Ontario Court of Appeal confirms distinction between treaty and fiduciary obligations and rejects constructive trust as appropriate remedy for Crown breaches of treaty duties

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On August 30, 2023, the Court of Appeal for Ontario released its decision in *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*.[1] The Court of Appeal upheld the trial judge's decision that the Chippewas of Nawash Unceded First Nation and Saugeen First Nation (collectively, SON) do not have Aboriginal title to submerged lands in a large section of Lake Huron and Georgian Bay surrounding the Bruce Peninsula, but remitted to the trial judge SON's alternative argument that they have Aboriginal title to certain portions of these lands, pursuant to the *Tsilhqot'in* test. The Court of Appeal also upheld the trial judge's decision that the Crown did not owe or breach a fiduciary duty to SON, but that the Crown breached its honour and Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachment by white settlers.

The Court of Appeal also granted the appeal of several municipalities, including Georgian Bluffs, Northern Bruce Peninsula and South Bruce Peninsula, and held that it would not be appropriate to grant SON a constructive trust over all municipal roads and unopened road allowances on the lands that were surrendered to the Crown through Treaty 72 (which followed Treaty 45 ½).

Background

SON sued the Canadian and Ontario governments 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, claiming that they have the right to control every aspect of occupation in those waters, consistent with the rights associated with Aboriginal title as described in *Tsilhqot'in Nation v. British Columbia*[2] (the Title Claim).[3] SON also claimed that the Canadian and Ontario governments breached a promise made in Treaty 45 ½ to protect the land from encroachments by "the whites" (the Treaty Claim).[4] SON further argued that they were compelled to enter into Treaty 72 because of the Crown's failure to fulfill the promises of Treaty 45 ½, resulting in most of the land on the Bruce Peninsula being surrendered to the Crown.[5] As part of the Treaty Claim, SON sued for $80 billion as compensation, $10 billion in punitive damages and the return of all Crown land not held by third parties.[6]

SON also sued several municipalities, including Georgian Bluffs, Northern Bruce Peninsula and South Bruce Peninsula,[7] and sought 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.

The trial judge dismissed SON's Title Claim and partially granted SON's Treaty Claim finding 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, the trial judge dismissed SON's fiduciary duty claim and deferred the issue as to whether municipalities should be excluded from the Treaty Claim to the next phase of the trial.

The Appeal decision

In its reasons, the Court of Appeal addressed the Title Claim, Treaty Claim and claims against the municipalities, as follows.

Title Claim

On appeal, SON argued, among other things, that the trial judge erred by (1) analyzing the claim for Aboriginal title through the lens of the more exacting test for Aboriginal rights; (2) giving insufficient weight to the Aboriginal perspective and failing to take into account the submerged nature of the land claimed; and (3) setting too high a threshold for the control element of the *Tsilhqot'in* test for Aboriginal title.[8] The Court of Appeal rejected all these arguments.[9]

The Court of Appeal found that the trial judge had concluded that the boundaries selected by SON encompass an area much larger than any SON connection to the claimed land.[10] It also found that there was no palpable or overriding error with respect to the trial judge's findings regarding SON's lack of control over the Title Claim area, pursuant to the *Tsilhqot'in* test.[11]

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. The trial judge concluded that SON did not have sufficient information to define specific areas within the larger Title Claim area for which Aboriginal title could be established.[12] On appeal, the Court of Appeal remitted the matter back to the trial judge to determine if SON satisfied the *Tsilhqot'in* test for any limited portion of the broader area over which SON initially claimed.[13]

Treaty Claim

Ontario argued that the trial judge erred by finding that the Crown breached the honour of the Crown and the treaty promises in Treaty 45 ½ by failing to act with diligence to protect SON's lands from encroachments by settlers, and pleaded the defence of Crown immunity.[14] SON argued that the trial judge erred by, among other things, failing to find that the Crown owed and breached a fiduciary duty to SON.[15]

The Court of Appeal rejected Ontario's Crown immunity argument and found that there was 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.[16]

The Court of Appeal also agreed with the trial judge's conclusion that the Crown did not owe or breach a fiduciary duty to SON.[17] The Court of Appeal held that the nature of the duties

required of the Crown by Treaty 45 ½ — essentially, to adequately police trespassers — were not fiduciary obligations and were more akin to public law, rather than private law, duties.[18] The Court of Appeal noted that where a Crown obligation is grounded in the honour of the Crown, it is not always necessary to invoke fiduciary duties because the Crown is still obliged to comply with its constitutional obligations in a manner consistent with the honour of the Crown.[19]

Claims against the municipalities

On appeal, the three municipalities renewed the arguments they made before the trial judge that the action against them should be dismissed.[20] They argued that they were *bona fide* purchasers for value without notice and that a constructive trust upon the road allowances would not be an appropriate remedy because the municipalities are innocent third parties and have expended monies on maintenance of the roads since they acquired them by provincial statute.[21]

The Court of Appeal agreed and held that it would not be appropriate to impress the municipal roads and road allowances with a constructive trust, and dismissed the action against the municipalities because

1. SON has taken continuing advantage of Treaty 72, as evidenced by the fact that by 1900, 97% of the surrendered lands were sold for SON's benefit; municipal construction of roads and setting out of road allowances facilitated the sales and provided SON with road access to different areas in the Bruce Peninsula; and Saugeen First Nation had relied on the validity of Treaty 72 to sue for a correction of the boundary of the lands reserved to it by that Treaty.[22]
2. the remedy sought was disproportionate to the wrong done. The breach of Treaty 45 ½ was the Crown's failure to act with sufficient diligence to reduce squatting on SON's lands. The Crown's failure to reduce squatting further did not rise to the level of dishonesty or other wrongful acts.[23]
3. the remedy sought would have an adverse effect on third parties, such as municipalities who have relied on the treaty surrender and Crown title that followed to build road infrastructure and others who relied on the roads to construct lives for themselves over many years.[24]
4. equitable compensation from the Crown would be a more appropriate remedy for the failure of the Crown to diligently perform the treaty promises taking into consideration the importance SON attaches to its lands, which it surrendered for reasons it considered appropriate at the time.[25] SON ultimately benefitted financially from the pressure by settlers to acquire land in the surrendered regions, so it would be unjust to impose the constructive trust claimed upon them.[26]

Significance

The Court of Appeal's decision provides clarity on the Crown's treaty obligations and the defences available for breaching those obligations. First, the Court of Appeal confirmed that

the nature of the duties required of the Crown by Treaty 45 ½ were not fiduciary obligations. Whether a Crown obligation under a treaty is more akin to a public or private law duty will become a relevant consideration when future claims are brought for breaches of treaty obligations. Second, where a court agrees that the Crown owes a fiduciary duty, Crown immunity will not be available as a full defence and appropriate remedies may be available to claimants.

Further, the Court of Appeal's decision provides some certainty to third parties regarding First Nation ownership rights to lands on which they wish to develop. The Court of Appeal held that granting a constructive trust to SON would have an adverse effect on third parties, such as municipalities, and that equitable compensation from the Crown would be a more appropriate remedy in this case. Although certain of the Court of Appeal's considerations related to Treaty 45 ½ specifically, this conclusion regarding the appropriateness of a constructive trust may apply in other circumstances where a claimant has ultimately benefitted from the alleged breaches.

Notwithstanding that the Court of Appeal remitted the Treaty Claim back to the trial judge, the Court's decision is subject to appeal. All parties have agreed that once all the appeals on these three claims are settled, the parties will proceed to the second phase of the proceeding, which will determine the remedy available for the claimants in this case. It remains to be seen what remedy will be granted for the Crown's breach of the honour of the Crown and Treaty 45 ½.

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[1] *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General),* 2023 ONCA 565 (*Chippewas*).

[2] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (*Tsilhqot'in*).

[3] *Chippewas* at para. 1.

[4] *Chippewas* at para. 3.

[5] *Chippewas* at paras. 3–4.

[6] *Chippewas* at para. 5.

[7] *Chippewas* at para. 5.

[8] *Chippewas* at para. 19.

[9] *Chippewas* at para. 20.

[10] *Chippewas* at para. 45.

[11] *Chippewas* at para. 54.

[12] *Chippewas* at paras. 103–105.

[13] *Chippewas* at paras. 21 and 107.

[14] *Chippewas* at para. 111.

[15] *Chippewas* at para. 156.

[16] *Chippewas* at para. 138.

[17] *Chippewas* at para. 160.

[18] *Chippewas* at para. 205.

[19] *Chippewas* at para. 210.

[20] *Chippewas* at para. 251.

[21] *Chippewas* at para. 254.

[22] *Chippewas* at para. 279.

[23] *Chippewas* at paras. 280 and 285.

[24] *Chippewas* at paras. 289–290.

[25] *Chippewas* at para. 292.

[26] *Chippewas* at para. 296.