COURT OF APPEAL FOR ONTARIO

CITATION: Chippewas of Nawash Unceded First Nation v. Canada (Attorney General), 2023 ONCA 565
DATE: 20230830
DOCKET: C69830 & C69831

Lauwers, Pardu and George JJ.A.

Docket: C69830

BETWEEN

Chippewas of Nawash Unceded First Nation and Saugeen First Nation

Plaintiffs (Appellants)

and

The Attorney General of Canada and His Majesty the King in Right of Ontario

Defendants (Respondents)

Docket: C69831

AND BETWEEN

Saugeen First Nation and Chippewas of Nawash Unceded First Nation

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

The Attorney General of Canada, His Majesty the King in Right of Ontario, the Corporation of the County Grey, the Corporation of the County of Bruce, the Corporation of the Municipality of Northern Bruce Peninsula, the Corporation of the Town of South Bruce Peninsula, the Corporation of the Town of Saugeen Shores, and the Corporation of the Township of Georgian Bluffs

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

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Michael Jackson, Terri-Lynn Williams-Davidson, Elizabeth Bulbrook and Nigel Baker-Grenier for the intervener the Council of the Haida Nation (C69830)

Ruben Tillman and Rachel Ariss, for the intervener Heiltsuk Nation (C69830)

Kelsey Rose, for the intervener Songhees Nation and Esquimalt Nation (C69830)

Thomas Slade and Cory Giordano, for the intervener Walpole Island First Nation (C69830)

Heard: May 8-11 and 15-17, 2023

On appeal from the judgments of Justice Wendy M. Matheson of the Superior Court of Justice, dated July 29, 2021 and October 28, 2021, with reasons reported at 2021 ONSC 4181.

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[1] Gregory Stewart appeared but made no written or oral submissions on behalf of the Corporation of the Municipality of Northern Bruce Peninsula and the Corporation of the Town of South Bruce Peninsula. These two municipalities adopted the submissions of the Corporation of the Township of Georgian Bluffs.

By the Court:

I. INTRODUCTION

[1] The appellants, the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation, collectively referred to as "SON",[2] sued Canada and Ontario for a declaration that they have Aboriginal title to submerged lands in a large section of Lake Huron and Georgian Bay, surrounding the Bruce Peninsula (the

[2] Both the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation have, for many years, lived on or near the Bruce Peninsula. These First Nations refer to themselves, together, as the Saugeen Ojibway Nation or, in this litigation, SON.

"Title claim"). SON claimed the right to control every aspect of occupation of those waters, consistent with the rights associated with Aboriginal title as described in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, and argued that any incursion on that right, whether for national defence, border control, recreation, commerce, or navigation, must comply with s. 35 of the *Constitution Act, 1982.*

[2] The trial judge dismissed their claim. SON appeals to this court, requesting a new trial, or that the matter be remitted back to the trial judge, for further evidence and submissions in order to determine whether there is Aboriginal title to any portion of the title area claimed.[3]

[3] SON also sued Canada and Ontario for breach of the promise made by the Crown in 1836, in Treaty 45 ½, to protect SON's land from encroachments by "the whites" (the "Treaty claim"). The treaty promise, which was accepted by SON's ancestors, provides:

> I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this island or to that part of your territory which lies on the north of Owen Sound, upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land, which your Great

[3] This trial was the first phase of a two-phase trial. The details of the phases are set out in "Schedule C" to these reasons. In brief, Phase 1 was to encompass the issue of liability to SON, and Phase 2 is to address consequential issues such as damages.

> Father engages for ever to protect for you from the encroachments of the whites. [Emphasis added.]

[4] SON alleges that the Crown did not fulfill its treaty promise with diligence and that the Crown misconducted itself during treaty negotiations in ways which were not compatible with the honour of the Crown. Treaty 45 ½ was followed by Treaty 72, in which most of the land in the Peninsula was surrendered to the Crown. SON says that it was compelled to enter Treaty 72 in 1854 because of the Crown's failure to fulfill the promise of Treaty 45 ½, but SON does not seek to invalidate Treaty 72.

[5] As part of the Treaty claim, SON claimed $80 billion as compensation for the alleged breaches and $10 billion in punitive damages, as well as the return of all Crown land not in the hands of third parties. SON also sued several municipalities, including Georgian Bluffs, Northern Bruce Peninsula, and South Bruce Peninsula. As a remedy for the Crown's breach of fiduciary duty, being the misconduct and failure to act with diligence to fulfill the treaty promise in Treaty 45 ½, SON seeks a declaration that it is the beneficial owner, by way of constructive trust, of certain road allowances in the municipalities, including those in active use as public roads.

[6] The trial judge held that the pre-Confederation Crown breached the honour of the Crown both in relation to the fulfillment of Treaty 45 ½ and at the treaty council in the leadup to Treaty 72. However, she dismissed SON's fiduciary duty

claim and deferred to the next phase of the trial the issue as to whether the municipalities should be excluded from the Treaty claim.

[7] SON appeals from findings of the trial judge respecting the consequences of Crown misconduct, as well as her conclusion that the treaty promise did not create fiduciary obligations. Ontario appeals from the trial judge's conclusion that the Crown failed to act with sufficient diligence to fulfil the treaty promise.[4] Ontario also asserts that the Crown is immune to suit for any breaches of fiduciary duty. Finally, the municipalities appeal from the trial judge's refusal to dismiss the action against them, particularly in light of her conclusion that the treaty promise did not give rise to an *ad hoc* or *sui generis* fiduciary obligation.

[8] For the reasons that follow, we grant SON's Title claim appeal, but only to the extent of remitting the matter back to the trial judge to determine whether Aboriginal title can be established to a more limited area. We dismiss SON's and Ontario's Treaty claim appeals. Finally, we grant the municipalities' Treaty claim appeal and dismiss the action against them.

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[4] Although Ontario did not file a formal notice of cross-appeal, we granted it leave, at the hearing, to challenge the determination that the honour of the Crown was breached and the related underlying factual findings.

II. OVERVIEW

[9] In these reasons we address in sequence the issues raised in the Title claim:

1. Did the trial judge confuse the tests for Aboriginal rights and Aboriginal title?
2. Did the trial judge give sufficient weight to the Aboriginal perspective?
3. Did the trial judge fail to take into account the submerged nature of the land claimed, thereby setting too high a threshold for determining whether SON could show a sufficient connection to the land?
4. Did the trial judge set too high a threshold for determining control by SON of the claimed land in her application of the *Tsilhqot'in* test?
5. Did the trial judge misperceive the common law regarding navigable waters and its relationship to Aboriginal title?
6. Should the trial judge have invited further submissions to determine a process as to whether a claim to Aboriginal title to a smaller area could be established?

In the Treaty claim:

1. Did the trial judge err in finding that the Crown breached the honour of the Crown and the treaty promise in Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachments by white settlers?

2. Did the trial judge err in finding that certain Crown conduct in the negotiation of Treaty 72 did not breach the honour of the Crown?
3. Did the Crown owe and breach a fiduciary duty to SON?
4. Is the Crown immune to claims for breach of fiduciary duty?

In SON's claims against the municipalities:

1. Did the trial judge err in not dismissing the action against the municipalities?

III. THE TITLE CLAIM

A. Background

[10] In its Title claim, SON sought a declaration of Aboriginal title over a large section of Lake Huron and Georgian Bay surrounding the Bruce Peninsula. The area claimed extends from near Goderich to the Canada-United States boundary to a point midway between Manitoulin Island and the northern tip of the Bruce Peninsula, through the channel between Manitoulin Island and the Peninsula, to a point midway between the Peninsula and the eastern shore of Georgian Bay and along the shore to the point of commencement. This area is labelled "Aboriginal Title Claim Area" in the map set out in "Schedule A".

[11] At trial, SON argued that the test from *Tsilhqot'in*, which has been applied to determine claims for Aboriginal title to dry land, should apply to their claim. Ontario and Canada did not agree that the *Tsilhqot'in* test applied, and took the position that, in any event, SON could not satisfy the test.

[12] On appeal, the parties generally agree that *Tsilhqot'in* establishes the test for proof of Aboriginal title to submerged lands, although Ontario argues that the application of that test should be nuanced by the more general test for Aboriginal rights, of which it is a subset: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 137.

[13] The *Tsilhqot'in* test requires an examination of Aboriginal occupation of land prior to the assertion of British sovereignty and requires that the occupation be:

1. *Sufficient*, in that there must have been sufficient occupation of the Aboriginal title claim area;
2. *Continuous*, in that, where present occupation of the Aboriginal title claim area is relied upon as proof of occupation pre-sovereignty, there must be continuity between pre-assertion of sovereignty occupation and present occupation; and
3. *Exclusive*, in that the historic occupation must have been exclusive, as of the date of assertion of British sovereignty.

[14] The parties agree that the date of assertion of British sovereignty was February 19, 1763, by the Treaty of Paris, which ended the Seven Years' War. France ceded all of the mainland in North America east of the Mississippi River, and other lands, to the British. The British then asserted sovereignty over the land

formerly claimed by the French, including the land to which SON now claims Aboriginal title.

[15] We draw the following additional principles from *Tsilhqot'in*:

1. With the assertion of sovereignty, the Crown is deemed to acquire radical or underlying title to all land (see also *Guerin v. The Queen*, [1984] 2 S.C.R. 335). That title is burdened by the "pre-existing legal right" held by Aboriginal peoples based on their use and occupation of the land prior to European arrival: at para. 12.

2. The dual perspectives of the common law and of the Aboriginal claimant group bear equal weight in evaluating a claim for Aboriginal title: at para. 14.

3. Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which are not confined to those Aboriginal practices, customs, and traditions integral to distinctive Aboriginal cultures: at para. 15.

4. The concepts of sufficiency, continuity, and exclusivity provide "useful lenses through which to view the question of Aboriginal title", but "the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty

Aboriginal interests into equivalent modern legal rights." Sufficiency, continuity, and exclusivity "are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established": at para. 32.

5. The Aboriginal perspective focuses on laws, practices, customs, and traditions of the group. The group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed, are all relevant: at para. 35.

6. The common law perspective imports the idea of possession and control of the lands. Sufficiency of occupation is a context-specific inquiry. The intensity and frequency of use sufficient to establish Aboriginal title may vary with the characteristics of the group asserting title and the character of the land over which title is asserted: at para. 37.

7. To sufficiently occupy the land for the purposes of title, the Aboriginal claimant group must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. The occupation cannot be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by,

or was under the exclusive stewardship of the claimant group: at para. 38.

8. Exclusivity requires the Aboriginal claimant group to have had “the intention and capacity to retain exclusive control” over the claimed land. Regular use, without exclusivity, may give rise to Aboriginal rights; however, to successfully claim Aboriginal title, the use must have been exclusive: at para. 47.

9. Whether the Aboriginal claimant group had the intention and capacity to control the land at the date of sovereignty in 1763 is a question of fact for the trial judge and depends on various factors, such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Proof that others were excluded or were allowed access only with the permission of the claimant group, an absence of challenges to the occupancy, or evidence that treaties were made with other groups may demonstrate an intention and capacity to control the land. As with the sufficiency of occupation, the exclusivity requirement must be considered from both the common law and Aboriginal perspectives: at para. 48.

10. The question of whether Aboriginal title has been proven is a question of fact for the trial judge. Appellate review is not justified absent a

palpable and overriding error. The presence of conflicting evidence is not sufficient to demonstrate palpable and overriding error: at paras. 52, 60.

[16] Here, deference is owed to the trial judge's findings concerning sufficiency, continuity, and exclusivity. The trial extended over 97 days of evidence. The evidence was conflicting, and the documentary record was massive, including almost 5,000 exhibits and over 30 expert reports.

[17] Further, as the trial judge observed, SON's choice of the boundaries of the area it claimed was not made to reflect physical occupation of that area. Rather, it was made to reflect the reality of the international border in the west and to divide the lake evenly between the First Nations on the north and east sides of the lake. SON's claim asserts title to the submerged land, with the rights to minerals and other resources that would be associated with that title, the right to exclude others from the space above the land, as well as the right to the things in the water above that land. It does not claim title to the water.

[18] With this background in mind, we now turn to the arguments on appeal.

B. Arguments on Appeal

[19] SON submits that the trial judge erred in numerous aspects of her decision regarding Aboriginal title. Specifically, SON claims that the trial judge erred by:

1. Analyzing the claim for Aboriginal title through the lens of the more exacting test for an Aboriginal right;

2. Giving insufficient weight to the Aboriginal perspective and failing to take into account the submerged nature of the land claimed;

3. Setting too high a threshold for the control element of the *Tsilhqot'in* test and drawing an erroneous distinction between control of resources and control of territory;

4. Failing to apply the test for determination of whether there was a treaty at Niagara and failing to apply principles of treaty interpretation to that document; and

5. Misperceiving the common law regarding navigable waters and its relationship to Aboriginal title.

[20] As we explain below, we reject these arguments. Nevertheless, as we further explain, we agree with SON that, having determined that SON did not have Aboriginal title over the entire claim area, the trial judge prematurely dismissed the possibility of Aboriginal title to portions of that area.

[21] We begin by considering each of SON's arguments in turn. We then explain why we remit the matter to the trial judge to determine whether SON has satisfied the *Tsilhqot'in* test for Aboriginal title to any limited portion of the broader Title claim area.

C. Analysis

(1) Did the trial judge confuse the tests for Aboriginal rights and Aboriginal title?

[22] At the time of the trial, the *Tsilhqot'in* test had not yet been applied to submerged land. SON urged the trial judge to apply that test to their claim. Because the application of the *Tsilhqot'in* test to submerged land was novel, the trial judge took the precaution of considering whether the claimed right also met the test for an Aboriginal right.

[23] The test for an Aboriginal right is different from the test for Aboriginal title. The test for an Aboriginal right asks whether the activity was integral to the distinctive culture of the claimant group before contact with European societies, not at the later time of the assertion of Crown sovereignty in 1763: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paras. 46, 60. Further, the activity must have been "a central and significant part of the society's distinctive culture": *Van der Peet*, at para. 55.

[24] Here, the trial judge applied the test for an Aboriginal right, as established in *Van der Peet* and more recently set out in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, as a precaution due to the novelty of the claim. She applied the test to the circumstances existing at the date the Crown asserted sovereignty. She went on to later apply the *Tsilhqot'in* test for Aboriginal title.

[25] The trial judge's analysis under the umbrella of an Aboriginal rights claim did not taint her analysis of the test for Aboriginal title. When referring to the Aboriginal rights test, she acknowledged that "there is some overlap between [that test] and the *Tsilhqot'in* test, but they are not the same. It is therefore also important that, as the trial judge, I make the factual findings needed for both issues." The trial judge's reasons make it clear that she applied the tests for sufficiency of occupation, continuity, and exclusivity in relation to the Aboriginal title claim. Her observation that SON had not demonstrated that their ancestors had a connection with the claimed land that was of central significance to their distinctive culture did not affect that analysis.

[26] The trial judge's consideration of the Aboriginal rights test was unnecessary. The *Tsilhqot'in* test is sufficiently flexible to be adapted to a claim for submerged lands. The trial judge's Aboriginal rights analysis did not undermine her analysis of SON's claim to Aboriginal title.

[27] In any event, the distinct approaches to Aboriginal rights and Aboriginal title are not conceptually alien to one another. As noted by the minority in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 140, echoing observations in *Delgamuukw*, "anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture." This connection explains the insistence in

Tsilhqot'in on a strong physical presence on the claimed territory. As recently reaffirmed by the Supreme Court, "Aboriginal title is thus a sub-category of Aboriginal rights": *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 27.

[28] We accordingly reject SON's argument that the trial judge erred by analyzing their claim for Aboriginal title through the lens of the test for an Aboriginal right. The trial judge's precautionary consideration of the Aboriginal rights test did not taint her analysis of the Aboriginal title test, which extends to submerged lands.

(2) Did the trial judge give sufficient weight to the Aboriginal perspective?

[29] Members of SON identify as Anishinaabe, both now and in the distant past. It is clear from her reasons for judgment that the trial judge, in evaluating SON's claim to Aboriginal title, considered the Anishinaabe perspective in many ways.

[30] She explained that there are approximately 200 to 250 Anishinaabe Indigenous groups in Canada and the United States in the Great Lakes regions, including the two that comprise SON. The Anishinaabe are a nation in a cultural sense, with no corresponding political manifestation.

[31] The trial judge noted that the Anishinaabe were sometimes described as nomadic, but "are more specifically understood as people who had a defined seasonal round of activities and locations, where they would hunt and fish and

harvest each year", although they did relocate from time to time. She considered their occupation of land on the Bruce Peninsula in this context.

[32] She noted that SON had kinship groups called "clans" or "Dodems". Dodems are named after a symbolic animal, bird, or fish, and are inherited from one's father. Some of the Dodemic identities first noted by Europeans in the 17th century are still in use today.

[33] SON members were also part of local Indigenous groups or bands, now referred to as First Nations. Decisions and, in particular, decisions about land, were made at the band level based on consensus.

[34] The trial judge acknowledged that there were other Indigenous groups in the Great Lakes region, with different languages and cultures. Sometimes, bands would form associations with others when it suited their interests.

[35] The trial judge observed that this was not a case where SON "collected plants, minerals or other useful or significant substances from the submerged land", but noted that she did not consider the lack of evidence of actual use of the lakebed to be determinative, given SON's submission that the water and lakebed were regarded by them as one.

[36] She reviewed the Creation Story of the Anishinaabe, part of their sacred teachings. Water was one of the four levels of creation. The Anishinaabe did not

look at boundaries, but were given the responsibility to care for the Earth, including the air, water, and land.

[37] The trial judge noted that two experts testified that it was “almost certain that the Anishinaabek included water territories in their band territories in and before 1763”, but that this was not a connection with the submerged land.

[38] She explained that water ceremonies were, and are, very important to the community. They were usually not held on water, except for a specific location at Nochemowenaing, on the Georgian Bay side of the Peninsula in the Hope Bay area. This was a very significant place from the Indigenous perspective, as the waters of Nochemowenaing are believed to have a healing quality. In the trial judge’s view, however, the Anishinaabe spiritual connection with the water did not mandate exclusive access to the water. The Nochemowenaing ceremony took place on the water, but other water ceremonies did not have to be held in, or near, the water of the Great Lakes.

[39] The trial judge found that SON are “a fishing people” and that they have relied heavily on fishing for sustenance, and sometimes for trade and commercial purposes. The Title claim area includes some significant fishing locations, such as the mouth of the Saugeen River and Colpoy’s Bay. She concluded that, while fishing was important, it had limited connection to the claimed land.

[40] The trial judge further found that Anishinaabe customary law included the recognition that a band had some control over: (1) the resources that could be harvested on their land and through fishing; and (2) the people who could come and settle on their land. This customary law was shared by Anishinaabe groups in the general area of the Peninsula.

[41] On appeal, SON argues that the trial judge failed to give sufficient weight to the Aboriginal perspective. SON contends that giving dual weight to the Aboriginal and common law perspectives means assessing physical possession or control in light of how SON's ancestors conceived of possession and that this modifies the standard set by *Tsilhqot'in*. They submit that *Tsilhqot'in*'s insistence on physical occupation at all times satisfies the common law perspective only. SON argues that their spiritual connection to land and water was so important that it overcame any absence of actual physical possession required to establish Aboriginal title to the submerged lands claimed. Thus, they submit that the trial judge should have given more weight to their spiritual connection to the aquatic environment.

[42] *Tsilhqot'in*, however, mandates that there must be a strong physical presence on or over the land claimed and that possession cannot be established based purely on subjective or internal beliefs: at para. 38. The trial judge found as follows in this regard:

> The Anishinaabek, including SON, had a spiritual connection with the whole of the Earth, including the water, as of 1763. SON appears to equate this spiritual connection with occupation. Spiritual connections with the whole Earth or the whole of a territory, land and water, may be relevant to occupation. I find them relevant in this case. But they are not sufficient to show occupation of the claim area for the purpose of Aboriginal title.

[43] We defer to the trial judge's assessment and reject SON's submission that she failed to give sufficient weight to the Aboriginal perspective.

(3) Did the trial judge fail to take into account the submerged nature of the land claimed, thereby setting too high a threshold for determining whether SON could show a sufficient connection to the land?

[44] SON argues that the trial judge erred by failing to consider the nature of the land claimed and the uses to which it could be put, in light of SON's ancestors' manner of living. SON submits that the nature of the land claimed – a "water space" – should be accounted for when weighing sufficiency of occupation. In other words, SON contends the uses that can establish a sufficient connection are those uses to which the submerged land, including the water above it, can reasonably be put.

[45] The trial judge, however, was acutely aware of the nature of the land claimed and reviewed, in detail, the evidence about the claimants' ancestors' way of life. Ultimately, she concluded that the boundaries selected by SON encompass an area much larger than any SON connection to the claimed land.

[46] Here, SON claimed the lakebed underlying the claim area in Lake Huron and Georgian Bay. The trial judge acknowledged that actual physical interaction with the lakebed was not determinative, though it was relevant. The trial judge operated under the guidance of *Tsilhqot'in* to hold that a sufficient context-specific connection had to be shown to the claimed land itself. Both the common law and the Indigenous perspectives bear equally: *Tsilhqot'in*, at para. 14. It is thus necessary to ask "whether a degree of physical occupation or use equivalent to common law title has been made out": *Marshall; Bernard*, at para. 66; see also *Delgamuukw*, at para. 149.

[47] The trial judge found the physical contact SON had with the lakebed itself was minimal. There was no evidence of construction of jetties, fishing weirs, docks, or other structures on the lakebed itself. Some fishing nets had weights that could sink to the lakebed, but the trial judge held that "any touching of the lakebed through fishing would have been close to shore at that time, not in the expanse of open water in the Aboriginal Title Claim Area. It was at best a minor use of the claimed lake bed."

[48] Again, while not dispositive, the trial judge's consideration of SON's interaction with the lakebed was relevant to determining connection. It is the most direct way of establishing occupation, especially in the common law perspective.

[49] SON further submits that the trial judge erred by observing that fishing could give rise to an Aboriginal right and not necessarily to Aboriginal title, when she indicated that title to the claimed lands was not necessary for the right to fish.

[50] There is no doubt that fishing is relevant to both a claim for an Aboriginal right and to Aboriginal title, a fact acknowledged by the trial judge. The degree of occupancy evidenced by fishing is relevant to the sufficiency of occupation necessary for Aboriginal title. We take the trial judge's point to be that Aboriginal title was not necessary to entail a right to fish, and that the right to fish may be established by occupation of a lesser intensity than that required to prove Aboriginal title.

[51] The trial judge acknowledged that fishing was important to SON's ancestors, but found that it was geographically limited:

> The Aboriginal Title Claim Area includes significant fishing locations, such as at the mouth of the Saugeen River and Colpoy's Bay. The Fishing Islands have also been an important area for SON's fishing, though the islands themselves are not part of the Aboriginal Title Claim Area. The Fishing Islands were surrendered in 1885.
>
> …
>
> Fishing took place in a limited part of the Aboriginal Title Claim Area…. The outer reaches of the Aboriginal Title Claim Area were not and are not regularly used for fishing. This is not analogous to seasonal hunting, for example, where some areas were used for only short periods, but were part of an annual seasonal round. Here, most of the Aboriginal Title Claim Area was

> unsuited for the boats used as of 1763 and was not part of an established fishing practice.
>
> …
>
> This is not a case where SON's ancestors traditionally used the extensive Aboriginal Title Claim Area, albeit with gaps in time, frequency and location.
>
> …
>
> For the most part, SON did not use that expanse of Lake Huron and Georgian Bay.

[52] The trial judge appropriately took into account the submerged nature of the land claimed and did not err in her consideration of the importance of fishing to SON's ancestors. We would accordingly reject this ground of appeal.

(4) Did the trial judge set too high a threshold for determining control by SON of the claimed land in her application of the *Tsilhqot'in* test?

[53] SON submits that the trial judge ought to have weighed the evidence about control of the claimed lands differently. They relied on evidence of historic events which, they submitted, demonstrated their control of the claim area in satisfaction of the *Tsilhqot'in* test.

[54] The trial judge was not persuaded. In our view, no palpable and overriding error results from that finding. The following examples suffice.

The meeting at the mouth of the French River in 1615

[55] In her reasons for judgment, the trial judge assessed the evidence of an encounter at the mouth of the French River in 1615 between Samuel de Champlain and about 300 Cheveux Relevées warriors from the southern area of Georgian

Bay. While SON argued that the encounter was evidence that their ancestors asserted some control of the waters in that area, the trial judge rejected their argument:

> SON relies on the arrival of the French explorer Samuel de Champlain at the mouth of the French River in 1615. When Champlain and his expedition party arrived at that location, they were met by about 300 Cheveux Relevées warriors, who were Odawa. This event has a potential connection to SON because the Cheveux Relevées may have been from the southern area of Georgian Bay, even though the encounter with Champlain took place elsewhere. SON submits that these events show that their ancestors asserted some control of that location, on the north east side of Georgian Bay.
>
> The historical record shows that the Cheveux Relevées' head man spoke to Champlain about picking blueberries and their use of dried blueberries. The experts differ on why the Cheveux Relevées were there on that occasion, though it is agreed that they were there for more than just picking blueberries. It is not disputed that Champlain provided the Cheveux Relevées with a gift of an axe, that the encounter was peaceful, and that Champlain continued on his way. There was a custom of gift-giving to establish a relationship.
>
> Dr. Driben testified that the warriors were there to meet Champlain, relying on a master's thesis by Leo Waisberg. However, the thesis provides little support for that proposition. The passage Dr. Driben relied on observed that the reason given by the Cheveux Relevées head man regarding blueberry picking was "strange" since it was raiding season and because the modern practice was that blueberries are normally picked by children, adolescents and women.
>
> Taking a generous approach to the evidence, I find that it still does not establish that the Cheveux Relevées travelled to the French River to meet Champlain, nor that

> they had control of the waters there or in the Aboriginal Title Claim Area. Nor does the evidence establish that the axe was the price of passage through the area. [Footnote omitted.]

The Beaver Wars – 1649 and after

[56] SON argues that Anishinaabe participation in the Beaver Wars, which drove the Haudenosaunee out of southern Ontario, supports its argument that SON controlled the claim area. In considering this argument, the trial judge found that SON's ancestors participated in the Beaver Wars in an attempt to assert control over the Peninsula itself, but that this did not extend to an intention or capacity to control the Title claim area in Lake Huron and Georgian Bay. She made the following assessment:

> Beginning in about 1649, and for decades, there were conflicts that are often called the Beaver Wars (due to the relationship between the conflicts and the fur trade with France) or the Iroquois Wars. The Beaver Wars caused widespread movement of Indigenous peoples in the Upper Great Lakes area. At the beginning of this time period, the Haudenosaunee (Iroquois or, at that time, the "Five Nations") drove all Huron-Wendat, Tionontati (Petun), and Anishinaabe people out of the area between Lake Ontario and Georgian Bay. The Indigenous peoples living north of Lake Ontario, including any living on or near the Peninsula, were all likely driven out of those lands by the Haudenosaunee. The French fur trade relationship, which was primarily with the Huron-Wendat, was destroyed.
>
> The French perspective during the Beaver Wars underscores the French plan to conquer that began in the prior century. Louis XIV assumed personal rule over France in 1661. In about 1665, Louis XIV sent about

1,200 men to the colony to counter the Haudenosaunee threat and expand French domination. He gave instructions “to expand the Kingdom of God by increasing His own, to establish Christianity among the pagans and to force the barbarians to submit to His dominion, and by the power of his armament to also open a mighty Heavenly harvest for the zealous missionaries, and to His subjects the colonists, the rivers for new discoveries.” The French led military expeditions against the Haudenosaunee.

In around 1687, the French and their allies, including some Anishinaabe groups, attacked the Haudenosaunee in Niagara and continued to hound the Haudenosaunee. Oral history also records that Indigenous groups who had been driven out of southern Ontario joined in an offensive alliance and continued to force the Haudenosaunee to the south of Lake Ontario into the 1690s.

Significantly, some battles took place on the Peninsula, for example, at Skull Mound and Red Bay. After the conflict ended, the Indigenous peoples living on the Peninsula were referred to as Ojibway and not Odawa, although this does not preclude the possibility that the same peoples had returned.

Peace negotiations began in the late 17th century. France and its allies negotiated treaties with the Haudenosaunee giving rise to what is known as the Great Peace of Montreal. Some Anishinaabe from the Great Lakes region attended the 1701 conference in Montreal, where a peace treaty between them and the Haudenosaunee was ratified. Other treaties were also entered into around that time, ending the Beaver Wars.

SON relies on the participation of their ancestors in the move to drive the Haudenosaunee out, and the reoccupation of Peninsula land, as an example of the Anishinaabe refusing to share their land. I find that SON ancestors did take part in the Beaver Wars, including in battles fought on the Peninsula. I find that this was an attempt to assert control over the Peninsula itself, in

> response to the actions of the Haudenosaunee. But the Beaver Wars do not show that SON ancestors had the intention or capacity to control the Aboriginal Title Claim Area in Lake Huron and Georgian Bay.

Anishinaabe control of French access to the claim area - 1701

[57] The trial judge analyzed the interactions between the French and the Anishinaabe before 1763 when the French ceded the territory to the British in the Treaty of Paris. SON argues that these interactions were evidence of an assertion of Anishinaabe control, but the trial judge rejected this submission. She found that while "[i]n the French period, the French also built forts at strategic locations in the Great Lakes region and travelled freely between them", "SON has not shown that France sought permission to do so from SON ancestors or other Anishinaabek." She further concluded that overall, "the evidence about the French period does not demonstrate that France generally sought permission for its activities in the Great Lakes area, nor that SON's ancestors had the intention or capacity to control the Aboriginal Title Claim Area."

The Seven Years' War - 1756-1763

[58] The trial judge reviewed the events of the Seven Years' War between France, Britain, and other European countries from 1756 to 1763, and weighed the expert evidence. She noted that, after the French surrendered New France to Britain, the British "proceeded to occupy the formerly French forts, including at Detroit."

[59] The trial judge explained that, in 1761, the British invited many Indigenous groups, who were former allies of the French, to meet at Detroit. SON, among other Indigenous groups, likely joined an alliance with the British – known as the Covenant Chain alliance. Britain began surveying Lake Huron and developed a plan to organize the territories ceded by France.

[60] Neither France nor Britain perceived any necessity to involve Indigenous persons in the Treaty of Paris, suggesting perhaps that there was no issue of control by the Anishinaabe in the claim area at the time. The trial judge accordingly concluded that "[t]he lack of Indigenous involvement in that treaty shows that the French saw no need to treat with any North American Indigenous peoples about its transfer of New France to the British."

Pontiac's War - 1763

[61] The trial judge rejected SON's argument that their ancestors actively took part in Pontiac's War and that their participation was evidence of control. She explained that, when the British asserted sovereignty, they decided to stop the annual distribution of presents to Indigenous peoples and to change the terms of trade. Chief Pontiac, an Odawa Chief from the Detroit area, encouraged Indigenous peoples to take up arms against the British, calling a council of several Indigenous groups together for that purpose in April 1763. The trial judge concluded that Chief Pontiac's War "was not a coordinated attack on the British by the Anishinaabe in the Great Lakes area." Rather, she explained that "[s]ome

groups openly sided with the British, providing the British with warriors to help in military operations. And a significant number of the Indigenous peoples of the Upper Lakes chose not to take part in Pontiac's war, whether or not they opposed it. Those decisions were made at the band level."

[62] In her reasons, the trial judge ultimately rejected SON's argument that their ancestors showed an intention to control their territory by active participation in Pontiac's War:

> SON submits that their ancestors actively took part in Pontiac's War against the British, showing an intention to control their territory. However, the evidence relied upon, primarily from Dr. Hinderaker, does not show that they did so. Dr. Hinderaker said that the Great Lakes Anishinaabe people were against the British, with very few exceptions. However, in reaching that opinion he included the Anishinaabe groups who refused to take part in the war. Those groups were not necessarily against the British and Anishinaabe decision-making about war was done at the band level, not for all Anishinaabe people. I found that his other evidence on this subject was similarly problematic.

[63] SON's expert, Dr. Eric Hinderaker, accepted that, at the end of Pontiac's War, the British had the same uncontested access to Lake Huron that they had before the war.[5]

[64] The trial judge ultimately concluded that the evidence did not establish that SON's ancestors fought the British in Pontiac's War. In her view, that conflict "does

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[5] See the Testimony of Dr. Eric Hinderaker, Trial Transcript, Vol. 21, pp. 2043, line 5 – 2045, line 15.

not show a SON effort to exert control generally, or specifically in the Aboriginal Title Claim Area."

The Niagara Congress - 1764

[65] The trial judge likewise concluded that the events of the Niagara Congress did not support SON's claim of control over the Title claim area. As she observed, Sir William Johnson, the Superintendent of Indian Affairs for the northern colonies, met with large numbers of Indigenous groups at Niagara in mid-1764, "establishing or reaffirming peace with most if not all of the Indigenous groups who attended the Congress."

[66] The trial judge considered SON's argument that a third treaty was agreed to at the Niagara Congress, which showed control over the claim area, but she rejected the argument:

> The Niagara Congress of 1764 was a major step in the ending of Pontiac's War. SON relies on the Niagara Congress to show some control over the Aboriginal Title Claim Area. SON submits that the Niagara Congress gave rise to three new treaties (rather than two). SON relies on the third, disputed treaty as evidence that Indigenous groups, including SON, had and exercised control of the Great Lakes by giving the British permission to travel on those lakes. The defendants dispute the suggestion of a third treaty at Niagara, as well as the alleged significance of what did happen, regardless of whether it was a treaty.
>
> … I find that the evidence about the Niagara Congress does not show that ancestors of SON had or asserted control over the Great Lakes or the Aboriginal Title Claim

> Area. Ancestors of SON were probably at the Congress, but the dealings between the British and what were called the Western Nations did not show that those nations controlled the Great Lakes.

[67] The trial judge reviewed the conflicting evidence about whether two or three treaties were concluded at the Niagara Congress, as well as jurisprudence dealing with that subject. She concluded that SON's ancestors may have been part of a group called the Western Nations, which comprised about one quarter of the Indigenous peoples at Niagara. She observed that the Western Nations "expressed their willingness to remain peaceful with the British, as had been promised at Detroit in 1761."

[68] In her reasons, the trial judge reviewed the events at the Niagara Congress at length:

> At the Niagara Congress, there were numerous discussions and responses from specific Indigenous people. There were individual meetings involving smaller groups of Indigenous peoples as well as larger, more public meetings. Britain held the balance of power and, in turn, Johnson ran the meetings and demanded terms.
>
> Johnson's talks with the Western Nations were aimed at renewing and strengthening the pre-existing alliance, which had been disturbed by Pontiac's War. Johnson was focused on peace. He required conditions, including that the Western Nations not commit acts of violence against the British or their forts and not interfere with travel over the lakes and rivers. This was a continuation of the alliance established in Detroit in 1761. If the Western Nations complied, Johnson would welcome them back into the alliance.

Johnson was not negotiating for access to the Great Lakes. The British had fully demonstrated that they controlled access. As Johnson said, the Crown had “all the doors”. Johnson was negotiating about going to their forts without interference and addressing the Indigenous request to resume trade.

While the Indigenous peoples who fought against the British had some early victories, they did not show the capacity to exclude the British from Lake Huron or Georgian Bay. They did not have the ability to control the lakes. Nor did they set the terms on which the British or traders came back into the area.

The speeches made at Niagara by the Indigenous people representing the Western Nations form part of the written record and are not challenged. Those speeches do not show an assertion of control. The Indigenous people spoke of the difficulties arising from the interruption of trade, which caused poverty and kept them from hunting. The Indigenous speakers asked for trade to be re-established, or at least that they be permitted to do business with the traders at Niagara. Johnson refused to allow trade to resume until peace was achieved with all nations. The British did not officially reopen trade until 1765, although trading at some specific sites was permitted earlier.

On the question of whether there was a treaty with the Western Nations, the defendants rely on a series of letters by Johnson, reporting on the outcome of the Niagara Congress. The documents consistently describe two treaties and one renewal of prior engagements, not three treaties. In an August 22, 1764 letter to Thomas Gage, Johnson referred to the peace treaties reached with the Huron-Wendat and the Seneca. With respect to the Western Nations, Johnson said he “only renew[e]d & strengthened the Covenant Chain with them”. On August 23, 1764, in a letter to the Lieutenant-Governor of the New York colony, Johnson again distinguished between the nations that made peace and those that renewed their engagements.

> Johnson also prepared a formal report to the Board of Trade dated August 30, 1764. In that report, Johnson spoke of the "treaties of peace with the Hurons of Detroit and the Enemy Senecas", and said that the other nations "only came to renew their engagements." Johnson enclosed copies of the two written treaties. He spoke of the goal of a lasting peace. He spoke of Chief Pontiac having gone to the country near the west end of Lake Erie but desiring peace. Johnson spoke about Britain's demonstration of its power to the Indigenous peoples but also said that they "could not be a match" for the Indigenous peoples' superior abilities in the extensive, woody country. He spoke about advancing the peace by conquering Britain's prejudices and moving forward with generosity, and he set out proposals to move forward. The evidence does not show any motivation for Johnson to say there were only two treaties instead of three.
>
> On September 21, 1764, Thomas Gage sent copies of the two treaties reached by Johnson to Lord Halifax, the Minister in charge of the colonies. Gage also indicated that Johnson "only renewed their alliance" with the Western Nations.

[69] This review of the evidence led the trial judge to conclude that "even if what transpired was a treaty from a legal standpoint, the events and context summarized above [do] not show that the British were seeking permission, or that permission was needed, for British access to the Great Lakes." She ultimately concluded that the events of the Niagara Congress did not support SON's claim of control over the Great Lakes of the Title claim area.

[70] There is no suggestion that the trial judge did not accurately describe the content of any agreements with SON's ancestors at the Niagara Congress.

The trial judge's conclusions regarding control and the Tsilhqot'in *test*

[71] The trial judge acknowledged SON's argument "that there was an alliance or co-operative effort among Anishinaabe to take certain steps to control access to the Great Lakes in the 18th century", but concluded that the evidence did not prove the existence of such an alliance in the 18th or 19th century (or control of all the access points).

[72] The trial judge refused to draw the inference that SON controlled the Title claim area. For the most part, SON did not use that area. She concluded that the British were undisturbed when they began to take steps to assert sovereignty in 1761.

[73] Ultimately, the trial judge concluded that SON had not proven that they, and their ancestors, had satisfied the *Tsilhqot'in* test. They did not have the control over the Title claim area needed to show exclusivity, nor did they occupy it. She noted that "[t]he lens of continuity does not significantly improve SON's claim. Their modern activities do not show occupation of the Aboriginal Title Claim Area now or continuity back to the relevant historical period." The trial judge's review and assessment of the conflicting evidence was thorough and fair. She recognized that occupation sufficient to ground Aboriginal title was not confined to specific sites of settlement, but extended to tracts regularly used for hunting, fishing, or otherwise exploiting resources: *Tsilhqot'in*, at para. 50. We are not persuaded that her findings were tainted by any palpable and overriding error.

(5) Did the trial judge misperceive the common law regarding navigable waters and its relationship to Aboriginal title?

(a) The trial judge's holdings on the common law incidents of navigable waters

[74] The trial judge noted that flowing water was incapable of ownership at common law, because it is a common resource: see G.V. La Forest and Associates, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Regional Economic Expansion, 1973), at pp. 223-24, 234, citing *McKie v. The K.V.P. Co. Ltd.*, [1948] O.R. 398 (H.C.), aff'd [1948] O.W.N. 812 (C.A.), aff'd [1949] S.C.R. 698.

[75] She observed that SON's claim for ownership of the lakebed, the contents of the water, and the right to exclude others from the water above the submerged land, was a claim for exclusivity, an element that was not part of the historical practices SON relied upon. She further noted that exclusivity was an element "basic to the notion of title at common law."

[76] SON relied upon the common law presumption *ad medium filum aquae* ("as far as the middle of the stream") to show that the common law would recognize ownership of the bed of a body of water. As noted by the trial judge, the *ad medium* presumption is a common law rule by which the owner of land adjacent to non-tidal waters is presumed to own the waterbed to the midpoint of those waters:

> Under the presumption, title to submerged land is presumed to remain with the Crown for tidal waters.

> However, for non-tidal waters, title is presumed to be with the riparian owners: *Keewatin Power Co. v. Kenora (Town)* (1908), 16 O.L.R. 184 (C.A.), at paras. 15-16. For non-tidal waters, the owner of the adjacent land is presumed to own the riverbed to the mid-point, hence the name *ad medium filum aquae* or "in the middle of the stream". The cases generally dealt with disputes about activities on rivers, such as fishing, logging or passage.

[77] The trial judge doubted that, at common law, the *ad medium* presumption could have any application to the Great Lakes and referred to authorities suggesting that the distinction between tidal and non-tidal waters had been abandoned in Canada: see e.g., *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 54, *per* La Forest J. In *R. v. Nikal*, [1996] 1 S.C.R. 1013, Cory J. indicated, at para. 72, that the presumption had been found not to apply in most parts of Canada because the English rule was "singularly unsuited to the vast non-tidal bodies of water in this country."

[78] In any event, the trial judge observed that, whether tidal or non-tidal, navigable waters were subject to the public right of navigation which, she concluded, was incompatible with SON's claim of exclusivity.

[79] The trial judge also reviewed comparative law from the United States, Australia, and New Zealand to assess SON's argument that "whatever portion of the common law right of public navigation is ruled to be a justified infringement of Aboriginal title, it can co-exist easily with Aboriginal title to the beds of navigable waters."

[80] Regarding the United States, the trial judge referred to expert evidence from an American lawyer to the effect that where land established as subject to the American counterpart to Aboriginal title includes submerged land that is navigable, that title is subject to "navigable servitude", meaning that the Aboriginal titleholder cannot interrupt or interfere with the United States government's paramount power over navigable waters, including authority over navigation, flood control, power production, and national defence. The trial judge did not find the small number of treaties that included submerged land to be of any particular assistance.

[81] The trial judge also reviewed regimes in place in Australia and New Zealand and concluded that they did not support SON's arguments.[6]

[82] In Australia, she noted, the *Native Title Act 1993* (Cth), 1993/110, expressly includes the possibility of native title to "land or waters". Despite this, the High Court of Australia, in *Commonwealth of Australia v. Yarmirr*, [2001] HCA 56, 184 A.L.R. 113, concluded that while native title rights and interests in the seabed may exist, common law rights of fishing, navigation, and innocent passage mean that those native title rights can only be non-exclusive. The majority held that public rights of navigation, fishing, and innocent passage were not consistent with a claim

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[6] The trial judge noted that, in contrast to the evidence on United States law, SON did not put forward expert evidence on either Australian or New Zealand law. She further observed, however, that there were no objections to putting forward case law from Australia or New Zealand and that doing so for comparative purposes without an expert is not unusual with respect to case law from other Commonwealth countries.

of exclusive native title, even where the claimants made their title claim subject to those rights, and that the assertion of sovereignty was “antithetical” to exclusive native title: *Yarmirr*, at para. 100.

[83] Jurisprudence from New Zealand suggested to the trial judge that there could be rights to some submerged land there, but the legislative regime expressly preserves the right of public navigation over those lands. The courts in New Zealand have not yet weighed in on the *scope* of possible title to submerged land.

[84] Ultimately, the trial judge concluded that, “[g]iven both the Indigenous and the common law perspectives, … the nature of SON’s connection to the claimed land in Lake Huron and Georgian Bay does not translate into title to that submerged land. Even if SON’s ancestors did have the necessary connection with that land, the historical practices do not translate into rights similar to common law ownership of part of the Great Lakes.”

[85] She made the following observations in support of that conclusion:

> [N]one of the in-water boundaries of the Aboriginal Title Claim Area reflect an area relevant to the historical practices, customs or traditions of SON’s ancestors. Those boundaries are well beyond any actual historical use and are mainly based on modern considerations. SON has not shown any historical use of most of the claim area.
>
> Further, SON’s connections to the Aboriginal Title Claim Area relate to the water, rather than to the submerged land. Moving water above submerged land cannot be

> owned at common law and is, by its nature, fundamentally different from land.
>
> Fishing already has a well-established route for recognition as an Aboriginal right and does not require title to the submerged land in the Aboriginal Title Claim Area.
>
> The location and nature of the specific land is also relevant. In this case, the land forms part of Lake Huron and Georgian Bay. This gives rise to the issue of public access to navigable waters on the Great Lakes. In seeking Aboriginal title, SON seeks the right to control the Aboriginal Title Claim Area and the right to exclude all others from the area. This right conflicts with the common law, under which these navigable waters are subject to the public right of navigation. The Supreme Court of Canada has said that this right is paramount.
>
> Not only the English and Canadian common law, but also the comparative law, shows the importance of the public right of navigation. The comparative law shows that SON's claim is out of step with the importance of this public right, even in the context of Indigenous land claims.

[86] The trial judge also expressed concern that the Title claim area extended to the international boundary with the United States, and that SON sought the right to control that area for all purposes, including with respect to national defence. She noted that "[c]ontrol of a border is an incident of sovereignty, and the state is expected to exercise it in the public interest", citing *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at paras. 160 and 163.

[87] SON invited the trial judge to grant Aboriginal title to the area claimed, but subject to the proviso that title did not exclude the public right of navigation. She

declined to do so, citing the fundamental inconsistency between Aboriginal title and common law rights, as recognized in *Yarmirr*, holding "[t]his alternative does not translate into Aboriginal title to the claimed land."

(b) Arguments on appeal about the public right of navigation

[88] The positions of the parties have evolved. In closing argument at trial and on appeal, SON submitted that it would be open to a court to define Aboriginal title by removing from it the right to exclude the public for the purposes of navigation. Ontario argues that it holds sovereign ownership of the lakebed by way of a public trust, for the protection of public interests in navigation and fishing. It takes the position that the lakebed is Crown land underlying waters used for navigation and is therefore incompatible with Aboriginal title. Canada now says that it agrees that the public right of navigation can be reconciled with Aboriginal title.

(c) Compatibility of the public right of navigation and Aboriginal title

[89] The right of public navigation over navigable waters has long been recognized in this province. French civil law governed until 1792, when the common law of England was substituted "in all matters of controversy relative to [p]roperty and [c]ivil [r]ights": S.U.C. 1792 (32 Geo. III), c. 1, s. 3. Under both French civil law and English common law, there was a public right of navigation over navigable waters, irrespective of ownership of the bed of the waterbody: *Regina v. Meyers*, [1853] O.J. No. 204 (U.C. Ct. Com. Pl.), at para. 106; see also

Water Law in Canada, at pp. 178-79; *Keewatin Power Co. v. Kenora (Town)* (1908), 16 O.L.R. 184 (C.A.). The public right of navigation over tidal waters has existed in England since the earliest times: *Caldwell v. McLaren*, [1884] UKPC 21, 9 A.C. 392.

[90] The *Constitution Act, 1867* created Canada and the four provinces of Ontario, Quebec, Nova Scotia, and New Brunswick. Section 109 gave each province the entire beneficial interest in all lands within its boundaries, which, at the time of union, were vested in the Crown: *St. Catharines Milling & Lumber Company v. The Queen*, [1888] UKPC 70, 14 A.C. 446. This grant excepted those lands reserved in Schedule 3, which provides that certain public works and property were to be the property of Canada, including, among other things: canals, with lands and waterpower connected therewith; public harbours; lighthouses, piers, and Sable Island; and rivers and lake improvements. The *Constitution Act, 1867*, also gave Canada legislative authority over navigation and shipping and over “Indians and Lands reserved for the Indians”: ss. 91(10) and (24).

[91] For the purposes of assessing jurisprudence about title to submerged lands, we agree that the Great Lakes are analogous to English tidal waters. In *In Re Provincial Fisheries* (1896), 26 S.C.R. 444, at p. 520, Strong C.J. stated that “[i]t appears from several cases decided in the courts of the province of Ontario that [the Great Lakes and navigable rivers] are to be considered navigable waters and that the rule of the English law as to navigable and tidal waters applies to

them” (see also *Dixson v. Snetsinger* (1873), 23 U.C.C.P. 235). The result is a rebuttable presumption of Crown ownership of the lakebed of Lake Huron and Georgian Bay.

[92] Similarly, in *Friends of the Oldman River*, La Forest J. observed, at p. 54, that, for the purposes of the right of navigation, the distinctions between tidal and non-tidal waters had been abandoned and that the right of navigation is paramount to the rights of the owner of the bed of water, even where the owner is the Crown. The public right of navigation can only be modified or extinguished by an authorizing statute and a Crown grant of land, alone, does not include the right to interfere with navigation: *Friends of the Oldman River*, at p. 55. For instance, under statutes like the *Canadian Navigable Waters Act*, R.S.C. 1985, c. N-22, the federal Crown could authorize the construction of structures (such as bridges, booms, dams, docks, and piers) upon navigable waters which would otherwise substantially interfere with navigation.

[93] Not every use of submerged lands will interfere with navigation. As noted in *Water Law in Canada*, at p. 186:

> “It is now doubtful, to say the least, that every structure built in the bed of navigable water that may interfere in some slight degree with navigation is a public nuisance. Whether an obstruction constitutes a public nuisance is a question of fact to be determined having regard to all the facts of the particular case. This gives the courts some scope to make reasonable adjustments when the public right of navigation comes in conflict with other

> rights. In any event it is clear that not every work placed in navigable waters interferes with navigation."

Some instances of Aboriginal title to submerged lands may have no practicable effect on the public right of navigation and may be entirely compatible with it.

[94] The common law has permitted private ownership of discrete areas of property on the seabed or lakebed of tidal waters or waters like the Great Lakes. In *Attorney General v. Emerson*, [1891] A.C. 649, the House of Lords recognized that a private domain (though pre-dating the *Magna Carta*) could include the foreshore and title to the bed of tidal waters. In *Water Law in Canada*, at p. 241, La Forest notes that the Crown can convey title to the beds of navigable waters.

[95] In *Yarmirr*, at paras. 96 and 98, the High Court of Australia recognized that the public right of navigation does not require access to every part of the territorial sea, but concluded that there was a fundamental inconsistency between the "asserted native title rights and interests and the common law public rights of navigation and fishing":

> It may readily be accepted that neither the public right to navigate, nor the right of innocent passage, require free access to each and every part of the territorial sea. Neither right is infringed, for example, by erecting a pier from the shore to a point well out into the territorial sea even though that pier prevents vessels from using the part of the sea on which it stands. Nevertheless, the tension between, on the one hand, the rights to "occupy, use and enjoy the waters of the determination area to the exclusion of all others" and "to possess" those waters to the exclusion of all others (which the claimants sought in their amended notice of appeal to this Court) and, on the

> other, the rights of fishing, navigation and free passage is self-evident.
>
> …
>
> When that is done in the present case, it is seen that there is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.

[96] At this stage, it is unnecessary for this court to assess whether the public right of navigation is incompatible with Aboriginal title.

[97] Whether or not Aboriginal title to a portion of the Great Lakes is compatible with the right of public navigation cannot be assessed until the extent of Aboriginal title in submerged lands is determined. If SON were able to satisfy the *Tsilhqot'in* test and establish Aboriginal title to the claim area, or a discrete portion or portions of the claim area, a court would then be able to assess whether such Aboriginal title to submerged land was not cognizable due to common law public rights, or whether such Aboriginal title would have such a substantial effect on public navigation as to create an incompatibility between Aboriginal title and the public right.

[98] The parties take different positions as to the consequences that would follow were SON to establish Aboriginal title to the claim area. Ontario says that Aboriginal title to the claim area is not possible because of the incompatibility with

the public right of navigation and the public interest. SON takes the position that because of its prior occupation of the claim area, any incursion upon its land must pass the test for infringement of an Aboriginal right, or, perhaps that Aboriginal title could be made subject to the public right of navigation. Canada says that Aboriginal title can be reconciled with the public right of navigation. That question is not before us. It would not be appropriate to express an opinion about an issue that is now hypothetical.

[99] In *Ngati Apa v. Attorney-General*, [2003] NZCA 117, 3 N.Z.L.R. 643, the Court of Appeal of New Zealand recognized that many questions cannot be answered until the extent of Aboriginal title is determined. That court noted, at para. 9, that, “[i]n the past, claims to property in areas of foreshore and seabed seem to have identified relatively discrete areas comprising shellfish sandbanks, reefs, closely-held harbours or estuaries, and tidal areas or fishing holes where particular fish species were gathered”, but went on to note that many other questions could not be answered until the nature and extent of the interest was determined.

[100] In this case, until the extent of Aboriginal title in any part of the submerged lands, if any, is determined, it is not possible to determine whether such title is incompatible with the right of public navigation.

(6) Should the trial judge have invited further submissions to determine a process as to whether a claim to Aboriginal title to a smaller area could be established?

[101] In *Tsilhqot'in*, at para. 23, the Supreme Court stated that, where an Aboriginal title claim is varied from what was initially claimed, a technical approach to pleadings should not stand in the way of resolving the substance of the issues:

> [C]ases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

[102] At trial, SON made two arguments about changing the physical dimensions of the area to which it claimed Aboriginal title. First, SON amended their pleadings to seek, in the alternative, Aboriginal title to "such portions" of the Title claim area, but they did not put forward any alternative boundaries in their pleadings or at trial. Second, in closing submissions, SON suggested that the Aboriginal title could be subject to the public right of navigation.

[103] After noting that the trial judge in *Tsilhqot'in* identified a number of specific areas within the larger claim area and found that the claim for Aboriginal title had been established for those areas, the trial judge in this case observed that SON

had advanced no alternative boundaries and, therefore, the invitation to change the boundaries was “left to guesswork.”

[104] The trial judge nevertheless considered whether she would be able to identify an area of submerged land with respect to Nochemowenaing, an area to which SON had a strong spiritual connection, where Aboriginal title might have been established. However, SON had not made submissions in support of that area, nor was the area demarcated in the trial evidence. At most, there were some general descriptions of the area.

[105] The trial judge noted that, in light of the lack of submissions and evidence with respect to Nochemowenaing, she did not have sufficient information to define the area. In addition, she found that it would not be fair to do so, given that Canada and Ontario had not had “an opportunity to raise any specific issues that may arise from any proposed boundaries in that area.” She noted that it would still be open to SON to pursue a different Aboriginal right that would recognize their historical spiritual practices.

[106] SON asks this court to remit this alternative claim to the trial judge “for a judgment, after further evidence and submissions, on the question of Aboriginal title to a portion of the Aboriginal title area claimed”.

[107] We accede to this request. SON should not have to begin a new proceeding to determine this issue. The trial judge in this case is uniquely qualified

to assess this request because of her long familiarity with the evidence and issues. The trial judge can devise a procedure that is fair to both sides, including further pleadings, discovery, and hearings that she deems necessary to determine whether the *Tsilhqot'in* test has been satisfied for any limited portion of the broader area SON had initially claimed.

[108] The concerns of some of the parties and interveners about Aboriginal title to submerged lands and the public right of navigation cannot be addressed until the extent of Aboriginal title, if any, is determined.

IV. THE TREATY CLAIM

A. Background

[109] At trial, SON's Treaty claim had two parts. The first focussed on the implementation of Treaty 45 ½, which was signed in 1836. SON argued, and the trial judge found, that the Crown breached its treaty obligation to protect the Peninsula from settler encroachments. She also found, for the same reasons, that the Crown breached its honour. These findings were rooted in the trial judge's determination that the Crown could have done more to both prevent encroachment and to remove those who were found to be encroaching.

[110] Second, SON challenged the treaty negotiation process and the Crown's conduct leading up to the signing of Treaty 72 in October 1854. At trial, SON submitted that the Crown, again, did not act honourably and, further, that it

breached the fiduciary duties it owed SON. The trial judge found that some, but not all, of the Crown conduct in the lead up to the signing of Treaty 72 breached the honour of the Crown. She also concluded there was no fiduciary duty.

[111] On appeal, Ontario challenges the trial judge's findings concerning settler encroachments and her resulting determination that the Crown breached both its obligations under Treaty 45 ½ and the honour of the Crown. SON argues that the trial judge erred in not finding that certain Crown conduct in the leadup to the signing of Treaty 72 also breached the honour of the Crown, and in not concluding that the Crown owed and breached a fiduciary duty. Ontario responds that, if this court concludes that the Crown owed SON a fiduciary duty, then Crown immunity applies and shields the Crown from liability.

[112] To properly evaluate these claims, it is necessary to examine the circumstances that led to Treaty 45 ½ and Treaty 72 and the trial judge's reasons.

(1) Treaty 45 ½

[113] Treaties 45 and 45 ½ were negotiated on Manitoulin Island in 1836, at a gathering for the distribution of presents. Sir Francis Bond Head, Lieutenant Governor of Upper Canada, convened a treaty council to address the status of both the Island and the Peninsula. This resulted in the two treaties with different Indigenous groups.

[114] Under Treaty 45, Manitoulin Island was made a place for settlement for all Indigenous peoples. Bond Head's speech in Treaty 45 spoke of settlers' appetite for more land.

[115] Treaty 45 ½ was next negotiated with the ancestors of SON, then referred to as the Saugeen. By Treaty 45 ½, the Saugeen surrendered a large swath of land south of the Peninsula. In exchange, the Crown promised to protect the Peninsula against encroachment and to assist with construction and cultivation.

[116] Bond Head spoke of the difficulty the Crown had in protecting the land from white settlers. He further indicated that if the Saugeen did not surrender the land, they would end up losing it, highlighting the importance of the land and the imminent threat of encroachment.

[117] While some accounts of the treaty council, including Bond Head's, describe the Saugeen as pleased to surrender land, others describe the Saugeen Chiefs as reluctant. Although they ultimately signed Treaty 45 ½, the trial judge concluded that the Saugeen were neither pleased nor eager to do so.

[118] The trial judge found that Treaty 45 ½ was unusual in that it did not include an annuity provision (although an annuity was later granted). The trial judge found that the encroachment clause, that is, the promise to protect the Peninsula from encroachment by white settlers, was the main benefit to the Saugeen, which was

why they reluctantly agreed to the treaty. The trial judge held the issue of encroachment to be central to Treaty 45 ½.

[119] In the trial judge's view, the encroachment clause was a promise by the Crown – to the Saugeen specifically – to protect the Peninsula from white "squatting", which included unauthorized settlement and the harvesting of resources, notably timber. She found that the Crown breached its honour by not diligently fulfilling its treaty obligation to protect the Peninsula from encroachment between 1836 and 1854, noting her view that "there was a lack of specific initiatives focused on fulfilling the treaty obligation itself."

[120] More specifically, the trial judge found that although the Crown paid some attention to the problem of squatting on the Peninsula, it did not do enough to discourage and prevent it. The Crown took general steps, such as passing legislation and responding to complaints, but this was not enough. The legislation it passed to prohibit squatting and trespassing had limited effectiveness because it was complaint-driven. There was a problem with squatting early on that got worse with the pressure of the rapid increase in the settler population. More proactive steps should have been taken, although the Crown could not have been expected to eliminate squatting entirely.

[121] The trial judge found that the Crown did not sufficiently focus on the treaty promise. The treaty promise was a solemn one, important to the Saugeen, and the

Crown did not give significant consideration as to how to protect the Peninsula. Notices could have been posted. Constables could have been appointed. Sheriffs could have been used. Instead of the leniency offered to trespassing settlers, penalties could have been imposed. Further, the trial judge observed that the Crown took law enforcement steps elsewhere in the province that could have been taken on the Peninsula.

[122] The trial judge accordingly concluded that the Crown had not made a diligent effort to fulfill the treaty promise and that the encroachment clause in Treaty 45 ½ and the honour of the Crown had been breached. Had the Crown made diligent efforts to fulfill the treaty promise, squatting could have been reduced at times during the period between the signing of Treaty 45 ½ and Treaty 72.

(2) Treaty 72

[123] Treaty 45 ½ was signed in 1836, and Treaty 72 was signed in October 1854. Treaty 72 surrendered the Peninsula, except for specific reserved lands and islands. The issue here is the propriety of the Crown's conduct leading up to Treaty 72.

[124] The 18 years between the treaties were marked by major change. The governance of British North America changed, notably with the *Act of Union* (*British North America Act, 1840*, 3 & 4 Vict, c. 35). The settler population was rapidly growing (with a corresponding rush for land) and, as the trial judge found, squatting was increasing.

[125] During this period the Crown made several attempts to obtain a surrender of the Peninsula. The First Nations residing on the Peninsula, SON, were at the time under the superintendency of Thomas G. Anderson. Despite the many attempts to negotiate further surrenders, there was only one: a strip of land for the construction of a road (Treaty 67, 1851). Anderson was the Crown's point person on almost all of these negotiations.

[126] On August 1 and 2, 1854, Anderson met with representatives of SON. He proposed a surrender of the whole Peninsula, except for 34,600 acres near the band's villages. The surrendered land would then be sold for SON's benefit.

[127] Anderson later reported that he told SON's representatives that it was a "folly" to retain "so large a tract of land from which they were deriving no advantage" and noted the "possibility of the whites taking possession of it," among other reasons for seeking a land surrender. Anderson spoke of SON's complaints about encroachments on the Peninsula, notably white settlers taking timber and settling on the land. When addressing SON's representatives, Anderson stated that SON could not prevent the white settlers, and that he did not think that the government would "take the trouble to help" them while they were opposed to their own interest. The trial judge found that Anderson's comments in response to SON's initial refusal to surrender the Peninsula were inappropriate and breached the Crown's honour.

[128] That Anderson's comments breached the Crown's honour is not disputed. However, the trial judge concluded that Treaty 72 was not undermined by Anderson's comments. She concluded that, while inappropriate, the comments were not threats. SON's subsequent conduct in advancing their position, and the continuing negotiations, showed that SON did not suffer adverse consequences.

[129] In October 1854, further negotiations took place between SON representatives and Superintendent General Laurence Oliphant, which led to the signing of Treaty 72. Oliphant maintained the Crown's position that a surrender was necessary because of the "avidity" of the encroaching settlers. He also "represented the extreme difficulty, if not impossibility, of preventing such unauthorised intrusion". In Oliphant's view, the sale of the lands would be the most beneficial outcome for SON, and in any event would be better than recurring enforcement against squatters.

[130] SON eventually agreed. The terms of Treaty 72 included the surrender of the Peninsula, with some exceptions; the sale of surrendered land for SON's benefit; and the regular distribution of sale proceeds. The trial judge found that SON agreed to Treaty 72 so as to maintain their communities, culture, and economy through secured land and finances.

[131] Once Treaty 72 was finalized, Oliphant took a series of concrete steps to curtail squatting; this is the basis on which SON argues that Oliphant had dishonestly misrepresented the Crown's capacity to police squatting.

[132] The trial judge found that Oliphant did not lie or misrepresent the Crown's ability, in October 1854, to prevent squatting. She held that Treaty 72 was not undermined by his statements, as with Anderson's comments in August 1854. Rather, Treaty 72 was made because the parties finally reached an agreement on its terms. The trial judge concluded that Oliphant's comments did not breach the honour of the Crown.

B. Arguments on Appeal

[133] SON's appeal and Ontario's cross-appeal raise four issues:

1. Did the trial judge err in finding that the Crown breached the honour of the Crown and the treaty promise in Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachments by white settlers?
2. Did the trial judge err in finding that Oliphant's conduct in the negotiation of Treaty 72 did not breach the honour of the Crown?
3. Did the Crown owe and breach a fiduciary duty to SON?
4. Is the Crown immune from claims for breach of fiduciary duty?

[134] As we explain below, we see no basis to interfere with the trial judge's findings concerning the Crown's failure to act with diligence to protect SON's lands from encroachment. We further agree with her that Oliphant's conduct in the negotiation of Treaty 72 did not breach the honour of the Crown. Finally, we conclude that the Crown did not owe or breach a fiduciary duty to SON, but, if it did, the principles of Crown immunity do not provide a defence to Ontario.

C. Analysis

(1) Did the trial judge err in finding that the Crown breached the honour of the Crown and the treaty promise in Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachments by white settlers?

[135] As mentioned, the trial judge found that the Crown did not act diligently to protect the Peninsula from the encroachment of white settlers. She therefore issued a declaration that the "pre-Confederation Crown breached the honour of the Crown in relation to the fulfillment of Treaty 45 ½". For the same reasons, she found that the Crown breached Treaty 45 ½ itself.

[136] Ontario argues that the trial judge made errors of fact, and of mixed fact and law, by finding that there was significant encroachment on the Peninsula and that there was more the Crown could and should have done to prevent it. Ontario takes the position that these findings led to the trial judge's erroneous legal conclusion that the Crown did not take sufficient steps to protect the Peninsula. We disagree.

[137] The principles governing the honour of the Crown were set out at some length by this court in *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 1 ("*Restoule (ONCA)*"), leave to appeal granted, [2022] S.C.C.A. No. 5, and summed up at para. 241:

> The honour of the Crown demands the purposive interpretation of treaties by the courts and by the Crown. The Crown must act "diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests" and "diligently pursue implementation" of treaty promises in order to achieve their intended purposes. This duty of diligent implementation is "narrow and circumscribed". Like the duty to consult, it is distinct from fiduciary duties. To fulfil the duty of diligent implementation, "Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise." Implementation need not be perfect, but "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise." [Footnotes omitted.]

[138] While Ontario contests a number of findings that led the trial judge to conclude that the Crown breached the honour of the Crown and the treaty promise in Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachments by white settlers, we see no basis to interfere with these findings.

(a) Significance of squatting

[139] Regarding the significance of squatting, Ontario submits that the trial judge improperly extrapolated the scale of the problem from little evidence and overlooked the nature of the reported squatting, namely that many instances

occurred with the support, and at the invitation of, SON members. Ontario also highlights evidence that in some cases SON members had encountered squatting, but failed to report it to Crown officials.

[140] The trial judge made several findings of fact about the extent of squatting on the Peninsula between 1836, when the Crown promised to protect it from white settlers, and 1854, when SON surrendered most of the Peninsula to the Crown. The trial judge found that, at least for the purposes of the promises set out in Treaty 45 ½, "encroachment" or "squatting" included timber theft, trespass, and semi-permanent and permanent forms of settlement. While Ontario argued that the problem of squatting was "not perceivable", the trial judge disagreed and found the contrary. She examined specific complaints and considered individual conduct from the historical record. She considered the issue of squatting throughout the province and on the Peninsula. In the end, she found that encroachment on the Peninsula was (1) significant, and (2) an escalating problem.

[141] The evidence also included government reports which identified squatting as a significant problem throughout the province. This, when considered with SON's complaints, permits the finding in this case of significant squatting.

[142] Further, there is no support in the record for Ontario's assertion that the problem of squatting was "not perceivable" to the Crown. Indeed, its own expert, Dr. Gwen Reimer, testified to SON's various complaints to Crown officials about

squatting and timber theft. The evidence otherwise established that there were many instances of SON complaining to the Crown about squatting and theft. The problem was therefore manifestly perceivable.

(b) Comparison to other areas where there was encroachment and complications arising from the size of the Peninsula

[143] In terms of what the Crown could and should have done to prevent encroachment, Ontario raises several other points related to the trial judge's alleged error on the significance of squatting.

[144] First, Ontario argues that the trial judge erred by finding that the Crown should have done more to prevent squatting on the basis it did so elsewhere (i.e., at Grand River), such as pursuing removals, imposing fines, posting notices, and appointing more commissioners and sheriffs. According to Ontario, the different approaches can be explained by the fact that, unlike in the Grand River area, there was not a significant problem with squatting on the Peninsula. It submits that it was wrong for the trial judge to reach a finding that the Crown breached its honour and the treaty by being "reactive, without proactive steps" to control encroachment. Again, Ontario does not dispute that there was squatting, but says there was no evidence to support a finding of significant squatting.

[145] Second, given the vast geographical area, Ontario claims there was nothing the Crown realistically could have done to prevent the encroachments we know did occur.

[146] In our view, what the Crown did elsewhere to combat encroachment identifies the tools available to the Crown to achieve that purpose, and is therefore relevant. Having concluded that the trial judge's finding about the significance of squatting is free from error, the specific comparison to Grand River makes sense.

[147] We likewise reject Ontario's argument that the Peninsula was too vast to protect against encroachment. The size of the area did not change from the time the promise was made to when SON looked for its fulfillment. In any event, the evidence at trial was that squatting was in most cases close to existing settlement "zones", at least initially, in the southern portion of the Peninsula. The trial judge accepted this as fact, relying largely on Canada's expert, Dr. Douglas McCalla, who testified that squatters were not hard to find if one went looking for them. There is no basis to interfere with the trial judge's conclusion that the Peninsula's size was not a meaningful barrier to diligent action on the part of the Crown to address squatting.

(c) The Crown's refusal to recognize settlers' legal interest in land

[148] Ontario submits that the only feasible weapon against squatting and speculating on the Peninsula was to refuse to issue any enforceable interest to white settlers, which was in fact the Crown's approach. That being the case, it cannot be said that the Crown acted dishonourably.

[149] In our view, the trial judge was correct to look beyond how the Crown treated the property interests of squatters because Treaty 45 ½ had already

promised the Peninsula to SON. The very purpose of the encroachment clause was to protect the Peninsula for SON's benefit, as a collective, and actual encroachments were barriers to the fulfillment of the Crown's promise to achieve that purpose. As such, there were no adverse property interests for the Crown to refuse to legally recognize.

(d) Crown diligence

[150] Ontario also submits that what the Crown did to prevent encroachment was sufficient. Essentially, Ontario reasons that because the Crown "paid attention" to the issue of squatting, it acted with diligence in implementing its promise to prevent encroachment. We reject this argument. The honour of the Crown requires more than simply being aware of a problem; it "requires the Crown to endeavour to ensure its obligations are fulfilled": *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 79 (emphasis added). The honour of the Crown underlies the assessment of all dealings with Indigenous peoples and requires the Crown to purposively and diligently perform its constitutional obligations and treaty promises: *Manitoba Metis Federation*, at para. 75; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 97.

[151] Ontario says the trial judge erred by treating the requirement to pay attention as separate and distinct from the duty to act diligently, and therefore did not take it into account. In our view, the trial judge did not commit that error. Rather,

she treated the duty to act diligently in the fulfillment of a treaty promise, in the circumstances of this case, as having two components: (i) to pay attention to the problem of squatting, and (ii) to act diligently with the purpose of preventing it. The trial judge went on to explain this second component as being about "whether the Crown did enough to prevent th[e] encroachments on the Peninsula" (emphasis added).

[152] This second component refers not to the awareness of a treaty promise or its challenges but to the necessary and corollary actions taken in furtherance of that promise. The trial judge found that the Crown did pay attention to squatting and took that fact into account in determining whether the Crown acted diligently, but she then went on to address whether the actions (and inactions) of the Crown were consistent with carrying out the promise to protect the Peninsula from encroachment. This was the correct approach.

(e) Competing Crown obligations and responsibilities

[153] Finally, Ontario argues that the trial judge erred by suggesting that the Crown could not take competing responsibilities and obligations into account when implementing a treaty promise. First, we accept that competing Crown obligations can be considered in evaluating the duty of diligent fulfillment, but how and to what extent depends on the facts of each case and the nature of the treaty obligation. Consider the impugned passage in the trial judge's reasons, found at para. 922: "[T]o the extent that there were pressures from the white population for land, the

Crown had already committed to protecting the Peninsula from those demands in the encroachment clause", a reference to the specific nature of the promise. In our view, the trial judge's analysis simply recognizes the obvious, which is that the Crown's honour cannot be compromised by interests that are axiomatically opposed to those that the Crown has promised to protect. Stated otherwise, white settlers' need, and desire, for land on the Peninsula is not a competing interest, but one that is diametrically opposed to the Crown's promise.

[154] In any event, the trial judge went on to conclude that "the evidence does not show that the Crown weighed choices regarding the protection of the Peninsula with other competing demands." There is no basis to interfere with that finding, which renders this aspect of the Crown's argument moot.

(f) Conclusion

[155] A trial judge's findings of fact are due a high degree of deference and can only be departed from if there was a palpable and overriding error. In arriving at her conclusion that the Crown breached its honour by failing to act diligently, and thereby breached Treaty 45 ½, the trial judge cited and applied the correct legal test and did not misapprehend the evidence. The evidence supported her conclusions about the extent of squatting and about the Crown's capacity to address it. The trial judge's determination that the honour of the Crown, and Treaty 45 ½, were breached is firmly rooted in the evidence and maintained on appeal.

(2) Did the trial judge err in finding that Oliphant's conduct in the negotiation of Treaty 72 did not breach the honour of the Crown?

[156] SON argues both that Oliphant had the obligations of a fiduciary while negotiating Treaty 72 and that he was obligated to disclose material steps that the Crown should have taken to protect the Peninsula from encroachments. SON contends that the trial judge erred by not finding that Oliphant's conduct in the negotiation of Treaty 72 breached the honour of the Crown.

[157] As discussed above, the trial judge, "[c]onsidering all of the evidence, and all of the issues raised by SON in relation to the process leading up to the treaty," concluded that "Oliphant did not lie or misrepresent the Crown's ability, in October 1854, to stop squatting." Further, she found that SON's decision to enter into Treaty 72 was not affected by Oliphant's statements or process, noting that "SON had shown they were fully capable of saying no, but this time SON reached terms that they agreed on."

[158] The trial judge found that Oliphant's conduct did not breach the honour of the Crown. He did not use lies or threats in the proceedings leading to Treaty 72, the notice of the treaty council given was adequate, and the time for decision-making was not unfairly curtailed. SON had able negotiators acting on its behalf, and Oliphant's strategy "did not go past hard bargaining into sharp dealing." Oliphant did not use inappropriate pressure in the course of his good faith negotiations.

[159] While SON argues on appeal that the trial judge erred in her findings regarding Oliphant's conduct, we see no basis to interfere with her largely factual determinations and her conclusion that Oliphant's comments did not breach the honour of the Crown.

[160] SON does not challenge the validity of Treaty 72. The trial judge's conclusion that Oliphant's conduct did not amount to a breach of the honour of the Crown was open to her on the evidence, and no palpable and overriding error has been demonstrated. We will have more to say in the next part of the reasons about SON's argument that the Crown had fiduciary duties arising from Treaty 45 ½. For now, it suffices to say that the Crown was not under a fiduciary obligation when negotiating Treaty 72.

[161] There is no precedent for imposing a fiduciary duty on the Crown respecting its conduct in treaty negotiation. During such negotiation, it would be impossible and inappropriate for the Crown to forsake its own interests and those of others for those of the other party in the negotiation. Further, an Indigenous interest may be the subject of negotiations, but at the negotiation stage the Crown has not yet assumed discretionary control over the interest, which is the source of any fiduciary obligations. The doctrine of the honour of the Crown, in this context, makes it unnecessary to extend fiduciary duty into treaty negotiations. The obligations which might arise in treaty-making – loyalty, honesty, and good

faith – are part of the honour of the Crown in the same context: *Manitoba Metis Federation*, at para. 73.

[162] We see no basis to interfere with the trial judge's findings concerning Oliphant's conduct in the negotiation of Treaty 72 and her determination that his conduct did not breach the honour of the Crown.

(3) Did the Crown owe a fiduciary duty to SON?

[163] SON argues that Treaty 45 ½ created a reserve, which, as such, gave rise to fiduciary duties on the Crown's part. SON also argues that both the breaches of the honour of the Crown and the Crown's failure to act with diligence to fulfil the promise in Treaty 45 ½ to protect the Peninsula from encroachment also amounted to breaches of both *ad hoc* and *sui generis* fiduciary duties owed by the Crown.

(a) Did Treaty 45 ½ create a reserve?

[164] The status of the SON lands retained after Treaty 45 ½ could have had some bearing on the question of whether a fiduciary duty was owed and, thus, the trial judge first dealt with the question of whether Treaty 45 ½ created a reserve.

[165] At trial, SON argued that Treaty 45 ½ created a reserve and, in light of the reserve's creation, the Crown had additional legal duties to protect the Peninsula, above and beyond its treaty obligations and the obligations underpinning the honour of the Crown.

[166] The trial judge did not accept this argument.

[167] She began by noting that the word “reserve” was often used in historical documents, by witnesses, and by parties as a common and convenient name, in a non-legal sense, to refer to Indigenous lands. However, she acknowledged that, at the time of Treaty 45 ½, it was not always used in that way. For example, she cited legislation enacted in 1849 and 1850[7] in which the term “reserve” was used to describe Crown and Clergy lands, not Indigenous lands.

[168] SON’s submission, based on law developed under the *Indian Act*, R.S.C. 1985, c. I-5, was that Treaty 45 ½ created a reserve in the formal legal sense, with consequential added legal obligations.

[169] The *Indian Act* was first introduced in 1876, long after Treaty 45 ½ was signed. Section 2(1) of the *Act* defines a “reserve” as “a tract of land, the legal title to which is vested in His Majesty, that has been set apart by His Majesty for the use and benefit of a band.”

[170] The trial judge noted that, where lands qualify as a “reserve” under the *Indian Act*, a myriad of statutory provisions under the *Act* then apply, including many Crown obligations. Citing *Madawaska Maliseet First Nation v. Canada*, 2017 SCTC 5, at para. 335, she observed that “[f]inding that an *Indian Act* ‘reserve’ is

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[7] *An Act to explain and amend an Act of Parliament of the late Province of Upper-Canada, passed in the second year of Her Majesty’s Reign, intituled, An Act for the protection of the Lands of the Crown in the Province from trespass and injury, and to make further provision for that purpose*, S. Prov. C. 1849 (12 Vict.), c. 9; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850 (13 & 14 Vict.), c. 74.

created ‘means finding that the Crown intended that an exhaustive body of federal legislation would apply to regulate the reserve, necessitating a degree of federal administration, control and corresponding duties and costs’ that come along with it.”

[171] SON relied on the leading case interpreting the term “reserve” under the *Indian Act*: *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816. Specifically, SON urged the trial judge to apply the following test for reserve creation, as set out at para. 67 of *Ross River*:

1. That the Crown had the intention to create a reserve;
2. That this intention was possessed by Crown agents holding sufficient authority to bind the Crown;
3. That steps were taken to set the land apart for the benefit of the Indigenous group; and
4. That the Indigenous group accepted the setting apart of the land and began making use of those lands.

[172] The trial judge noted that *Ross River* involved very different circumstances, the issue in that case being whether a reserve had been created, within the meaning of the *Indian Act*, in the Yukon in the mid-20th century, where there was no treaty.

[173] Turning to the facts underpinning this action, the trial judge first examined whether Bond Head (who, as noted above, was the Lieutenant Governor of Upper Canada at the relevant time and negotiated Treaty 45 ½) intended the treaty to create a reserve. She referred to the following discussion in *Ross River*, at para. 71, about what might constitute evidence of intention to create a reserve:

> [T]he critical flaw in the appellants' reliance on the authority of these Crown officials to bind the Crown appears when one asks whether these agents either (1) made representations to the Ross River Band that they had authority to create reserves; or (2) both made the representations and set apart the lands by legal act…. There is simply no evidence provided by the appellants which suggests that any Crown agents with the authority to set apart lands went to the members of the Band and in effect said: "The Crown is now creating a reserve for you, a reserve of the type contemplated under the *Indian Act* and which will be subject to all of the terms of that Act".

In the absence of such evidence, the court in *Ross River* found that a reserve had not been created within the meaning of the *Indian Act*.

[174] The trial judge concluded that Bond Head, as a Crown agent, did not have the intention to take on any more obligations than those set out in Treaty 45 ½ itself, but only to commit to the obligations expressed in the treaty on a provisional basis. She noted the Supreme Court's emphasis, in *Ross River*, on the fact- and context-specific nature of the process of reserve creation.

[175] There is obvious difficulty in determining whether, in 1836, the Crown intended to create a reserve within the meaning of detailed legislation that arrived

many years later. Despite the plethora of expert evidence at trial, no expert gave focused expert opinion evidence on how reserves were created in what is now Ontario at the relevant time.

[176] The language of Treaty 45 ½ does not assist in this determination. For ease of reference, we set the relevant treaty promise forth again:

> I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this Island or to that part of your territory which lies on the north of Owen Sound, upon which proper houses shall be built for you, and proper assistance given to enable you to become civilized and to cultivate land, which your Great Father engages for ever to protect for you from the encroachments of the whites.

[177] The language of the treaty acknowledges that SON had territory north of Owen Sound, on the Peninsula, but does not define those lands in any way or purport to set aside lands for SON. The treaty describes the land as the “Sauking Territory you at present occupy”, and offers the alternative that SON would “repair ... to this [Manitoulin] Island” without limiting the choices to be made about each location. There is nothing in the document, or the surrounding circumstances, to suggest that Bond Head intended the Crown to have additional obligations beyond those set out in the treaty.

[178] The question of whether a reserve was created is, as noted in *Ross River*, a fact-specific exercise. It is a question of mixed fact and law. The question of whether Bond Head, as a Crown agent, had the intention to create a reserve is

particularly fact-specific. We are not persuaded that there is any palpable and overriding error that would justify this court's departure from the trial judge's conclusion that Treaty 45 ½ did not create a reserve.

(b) Did the Crown's breach of its treaty promise amount to a breach of fiduciary duty?

[179] We begin with some general observations.

[180] Section 35(1) of the *Constitution Act, 1982*, provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[181] The honour of the Crown underlies the assessment of all dealings with Aboriginal peoples. The honour of the Crown requires that the Crown purposively and diligently perform its constitutional obligations and treaty promises: *Manitoba Metis Federation*, at para. 75; *Mikisew Cree*, at para. 97.

[182] In certain circumstances, the obligations arising out of the honour of the Crown can manifest in a fiduciary duty owing to an Aboriginal group. As noted in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 16 and 18:

> The honour of the Crown is always at stake in its dealings with Aboriginal peoples. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> …

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. [Citations omitted; emphasis added.]

[183] A fiduciary duty may arise in two circumstances. Crown fiduciary duties to Aboriginal peoples can arise either in accordance with the *sui generis* test set out in *Haida Nation*, or according to the *ad hoc* test described in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261: *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 44.

[184] In *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing, 2015), Jamie D. Dickson characterizes an *ad hoc* fiduciary duty as a "conventional" fiduciary duty, as it most resembles a private law fiduciary duty. He characterizes the *sui generis* fiduciary duty as a non-conventional one, to mark its special application to Aboriginal peoples. We adopt his language because the Latin terms do more to obscure than clarify the common law origins of the principles.

[185] An *ad hoc*, or conventional, fiduciary duty arises where there is: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries; (2) a defined class of beneficiaries vulnerable to the fiduciary's control; and (3) a legal or substantial practical interest of the beneficiaries that

stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Manitoba Metis Federation*, at para. 50; *Restoule (ONCA)*, at para. 586.

[186] As observed in *Manitoba Metis Federation*, at para. 61, a conventional fiduciary duty requires that the alleged fiduciary undertake to act in the beneficiaries' best interests and forsake the interests of all others:

> The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31.

Fundamental to a conventional fiduciary duty is the obligation to act *only* with regard to the interests of the beneficiaries and to disregard the interests of all others: *Guerin*, at p. 387; *Restoule (ONCA)*, at para. 601.

[187] A *sui generis*, or non-conventional, fiduciary duty can arise where the Crown assumes a sufficient amount of discretion over a sufficiently specific Aboriginal interest. The interest must be cognizable and the Crown's assumption of discretion must be such that it invokes responsibility "in the nature of a private law duty": *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 85.

[188] The question to be asked is whether there is an Aboriginal interest sufficiently independent of the Crown's executive and legislative functions to give rise to a responsibility in the nature of a private law duty. If not, "then no fiduciary duties arise — only public law duties": *Williams Lake*, at para. 52.

[189] Where a non-conventional fiduciary duty exists, the Crown is required to act with diligence and in accordance with the honour of the Crown. As Hourigan J.A. noted at para. 616 of *Restoule (ONCA)*, quoting Brown J.'s reasons in *Williams Lake*, this form of fiduciary duty permits the Crown to balance competing interests:

> This form of fiduciary duty imposes a less stringent standard than the duty of utmost loyalty incident to an *ad hoc* fiduciary duty. It requires Canada to act — in relation to the specific Aboriginal interest — with loyalty and in good faith, making full disclosure appropriate to the subject matter and with ordinary diligence. It allows for the necessity of balancing conflicting interests. [Citations omitted.]

[190] In *Haida Nation*, at para. 18, McLachlin C.J. likewise acknowledged that the content of the non-conventional duty may vary to account for the Crown's other obligations:

> Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising

> discretionary control over the specific Aboriginal interest at stake. [Citation omitted.]

[191] While there is a fiduciary relationship between the Crown and Aboriginal peoples, there are limits to the circumstances in which a fiduciary duty can be imposed on the Crown. As Binnie J. noted in *Wewaykum*, at para. 83, there must be a sufficient assumption of discretionary control by the Crown:

> [I]t is desirable for the Court to affirm the principle … that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature, and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation. [Citation omitted; emphasis added.]

And further, at para. 96, he stated that the Crown wears "many hats" and is "no ordinary fiduciary":

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary: it wears many hats and represents many interests, some of which cannot help but be conflicting. [Citation omitted.]

[192] At trial, SON submitted that, in addition to the obligations arising out of Treaty 45 ½ and the honour of the Crown, the Crown had additional obligations to SON arising from both an *ad hoc* and a *sui generis* fiduciary duty. In support of the alleged breach of these fiduciary duties, it relied on the same events claimed to

constitute a treaty breach and a breach of the honour of the Crown. Both Ontario and Canada argued that there was no *ad hoc* fiduciary duty, but they disagreed about whether there was a *sui generis* duty. However, they both argued that, if there was a duty, it was not breached.

[193] The trial judge noted that, while the relationship between the Crown and Indigenous peoples is fiduciary in nature, not all dealings are governed by fiduciary obligations. Fiduciary relations open access to a variety of equitable remedies. In this case, in arguing that Treaty 45 ½ gave rise to a fiduciary duty, SON sought equitable remedies, including beneficial ownership of lands it surrendered under Treaty 72. In other words, it sought to reverse the practical effects of Treaty 72 without invalidating the treaty.

[194] The trial judge ultimately concluded that there was no fiduciary duty owed by the Crown to SON in this case.

(i) *The trial judge's findings regarding an* ad hoc *fiduciary duty*

[195] The trial judge reviewed the requirements for the establishment of an *ad hoc* fiduciary duty, noting that it arises when the general conditions for a private law fiduciary duty, as set out in para. 50 of *Manitoba Metis Federation*, are satisfied:

1. There must be an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary;

2. The beneficiary must be a defined person or class of persons vulnerable to a fiduciary's control; and

3. There must be a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[196] All parties agreed that the second part of the test was met and the issue was whether the first and third steps were satisfied. The trial judge concluded that they were not.

[197] With respect to the first requirement, SON said that the encroachment clause in Treaty 45 ½, which was affirmed in the 1847 Declaration and the 1850 Act,[8] was the basis for the undertaking. The trial judge rejected the argument that a treaty promise to do something was sufficient to constitute an undertaking of loyalty, particularly because the Crown did not forsake the interests of all others. For example, the Crown did not promise to disregard the interests of other Indigenous peoples, so this element of the test was not met.

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[8] The 1847 Declaration, issued by Governor General Lord Elgin, stated that the encroachment clause in Treaty 45 ½ did not preclude SON from later surrendering the land: see *Declaration by Her Majesty in favor [sic] of the Ojibiway Indians respecting certain lands on Lake Huron* (June 29, 1847). The 1850 Act – *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850 (13 & 14 Vict.), c. 74 – provided more summary and effectual means to protect Indigenous peoples and their lands by, among other things, giving more powers to Commissioners, including punishments for trespassing.

[198] The trial judge also considered the third element of the test and determined that it was, likewise, not met. First, she rejected SON's argument that it had a legal interest because: (1) Treaty 45 ½ created a reserve on the Peninsula (which was not established); (2) the 1847 Declaration and 1850 Act enhanced SON's legal interest (which was not established); and (3) SON had historically used and occupied the Peninsula (which the trial judge acknowledged could give rise to a legal interest).

[199] Second, she dismissed SON's argument that the Crown had discretion and control because the Crown could decide how to go about fulfilling the encroachment clause. She concluded that SON did not show that the Crown's discretionary choices about how to fulfill the encroachment clause would have adversely affected SON's interests – it was the breach of the clause that was the problem. The trial judge, therefore, found that there was no *ad hoc* fiduciary duty.

(ii) *The trial judge's findings regarding a* sui generis *fiduciary duty*

[200] A *sui generis* fiduciary duty is unique to the relationship between the Crown and Indigenous peoples and can arise from the Crown assuming discretionary control over specific Aboriginal interests. It requires: (1) a specific or cognizable Aboriginal interest in relation to which the fiduciary obligation is owed, and (2) a Crown undertaking of discretionary control over that interest: *Manitoba Metis Federation*, at para. 51.

[201] Though the trial judge had concerns about the first part of the test, she accepted that SON had a sufficient specific or cognizable interest in the Peninsula, as of 1836, to satisfy the first requirement for the purposes of considering whether SON met the second requirement. SON said that the Crown assumed discretionary control over the Peninsula through Treaty 45 ½, relying primarily on its argument that the treaty created a reserve (which was not established), but also on the encroachment clause.

[202] The trial judge rejected the encroachment clause argument because the Crown did not preclude SON from taking its own steps to protect the land and, thus, the Crown did not assume complete control over the Peninsula. The trial judge therefore found no *sui generis* duty in this case.

(iii) Was there a breach of fiduciary duty?

[203] In this case, the trial judge did not err in concluding that SON had not established a conventional fiduciary duty. The treaty promise cannot be construed as an undertaking by the Crown to forsake the interests of all others in the province and act exclusively for SON's benefit, which is an essential element of the conventional fiduciary duty test: see *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 75; *Elder Advocates*, at paras. 36, 61.

[204] Nor did she err in rejecting the imposition of a non-conventional fiduciary duty. The nature of the promise here did not amount to direct administration of access to SON's lands. The Crown did not control access to those lands and was

not the gatekeeper. This case is far different from *Guerin*, where the Crown assumed all responsibility for dealing with the leasing of Aboriginal lands. Here, the treaty promise did not amount to sufficient control over access to SON's lands to give rise to a non-conventional fiduciary duty.

[205] Nor was the nature of the duties required of the Crown by Treaty 45 ½ appropriate for fiduciary obligations. Here, the Crown essentially failed to adequately police trespassers. They could have done more to prosecute them. They could have passed more effective legislation. These obligations, however, are ill-suited to fiduciary obligations and are more akin to public law, rather than private law, duties.

[206] While the court noted in *Wewaykum*, at para. 86, that "[o]nce a reserve is created, the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation", we sustain the trial judge's conclusion that Treaty 45 ½ did not create a reserve. Further, even if the promise to protect SON's lands from incursions could be viewed as analogous to the protections offered by the creation of a reserve, the promise to police and remove squatters is not sufficient to invoke a non-conventional fiduciary duty. Here, the treaty obligations agreed to by the Crown did not amount to "direct administration" of access to SON lands: *Elder Advocates*, at para. 53.

[207] The Crown failed to act with sufficient diligence in regard to the treaty promise made to SON. However, there was no question of disloyalty, abuse of power, or breach of trust, as might be associated with a traditional breach of fiduciary duty, although we recognize that the content of a fiduciary duty will vary widely depending on the relationship between the parties and the circumstances: see *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41.

[208] This was not a case where the Crown was acting in a trustee-like role in the management of Aboriginal land, as was the case in *Guerin*, or managing resource royalties on behalf of an Aboriginal group, as in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222. This case is factually and legally distinguishable from *Guerin*, where the Crown was obliged to hold surrendered land exclusively for the benefit of the surrendering band and its obligations were in the nature of a private law duty: see pp. 385, 387.

[209] Here, the imposition of a fiduciary duty would add nothing to the Crown's obligations to diligently and purposively perform the treaty promise. As observed in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 105, the Supreme Court "has, over time, substituted the principle of the honour of the Crown for a concept – the fiduciary duty – that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones".

[210] Where a Crown obligation is grounded in the honour of the Crown, it may not be necessary to invoke fiduciary duties; the Crown is still obliged to comply with its constitutional obligations in a manner consistent with the honour of the Crown: *Mikisew Cree,* at paras. 51-52.

[211] We agree with the trial judge that there was no additional fiduciary duty in the circumstances of this case.

(4) Is the Crown immune from claims for breach of fiduciary duty?

[212] It is common ground that the Supreme Court's decision in *Guerin*, an Aboriginal land rights case, broke new ground by introducing a "fiduciary principle" that underpinned a new form of liability, as La Forest J. explained in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at pp. 62-69. The issue is whether and how Crown immunity is to be reconciled with this new source of liability.

[213] More specifically, in response to SON's fiduciary duty claims, Ontario pleaded the defence of Crown immunity. The trial judge did not address this defence because she found that the Crown owed no fiduciary duties to SON. We could do the same, but having had the benefit of full argument, and keeping in mind that this appeal might not end this case, we address the issue.

[214] We begin with the history of Crown immunity and then consider Ontario's arguments.

(a) The history of Crown immunity

[215] Historically, Crown immunity from civil suits did not originate in policy or statute, but in the common law derived from medieval civil procedure. The feudal principle was that a lord could not be sued in his own court, and, since no court was higher than the King's own court, he could not be sued at all: Peter Hogg, Wade Wright & Patrick Monahan, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011), at p. 5. The maxim was that "The King hath no lord but God". This, in turn, evolved into the more commonly cited but misleading maxim, "the King can do no wrong": Sir William Wade, "The Crown, Ministers and Officials: Legal Status and Liability" in Maurice Sunkin & Sebastian Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999), at p. 24.

[216] There were limitations on Crown immunity. The King enjoyed personal immunity and the Crown could not be held vicariously liable for wrongs committed by its agents and ministers, but those who committed wrongful acts while acting for the Crown could not avail themselves of the protection of the Crown's immunity: see "Crown Practice" in *Halsbury's Laws of England*, 2nd ed., vol. 9 (London: Butterworths & Co., 1933), at p. 691. This is the source of the most notable limitation on Crown immunity.

[217] To compensate for the King's procedural but non-substantive immunity, the procedural mechanism of the 'petition of right' emerged: Hogg *et al.*, at p. 5. The petition of right allowed certain claims to proceed against the King upon receiving

his fiat, primarily for the recovery of property, but it notably excluded tort claims: see Hogg *et al.*, at pp. 6-7.

[218] The proper remedy where a person committed a tort while acting for the Crown was to sue the individual personally, because the Crown could not legally have authorized the conduct: see *Halsbury's Laws of England*, at p. 691. For tort claims and other claims for which a petition of right was not available, the historical practice was that the Crown servant – including senior officials such as Cabinet Ministers – would be sued personally. Since the King could do no wrong, the Crown could not have authorized the wrongdoing, so the minister or servant was seen as having acted outside of his authority: see *Feather v. The Queen* (1865), 122 E.R. 1191 (K.B.), at p. 1205. In situations where it would be difficult to identify one individual responsible for the breach, the Crown would nominate an individual to serve as defendant, and the treasury would compensate for the individual defendant's potential lack of funds, so as not to leave a plaintiff without a remedy: see *Matthews v. Ministry of Defence*, [2003] UKHL 4, [2003] 1 A.C. 1163, at para. 46, *per* Lord Hope of Craighead.

[219] Lord Woolf explained in *M. v. Home Office*, [1993] UKHL 5, [1994] 1 A.C. 377, at p. 410, that, in practice, this system allowed plaintiffs to pursue claims and receive compensation almost as though the Crown were liable:

> The difficulty which a plaintiff might have in identifying the appropriate servant of the Crown who was the tortfeasor

> in practice was overcome by the Crown nominating the individual responsible for the damage and the lack of resources of the defendant did not cause problems since the Treasury would make an ex gratia payment of compensation if it was a case where, but for Crown immunity, the Crown would be vicariously liable. In such proceedings, if it was appropriate for an injunction to be granted, there was no reason why this should not be done.

[220] Further, English authorities suggest that Crown immunity was limited to causes of action, and, since declaratory relief did not require a cause of action, a party could seek a declaration against the Crown notwithstanding the Crown's immunity: see *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (Eng. & Wales C.A.). The fact that the Crown would pay in response to a declaration did not have the effect of converting the case into a claim for damages.

[221] It is not our intention to traverse in more detail the history that Cullity J. covered so well in his lengthy and scholarly discussion in his seminal decision of *Slark (Litigation Guardian of) v. Ontario*, 2010 ONSC 1726, 6 C.P.C. (7th) 168, leave to appeal refused, 2010 ONSC 6131, 6 C.P.C. (7th) 221 (Div. Ct.). Cullity J. reviewed, at paras. 98-114, the origins and evolution of the petition of right procedure in England and Canada. He noted that "it is apparent that, prior to the enactment of [the *Proceedings Against the Crown Act, 1962-63,* S.O. 1962-63, c. 109], the law governing the scope of declaratory relief against the Crown was continuing to evolve": at para. 115. He also noted the "gradual erosion" of the

maxim that the King can do no wrong, an erosion which was “vastly accelerated by the enactment of [the *Proceedings Against the Crown Act*]”: *Slark*, at para. 116.

[222] In particular, Cullity J. noted, at para. 102, the abandonment of the distinction between direct and vicarious liability:

> [T]he statutes have in the past been interpreted as - subject to specific exceptions - excluding the direct, as distinct from the vicarious, liability of the Crown in tort. To this extent they preserved, or reflected, the rule that the king can do no wrong. The relevance of the distinction - and, consequentially, the continuing influence of the maxim for this purpose - was, however, emphatically rejected by the majority of the Supreme Court of Canada in *Swinamer v. Nova Scotia*, [1994] 1 S.C.R. 445 where Cory J. stated (at para. 29):
>
> > The arguments of the Crown [in favour of immunity from direct liability] are regressive and to accept them would severely restrict the ability of injured persons to claim against the Crown.

[223] Speaking of the *Dyson* procedure as an exception to the operation of Crown immunity, because it permitted an action for a declaration against the Crown without the need for a petition of right, Cullity J. noted, at para 115:

> I believe it is apparent that, prior to the enactment of [the *Proceedings Against the Crown Act*], the law governing the scope of declaratory relief against the Crown was continuing to evolve in accordance with the principle mentioned by [Sir William] Holdsworth [in *A History of English Law*, vol. 9 (London: Methuen & Co. Ltd., 1926), at p. 41, that a petition of right “should be available against the crown where the subject has a cause of action against a fellow subject”] - and that neither the maxim that the king can do no wrong nor the inability to

> enforce judgments by coercive process against the Crown were sufficient in all cases to preclude declarations that a plaintiff was entitled to damages, compensation or restitution from the Crown.

[224] Statutory and common law reforms in both Canada and England have gradually moved away from Crown immunity, in recognition of the problem it poses to the rule of law. As the Ontario Law Reform Commission wrote in *Report on the Liability of the Crown* (Toronto: Ontario Law Reform Commission, 1989), at p. 6:

> In our view, the answer to the question why the government should relinquish many of the advantages that it now enjoys is very simple, yet compelling. It is the right and fair thing for good government to do…. The preservation of the Crown's minor tactical advantages in its dealings with ordinary persons would be a trivial and unworthy reason to set against the improvement in the justice of our legal system that this report proposes.

[225] This policy perspective underpins the *Proceedings Against the Crown Act, 1962-1963,* S.O. 1962-63, c. 109 ("*PACA*").[9] The *PACA*, which was originally enacted in 1963, eliminated some of the immunities enjoyed by the Crown while preserving both immunity from action and the petition of right regime with respect to claims that existed on September 1, 1963.

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[9] There have been several iterations of the *PACA*, with the last being the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. While there were some amendments to the legislation over the course of its history, for the purposes of Ontario's argument in this appeal, they are inconsequential. Accordingly, we use "*PACA*" to refer to all versions of the legislation.

The *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 ("*CLPA*"), came into force on July 1, 2019, repealing the *PACA*. The repeal and replacement of the *PACA* does not imply anything about the previous state of the law: *Legislation Act, 2006,* S.O. 2006, c. 21, Sched. F, s. 56(1). The *CLPA* does not apply to this action (see s. 31(3)), nor did any party argue that it does.

(b) Analysis

[226] Ontario argues that it is not liable for any breach of fiduciary duty in this case because "no legislation has clearly and unequivocally removed Crown immunity for claims of breach of fiduciary duty". In support of its position, Ontario cites *Canada v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, in which the court stated, at para. 1, that "Crown immunity is deeply entrenched in our law…. [T]o override this immunity … requires clear and unequivocal legislative language." Ontario contends that any fundamental reform to the law of Crown immunity is for the legislature to make, citing *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, *per* Wilson J., at pp. 120-21. Because the legislature has not yet done so, Ontario submits that the Crown remains immune from claims for breach of fiduciary duty.

[227] At issue in *Thouin* was whether the Crown in right of Canada was immune from discovery in civil proceedings to which it was not a party. Section 27 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, provides: "Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings." The Supreme Court noted, at para. 27, that these words "do not show a clear and explicit intention to bind the Crown in all proceedings in which it is involved" but rather only relate to those proceedings in which the Crown is a party. As a result, the court concluded, at para. 25, that s. 27 did "not indicate a clear and unequivocal

intention on Parliament's part to lift the Crown's immunity by requiring the Crown to submit to discovery in proceedings in which it is not a party."

[228] Ontario acknowledges that the enactment of the *PACA* changed the law with respect to Crown immunity in the province, but argues that the legislation did not remove its immunity because a claim for breach of fiduciary duty could not have been enforced by petition of right prior to September 1, 1963. The same argument has been made – and rejected – in several cases.

[229] Most notably, in *Slark*, Cullity J. emphatically rejected the argument that the provincial Crown is immune from liability for all claims for breaches of fiduciary duty that arose before September 1, 1963, when the *PACA* came into force. In *Slark*, the plaintiffs sought certification for a class action case against the Crown for abuse suffered by them while they were housed in Huronia Regional Centre, a residential facility for individuals with developmental disabilities. In defending the action, Ontario argued that the Crown could not be liable for breaches of fiduciary duty occurring before September 1963, on two bases: first, the law did not recognize claims for breach of fiduciary duty against the Crown before September 1963; and second, the *PACA* did not purport to create a cause of action against the Crown for breaches of fiduciary duty occurring before September 1963.

[230] Cullity J. rejected Ontario's argument. He began his analysis by considering the wording of the relevant provisions of the *PACA*, particularly ss. 3, 28 and 29(1).[10] Those sections provide:

> 3. Except as provided in section 29, a claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act without the grant of a fiat by the Lieutenant Governor.
>
> 28. No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the first day of September, 1963.
>
> 29. (1) A claim against the Crown existing on the first day of September, 1963 that, if this Act had not been passed, might have been enforced by petition of right may be proceeded with by petition of right subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.[11]

[231] Based on the language of s. 29(1), Cullity J. asked "whether the claims for declarations in respect of breaches of fiduciary duty would have been permitted if [the *PACA*] had not been enacted": *Slark*, at para. 118. He noted that the *PACA*

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[10] Although they do not appear in the 1980 or 1990 consolidations of the *PACA*, ss. 28 and 29 of the 1970 consolidation have never been repealed, and have been held to still be in force: see *S.M. v. Ontario* (2003), 67 O.R. (3d) 97 (C.A.), at paras. 23-35.

[11] The Royal Fiat for this action was issued to SON by the Lieutenant Governor of Ontario on January 5, 2007. It reads:

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

does not specifically mention claims for breach of fiduciary duty, and as such, they could only be actionable against the Crown if they fell under the broad umbrella of a claim that "could have been enforced by petition of right if [the *PACA*] had not been enacted": at para. 77.

[232] The keystone to Cullity J.'s analysis was his holding that it was not necessary "to treat the evolution of the law governing petitions of right as frozen at the end of August 1963, and to ignore developments in the equitable jurisdiction of the court since that time": *Slark*, at para. 118. Instead of considering whether the claim would have been actionable by petition of right on the day the *PACA* was enacted, he assessed whether the claim would be actionable in a hypothetical world in which the *PACA* had never been passed at all: at para. 121. He relied on the text of s. 29(1): "A claim against the Crown existing on the first day of September, 1963 that, <u>if this Act had not been passed</u>, might have been enforced by petition of right may be proceeded with by petition of right subject to the grant of a fiat" (emphasis added).

[233] Noting that claims for breach of fiduciary duty against the Crown after September 1963 emerged despite the lack of statutory authorization in the *PACA*, Cullity J. thought it likely that the common law would have evolved in such a manner that, absent the *PACA*, claims for breach of fiduciary duty would have become actionable against the Crown by petition of right: *Slark*, at para. 123. Accordingly, he held that claims for breaches of fiduciary duties occurring before

1963 are now actionable with a petition of right and therefore captured by s. 29(1) of the *PACA*: *Slark*, at para. 125.

[234] In reaching this conclusion, Cullity J. rejected an approach adopted in *Richard v. British Columbia*, 2009 BCCA 185, 93 B.C.L.R. (4th) 487, leave to appeal refused, [2009] S.C.C.A. No. 274, and other British Columbian authorities that more closely aligns with the approach Ontario asks us to adopt in this case. He reasoned, at para. 82, that the cases from British Columbia are not easily reconciled with the language of the *PACA*. Ontario's legislation asks whether the claim would be actionable *if the PACA had not been passed*, whereas British Columbia's *Crown Proceedings Act*, S.B.C. 1974, c. 24, asks whether a claim existed prior to its enactment. Therefore, British Columbian courts have instead asked the *point in time question* as to whether the claim was actionable *before* the legislation was enacted, leaving no prospect for further development in the common law of Crown immunity. Cullity J. determined that Ontario's *PACA* was more disposed to the counterfactual approach to actionability, rather than British Columbia's point-in-time approach.

[235] Cullity J. held, at paras. 117-18, that it would be artificial to ask how equitable claims that were effectively unknown to the law before *Guerin* would have been treated if they had been considered by a court before 1963; instead, the correct question is whether a court today would recognize an equitable claim against the Crown for breach of fiduciary duty had the *PACA* not been passed. He

found it “inconceivable that the petition of right procedure … would not have been adapted to accommodate judicial recognition of the new fiduciary duties of the Crown” if the *PACA* had never been enacted: at para. 124.

[236] We note the Divisional Court denied leave on *Slark*, seeing “no reason to doubt the correctness of [Cullity J.’s] decision”: 2010 ONSC 6131, 6 C.P.C. (7th) 221, at para. 31 (Div. Ct.).

[237] We further note that Cullity J., sitting as a judge of the Divisional Court, took a similar approach in his dissent in the earlier decision of *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492 (Div. Ct.), rev’d (2004), 73 O.R (3d) 401 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50. In *Cloud*, former residents of an Aboriginal residential school appealed the dismissal of their certification motion for a class action against the Crown in right of Canada to the Divisional Court, which upheld the dismissal by majority. On further appeal, this court certified the action, including a claim for breach of fiduciary duty which included conduct pre-dating the enactment of the federal *Crown Liability and Proceedings Act*, S.C. 1952-53, c. 30, in 1953. Goudge J.A. noted, at para. 24, that Cullity J., in his dissenting reasons, had “found that the claim against the Crown for breach of fiduciary duty is a claim in equity that could have been brought against the Crown in the Exchequer Court before May 14, 1953, and can therefore now be brought in the Superior Court even if it arises before that date.” At para. 6,

Goudge J.A. stated that he agreed with Cullity J.'s conclusion, and "in large measure, with his analysis."

[238] Indeed, a number of cases have cited favourably to *Slark* and concluded the Crown may be held liable for breaches of fiduciary duty, including *Seed v. Ontario,* 2012 ONSC 2681, 31 C.P.C. (7th) 76, *Templin v. Ontario*, 2016 ONSC 7853, 6 C.P.C. (8th) 410, and *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932, 452 D.L.R. (4th) 604 ("*Restoule No. 2"*), aff'd 2021 ONCA 779, 466 D.L.R. (4th) 1, leave to appeal granted, [2022] S.C.C.A. No. 5. We review the context of each case.

[239] In *Seed*, the plaintiffs were seeking certification of a class action against the Crown for abuse while they were residents in a residential school for the visually impaired. Horkins J. noted one of Ontario's objections, at para. 79, that "[t]here is no cause of action for breach of fiduciary duty prior to 1963." She explained that Ontario was raising the same arguments as it did in *Slark*, at para. 80. She held, at para. 81, that "there is no principled reason to disagree with the result in *Slark.*"

[240] In *Templin*, Belobaba J. certified a class action against Ontario for abuse suffered by the plaintiffs at the Children's Psychiatric Research Institute. He noted, at para. 6: "The action alleges negligence and breach of fiduciary duty in the operation and management of an institution operated directly by the provincial

Crown. These are the same causes of action that were approved by the Court of Appeal for Ontario in *Cloud*, and by [the Superior Court] in *Slark*" (citations omitted).

[241] *Restoule No. 2* concerned fiduciary breach claims arising from breach of a treaty. Hennessy J. noted Ontario's concession, at para. 12: "Ontario concedes that it is liable for breaches of fiduciary duty based on facts in existence post September 1, 1963 and submits that it is not relying upon a defence of Crown immunity for any breach of fiduciary duty post September 1, 1963."

[242] She then observed, at para. 42, that Ontario put forward the same arguments as in *Slark* and *Seed* and as Canada did in *Cloud*. She accepted the analysis in *Slark*. She rejected, at para. 56, Ontario's argument that "the test on certification is so different from the test for summary judgment that the reasoning in *Slark* and *Seed* should not be applied in this case." She cited, at para. 58, the principles of *stare decisis* and comity, both horizontal and vertical, and concluded, at para. 59, that the Crown "has shown no good basis for their claim that the decision in *Slark* is plainly wrong, particularly in light of the appellate decisions in *Cloud* and *Carvery* [*v. Nova Scotia (Attorney General)*, 2015 NSSC 199, 364 N.S.R. (2d) 63, at paras. 59-61, aff'd 2016 NSCA 21, 371 N.S.R. (2d) 296] which adopt the reasoning" in *Slark*. Hennessy J.'s respect for *stare decisis* and comity was reinforced by the Supreme Court in *R. v. Sullivan*, 2022 SCC 19, 472 D.L.R. (4th) 521, at para. 65.

[243] Ontario nevertheless points to the British Columbia Court of Appeal's decision in *Richard*, this court's decision in *Barker v. Barker*, 2022 ONCA 567, 162 O.R. (3d) 337, leave to appeal refused, [2022] S.C.C.A. No. 368, and the Supreme Court's decision in *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695, to substantiate its argument. Cullity J. explained in *Slark* why *Richard* is not apposite based on the differences in each province's legislation. We agree.

[244] We also do not think that *Barker* assists Ontario. In *Barker*, at para. 91, on the basis that "*Guerin* is fatal to Ontario's position", this court did not accept Ontario's invitation to review Cullity J.'s decision in *Slark.* This court took Ontario's argument at its highest, noting, at para. 93: "But as Ontario's argument concedes, *Guerin* entails the conclusion that where legislation imposes an obligation that gives rise to duties of a fiduciary nature on the Crown, it must be taken as waiving Crown immunity for breach of that obligation." This court found that the imposition of a duty on Ontario by the *Mental Health Act*, R.S.O. 1990, c. M.7, was sufficient to satisfy any requirement in *Thouin* for clear and unequivocal language to override Crown immunity, on the basis, at para. 94, that it would "make little sense to conclude that the legislation created that obligation but left the fiduciary immune from the consequences of its breach." The *Barker* court left open for another day how *Slark* might factor into the analysis.

[245] Ontario also relies on *Rudolph Wolff*, which stands for the proposition that the general jurisdiction conferred on Canadian courts to hear claims against the

federal Crown comes from the enactment of statutes such as the *Petition of Right Act,* S.C. 1875, c. 12, and subsequent federal legislation, and that only Parliament can enact such statutes with respect to the federal Crown. *Rudolph Wolff* does not address the availability of remedies against the Crown. It does not provide guidance on how to interpret Crown liability legislation, let alone the specific language addressed in *Slark*.

[246] We agree with Cullity J.'s analysis in *Slark* and reject Ontario's argument that it is immune from claims for breach of fiduciary duty in this case, and that reform to the law of Crown immunity should be entirely left to the legislature. The common law still has a role to play, as *Slark* illustrates.

[247] We accordingly disagree with Ontario that the correct way to interpret the *PACA* is to consider the state of the law as it was prior to September 1, 1963 and ask whether a claim for fiduciary duty might have been enforced, at that time, by petition of right. Section 29(1) of the *PACA* permits claims against the Crown that: (1) existed on September 1, 1963; and (2) might have been enforced by petition of right if the *PACA* had not been passed. Section 28 maintains a bar to such claims which do not meet these conditions. In *S.M. v. Ontario* (2003), 67 O.R. (3d) 97 (C.A.), at para. 47, this court held that the word "claim" in s. 29(1) does not refer to a cause of action *per se*, but rather to the basis for the existence of a cause of action. The events giving rise to the claim for breach of fiduciary duty in this case obviously pre-date September 1963. Like Cullity J., however, we conclude that had

the *PACA* not been enacted, the petition of right procedure would have evolved to account for the actionability of the Crown's fiduciary obligations.

[248] We accordingly conclude that Ontario is not immune from claims for breach of fiduciary duty in this case. We do not consider *Thouin* to be dispositive of Ontario's argument for four reasons. First, *Thouin* focused on an interpretive approach to statutory language in the federal legislation. The statutory language at issue in this case – s. 29(1) of the 1970 consolidation of the *PACA* – is phrased and framed quite differently, and opens up the prospect of further common law development in the area of Crown immunity, as Cullity J. explained in *Slark*. Second, no argument was addressed to the Supreme Court in *Thouin* about the way in which the common law on Crown immunity might have evolved, as noted in this court's decision in *Cloud* or in the numerous decisions following *Slark*. Third, the issue in *Thouin* was procedural, not substantive. Finally, *Thouin* did not concern fiduciary duties in an Aboriginal context.

[249] We take seriously the Supreme Court's statement in *Mikisew Cree*, at para. 33, that reconciliation "is the 'fundamental objective of the modern law of aboriginal and treaty rights'" (citing *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 1) and that "[t]he purpose of s. 35 … is to facilitate this reconciliation". Ontario asks us to ignore the principles behind Crown immunity and to keep to a technical approach, which is quite inconsistent with the honour of the Crown, in order to dismiss SON's

fiduciary breach claim on the ground of Crown immunity. It would be wrong to apply unyielding and regressive procedural bars to Aboriginal claims for breach of fiduciary duty. Doing so would not further reconciliation.

[250] If SON's claim for damages for breach of the Crown's fiduciary duty respecting Treaty 45 ½ were successful, then, in our view, Ontario would not be able to rely on the principles of Crown immunity as a full defence.

V. THE CLAIMS AGAINST THE MUNICIPALITIES

A. Background

[251] Three municipalities appeal from the trial judge's refusal to dismiss the action against them.

[252] SON's action against the municipalities is based on the Crown's alleged breaches of duty to SON before its surrender of lands to the Crown through Treaty 72. SON argues that the surrendered lands should be impressed with an institutional constructive trust by reason of those breaches, and that SON is entitled to follow the lands impressed with that trust into the hands of the municipalities. SON acknowledges that the municipalities were not the Crown, did not breach any fiduciary duties to SON, and, therefore, are innocent of any wrongdoing.

[253] Nonetheless, SON claims entitlement to all of the municipal roads and unopened road allowances on the surrendered lands. A map, appended to these

reasons as “Schedule B”, illustrates the network of road systems in one of the municipalities, Georgian Bluffs. In Georgian Bluffs, there are, for example, about 380 kilometres of roads that must be maintained and about 240 kilometres of unopened road allowances.

[254] One of the defences asserted at trial to SON’s claim was that the municipalities were *bona fide* purchasers for value without notice and have expended monies on maintenance of the roads since they acquired them by provincial statute. The trial judge refused to dismiss the action against the municipalities, holding that the issue of whether the municipality had expended money on maintaining any particular road was necessarily a property-specific inquiry, more properly dealt with at Phase 2 of the proceedings. We agree that was an appropriate exercise of her trial management discretion.

[255] However, this was not the only defence asserted by the municipalities. They also submit that, since the trial judge dismissed the arguments alleging that the Crown breached fiduciary duties owed to SON, the entire foundation of the action against them has crumbled. They rely on *Guerin* to argue that lands surrendered by treaty are not impressed with a constructive trust in favour of the Aboriginal peoples who surrendered the land.

[256] At trial, the municipalities argued that there was no basis for any municipal liability either at Phase 1 or Phase 2 of the proceedings. This argument was made

entirely apart from the issue of whether they qualified as *bona fide* purchasers for value of the roads and road allowances. The municipalities cited para. 55 of *Haida Nation* for the proposition that "the remedy tail cannot wag the liability dog":

> Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result.

[257] Further, the municipalities argued, in their written trial submissions, that a constructive trust impressed upon the road allowances would, in any case, not be an appropriate remedy:

> Even if SON is successful in proving liability as against the Crown, a constructive trust over municipally-owned lands is not an appropriate remedy where, as here, there is absolutely no wrongdoing by the Municipal Defendants. Further, as confirmed in the case of *Semiahmoo Indian Band v. Canada*, one of the goals in imposing a constructive trust is to ensure that, "the wrongdoer does not benefit from his wrongdoing." Granting a constructive trust over municipally-owned lands in this case would only harm innocent third parties – namely, the Municipal Defendants and the public who rely on the roads.

[258] The trial judge did not address this argument.

B. Arguments on Appeal

[259] On appeal, the municipalities renew their arguments made before the trial judge that the action against them should be dismissed. SON responds that the municipalities have misinterpreted *Guerin* and that deference is owed to the trial

judge's decision deferring the issue of municipal liability to Phase 2 of these proceedings. SON argues that, even if its claims alleging breach of fiduciary duty have been dismissed, there may be some equitable relief available for breaches of treaty and the honour of the Crown and, thus, that a constructive trust entitling SON to the roads and road allowances cannot be foreclosed as a possible remedy for the latter breaches.

[260] As we explain below, we agree with the municipalities that the action against them should be dismissed.

C. Analysis

Did the trial judge err in not dismissing the action against the municipalities?

[261] The argument raised by the municipalities – that a constructive trust upon the roads and road allowances was not an appropriate remedy, even if the Crown were found liable in some way – was a "high-level defence", as contemplated by the phasing order, rather than a property-specific issue. Thus, the trial judge ought to have dealt with this issue in Phase 1. She was wrong to say that it had not been raised as an issue before her. Therefore, it falls to this court to consider whether the action against the municipalities should be dismissed at this stage.

(a) The trial judge's factual conclusions

[262] The trial judge's reasons supply the necessary factual backdrop for understanding this issue. As the trial judge explained, Treaty 72 provided that the

lands surrendered were to be sold for the benefit of SON, which in fact occurred. She noted that SON expected that the sale of the surrendered lands would mean that roads would be built and that, over time, these roads and road allowances would vest in the municipalities, who relied on their maintenance obligations to argue they qualified as purchasers for value. The trial judge explained:

> After Treaty 72, the Crown had the surrendered lands surveyed and allowances were identified on Crown surveys and set aside for the development of roads. SON expected that the sale and settlement of the surrendered lands would mean that roads would be built, and they were, including roads built to increase access to the lands with a view to expediting sales. SON repeatedly requested steps to increase the pace of the sale of the surrendered lands. As the land was developed, more roads were opened.
>
> Over the relevant time period, the ownership of road allowances that were shown on Crown surveys was determined by statute. Well before Treaty 72, the "soil and freehold" of roads and highways had been vested in the Crown: *An Act to provide for the laying out, amending and keeping in repair, the Public Highways and Roads in this Province, and to repeal the Laws now in force for that purpose*, S.U.C. 1810, c. 1, s. 35 (the "1810 Act").
>
> Under s. 12 of the 1810 Act, all original road allowances made by Crown surveyors were deemed to be common and public highways. In turn, road allowances on the Crown surveys of the surrendered land were, by statute, owned by the Crown.
>
> The *Municipal Institutions Act*, S.U.C. 1858, 22 Vic., c. 99, continued to provide, in s. 301, that the "soil and freehold" of every road or highway was vested in the Crown. However, under s. 302, the municipalities were given jurisdiction over and possession of the original

> allowances for roads and highways. The division between ownership and jurisdiction continued until 1913.
>
> In 1913, title to the roads and road allowances was vested in the municipalities. The *Municipal Act, 1913*, S.O. 1913, c. 43, broadly defined "highways" to include road allowances on Crown surveys and s. 433 provided that "the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities … of which for the time being have jurisdiction over it under the provisions of this Act".
>
> The municipal defendants rely on the statutory maintenance obligations that were imposed on them to show that they were purchasers for value, as discussed below. The *Municipal Act* of 1913 imposed substantial obligations on the municipalities with respect to the repair of roads, related sewers, sidewalks, crossings, lighting and other matters including liability with respect to repairs: ss. 460-462. Although there have been amendments to the legislation from time to time, the municipalities continue to have maintenance obligations: see e.g., *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 44, 55. [Footnote omitted.]

(b) Governing principles

(i) Institutional or remedial constructive trusts

[263] SON relies on *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, to assert that when Treaty 72 was signed, the surrendered lands were impressed with an institutional constructive trust in its favour because of the Crown's wrongdoing, consisting of Anderson's inappropriate remarks and the failure to diligently enforce the promise in Treaty 45 ½ to protect SON's lands from incursions by settlers and trespassers.

[264] In *Soulos*, a realtor bought property for himself, although he had been negotiating the purchase of that property on behalf of a client. He did not disclose the counter-offer made in response to his own client's offer for the property. The value of the property decreased, so the client did not suffer any loss as a result, but the client wanted the property for other reasons. The Supreme Court held that the remedy of a constructive trust was not limited to cases of unjust enrichment, but that a constructive trust could be imposed in the absence of loss, "in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the 'integrity of the laws' which a court of equity supervises": at para. 13.

[265] The court further held, at para. 17, that the constructive trust is a remedy to protect relationships of trust and prevent the wrongful retention of property:

> [T]he constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

[266] The *Soulos* court noted, however, that not all breaches of fiduciary duty give rise to such a remedial constructive trust: at para. 19. Citing L.S. Sealy, "Fiduciary Relationships" (1962) 20 Camb. L.J. 69, at p. 73, the court instructed that "[e]ach equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied": at para. 19. On the other hand, the court noted that the absence of a "classic fiduciary relationship does not necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute a breach of a trust-like duty": at para. 19.

[267] The court also endorsed the view that underlying remedial constructive trusts is a concern about a lack of probity on the part of the holder of legal title. Conduct contrary to "good conscience" may give rise to a remedial constructive trust. The court noted, at para. 33, that "[g]ood conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships".

[268] The court further held, at para. 34, that the inquiry into good conscience is informed by many factors:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into

> good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[269] The *Soulos* court, at para. 45, identified four elements which should generally be satisfied to justify imposition of a constructive trust based on wrongful conduct:

1. The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in their hands;

2. The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of their equitable obligation to the plaintiff;

3. The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

4. There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case (e.g., the interests of intervening creditors must be protected).

[270] Ultimately, the court concluded, at paras. 47-51, that a constructive trust should be imposed to require the realtor to return the property to his client because: (1) the realtor's conduct was so flagrantly in breach of his duty to his client; (2) his acquisition of the property was a direct result of his breach of duty; and (3) no third party would be adversely affected.

(ii) Contrasting the constructive trust with equitable compensation

[271] The court more recently considered principles of equitable compensation in *Southwind v. Canada*, 2021 SCC 28, 459 D.L.R. (4th) 1. A project to flood reserve lands was advanced without the consent of the First Nation, as well as without compensation or lawful authorization. The court noted that the constructive trust is a gains-based remedy, measured by the fiduciary's gain rather than the plaintiff's loss: at para. 67. It indicated that, when the Crown breaches its fiduciary duty, the remedy will seek to restore the plaintiff to the position the plaintiff would have been in had the Crown not breached its duty. When it is possible to restore the plaintiff's assets *in specie*, a constructive trust and accounting for profits are often appropriate, but when restoring the plaintiff's assets *in specie* is not available, equitable compensation is the preferred remedy: at para. 68.

[272] The court went on to hold, at para. 73, that fiduciary remedies are shaped by the particular fiduciary duty at play in a given case:

> There must be a close relationship between the fiduciary duty and the fiduciary remedy, and the fiduciary duty must "forcefully shape the content of [the] fiduciary remed[y]". Thus, while factual causation will always apply to equitable compensation in the sense that the fiduciary's breach must cause in fact the plaintiff's loss, common law limiting factors will not readily apply because of the nature of the fiduciary relationship and obligations. [Citation omitted.]

(iii) Unjust enrichment

[273] SON also relies upon *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, for the proposition that a constructive trust can be imposed upon property in the hands of a person who is innocent of any wrongdoing. In that case, a husband and wife agreed that the wife would pay the premiums upon an insurance policy on his life and that he would continue to name her as beneficiary of the policy. Instead, the husband named his new common law spouse as beneficiary, while the former wife continued to pay the premiums. The court treated this as a case of unjust enrichment – the first wife was deprived of the insurance proceeds and the common law spouse was enriched. Absent a juristic reason for the enrichment of the common law spouse, a *prima facie* case of unjust enrichment was established and the common law wife then had the onus to establish some residual reason why the enrichment should be maintained. At this stage, the reasonable

expectations of the parties, as well as moral and policy-based arguments, were relevant: at para. 83.

[274] The court noted, at para. 89 of *Moore*, that a personal remedy – essentially a debt or money obligation – is the default remedy for unjust enrichment. A court will impress the disputed property with a constructive trust only if the plaintiff can establish that a personal remedy would be inadequate: at para. 91. Further, the plaintiff must also establish that their contribution underlying the action is "linked or causally connected to the property over which a constructive trust is claimed": at para. 91. In *Moore*, for instance, the first wife's payment of the premiums meant that the proceeds of the policy were causally connected to the premiums she paid, a further factor justifying the imposition of a constructive trust.

(c) Analysis

[275] In our view, to impress the municipal roads and road allowances with a constructive trust is not an appropriate remedy for several reasons and the action against the municipalities should be dismissed.

[276] As a preliminary matter, however, we must first address an argument advanced by SON about the trial judge's factual findings that shaped consideration of the municipalities' argument. SON argues that the trial judge erred in making findings of causation and, in particular, that these findings should have been left to Phase 2 of the trial. SON submits that the trial judge should not have made the finding that Anderson's remarks and the statements made, or the process adopted,

by Oliphant leading to the signing of Treaty 72 did not affect SON's decision to sign the treaty.

[277] We reject SON's argument. The trial judge did not err in making these findings. She had to assess all of the circumstances surrounding the signing of both treaties and the effects of the impugned conduct on SON. SON itself made submissions on causation in its closing submissions to the trial judge. The findings are not property-specific matters contemplated by Phase 2. There is no basis to interfere with the trial judge's findings because no palpable or overriding error was argued or shown.

[278] We now turn to the reasons why it would not be appropriate to impress the municipal roads and road allowances with a constructive trust and why the action against the municipalities should be dismissed.

(i) SON has taken continuing advantage of Treaty 72

[279] Firstly, SON does not dispute the validity of Treaty 72. SON agreed that the surrendered lands would be sold for its benefit; in fact, its predecessors urged the sale of the lands be undertaken with greater dispatch, and that roads be constructed to facilitate the sales. Land sales were booming and prices were rising. The evidence indicated that, by 1900, 97% of the surrendered lands were in fact

sold for SON's benefit.[12] Municipal construction of roads and setting out of road allowances facilitated the sales and provided SON with road access to different areas in the Peninsula. We also note that the Saugeen First Nation has relied on the validity of Treaty 72 to sue for a correction of the boundary of the lands reserved to it by that treaty: *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula*, 2023 ONSC 2056, appeals as of right to Ont. C.A. filed, COA-23-CV-0491 & COA-23-CV0511. Under these circumstances, it is not appropriate to reverse discrete parts of the treaty surrender.

(ii) The remedy sought is disproportionate to one of the wrongs

[280] Secondly, the remedy claimed is disproportionate to the wrong done. Anderson's ill-considered remark in 1854, which the trial judge found had no effect on SON, might merit symbolic equitable financial compensation from the Crown, but does not justify the constructive trust claimed against the municipalities. Gross disproportionality between the wrong done and the constructive trust remedy sought may make the latter inappropriate. In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, for example, an insolvent employer breached a fiduciary duty by failing to ensure that employee pension plan beneficiaries were treated with procedural fairness in the insolvency proceedings. Cromwell J. noted, at para. 239, that the constructive trust claimed, being a

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[12] See Dr. Gwen Reimer, "Volume 4: Implementation Issues Related to Surrender No. 72, 1854-1970s", Exhibit 4704, p. iv.

$6.75 million penalty on the other creditors as a remedial response to the breach, was “so grossly disproportionate to the breach as to be unreasonable.”

[281] The breach of Treaty 45 ½ was the Crown’s failure to act with sufficient diligence to reduce squatting on SON’s lands. Squatting included permanent or transient residency and unauthorized timber cutting. There is no reasonable prospect that any government could have eliminated all incursions on the Peninsula. The difficulty of dealing with incursions is illustrated by William McGregor’s activities on the Peninsula, occupying fishing stations, farming, cutting timber, and selling whiskey. In 1840, no Aboriginal person was inclined to make a complaint, perhaps because McGregor cohabited with a SON Chief’s daughter and had a son with her, who became a SON Chief for the period between 1867 and 1907. It is not obvious that it would have been prudent for the Crown to expel McGregor from SON lands.

[282] Further, as noted earlier in these reasons, a number of the Europeans on the Peninsula were there at the invitation, or with the permission, of SON or its members.

[283] The population was exploding with a flood of settlers. The expert report of Dr. McCalla indicated that “[p]opulation growth was especially rapid in newly opening areas where there was fertile land. In 1851 Huron, Grey, and Bruce counties had a total population of about 35,000; by 1861, their combined

population had more than tripled…. No other area of the two Canadas experienced this rate of growth in the 1850s."[13]

[284] The trial judge identified the period between Treaty 45 ½ and Treaty 72 as "a time of major change". The governance of British North America changed, including for the Peninsula area. There was rapid population growth. There was a rush for land. Thus, squatting increased. She noted that the non-Indigenous population in Upper Canada rose from 374,000 to 952,000 between 1836 and 1851 as a result of high birth rates in settler families and immigration.

[285] The result of the inadequate level of diligence was that squatting was not reduced as much as it could have been. The government failures here, however, did not amount to dishonesty or other wrongful acts which are tainted with moral opprobrium, as occurred in *Soulos*.

[286] The Durham Report of 1839 described the difficulties faced by government in this respect:

> The peculiar geographical character of the Province greatly increases the difficulty of obtaining very accurate information. Its inhabitants scattered along an extensive frontier, with very imperfect means of communications, and a limited and partial commerce, have, apparently, no unity of interest or opinion. The province has no great centre with which all the separate parts are connected, and which they are accustomed to follow in sentiment and action; nor is there that habitual intercourse between

[13] Dr. Douglas McCalla, "Population Growth and the Search for Land in Upper Canada & Related Questions: Expert Witness Report" (March 31, 2015), Exhibit 4367, p. 6.

> the inhabitants of different parts of the country, which, by diffusing through all a knowledge of the opinions and interests of each, makes a people one and united, in spite of extent of territory and dispersion of population.[14]

[287] The report of January 22, 1844, on the Affairs of Indians in Canada, submitted to the Legislature by the Commissioners similarly indicated:

> But the extent and isolation of the Indian Lands in Upper Canada, the impossibility of exercising a surveillance over those vast tracts, and still more, the incontrollable force of those natural laws of society to which even Governments must bend, have prevented the efficient protection of the Indian Reserves, any more than the Crown and Clergy Lands under similar circumstances.[15]

[288] The nature of the Crown's failures – not adopting more effective legislation or more rigorous policing – are not obligations of a nature that has historically attracted fiduciary or trust-like responsibility.

(iii) Adverse effects on third parties

[289] Thirdly, a long time has passed. The Crown's failure to act with adequate diligence here transpired over a period of 18 years, from 1836 to 1854. The municipalities have relied on the treaty surrender, and the Crown title that followed,

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[14] John George Lambton, The Earl of Durham, *Report on the Affairs of British North America* (January 31, 1839), reproduced as *Report of the Earl of Durham*, 3rd ed. (London: Methusen & Co. Ltd., 1922), Exhibit 1287, p. 104.

[15] Rawson W. Rawson, John Davidson & William Hepburn, *Report on the Affairs of the Indians in Canada* (January 22, 1844), reproduced as Appendix T to the *Journals of the Legislative Assembly of the Province of Canada*, vol. 6, appendix no. 1, s. III (1847), Exhibit 1447, s. III.4 (PDF p. 34).

to build road infrastructure which covers the land in a network. Others have undoubtedly relied on the roads to construct lives for themselves over many years.

[290] Deterrence of wrongful conduct by the municipalities is not a factor here. As acknowledged by SON, the municipalities are utterly innocent of any wrongdoing. In *Indalex*, at paras. 239-40, Cromwell J. concluded that it would be unfair to creditors to impress the funds in issue with a constructive trust. Here, we are persuaded that it would be unfair to the municipalities to impress roads and road allowances with the constructive trust claimed.

[291] We are also not persuaded that *Moore* has any application here. *Moore* involved a claim for unjust enrichment in a binary dispute in a domestic context. The issue there, whether there was a juristic reason for the enrichment, is not engaged here.

(iv) Equitable compensation from the Crown would be an appropriate remedy for the failure to diligently perform the treaty promise

[292] Finally, we are persuaded that equitable compensation, payable by the Crown, would be an effective remedy in the circumstances, taking into consideration the importance SON attaches to its lands, surrendered for reasons it considered appropriate at the time. As the trial judge noted:

> Considering all of the evidence, and all of the issues raised by SON in relation to the process leading up to the treaty, I find that Oliphant did not lie or misrepresent the Crown's ability, in October 1854, to stop squatting. I further find that SON's decision to enter into Treaty 72

> was not affected by Oliphant's statements or process. SON had shown they were fully capable of saying no, but this time SON reached terms that they agreed on.

[293] The trial judge did not accept SON's arguments that Crown failures led to the surrender in Treaty 72.

[294] We are not satisfied that "good conscience" demands that the municipalities' roads and road allowances be transferred to SON. As Cromwell J. noted in *Indalex*, at para. 229, "while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained" (emphasis added). Further, as noted in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property."

[295] These principles apply in the determination of this appeal. While such authorities must be applied with caution in contexts where the honour of the Crown is the dominant principle, the assessment of an appropriate remedy cannot be divorced entirely from its historical context and existing jurisprudence about remedies.

[296] In *Indalex*, the pension plan members sought a constructive trust over funds "which arose only because of the process to which they now object": at

para. 233. Cromwell J., at para. 240, concluded that “[t]o impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.” Similarly, the surrender in Treaty 72 ultimately enabled the surveys, road construction, and laying out of road allowances. Despite its dissatisfaction with the level of squatting, SON ultimately benefited financially from the pressure by settlers to acquire land in the surrendered regions.

[297] Quite apart from the issue of whether the municipalities can be qualified as *bona fide* purchasers for value without notice, it would be unjust to impose the constructive trust claimed upon them, regardless of whether the Crown failings are characterized as breach of treaty, breach of the honour of the Crown, or breach of fiduciary duties. Equitable compensation is more appropriate.

[298] The claim against the municipalities is dismissed.

VI. DISPOSITION

[299] In light of these reasons, we deal with this appeal as follows:

1. SON’s appeal from the dismissal of the claim for Aboriginal title to submerged lands is allowed only to the extent of remitting the matter back to the trial judge to determine whether Aboriginal title can be established to a more limited and defined area, in accordance with the *Tsilhqot’in*

test. The trial judge shall establish a fair procedure for dealing with this issue, which avoids repetition of the work done so far in this action;

2. SON's appeal from the dismissal of the claim for breach of fiduciary duty is dismissed;

3. Ontario's appeal from the findings that the Crown breached Treaty 45 ½ by failing to perform the treaty promise with sufficient diligence is dismissed; and

4. The appeal by the municipalities is allowed and the action against the municipalities is dismissed.

[300] If the parties cannot agree as to costs, each may make written submissions of no more than 10 pages plus their bills of cost within 30 days of release of these reasons. Reply submissions, if any, must be filed within 10 days thereafter and limited to 5 pages.

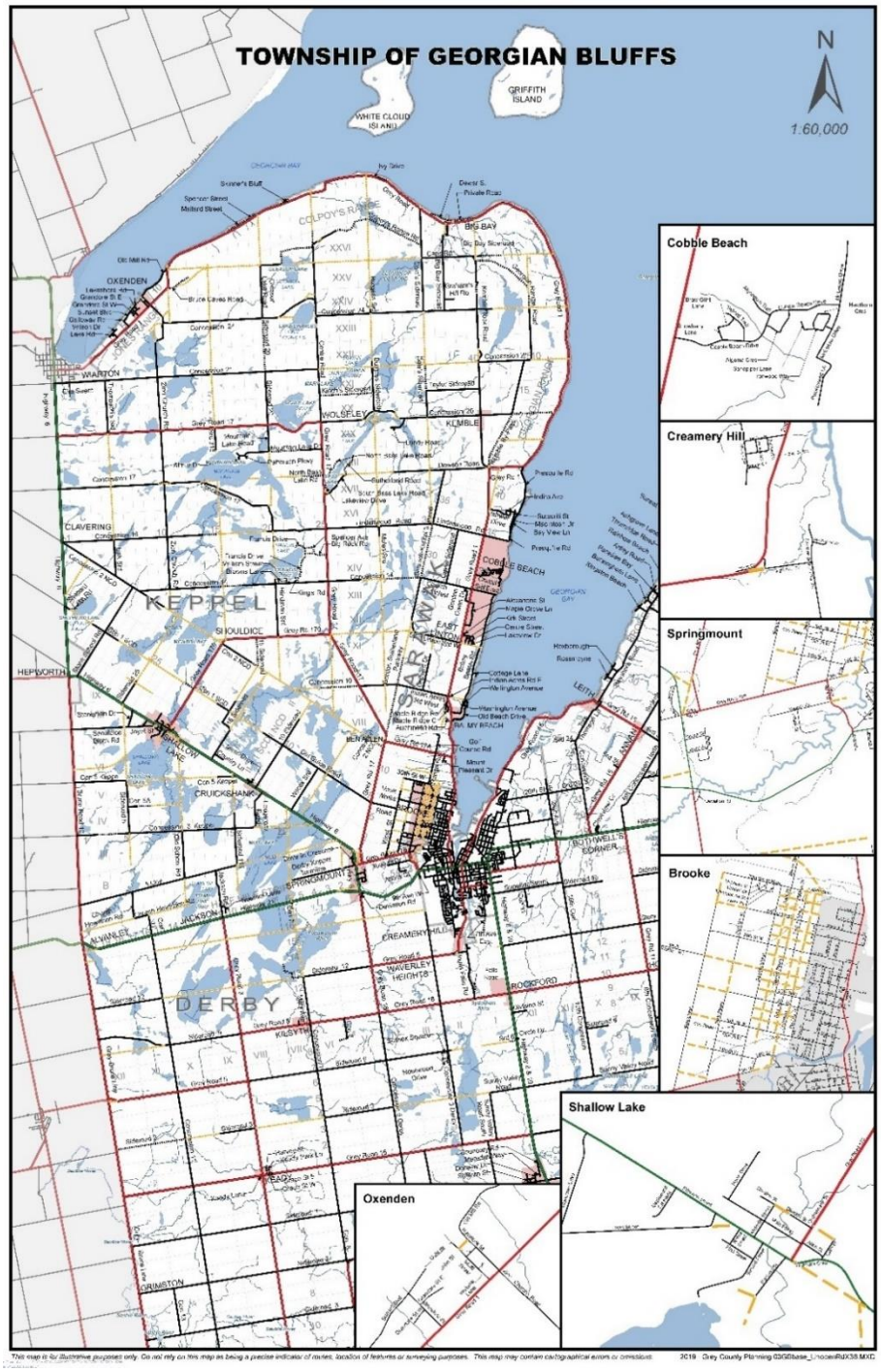
Released: August 30, 2023 "P.D.L."

"P. Lauwers J.A."
"G. Pardu J.A."
"J. George J.A."

SCHEDULE A: ABORIGINAL TITLE CLAIM AREA[16]

[16] The untitled map was marked as Exhibit P at trial. The Title claim area is marked in light blue and labelled "Aboriginal Title Claim Area". In closing submissions, SON removed a triangular portion of the Title claim area to the east of 80°20'W, a line of longitude that passes between Collingwood and Meaford.

SCHEDULE B: ROAD SYSTEMS IN GEORGIAN BLUFFS[17]



[17] The map was entered into evidence as Exhibit 4896 at trial.

SCHEDULE C: THE PHASING ORDER

[1] The decisions challenged on appeal were made in Phase 1 of this action. By the order dated January 16, 2020, the trial judge ordered that Phase 1 was to encompass the issue of liability to SON, including the following matters:

i. The entitlement to the heads of remedies sought, namely,

1. Declarations of Aboriginal title;
2. Declarations with respect to the interpretation or rectification of Treaty 72;
3. Declarations of breaches of fiduciary duties by the pre-confederation Crown; and
4. Declarations with respect to the honour of the Crown.

ii. Limitations or laches defences applicable to any of SON's causes of action in general, or applicable to the entitlement of SON to compensation for breaches of fiduciary duty of the pre-confederation Crown, save and except any such limitations or laches defences that may apply to claims of beneficial ownership of lands or that the Phase 1 trial judge concludes in the Phase 1 judgment should be deferred to Phase 2.

Phase 2, which is deferred until after all appeals from the Phase 1 ruling are exhausted, is to deal with the following matters:

i. The apportionment of liability, if any as between Canada and Ontario to pay compensation for any breaches of fiduciary duty of the pre-Confederation Crown;
ii. The crossclaims between Canada, Ontario and the municipalities;
iii. The entitlement of SON to beneficial ownership of the lands referred to in the Statement of Claim;
iv. The methodology of calculation and the quantum of compensation and damages that may be owed to SON;
v. The entitlement of SON to compensation for the value and loss of use of lands within the Title claim area, but which are excluded from the claim area because they are held in fee simple by private parties;

vi. The entitlement of SON to an accounting of revenues derived by Canada and Ontario from any lands found subject to Aboriginal title in Phase 1; and

vii. All remaining limitations and laches defences.

[2] As the trial judge observed, Phase 1 focussed on “liability, declaratory remedies and high-level defences” while Phase 2 will consider “other remedies and defences”, including “property-specific issues”.