that it cannot be automatically concluded that the outcome would necessarily have been to move the entire eastern Reserve boundary further east. This undermines the Town and Families' contention that granting Saugeen the remedy they and Canada seek – a declaration that the Disputed Beach is unsurrendered territory, to be followed in due course by an adjustment of the Reserve boundaries to bring the beach within the Reserve – necessarily implies that there must also be a second strip of unsurrendered land lying to the east of the existing eastern Reserve boundary, south of lot 26, or that the extended boundary that will have to be surveyed to give effect to the trial judge's declaration will have to include land east of Lakeshore Boulevard.

(iv) The remedy crafted by the trial judge achieves the remedial goal of ensuring the Treaty promise is fulfilled

[217] Remedies are necessarily prospective and purposive. A court cannot go back in time and change history to stop past injustices from having occurred. Rather, what a court can do is craft remedies that try, as best as possible in the circumstances, to undo the effects of past wrongs and prevent their perpetuation into the future.

[218] As Jamal J. explained in *Restoule (SCC),* at para. 277, quoting from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 45, and from academic commentary by Kent Roach and by Peter Hogg and Laura Dougan (citations omitted):

> As with other constitutional rights, courts should take a purposive approach to determining the appropriate remedy for breaches of treaty obligations. As always, "[t]he controlling question ... is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake". Restoring the honour of the Crown "requires the courts to be creative" within a principled legal framework and provide remedies that "forward the goal of reconciliation".

[219] In this case, the trial judge properly focused her remedial attention on the status of the Disputed Beach, which was the only land Saugeen were seeking to have returned to them. She found as fact that at the time of the Treaty the beach was vitally important to Saugeen's traditional way of life, both as a fishing ground

and a canoe launch point, and that retaining it as part of the Reserve had been a matter of great importance to Saugeen's negotiators. Starting in 1877, after it became clear to Saugeen that the Disputed Beach had not been included within the Reserve boundaries that had been set by the Crown, Saugeen began to complain that the northern terminus of the eastern boundary had been improperly situated too far to the south, thereby excluding the Disputed Beach from the Reserve.

[220] Conversely, there was no evidence that Saugeen had any special attachment to, or particular use for, a narrow strip of land lying immediately to the east of the existing eastern boundary. There was also no evidence that they have ever complained over the past 170 years about an eastern strip being wrongly excluded from the Reserve, up to and including when they commenced this action, in which they did not seek the return of an eastern strip in either their pleadings or their submissions at trial.

[221] The trial judge's task was to fashion a prospective remedy that addresses the historical wrong done to Saugeen as a result of the Disputed Beach having been improperly excluded from the Reserve. However, it was not her job to address other purely hypothetical land claims that Saugeen have not made in the past and are not making now, particularly when these hypothetical claims would affect the interests of third parties who are strangers to the litigation.

[222] We agree that the trial judge's declaratory remedies recognizing that Saugeen have never ceded title to the Disputed Beach, that it was and is part of the Reserve, and that no third parties have any interest in it, necessarily imply that a resurvey will need to be completed to accurately reflect the Disputed Beach's belatedly-recognized status as Reserve land. However, this prospective remedial exercise will not be constrained by what might have been possible under the rules of surveying as matters stood in 1855.

[223] As noted above, apart from finding that the coastline and beach has moved further to the west since 1855, and that it is now "wider", the trial judge found the evidence was such that she could not make findings of exactly where the western edge of the beach was in 1855. On the record in this case, as a practical matter, the issue of remedy must be considered in light of the current geography of the beach. After years of accretion, the coastline has moved west. The eastern boundary can now be run due north to lot 31 from the existing terminus entirely over dry land.

[224] The court's goal in crafting an effective remedy is not to speculate about how the Imperial Crown would or should have drawn the boundaries in 1856 if it had approached the job differently: that is, if Rankin had consulted the Crown about the latent ambiguity resulting from the concavity of the shoreline, and the Crown had acted in accordance with the Treaty partners' common intention. Moving the end point of the eastern boundary due north will give Saugeen the land that was

important to them when the Treaty was signed, and that remains important to them now. Such a remedy will fully achieve the dual goals of restoring the honour of the Crown and promoting reconciliation between the Crown and its Treaty partner, Saugeen.

[225] In sum, the trial judge found that the Treaty entitled Saugeen to approximately 9.5 miles of Lake Huron coastline as part of the Reserve. They did not receive it. The failure to include the Disputed Beach in the Reserve was a breach of the Treaty promise and was inconsistent with the honour of the Crown and the Crown's fiduciary duty toward Saugeen. One method of fulfilling the Treaty promise in 1855 would have been to survey the eastern boundary further to the east, so that it could be surveyed entirely on dry land. But that was not the only way the Treaty promise could have been fulfilled. What Saugeen are entitled to under the Treaty is not determined by colonial survey practices or colonial ideas about which types of land are valuable.

[226] In considering the appropriate remedy now, the trial court was faced with changes to the coastline in the form of accretion moving the edge of the beach west, and an inability to determine exactly where the edge of the beach was in 1855 or where a survey line could have been run entirely on dry land south from lot 31. The forward-looking remedy crafted by the trial judge of making a declaration that Saugeen are entitled to have the Disputed Beach (as defined in her reasons for judgment) form part of the Reserve fulfills the Treaty promise,

restores the honour of the Crown, and promotes reconciliation between the Treaty partners.

H. ISSUE #4 – THE TRIAL JUDGE IMPROPERLY LIMITED THE AVAILABILITY OF THE *BONA FIDE* PURCHASER DEFENCE, BUT DID NOT ERR IN BALANCING THE COMPETING INTERESTS

(1) Overview

[227] The Town does not contest the trial judge's finding that it was not a *bona fide* purchaser for value. The Families, however, submit that the trial judge erred in law by relying on this court's decision in *Benzie* to find that those who inherit property cannot avail themselves of the *bona fide* purchaser defence because they personally did not pay valuable consideration. They contend that this court's intention in *Benzie* was simply to ensure that a beneficiary is not in a "better" position than the initial *bona fide* purchaser, and that, in this case, they are simply asking to be placed in the same position as their predecessors.

[228] In other words, the Families argue that it was open to them to seek equitable protection against Saugeen's claim as *bona fide* purchasers for value of the Disputed Beach. In their submission, the Supreme Court's decision in *i Trade Finance Inc. v. Bank of Montreal*, 2011 SCC 26, [2011] 2 S.C.R. 360, and the well-known equitable principles which they say have always favoured a good faith purchaser with a clear conscience, demand that the *bona fide* purchaser defence

be absolute and that Saugeen's remedy for any breaches is monetary compensation from the Crown. The Families are supported in their position by the Town and by the intervener, the Ontario Landowners Association.

[229] As we will explain, we agree that the trial judge erred in holding that the *bona fide* purchaser defence could not apply to the Families because they inherited their properties, but we disagree that the defence is absolute. Ultimately, we see no basis to interfere with the trial judge's discretion to not apply the defence in this case.

(2) Analysis

(a) The trial judge erred by limiting the availability of the *bona fide* purchaser defence to exclude the Families

[230] We find that the trial judge erred in law when she concluded that the Families were barred from raising the *bona fide* purchaser defence because Alberta Lemon and Barbara Twining did not purchase their land but rather inherited it. We agree with the Families that the trial judge's conclusion leads to a "perverse result", in that it would encourage a claimant to wait for a current *bona fide* purchaser to pass away before commencing their claim against the beneficiaries of an estate. Put simply, the defence is not lost when property passes from an estate to its beneficiaries without consideration.

[231] As the Supreme Court explained in *i Trade*, at para. 60 (quoting Lionel Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997), at p. 386):

> The effect of the [*bona fide* purchaser] defence is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.

What passes to any heirs is the same as what the good faith purchaser held: the property stripped of pre-existing encumbrances.

[232] We agree with the Families that *Benzie* does not purport to alter the operation of the *bona fide* purchaser for value defence as the Supreme Court defined it in *i Trade*, and as it has existed for centuries. When this court in *Benzie* held, at para. 37, that "[h]eirs do not fall into the category of a bona fide purchaser for value without notice" because heirs are "volunteers in the sense that they give no consideration for title" to property, it was making the point that beneficiaries are not in the same relationship to testators as *bona fide* purchasers are to previous owners of whom they were unaware. *Bona fide* purchasers may stand in a better position than original owners because of the series of transactions that led to their acquisition of the property, and the defence protects that position. Heirs, however, cannot stand in a better position – or even, generally, in a different position – than the estate from which they inherit: *Benzie*, at para. 37. Equally, however, heirs do not stand in a worse position than the estate.

[233] The trial judge therefore erred in law by misapplying *Benzie* and by limiting the *bona fide* purchaser defence in the way that she did. This does not, however, end the matter. As we explain in the next part of these reasons, the trial judge's application of this court's decision in *Chippewas of Sarnia*, and her ultimate conclusion that the Families were not entitled to an equitable remedy even if they were not barred from relying on the defence, do not require appellate intervention.

(b) The trial judge did not err in balancing the interests under the principles of reconciliation to deny applying the *bona fide* purchaser defence

[234] As noted above, the Families and the intervener take the position that the decision in *i Trade* and equitable principles demand that the *bona fide* purchaser defence be absolute. As we will explain, this court in *Chippewas of Sarnia* held something different.

[235] The Families note that the trial judge's decision is the first time in Canadian history that a court has dispossessed an innocent third party as a remedy for historical wrongs committed by the Crown alone. In their view, they are unfairly "bear[ing] the brunt" of the Crown's misdeeds. The intervener points to the English Court of Appeal in the seminal case of *Pilcher v. Rawlins* (1872), L.R. 7 Ch. App. 259 (Eng. C.A.), where Sir W.M. James, L.J. wrote, at p. 268, that "[t]he plea of purchaser for valuable consideration without notice is an absolute, unqualified,

unanswerable defence". The intervener submits that it is important for the defence to be absolute because it must be capable of consistent, predictable application.

[236] However, in *Chippewas of Sarnia*, this court held, at para. 309:

> [W]e accept that … the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers … should be considered on a case-by-case basis. It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right. [Emphasis added.]

[237] It was not necessary in *Chippewas of Sarnia* to consider the possibility outlined here – that the test should not be applied rigidly where there is a substantial denial of an Aboriginal right – because the court found that the First Nation had accepted the terms of the land surrender in question. But the court made it clear that the *bona fide* purchaser defence is not absolute, and must yield when fairness demands it.

[238] Therefore, in our view, it was open to the trial judge, who balanced all of the competing interests, to find that "fairness dictates that a rigid application of the doctrine of *bona fide* purchaser without notice would render an injustice in the circumstances of this case".

[239] It is not surprising that the parties have been unable to find any reported cases where the defence has not succeeded. This is because according to traditional property law doctrine, a *bona fide* purchaser's interest will almost always

carry the stronger equity. However, this is not always the case when Indigenous interests in land are in play, especially when the land at issue was set aside as a reserve. Due to the *sui generis* nature of a First Nation's interest in reserve land, the doctrinal rules of property law do not necessarily apply without modification. Thus, when an Indigenous land interest is competing against later acquired legal rights, it is incumbent on the court to weigh the equities and specifically to consider the conscionability of upholding the legal rights of the *bona fide* purchaser in the circumstances.

[240] It is important to emphasize how significantly the competing interests in *Chippewas of Sarnia*, where the equities clearly favoured the private landowners, differ from those in the present case. Here, the Families' attachment to their properties is largely rooted in their cottages, which in both cases are across the street from the Disputed Beach. This decision will not alter their rights to those cottages. Both of the Families had primarily a commercial interest in the beach, which they used as a parking lot for tourists. By contrast, as the trial judge held, Saugeen has a "constitutionally protected Treaty right to exclusive possession of its reserve territory – all of it – until otherwise surrendered". More than that, the Saugeen people have a "cultural connection … [to] the land and water, which is sacred". As the Supreme Court observed in *Southwind*, at para. 105, reserve lands are not "fungible commodities that can be easily replaced". The constitutionally-

protected, spiritual connection of Saugeen to its unceded Reserve land outweighs the commercial interests of the Lemons and Twinings.

[241] The *bona fide* purchaser for value defence is not absolute. It is an equitable tool to achieve fairness: *Canadian Imperial Bank of Commerce v. Pena*, 2022 ONSC 6941, at para. 13; *Urban Metal Contracting Ltd. v. Zurich*, 2022 ONCA 589, 163 O.R. (3d) 652, at para. 59. There is no principled reason that a treaty-protected reserve interest of a First Nation should, in every case, give way to the property interest of a private purchaser, even an innocent, good faith purchaser for valuable consideration. Such an approach is inconsistent with this court's decision in *Chippewas of Sarnia*, fails to recognize the *sui generis* nature of Indigenous land interests, and would not move us closer to reconciliation.

[242] We note, as did the trial judge, that the Families are not left without remedies. Pursuant to the Phasing Order, the Families' claims for compensation will be determined in Phase 2 of the trial.

[243] The trial judge's balancing of the competing interests, and her ultimate finding that the equities in this case favoured Saugeen, are owed deference. As there is no basis on which to interfere with the trial judge's exercise of discretion, we would reject this ground of appeal.

I. ISSUE #5 – THE TOWN'S REQUEST FOR LEAVE TO APPEAL COSTS IS DENIED

(1) Overview

[244] The Town seeks leave to appeal the trial judge's costs order which: (i) apportions liability for Saugeen's costs at 50 percent to the Town, 10 percent to Canada, and 40 percent to Ontario; (ii) grants the Sanderson Order requiring the Town to pay 50 percent of Canada's partial indemnity costs; and (iii) dismisses the Town's claim for costs against Canada. If leave is granted, the Town asks that we allow the appeal, set aside the trial judge's costs award, and in its place order that:

i) Canada is liable for 60 percent of Saugeen's costs and the Town bears no liability for Saugeen's costs;

ii) Canada's request for a Sanderson order be dismissed; and

iii) Canada is liable to the Town for its costs in the amount sought at trial, or in the alternative, the issue of Canada's liability for the Town's costs of Phase 1 of the trial is an issue to be determined at Phase 2.

[245] The Town argues that the trial judge erred in principle by characterizing Canada as a "successful" defendant. According to the Town, this in turn led the trial judge to err by apportioning 50 percent of Saugeen's costs to the Town, granting the Sanderson Order, and refusing the Town's request for its costs.

[246] For the reasons that follow, leave to appeal the costs award is denied.

(2) Analysis

(a) The Town bears a heavy onus to obtain leave from the costs award and to set it aside

[247] In *Canadian Tire Corporation, Limited v. Eaton Equipment Ltd.*, 2024 ONCA 25, 95 C.C.L.T. (4th) 175, at para. 13, this court recently summarized the test for granting leave to appeal a costs award:

> Leave to appeal a costs order will not be granted except in obvious cases where the party seeking leave convinces the court there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion". This test is designed to impose a high threshold because appellate courts recognize that fixing costs is highly discretionary and that trial and motion judges are best positioned to understand the dynamics of a case and to render a costs decision that is just and reflective of what actually happened on the ground. [Citations omitted.]

[248] An appellate court may set aside a trial judge's costs award only if the trial judge made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. This places a heavy onus on the Town: *Legault v. TD General Insurance Company*, 2024 ONCA 439, 50 B.L.R. (6th) 180, at para. 33.

(b) The trial judge did not err in characterizing Canada as the successful defendant

[249] The Town's grounds of appeal all turn on its argument that the trial judge erred by characterizing Canada as "the successful defendant". The Town submits that Canada was not "successful" relative to the other defendants on what the Town views as the essential question in this litigation: the location of the eastern boundary of Saugeen's Reserve.

[250] We do not agree with this submission. The trial judge's determination that Canada was the successful defendant, relative to the other defendants, is a question of mixed fact and law, and thus entitled to deference on appeal absent an error in principle or palpable and overriding error: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 37. As Newbury J.A. explained in *Fraser v. Desmond* (1996), 24 R.F.L. (4th) 365 (B.C.C.A.), at para. 7, there is good reason to defer to a trial judge's assessment of the parties' relative success:

> I think it must be acknowledged that a person appealing an order for costs made at the close of detailed Reasons for Judgment faces an uphill battle in attempting to persuade an appellate court that a trial judge failed properly to assess the relative success or failure of each party. The trial court has before it not only the pleadings and final result of the case, but is able to assess as well how the evidence went in, who was responsible for any prolongation or shortening of the trial, the reasonableness of the positions taken by the parties, and what the "real issues" turned out to be. In my opinion, we should accord a good degree of respect to such an

> assessment and should not require a trial judge to list in detail the many factors behind it.

[251] It was open to the trial judge to conclude that Canada was the successful party relative to the Town. In assessing success, courts look to the overall outcome of the proceeding, rather than conduct an issue-by-issue analysis: *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 381, at para. 10; *Aurora (Town) v. Lepp*, 2020 ONCA 528, 5 M.P.L.R. (6th) 8, at para. 24. Here, the trial judge concluded that the central issue was the location of the Reserve's eastern boundary and that Canada was successful on that issue.

[252] The Town argues that Canada was not the successful defendant because the trial judge rejected Canada's (and Saugeen's) position that Rankin was able to draw a boundary on dry land to lot 31; she found instead that Rankin confronted a latent ambiguity due to the coastline's concavity, and wrongly exercised his discretion to move the Reserve's northern terminus to a spot further south. In other words, the trial judge did not accept Canada's position that Rankin's survey reserved the Disputed Beach, but instead concluded that his survey wrongly excluded the Disputed Beach.

[253] While the Town is right in that the trial judge rejected Canada's theory about what Rankin did, the trial judge agreed with Canada's overarching argument, which is that the Disputed Beach is part of the Reserve. Put another way, despite her rejection of Canada's theory about Rankin's approach, the trial judge found that

Canada was the successful defendant because she accepted its position on the central question she had to answer: whether the Reserve includes the Disputed Beach.

[254] We acknowledge that another judge might have, on this record, arrived at a different conclusion, especially since this litigation arose from the Crown's breaches of the duties it owed Saugeen. But that alone is not a basis on which to grant leave. The Town has not displaced the deference owed to the trial judge's determination that Canada was the successful defendant.

[255] The remaining grounds of appeal – i.e., the apportionment of Saugeen's costs, the Sanderson Order, and the dismissal of the Town's request for costs – all hinge on the trial judge's alleged mischaracterization of Canada as the successful defendant. Having concluded that there is no basis on which to disturb the trial judge's finding in that respect, there is no reason to consider the remaining grounds.

[256] In summary, the Town has not demonstrated that the trial judge's assessment of Canada as "the successful defendant" is unworthy of deference, and neither has it met the high bar for granting leave to appeal a costs award. Leave is denied.

[257] Accordingly, the Town's appeal against the trial judge's costs order is dismissed.

J. ISSUE #6 – THE TRIAL JUDGE ERRED BY DETERMINING RESPONSIBILITY FOR PRE-CONFEDERATION CROWN LIABILITY IN PHASE 1

(1) Overview

[258] As noted above, the trial of this action is subject to a phasing order that divided the issues into two groups, to be reviewed successively. Phase 1 was to address, among other issues, the liability of the Crown to Saugeen for any breaches of fiduciary duty or duties flowing from the honour of the Crown. The Phase 1 trial led to the Judgment now under appeal. Phase 2, which will not proceed until all appeals in relation to Phase 1 have been disposed of, was to address all issues not already determined in Phase 1, including the allocation of any pre-Confederation liability as between Canada and Ontario. The Phasing Order provides, in relevant part, the following:

> 2. **THIS COURT ORDERS** that the trial of Phase I shall determine the following issues:
>
> > a) The Plaintiff, the Chippewas of Saugeen First Nation's ("Saugeen First Nation"), claim for the following relief …:
> >
> > > a declaration that the Crown, as variously represented by the Defendants Canada and Ontario and their predecessors, breached its fiduciary duties to Saugeen First Nation;
> >
> > > a declaration that the Crown, as variously represented by the

> Defendants Canada and Ontario and their predecessors, breached its duties to Saugeen First Nation flowing from the honour of the Crown;
>
> …
>
> 5. **THIS COURT ORDERS** that Phase II, if necessary, shall address all issues not already determined in Phase I of the action, including: …
>
> > b) the determination of the crossclaim of Her Majesty the Queen in Right of Ontario and the Attorney General of Ontario against Her Majesty the Queen in right of Canada and the Attorney General of Canada;
> >
> > c) the determination of the counterclaim of the Attorney General of Canada against Her Majesty the Queen in Right of Ontario; [Emphasis in original.]

[259] As set out earlier in these reasons, paras. 1 and 2 of the formal Judgment declare that the Imperial Crown and Canada acted in a manner that was inconsistent with the honour of the Crown, that the Imperial Crown and Canada breached their fiduciary duties owed to Saugeen, and that the liability for the Crown's dishonourable conduct and the related breaches falls entirely to Canada.

[260] Canada cross-appeals, arguing that the trial judge: (i) denied procedural fairness by, without notice, determining the allocation of pre-Confederation liability in Phase 1, and not reserving the issue until Phase 2; and (ii) erred by finding that Canada inherited 100 percent of the pre-Confederation Crown's liability.

[261] For the reasons that follow, we find that the trial judge denied procedural fairness by determining the allocation of pre-Confederation liability in Phase 1 of

the trial. This amounted to an error in law. As this error alone requires that this aspect of the Judgment be set aside and that the issue be deferred until the Phase 2 trial, there is no need to address Canada's second ground of appeal, which challenges the trial judge's substantive decision on apportionment. That is, again, an issue for Phase 2.

(2) Analysis

[262] The allocation of pre-Confederation liability is a matter of constitutional significance. The trial judge erred by making a determination on this question without providing Ontario and Canada the opportunity to make submissions.

[263] Ontario contends that while the Judgment states that liability for the Imperial Crown's dishonourable conduct and breaches "falls to Canada", it "does not say that Canada will pay Saugeen for any loss and that Ontario will exit the litigation with no money order against it", an issue that it says has been left for Phase 2. Ontario argues that the Judgment must be read together with the minutes of a post-trial case conference, at which Canada expressed the very concern it raises now.

[264] Ontario highlights the fact that the trial judge's endorsement from that case conference notes that she has "not made any ruling with respect to the disposition of Canada's counterclaim or Ontario's cross claim". We are not entirely certain what the trial judge means, because the Judgment clearly says that liability "falls

to Canada". What could it mean, other than that Canada is 100 percent liable for the Crown's pre-Confederation breaches?

[265] Whatever the trial judge said in her case conference endorsement, the plain language of the Judgment makes it clear that Canada is liable for the pre-Confederation breaches, and Ontario is not. This conclusion precludes all later counterclaims and cross claims concerning pre-Confederation Crown liability.

[266] Ontario further argues that the trial judge, at Phase 2, could simply direct Ontario to reimburse Canada for the amount Canada pays to Saugeen. This, in Ontario's view, would allow her to remain faithful to her Phasing Order. We disagree. This approach is not authorized by the Phasing Order, and even if it were, the parties should have been permitted to make submissions on the apportionment of liability question before it was decided. In any event, it is not clear how Canada would seek contribution from Ontario at that point. Ontario has not answered that question.

[267] At Phase 1, as the Phasing Order sets out, the trial judge could simply have found that the pre-Confederation Crown was liable for breaches prior to 1867. It was not necessary to decide the issue of which Crown inherited that liability in order to decide the other issues that had been argued. Further, we observe that there was nothing in Ontario's submissions at trial that required the trial judge to

weigh in on the apportionment of liability at this point, especially in the absence of submissions from Canada and Ontario on the apportionment issue.

[268] Lastly, we do not accept Ontario's argument that because Canada has been held responsible for the breaches that occurred post-Confederation it must also be responsible for the acts of Imperial Crown officials in 1856, since "the obligation and breach had to go somewhere". In other words, Ontario submits that because this is a "continuing breach", Canada must necessarily be found solely liable. While it is true that, after Confederation, Canadian officials failed to recognize Saugeen's Reserve interest in the Disputed Beach, it does not necessarily follow that Ontario is entirely free from responsibility for the breaches of the Imperial Crown. Neither Ontario nor Canada committed the initial breaches; agents of the Imperial Crown did. The parties were entitled to make submissions, pursuant to the Phasing Order, in the context of their cross claim and counterclaim about how liability should be apportioned for acts committed before either Ontario or Canada existed.

[269] In the end, to hold that liability rests squarely with Canada and not with Ontario at all, without informing the parties of her intention to do so or inviting submissions from them on that question, is contrary to the principles of natural justice and procedural fairness. This breach of procedural fairness amounts to an error in law. Accordingly, the question of pre-Confederation liability is referred back to the trial court to be decided at Phase 2.

K. DISPOSITION

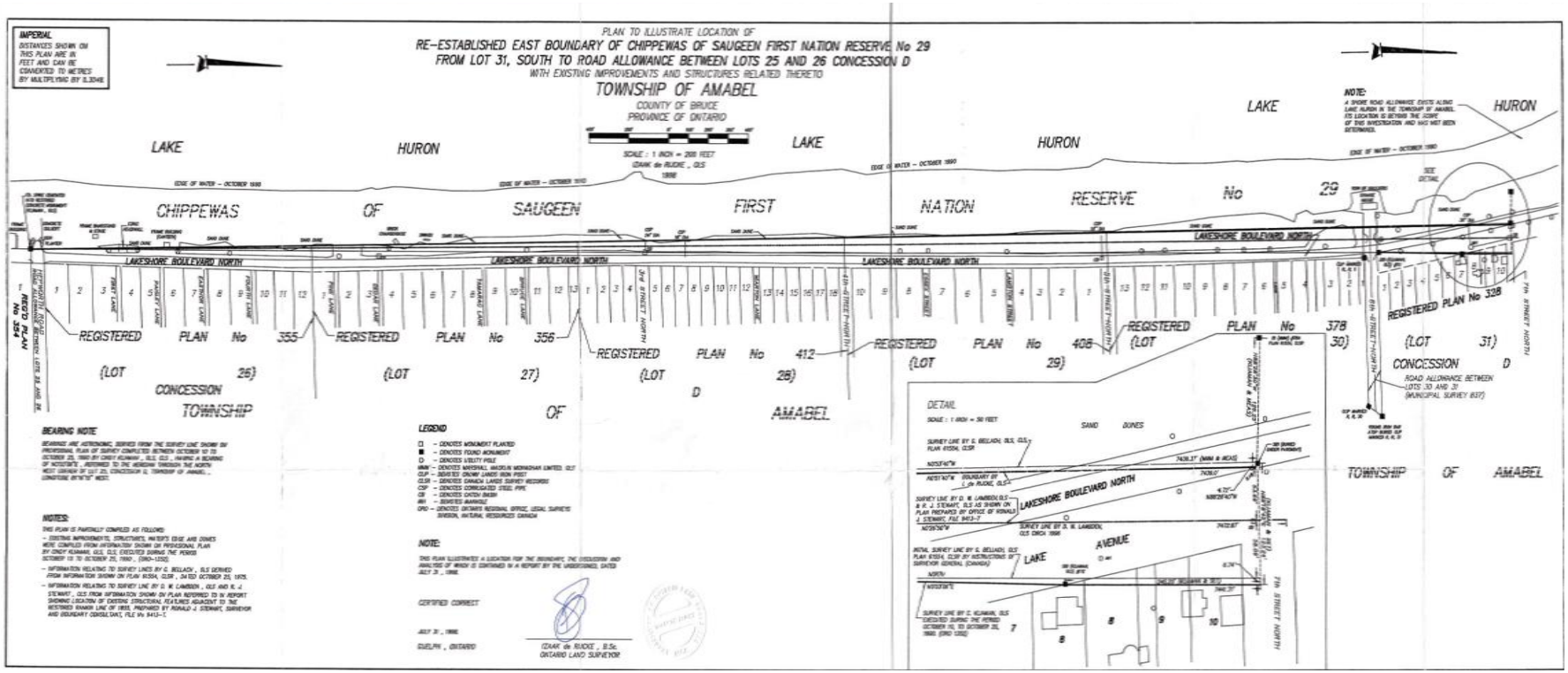
[270] For these reasons, we dismiss the appeals brought by Ontario and the Town and Families, and deny the Town's request for leave to appeal the costs order. We allow Canada's cross-appeal and refer the question of pre-Confederation liability back to the trial court to be decided at Phase 2.

[271] In accordance with the electronic appeal protocol governing this matter, costs submissions were deferred pending the release of these reasons. If the parties are unable to agree as to costs, each may make written submissions of no more than 10 pages plus their bills of cost. Saugeen and Canada are to provide their submissions within 15 days of the release of these reasons. Ontario and the Town and Families are to provide their submissions within 30 days of the release of these reasons.

Released: December 9, 2024 "J.G."

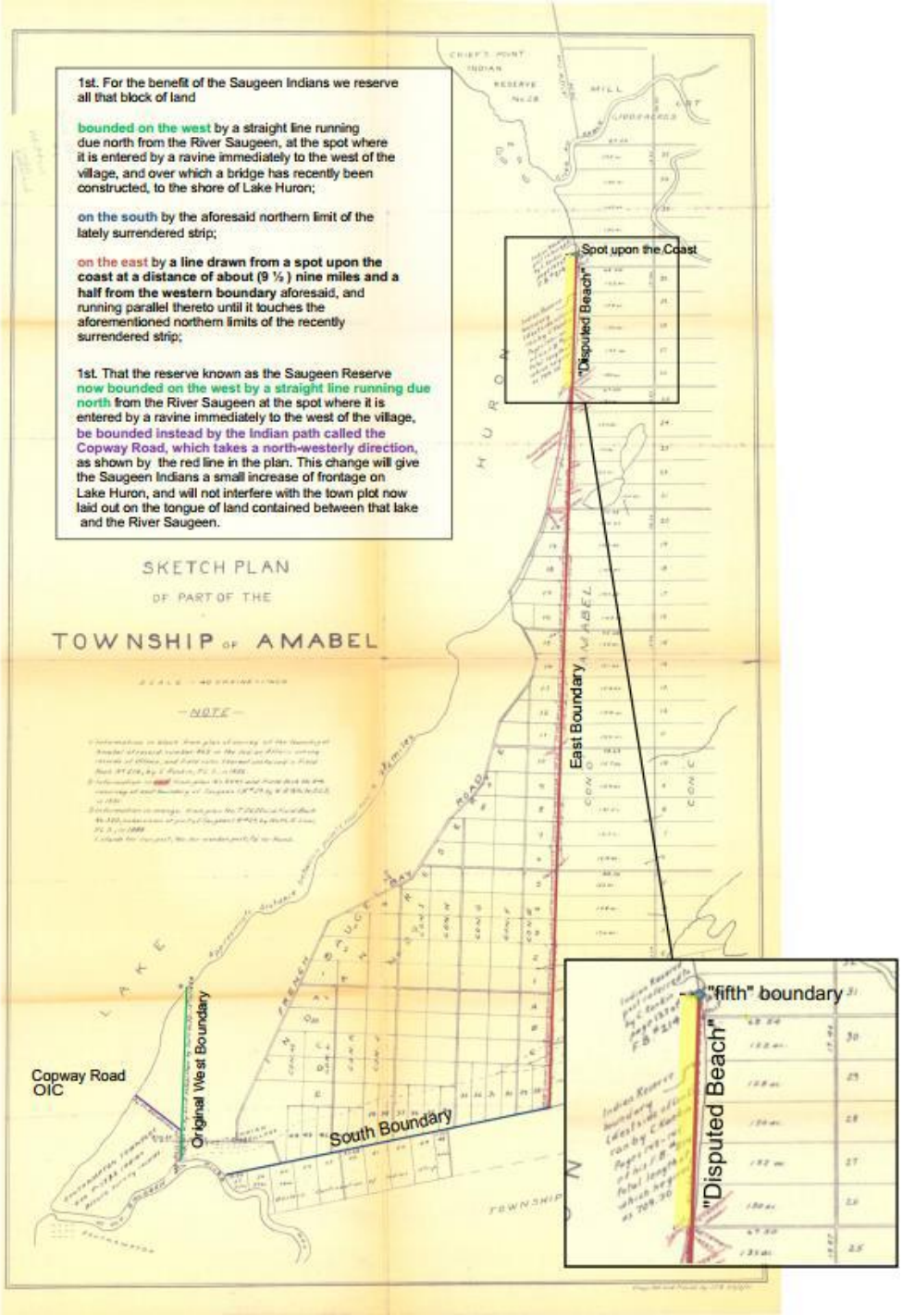
"J. George J.A."
"J. Copeland J.A."
"J. Dawe J.A."

APPENDIX A: THE DISPUTED BEACH[18]



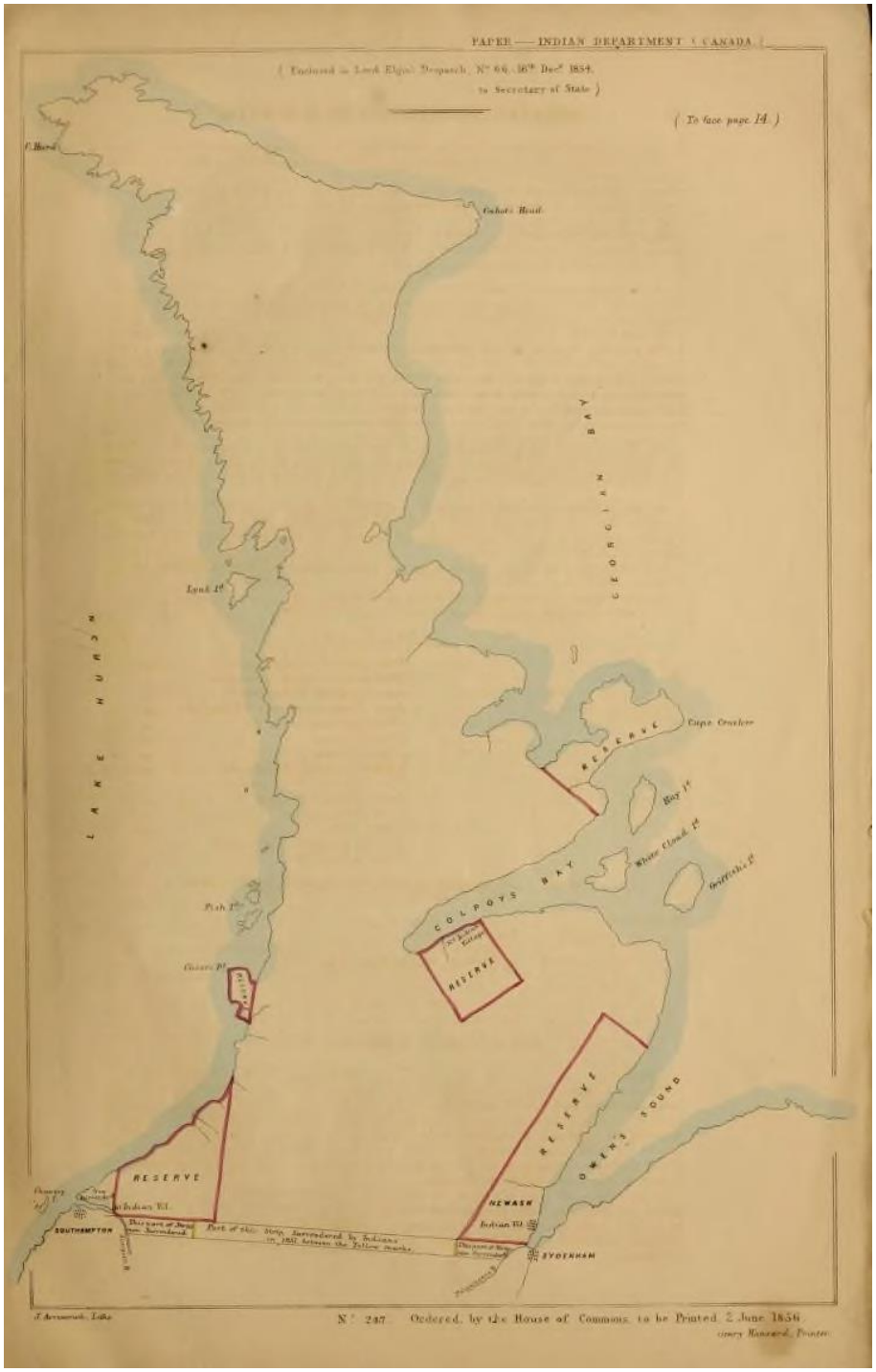
[18] See Exhibit 1900 (Report on the Re-Establishment of the North Segment of the East Boundary, Chippewas of Saugeen First Nation Reserve No. 29 (2021)), Appendix 3.

APPENDIX B: THE RESERVE BOUNDARIES[19]



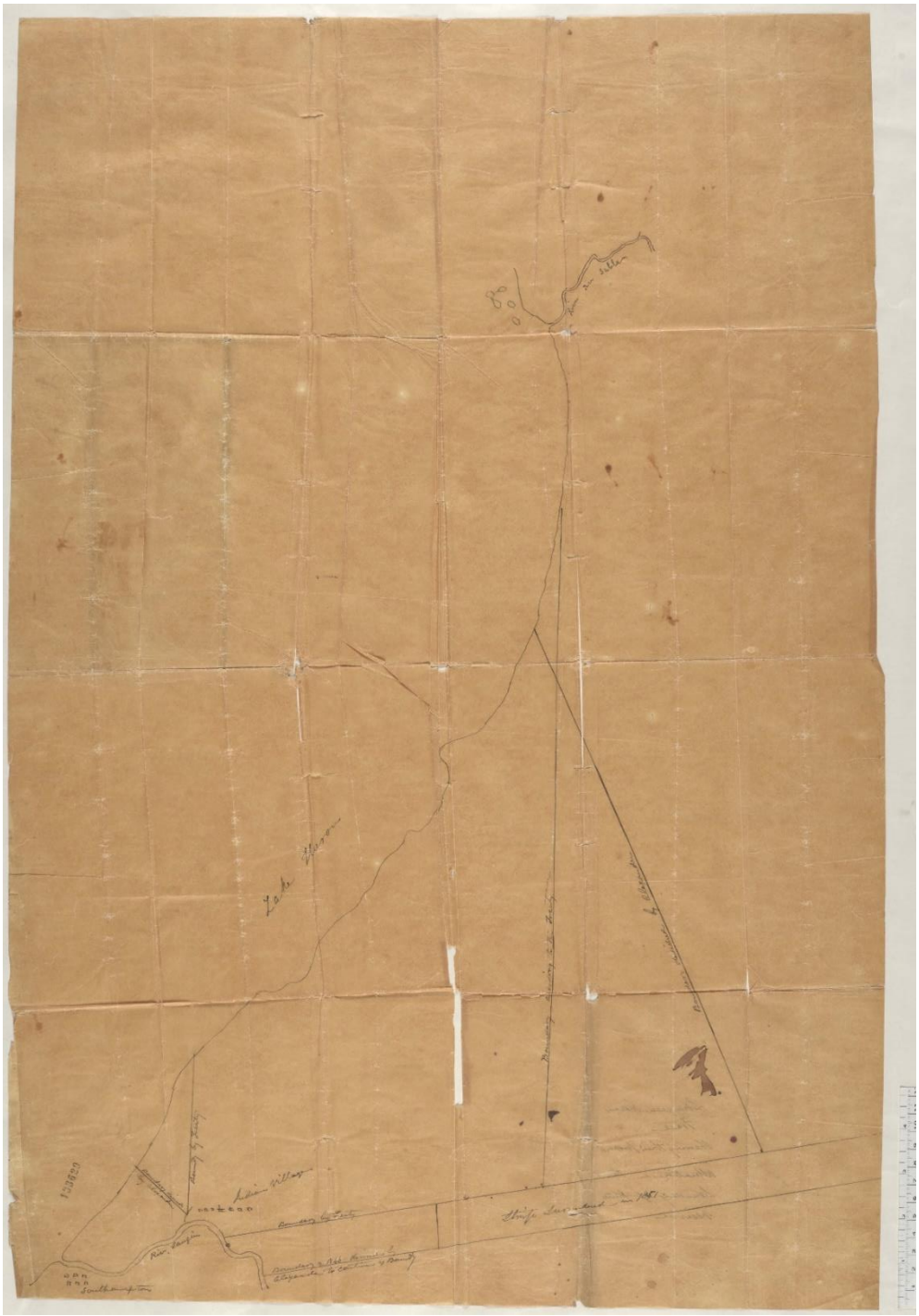
[19] See Exhibit 1196 (Sketch Plan of Part of the Township of Amabel (1951)). The sketch plan is annotated by Canada.

APPENDIX C: THE SKETCH MAP[20]



[20] See Exhibit 324 (Copies or Extracts of Recent Correspondence Respecting Alterations in the Organization of the Indian Department in Canada (1856)), at p. 14.

APPENDIX D: THE TRACE MAP[21]



[21] See Exhibit 523 (Sketch Map Attached to a Report by Charles Rankin, Public Archives, RG 10, Vol. 225, p. 133629 (1856)).