COURT FILE NO.: CV-98-0743-00
DATE: 2025-06-17

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Couchiching First Nation, Naicatchewenin First Nation, Nicikousemenecaning First Nation and Stanjikoming First Nation	M. McPherson, K. Hille, B. Brookwell, G. Cook and J. Shields for the First Nations Plaintiffs/Defendants by Counterclaim
Plaintiffs	
- and -	
The Attorney General of Canada, His Majesty the King in Right of Ontario and The Corporation of the Town of Fort Frances	J. Morse and D. Trafford for the Defendant/Plaintiff by Counterclaim, The Corporation of the Town of Fort Frances
Defendants/Plaintiffs by Counterclaim	C. Collins-Williams, T. Andreas and N. Sdieq for the Defendant by Counterclaim, The Attorney General of Canada
	S. Davis, I. Kamal and S. Nestico-Semianiw for the Defendant by Counterclaim, His Majesty the King in Right of Ontario
	HEARD: November 25, 26, 27, 28 and 29, 2024 at Fort Frances, Ontario

Mr. Justice J.S. Fregeau

Table of Contents

Reasons on Motions for Summary Judgment

OVERVIEW

[1] The Corporation of the Town of Fort Frances (the "Town"), brings this motion for summary judgment on its counterclaim and crossclaims seeking a declaration that the Town is the legal and beneficial owner of lands surrendered by Couchiching First Nation, Naicatchewenin First Nation, Nicickousemenecaning First Nation and Stanjikoming First Nation (collectively the "First Nations"), to Canada on October 1, 1908 (the "1908 Surrender"), and which have never been sold ("Unsold Surrendered Lands" or "USL"). The USL are more particularly described later in these Reasons.

[2] In the alternative, the Town seeks an order that it is the legal and beneficial owner of the "1910 Park" and/or the "Point Park", both located within the USL and more particularly described later in these Reasons, and all roads within the USL or that provide access thereto, to be used for park purposes.

[3] In the further alternative, the Town seeks an order declaring that it is entitled to a conveyance or conveyances of the USL, including, or in the alternative, the 1910 Park and/or the Point Park, and all roads within or that provide access thereto, for park purposes.

[4] In addition, or in the further alternative, the Town seeks an order declaring that it and/or its citizens hold a public interest in the USL, including, or in the alternative, the 1910 Park and/or the Point Park, and all roads within or that provide access thereto and which have been dedicated to the public for park purposes and that such lands are held and shall continue to be held indefinitely, in trust for, and subject to, the rights of the Town, its citizens and the public at large for its continued use for park purposes.

[5] In the event the court does not grant any of the relief sought by the Town and finds that one of the defendants by counterclaim is the legal or beneficial owner of the USL, the 1910 Park, the Point Park and/or the roads, then the Town seeks a trial to establish its right to damages and to determine the quantum of damages as sought in its counterclaim**.** The Town's alternative claim for damages is against Canada and Ontario, firstly in the amount of $50,000,000.00 for "breach of promise and agreement, and/or breach of duty, and/or failure, neglect, and/or refusal to comply with" a 1908 Ontario Order-in-Council and secondly, in the amount of $2,000,000.00 as reimbursement for capital improvements undertaken by the Town within the USL, on the basis of unjust enrichment.

[6] The First Nations, the Attorney General of Canada ("Canada"), and His Majesty the King in Right of Ontario ("Ontario"), seek an order by way of summary judgment dismissing the counterclaim and crossclaims of the Town in their entirety, including the claim for damages.

LITIGATION BACKGROUND

[7] This action was initiated by the First Nations in 1998. In the original Statement of Claim, the First Nations sought damages from Canada for breach of fiduciary duty in relation to Canada's alleged maladministration of the lands surrendered pursuant to the 1908 Surrender.

[8] Ontario and the Town were added as parties in 2007. In 2009, the Town issued a counterclaim against the First Nations, and crossclaims against Canada and Ontario, asserting legal and/or beneficial ownership of the USL or, in the alternative, legal and/or beneficial ownership of the 1910 Park and/or the Point Park.

[9] On March 13, 2018, the First Nations settled their claim against Canada and Ontario and the action was dismissed as against these defendants. On December 18, 2018, the First Nations were granted leave to discontinue the action against the Town on terms, including that the First Nations be prohibited from commencing any future action or proceeding against Canada, Ontario, or the Town upon claims or causes of action alleging that the 1908 Surrender was legally or equitably invalid or otherwise ineffective.

[10] The only extant issues in this litigation are those raised in the Town's counterclaim against the First Nations and crossclaims against Canada and Ontario.

HISTORICAL BACKGROUND

[11] On October 3, 1873, Canada entered into a treaty with the Anishinaabe peoples in the Rainy Lake and Rainy River area of what is now the Province of Ontario. The treaty was known as the Northwest Angle Treaty, or Treaty No. 3 (hereinafter referred to as "Treaty 3"). Treaty 3 was negotiated on behalf of the Government of Canada by two Commissioners, Mr. Simon Dawson ("Dawson") and Mr. Robert Pither ("Pither"). Canada confirmed Treaty 3 by Order-in-Council on October 31, 1873. The First Nations are descendants of four of the Anishinaabe treaty signatories.

[12] Treaty 3 provided for the surrender to the Crown by the First Nations of the lands covered by the treaty, comprising approximately 55,000 square miles and including lands in the Rainy Lake and Rainy River area which are the subject of this action. In exchange, the Crown promised, among other things, to lay aside reserves for the benefit of the First Nations.

[13] The promised reserves were neither described nor set aside under the treaty. Pursuant to the Crown's reserve creation obligation in Treaty 3, Dawson and Pither were appointed by Order-in-Council dated July 8, 1874 ("1874 OIC"), to confer with the First Nations regarding the creation of the reserves. In 1875, Dawson provided a report dated December 31, 1874 on the proposed reserves to the Governor General in Council, including Reserve No. 1, which came to be known as the "Agency One Reserve". Reserve No. 1 was described as follows:

> At the foot of Rainy Lake, to be laid off as nearly as may be indicated on the plan. Two chains in depth along the shore of Rainy Lake and the bank of Rainy River, to be reserved for roads, right-of-way to lumbermen, booms, wharves, and other public purposes.
>
> This Indian reserve not to be for any particular chief or Band, but for the Saulteuse tribe, generally, and for the purpose of maintaining thereon an Indian Agency generally with the necessary grounds and buildings.

[14] On February 27, 1875, Canada provisionally approved the Treaty 3 reserves, including the Agency One Reserve, by Order-in-Council ("1875 OIC"). The Agency One Reserve was surveyed for Canada by E.C. Caddy ("Caddy"), a Dominion Land Surveyor, between August 3 and 9, 1875. The Agency One Reserve was originally approximately 170 acres.

[15] Pither was appointed as the local Indian Agent and agency buildings were constructed on the southernmost tip of the reserve, adjacent to where Rainy Lake flows into Rainy River. These lands became known as "Pither's Point". The Agency One Reserve was used by the First Nations as an agency reserve only until approximately 1882.

[16] C.C. Forneri ("Forneri"), also a Dominion Land Surveyor, was employed by Canada to survey the Township of McIrvine and the Rainy River reserves. He began this work in September

1875 and completed it in March 1876. The Township of McIrvine, later incorporated into the Town, was established in 1891. It was located adjacent to, and west of the Agency One Reserve.

[17] Forneri's Plan of Township of McIrvine, No. 5 S. Range (the "Forneri Plan"), indicates that it was surveyed by Forneri on October 15, 1875 and that the plan was approved and confirmed by the Dominion Lands Office Surveyor General on August 18, 1876. The Forneri Plan appears to have roads and road allowances running through the Agency One Reserve lands. On March 25, 1886, Ontario passed *The Rainy River Free Grants and Homesteads Act, 1886.* This act "adopted and legalized" townships that had been surveyed in the Rainy River District.

[18] At the time Treaty 3 was signed, and the Agency One Reserve set aside, Canada and Ontario were embroiled in a dispute as to the location of Ontario's western boundary. Canada asserted that Ontario's western boundary was east of Rainy Lake and that the lands in issue in this action were outside of Ontario and within the Northwest Territories. The dispute was resolved by the *Boundary Award* decision of the Judicial Committee of the Privy Council ("JCPC"), dated August 11, 1884 and the *Canada (Ontario Boundary) Act*, 1889, 52-53 Vict., c. 28 (U.K.). This legislation confirmed that Ontario's boundaries were, and had been since 1867, north and west of Rainy Lake and Rainy River. The new boundary encompassed within Ontario a large tract of Treaty 3 lands which had been previously surrendered by the First Nations, as well as reserves which had been set aside by Canada pursuant to Treaty 3.

[19] Ontario and Canada each claimed a beneficial interest in the lands surrendered in Treaty 3. The dispute went to the JCPC for resolution. In 1888, the JCPC held, in *St. Catherine's Milling and Lumber Company v. The Queen*, (1888) 14 App. Cas. 46 ("*St. Catherine's Milling"*), that upon

the signing of Treaty 3, s. 109 of the *Constitution Act, 1867* operated to vest in Ontario the entire beneficial interest of the Crown with respect to all lands within Ontario's boundaries, as surrendered to the Crown in Treaty 3.

[20] Following *St. Catherines Milling*, uncertainty remained as to the status of the lands within Ontario that Canada had already set aside as reserves pursuant to Treaty 3. Canada and Ontario entered negotiations in which Canada sought Ontario's concurrence regarding the Treaty 3 lands that had been surveyed by Canada for the establishment of Indian Reserves, including the Agency One Reserve. Ontario sought information concerning the location and extent of the intended reserves.

[21] These negotiations led to the enactment of reciprocal federal-provincial legislation in 1891: *An Act for the Settlement of Questions between the governments of Canada and Ontario respecting Indian Lands,* S.O. 1891, c. 3 (54 Vic. c.3) and *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.C. 1891 c. 5 (54-55 Vic., c.5) (collectively the "1891 Legislation"). The 1891 Legislation authorized the making of a formal agreement with respect to reserves already selected and set aside by Canada, within Ontario, prior to the settlement of the Ontario boundary issue.

[22] The 1891 Legislation was followed by a statutory agreement between Ontario and Canada dated April 16, 1894, entitled "Agreement Re Indian Lands" (the "1894 Agreement"). The relevant portions of the 1894 Agreement are as follows:

> 2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the Government of Ontario as to the reserves heretofore laid out in the territory, with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course.

> 3. That in case the government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in the case other reserves in the said territory are to be selected, a joint commission or joint commissions shall be appointed by the Governments of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed reserves.
>
> 6. That any future treaties with the Indians in respect of territory in Ontario to which they have not hitherto surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.

[23] It is not in dispute that no such joint commission was ever established.

[24] On July 7, 1902, during the appeal to the JCPC of *Ontario Mining Company v. Seybold*, [1902] J.C.J. No. 2, ("*Seybold*"), legal counsel for Canada and Ontario entered into an agreement (the "1902 Agreement" or the "Blake-Newcombe Agreement"). The 1902 Agreement was intended to address on a broader, "go-forward basis", the issue before the JCPC in *Seybold* – which emanation of the Crown had the authority to grant an interest in "Treaty Indian Reserves in Ontario (including those in the territory covered by [Treaty 3] which are or shall be duly established pursuant to the [1894 Agreement]) and which have been or shall be duly surrendered by the Indians to sell or lease for their benefit".

[25] The Blake-Newcombe Agreement includes the following terms:

> 1. Ontario agrees to confirm the titles heretofore made by the Dominion;
>
> 2. The Dominion shall have full power and authority to sell or lease and convey title in fee simple or for any less estate; and
>
> 3. Nothing is hereby conceded by either party with regard to the constitutional or legal rights of the Dominion or Ontario as to the sale or title to Indian Reserves or precious metals or as to any of the contentions submitted by the cases of either Government herein but it is intended that as a matter of policy and convenience the Reserves may be administered as hereinbefore agreed.

[26] In *Seybold*, at para. 12, the JCPC expressly acknowledged and endorsed the principles set out in the Blake-Newcombe Agreement:

> By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians". But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province…let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfill the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint actions of the two Governments.

[27] The Town was incorporated in 1903. The Town was and is located adjacent to the Agency One Reserve. Shortly after the Town was incorporated, it began lobbying both Canada and Ontario for land out of the Agency One Reserve for a municipal park. In general terms, the initial response of both Canada and Ontario was that until the matter of the reserves had been resolved nothing could be done.

[28] Canada's position in response to the Town's request is reflected in correspondence from the then Deputy Superintendent General of Indian Affairs Canada, Frank Pedley ("Pedley"), to A.E. Dyment, Member of Parliament, dated March 8, 1904:

> In reply, I would say that Pither's Point is what is known as Indian Reserve No. [1], containing 170 acres and was set aside under Treaty No. 3, made with the Indians in 1873…it was the site for the Indian Agency and as a general Reserve for Indians when visiting the Agency.
>
> This and other reserves set aside under Treaty No. 3, located in what was formerly known as the disputed territory have not been confirmed as such by the Ontario Government, and the Department is, therefore, unable to deal therewith.

[29] In 1906, the Town applied to Frank Cochrane, Minister of Lands, Forests and Mines for Ontario ("Cochrane"), for land out of the Agency One Reserve for a park. Cochrane provided Ontario's position on the issue to the Town Mayor in correspondence dated October 25, 1906:

> …in reference to the application of the Town of Fort Frances for Pither's Point for park purposes…you will see that this point is in dispute between the Dominion and the Ontario Governments. We are endeavoring to arrange this dispute, but in the meantime, I regret that it will not be possible to do anything in this matter.

[30] On July 24, 1907, Cochrane pursued the issue in correspondence to Frank Oliver, Canada's Minister of the Interior ("Oliver"). Cochrane expressed Ontario's position in relation to reserve land in the Rainy River District generally, and in relation to the Agency One Reserve specifically:

> I have just returned from a trip to the Rainy River District where I have been hearing the views of the settlors as to what might be done to improve their position and surroundings. Among other things I found that people complained a good deal of the large areas of agricultural land that are locked up by Indian Reserves, and that the continuity of settlement is broken by these Reserves having no colonization roads through them.
>
> I am sure that you will agree with me that it is a pity to retard growth and prosperity of the settlement in that region by keeping these large areas locked up as Indian Reserve, especially as the Indians are few in number, and will never cultivate the land to any great extent.
>
> … I would be glad to know that I have your active sympathy in this matter, and that you will recommend to the Government of Canada the taking of surrenders of these Reserves, and opening them up for sale to actual settlers.
>
> At what is known as Pither's Point there is an area of which is considered suitable for Park purposes, and the Town of Fort Frances is very anxious to obtain a portion of this Reserve to be used for that purpose. Might I ask your attention to this matter with a view to your consenting to the Town getting what it may require for Park purposes.

[31] On July 26, 1907, having considered Cochrane's report on his trip to the Rainy River District, Ontario approved an Order-in-Council ("Ontario's 1907 OIC"), which stated the following:

> … the Committee of Council advise that the consent of the Province of Ontario be given to the surrender to the Dominion of Canada, and the sale to actual settlers of the following Indian Reserves in the District of Rainy River pending the settlement of the whole reserve question and without prejudice to any rights the Province may have in the matter; Reserve No. 1 at Pither's Point at outlet of Rainy Lake…

[32] Canada did not immediately seek a surrender of the Agency One Reserve lands. Canada's position is reflected in correspondence from Pedley to James Conmee, Member of Parliament, dated July 8, 1908, in reference to the Town's request for a portion of the Agency One Reserve for park purposes:

> … I have to inform you that the matter cannot be dealt with at once and solely by this Department. As you are aware, the reserve was set aside under Treaty No. 3, and the reserves located for the Indians of this treaty have not been confirmed by the Government of the Province of Ontario. As a preliminary step Ontario should confirm the location of the reserve in question, after which this department could take necessary action.
>
> I may say that this Department is anxious to further the accomplishment of the purpose which the Town of Fort Frances has in view, subject, of course, to safeguarding the Indian interest in this land. I feel free to say that if the Government of the Province of Ontario would pass an Order-in-Council confirming the Reserve No. 1 at Pither's Point this Department will endeavour to obtain from the Indian owners of the property a surrender to the Crown in order that the necessary lands may be sold as a park for the Town of Fort Frances at a fair price to be fixed.

[33] Pedley's position on behalf of Canada was apparently communicated to the Town's Mayor and then to Ontario, resulting in Aubrey White ("White"), of the Ontario Department of Lands, Forests and Mines, responding to Pedley by letter dated July 11, 1908:

> Mr. Williams, the Mayor of Fort Frances, called on me today in connection with the Pither's Point Reserve, which the Town of Fort Frances is anxious to get for park purposes. He said that before your department could deal with the matter, we must pass an Order in Council vesting the Reserve in the Dominion Government for the Indians. I was under the impression we had already done this. I am sending you herewith copy of an Order in Council passed on the 26th July, 1907, in which we gave consent to the surrender to the Dominion Government by the Indians of all the Reserve on the Rainy River to be opened for sale to actual settlers. I am also sending you copy of a letter dated the 24th July, 1907, addressed by my Minister [Cochrane]

> to the Honourable Frank Oliver, the last paragraph of which deals with Pither's Point. Why I do not know, but the fact remains that Mr. Oliver never answered the letter of my Minister.
>
> We are very anxious to assist the Town in getting this Park, and if you will say exactly what form you require the Order in Council to be in in order to enable you to deal with the matter, I will bring it before the Minister and get the necessary order passed, as he is only too anxious to do what the Town asks. Please let me hear from you as soon as possible, as I am going on my holidays in a few days.

[34] On July 13, 1908, Pedley responded to White's July 11, 1908 letter and provided the following draft wording for an Ontario Order-in-Council:

> I think the wording of the implementing clause in the Order-in-Council should be somewhat as follows:
>
> "That the Committee of Council advise that the consent of the Province of Ontario be given to the surrender to the Dominion of Canada to dispose of that portion of Reserve No. 1 at Pither's Point required for park purposes by the Town of Fort Frances pending the settlement of the whole reserve question without prejudice to any right the Province may have in the matter."
>
> So soon as this Department has received your Order-in-Council it will place the matter in the hands of its Agent with a view to obtaining a surrender from the Indians which is a necessary preliminary procedure.

[35] On September 4, 1908, Ontario approved the following Order in Council (the "1908 OIC"):

> Upon consideration of the memorandum of the Deputy Minister of Lands and Forests dated 1st September 1908 and upon the recommendation of the Honourable Minister of Lands and Forests and Mines the Committee of Council advise that consent be given to the government of Canada granting such part of Pither's Point Indian Reserve as may be asked for by the Town of Fort Frances for Park purposes.

[36] The parties to this motion agree that the 1908 OIC has never been revoked.

[37] Also on September 4, 1908, Pedley wrote to the Town's Mayor advising him that as soon as he received a copy of the 1908 OIC, Canada would "take immediate steps to obtain a surrender

from the Indians." Pedley noted that "the question of the amount to be paid for this land has not yet been decided but that is a matter which can be adjusted later on."

[38] On October 1, 1908, the predecessors of the First Nations surrendered approximately 114 acres of the Agency One Reserve (the "1908 Surrender") on the following terms:

> To Have and To Hold unto His Majesty the King… in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.
>
> And upon the further condition that all moneys received from the sale thereof shall… be placed to our credit and interest thereon paid to us, in the usual way.
>
> Reserving, nevertheless, the right to the various Bands now entitled to hold a general meeting on the lands hereby surrendered, to hold any future gatherings thereon.

[39] On October 12, 1908, Indian Agent for the Fort Frances area, John Wright ("Wright"), provided the signed 1908 Surrender to the Secretary of the Department of Indian Affairs and advised as follows:

> As I am not aware of what portion, if any, the Department proposes giving to the town for park purpose and understanding that they have applied for the whole reserve, I would suggest that only the sixty odd acres applied for by them some years ago be given, and the balance of the land excepting that on the south side of the railway, be subdivided into quarter acre lots and sold, for which I think there would be a ready sale at good prices, if sold say next summer. The land on the south side of the railway consists of a grove, and should be kept as it is, as a camping place for the Indians and general public.

[40] Canada accepted the 1908 Surrender by Order-in-Council dated November 14, 1908.

[41] On November 26, 1908, Pedley wrote to Wright advising him that the 1908 Surrender had been accepted and that the Department of Indian Affairs was now in a position to "make disposition of part thereof to [the Town]". Pedley asked Wright "to report as early as possible what price per

acre you consider the [Town] should pay for this land, and what portion should be granted". Wright replied on December 18, 1908, as follows:

> … relative to the disposition of the Agency Reserve at Pither's Point, I have the honour to state that, as I understand this land was set aside for an agency and general camping reserve for the Rainy Lake Indians and the Ontario Government has waived any rights they may have to the [Town], for the purpose of it being set aside for a park for the [Town], my views are that the Department grant the [Town] the sixty odd acres they applied for two years ago, provided they give the Department suitable land in the town for agency buildings exempt from taxation, and that the balance of the land, except that on the south side of the railway tracks, be subdivided in suburban lots and sold, for the benefit of the Indians interested. The land on the south side of the railway consists of a beautiful grove, and should be kept as it is, as a camping place for the Indians and general public, and could either be given to the [Town], or held as it is, probably it would be better to let the [Town] have it.

[42] On January 5, 1909, J.D. McLean, Secretary, Department of Indian Affairs ("McLean") replied to Wright as follows:

> With reference to your suggestion that the said land be given to the Town, for the reasons stated in your letter I have to say that this Department has the same control over the Agency Indian Reserve that it has over any other Indian Reserve in its neighborhood. It does not see its way to make a gift of any portion of the said land…you should make a careful valuation of the land desired by the [Town] and of the lot or lots the [Town] desires to transfer to the Department.

[43] On June 25, 1909, McLean wrote to W.H. Elliot, Town Clerk, and advised as follows:

> I am directed to request the [Town] to pay to this Department the value of the land required in the Fort Frances Indian Agency Reserve before permission can be granted to enter upon and improve the said land.

[44] The Town Mayor responded to McLean on August 2, 1909:

> Re your letter of June 25 in regard to Pither's Point Park site, would say that up to the date of this letter, your Department has not informed the Town as to any specific value or terms on which the land asked for would be granted the [Town]. We will be pleased to receive this information at your earliest convenience.
>
> To refresh your memory I might state that the last request of the Town was for the balance of Pither's Point Reserve not already granted for Indian School or Railroad

> purposes, about 100 acres. This land to be held and used for Park purposes and the Indians still to have the right to hold meetings thereon if the Agent considered it desirable they should do so, also the Town was to furnish a suitable site in the Town for the erection of Agency buildings. We considered that as the Town would only have the land for Park purposes, would have to stand all expense of improving this wild land, would only hold their right while using it for park purposes and the Indians still retaining the right to use it for the purpose for which it was originally set aside, we consider we should only be asked to pay a nominal amount.
>
> I would further call your attention to the fact that the Ontario Government only surrendered any rights they might have in the land on the understanding that it was to be granted to the [Town] for park purposes.

[45] On December 17, 1909, Pedley wrote to Oliver, reminding him of the background facts and expressing his view of the situation:

> You will remember that the [Town] has been urging the Department to set aside a certain area of the land known as Pither's Point which is held as an Indian Reserve for the use of the Town of a Park. Desiring as far as possible to meet the wishes of the [Town] the department obtained from the Indians a Surrender pro forma of the land to be disposed of for their benefit. The Ontario Government on the 4th of September 1908 gave consent that the Dominion Government should grant a portion of Pither's Point for Park purposes. This was necessary as the Ontario Government has not yet confirmed the title of the Reserves in Treaty No. 3. The [Town] wishes to obtain the use of this land free of cost and has offered the Department a free site for an Agency residence and office within the Town, with exemption from taxation, and is willing to accord to the Indians their old camping privileges on the Park Reserve…after carefully considering this question I think it would be well not to complicate the matter by accepting from the [Town] a free site with exemption from taxation, but to grant them a lease for a long term at a fixed rate.

[46] Canada provided its position to the Town by way of correspondence dated January 25, 1910, from the Assistant Secretary, Department of Indian Affairs to the Town Clerk:

> With reference to the desire expressed by [the Town] to acquire a portion of Pither's Point for park purposes, I beg to say that after due consideration as to the value of the land, and the necessity of conserving the Interests of the Indians, the Department has decided to place the value at $750.00 an acre. The full price of the 60 acres required approximately for the Park is therefore $45,000.00. In the event of the town leasing the land the annual rent would be $1350.00, which represents 3% on $45,000.00, the amount which the Indians [illegible] for the purchase price as a government deposit.

[47] On May 18, 1910, the Town entered into a lease with Canada for 60 acres of the surrendered Agency One Reserve "to be used for park purposes only for and during the term of 99 years" at an annual rent of $1.00 per acre (the "1910 Lease"). This is the "1910 Park" referred to in para. 2 hereof. In the 1910 Lease, Canada and the Town expressly agreed that "the various Bands of Indians now or hereafter entitled to hold meetings and camp on Pither's point shall have the right during the continuance of this lease to camp and sell wares, free of charge, within the limits of the land hereby leased." Pursuant to the 1910 Lease, the Town established a park (the "1910 Park"). The expiry date for the 1910 Lease was April 30, 2009.

[48] The 1910 Lease was renegotiated and on September 26, 1927, Canada and the Town signed a second lease (the "1927 Lease") reducing the acreage of the park to approximately 36.4 acres, this being the present day "Point Park" referred to in para. 2 hereof. The expiry date for the 1927 Lease remained at April 30, 2009. The balance of the acreage from the 1910 Park was leased to the local golf course.

[49] By internal memo dated July 11, 1910, George Yates, Minister's Secretary, Ontario Department of Lands, Forests and Mines, wrote to White regarding the terms of the 1910 Lease:

> The Indian Department is charging a dollar an acre a year rental. This province relinquished its rights to this land on the understanding that a grant would be made to the [Town], and the Minister does not propose that the Department of Indian Affairs should derive a revenue from land which was in dispute between the Dominion and this Province. We therefore wishes you to draft another Order-in-Council revoking the previous Order which embodies the consent of the Province. We also wishes you to write Ottawa setting forth our reasons for doing so.

[50] On July 13, 1910, White wrote to Pedley as follows:

> The Department is in receipt of a copy of the lease granted by your Department to the [Town] for a part of Pither's Point Indian Reserve, for park purposes. The lease dated the 19th of May, 1910, and the annual rent is $60. Per year, $1. per acre.

> The Minister directs me to remind you that when the consent of this Government was given by Order-in-Council of the 4th of September 1908, to your Department, granting to the Town that part of the Reserve for park purposes, it was on the expectation that the price or rental, if leased, would be merely nominal, but your Department is charging a pretty heavy rental, viz.; - $1. per acre per annum.
>
> The Minister is disposed to recommend the rescinding of the Order-in-Council of the 4th of September, 1908, but before doing so I am writing to know why the rent was made so high, and if you cannot see your way to making it merely nominal.

[51] On January 31, 1912, White followed up on this by letter to McLean, repeating the contents of his July 13, 1910 letter to Pedley and noting that no substantive reply had yet been received from Canada.

[52] In 1915, Ontario passed *An Act to confirm the title of the Government of Canada to certain lands and Indian Lands,* S.O. 1915, c. 12 (the "1915 Act"), pursuant to which all Treaty 3 reserves, but for Indian Reserve 24 C, were transferred from Ontario to Canada. The 1915 Act provides as follows:

> Whereas under a treaty known as "The Northwest Angle Treaty, No. 3" certain Indians surrendered to Her late Majesty Queen Victoria all their rights, titles and privileges to the lands therein defined and described, out of which reserves were to be selected and laid aside for the benefit of the said Indians; and whereas after the true boundaries of Ontario had been ascertained and declared it was found that certain of the reserves selected and laid aside were within the said boundaries; and whereas in pursuance of the terms of an agreement dated 16th April 1894, between the Government of Canada and the Government of Ontario, the Government of Ontario has made full enquiry as to the said reserves so laid out, and it has been decided to acquiesce in the location and extent thereof with the exception of that known as Indian Reserve 24C, in the Quetico Forest Reserve, and subject to the modifications and additional stipulations of said agreement hereinafter set forth; and whereas the government of Canada has deposited in the Department of Lands, Forests and Mines of Ontario plans of said reserves:
>
> Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:
>
> 1. The said reserves as shown on said plans, with the exception of Indian Reserve 24C, in the Quetico Forest Reserve, are hereby transferred to the Government of

> Canada, whose title thereto is hereby confirmed, and subject to all trusts, conditions and qualifications now existing respecting lands held in trust by the Government of Canada for Indians, and subject to the provisions of the following sections.
>
> 2. ….
>
> 3. The area of the said reserves so transferred has been computed and settled at 20, 672 acres, and payment therefore at $1 per acre, being the sum of $20,672, is to be made by the Government of Canada to the Government of Ontario.

[53] Pursuant to an Ontario MNR Indian Land File document entitled "Indian Reserves in Treaty No. 3 Within the Former Limits of the Province of Ontario", on which the calculation and payment noted above were based, the total acreage of reserves in Ontario was determined to be 330,589 acres, including the Agency One Reserve at 170 acres.

[54] In 1916, Ontario Land Surveyor D.J. Gillon ("Gillon") surveyed 26 subdivision lots within the area of the Agency One Reserve surrendered pursuant to the 1908 Surrender (the "Idylwild Subdivision"). Gillon's *Plan of Subdivision of Part of Indian Reserve No. 1*, SM88 (the "Gillon Plan" or "SM88"), dated November 24, 1916, also identified roads within the area surveyed, including The Avenue (now Idylwild Drive), School Road, Mill Road, Lake Road and Rainy River Colonization Road. In 1920, Canada sold the 26 subdivision lots located within the Idylwild Subdivision. The parties are not challenging the validity of the sale of this land.

[55] In 1924, Canada and Ontario passed reciprocal legislation entitled *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c.48 and S.O. 1924, c.15 (the "1924 Legislation").

[56] The final paragraph of the preamble to the 1924 Legislation states that the governments of Canada and Ontario entered into the 1924 Legislation "in order to settle all outstanding questions

relating to Indian Reserves in the Province of Ontario." Section 9 of the 1924 Legislation provides as follows:

> Every sale, lease or other disposition heretofore made…under the direction of the Government of Canada of lands which were at the time of such sale, lease or other disposition included in any Indian Reserve in Ontario, is hereby confirmed…

[57] It is not in dispute that the Town paid the rent required by the 1910 Lease and 1927 Lease. It is also not in dispute that the Town, during the terms of the leases and upon receipt of requests from third parties to use the lands for purposes other than a park, submitted those requests to Canada for approval, and Canada, in turn, sought the consent of the First Nations. Examples of such requests include the following:

1. December 16, 1925: The Town Clerk wrote to the Superintendent General of Indian Affairs advising that an application had been made to the Town, "the Lessee of Pither's Point Park", by a party seeking to lease approximately four acres of the Park for the purpose of building a summer tourist lodge. The Town sought approval for a sublease and stated that the Town "assures you that any sub-lease… entered into will conform in every respect with the requirements of the lease made between the Department of Indian Affairs and the Town of Fort Frances, dated May 18, 1910;

2. 1927: 23.6 acres of the 60-acre 1910 Park lands were leased to a private club for a golf course. The Town signed a new lease (the "1927 Lease") for the remainder of the original 60 acres without objecting to the removal of the 23.6 acres;

3. 1930: The Town sought and received approval from the Department of Indian Affairs for permission "to cross Pither's Point Park" with two 12 inch watermains;

4. 1944: The Town sought and received approval from the Department of Indian Affairs to permit a local radio station to erect two wooden poles for antennae in the park;

5. 1954: The Ontario Minnesota Pulp and Paper Company sought the Town's permission to use the Park to dump pulpwood. Approval was sought and received from the Department of Indian Affairs, with the consent of the First Nations, restricted to the months of December to May so as not to interfere with the First Nations use of the land for camping purposes;

6. 1960: The Town received an application from a franchisee to sublease a portion of the Park property to build a Dairy Queen. In its letter to Canada seeking approval, the Town acknowledged that the "use of the property… is restricted to park purposes, [the Town]

respectfully solicit the approval of [Indian Affairs] to permit rental of the above property. Canada sought a Band Council Resolution before agreeing to the sublease and the Town agreed to turn the proceeds of the rental over to Indian Affairs by means of an increase in annual rent;

7. 1963: The Town applied to Indian affairs for an easement to extend their water distribution system into Point Park;

8. 1973: In a meeting between the Town council and representatives of the First Nations to discuss the First Nations proposal for a new lease, the Town proposed purchasing the Pither's Point. The First Nations declined and the Town Mayor explained that "if the Bands did not wish to sell, the Council was not interested in breaking the lease".

[58] On April 8, 1984, the Town passed a resolution to petition Canada and Ontario to "acquire Pither's point Park for historical purposes" and the Town agreed to maintain such park in perpetuity. By correspondence dated April 30, 1984, a copy of this resolution was sent to J.C. Munro, federal Minister of Indian Affairs, with copies to the Ontario Ministers of Northern Affairs and Natural Resources. On October 10, 1984, the Town reiterated this proposal to Canada and Ontario.

[59] On November 23, 1984, David Crombie, Minister of Indian Affairs, responded to the Town's proposal and advised the Town that Canada could not consider the proposal because it was "unacceptable to the four Agency Reserve No. 1 Bands".

[60] When the 1927 Lease expired on April 30, 2009, Canada advised the Town that it did not intend to renew the lease with the Town. The Town was further informed that Canada intended to return the Agency One Reserve lands to the First Nations. The Town obtained a preservation order from the court on April 27, 2010 (the "Preservation Order"), which requires that the parties maintain the *status quo* pending a determination of the Town's counterclaim. As noted previously, on March 13, 2018, the First Nations settled their claim as against Canada and Ontario.

THE ISSUES TO BE DETERMINED

[61] The following issues are to be determined by the Court on these motions:

1. Is this an appropriate matter for summary judgment?
2. Was the Agency One Reserve a properly created Reserve?
3. Did Ontario's 1908 OIC convey the USL, or portions thereof, to the Town by way of fee simple?
4. Did Ontario's 1908 OIC dedicate some or all the USL to the Town by way of a public trust?
5. Have the Roads within the USL and/or the Point Park been dedicated for public use either by statute or at common law?
6. If it is found that the Town is not the legal or beneficial owner of the USL, or portions thereof, is the Town entitled to damages, as against Canada and Ontario, for breach of promise or agreement and/or for unjust enrichment in respect of capital improvements undertaken by the Town for the Point Park?
7. Are the Town's claims barred by the *Real Property Limitations Act,* the equitable doctrine of laches, *res judicata* or estoppel?

THE POSITIONS OF THE PARTIES

The Town

[62] The Town submits that the historical record is clear that when the Agency One Reserve was provisionally approved and surveyed in 1875, Canada was under the mistaken assumption that the lands comprising this reserve were outside Ontario. The Town submits that the JCPC's *Boundary Award* decision, and the *Canada (Ontario Boundary) Act*, 1889, establish that the Agency One Reserve lands were in fact within Ontario. The Town contends that *St. Catherines Milling* confirmed that the entire beneficial interest of the Crown in these lands vested in Ontario pursuant to s. 109 of the *Constitution Act, 1867*, upon surrender by the First Nations in 1873 pursuant to Treaty 3.

[63] The Town submits that the 1891 Legislation and the 1894 Agreement expressly required Ontario's acquiescence to both the location and extent of the reserves set aside within Ontario, pursuant to Treaty 3. The Town contends that Ontario never acquiesced, authorized, or consented to the setting aside of the Agency One Reserve. The Town submits that Ontario, in accordance with the 1894 Agreement, instead and for "good reason", chose "a different course", when, in the 1908 OIC, Ontario consented to Canada "granting such part of Pither's Point Indian Reserve as may be asked for by the Town".

[64] The Town argues that because Ontario never acquiesced to the creation of the Agency One Reserve as required by the 1894 Agreement, the effect of the 1908 Surrender was to vest the 1908 surrendered lands entirely in Ontario and extinguish any underlying interest the First Nations may have had in the 1908 surrendered lands.

[65] The Town submits that the Supreme Court of Canada, in *Smith v. The Queen,* [1983] 3 C.N.L.R. 161, affirmed the JCPC's decisions in *St. Catherines* and *Seybold.* In *Smith*, the federal Crown brought an action on behalf of the Red Bank Band of Indians for possession of certain lands occupied by the appellant non-Indian and located in a surrendered portion of a reserve. The reserve had been set aside prior to Confederation and non-Indian occupation of the lands in issue began in 1838. In 1895, a portion of the reserve, including the lands in issue, was surrendered to the Crown. The surrender consisted of a release of the lands, a provision that the Crown hold the land in trust for sale, and a condition that the proceeds be held to the credit of the band. At the time the action was commenced, the surrendered lands had not been sold and were occupied by squatters.

[66] The Supreme Court of Canada was unanimous in dismissing Canada's action in *Smith*. The Town submits that the Court's decision in *Smith* was based on three legal principles:

1. Since Confederation, pursuant to s. 109 of the *Constitution Act*, *1867*, the province has had title and beneficial interest in the lands in issue, subject to the burden of the Indian interest.

2. Upon an absolute surrender, the Indian interest is extinguished, thus restoring complete beneficial ownership in the province.

3. Upon surrender by the band the lands ceased to be under the legislative authority of the federal Crown under s. 91(24) of the *Constitution Act, 1867*, even though the lands remained unsold.

[67] The Town notes that, in *Smith,* the Court expressly observed that "the authority of [*St. Catherines Milling*] has never been challenged or indeed varied by interpretations and application".

[68] The Town submits that the principles enunciated in *St. Catherine's Milling* and *Smith* apply to the Agency One Reserve:

1. Since Confederation, Ontario has held title and the beneficial interest in the Agency One Reserve lands, burdened by the First Nations' interest.

2. As a result of the 1908 Surrender, the First Nations' interest was extinguished (not transferred to the federal Crown). The effect of the 1908 Surrender was therefore the restoration of complete beneficial ownership in Ontario.

3. Section 91(24) of the *Constitution Act, 1867*, does not provide the federal Crown with an interest in the USL.

[69] The Town submits that it follows, from *Smith*, that, as a result of the 1908 Surrender, Ontario held complete beneficial interest in the surrendered lands and had capacity to grant to the Town the portion of the USL the Town requested for park purposes, which Ontario in fact did pursuant to the express terms of the 1908 OIC.

[70] The Town submits that, from the date of its incorporation in 1903, it has consistently sought, from both Ontario and Canada, a grant of all or a portion of the 1908 surrendered lands for a park. The Town suggests that the historical record confirms that Ontario, as the owner of the land, supported and endorsed the Town's desire to have this land for a park. The Town contends that the 1908 OIC represents the finalization of Ontario's "full enquiry", pursuant to the 1894 Agreement, as to the reserves laid out within Ontario. Contrary to any suggested acquiescence within the meaning of the 1894 Agreement, the Town submits that pursuant to the 1908 OIC, Ontario, as owner of the lands following surrender, consented to the granting of the 1908 surrendered lands to the Town for park purposes. The Town suggests, in reference to the express terms of the 1894 Agreement, that the contents of the 1908 OIC represent "good reason… for a different course".

[71] The Town submits that the historical record establishes that Ontario understood and intended that the land requested by the Town for park purposes was to be granted, as in "given", or sold to the Town at a nominal price. The Town submits that the language of the Ontario 1908 OIC constrained what Canada could do with the land. The Town contends that any suggestion that the 1908 OIC permitted Canada to deal with the lands requested by the Town for park purposes in any manner it chose ignores the express terms of the 1908 OIC, and the fact that the land was Ontario's land.

[72] The Town submits that Canada's requirement that the Town lease 60 acres of the surrendered Agency One Reserve lands for a fixed 99-year term at $1.00 per acre was expressly contrary to Ontario's conditional consent as owner of the lands, and the terms of the 1908 OIC. The Town suggests that the unqualified use of the word "grant" in the 1908 OIC denotes Ontario's

intention that the land be given to the Town, as requested, for park purposes. The Town contends that this interpretation is supported by the historical contemporaneous communications between the Town, Ontario and Canada.

[73] The Town submits that Ontario, by denying the plain and ordinary meaning of the 1908 OIC, seeks to unlawfully derogate from its grant of the USL to the Town for park purposes. The Town contends that Ontario's displeasure and complaints, including threatening to revoke the 1908 OIC upon learning that Canada had leased the land to the Town, confirms Ontario's understanding and intention that the lands were to have been given to the Town for park purposes.

[74] The Town submits that it is not in issue that the 1908 OIC is extant and remains in full force and effect. The Town suggests that, in the event that the defendants are correct and the 1908 OIC gave Canada the authority to lease the lands to the Town for park purposes, Canada remains bound by its terms and must continue to lease Point Park to the Town so long as the 1908 OIC remains extant.

[75] The Town submits that its claim to all roads within the 1908 surrendered lands (Idylwild Drive, School Road, Mill Road, Lake Road, Calder Drive and Rainy River Colonization Road – collectively the "Roads") is based on the doctrine of public dedication and the provisions of the *Municipal Act*, 2001, S.O. 2001, c. 25.

[76] The Town submits that the Roads are all identified on the 1876 Forneri Plan and on the 1916 Gillon Plan, the registered plans of subdivision. The Town submits that the Roads belong to it, pursuant to, among other things, ss. 26(1) and (5) of the *Municipal Act*, as they are either road allowances, highways, streets or lanes shown on a registered plan of subdivision and/or pursuant

to the provisions of the *Rainy River Free Grants and Homesteads Act, 1886*, S.O. 49 vict. C. 7, s.2.

[77] The Town further submits that the Roads identified and laid out on these two plans were dedicated to, and accepted by, the public. As a result, the Town holds the roads in trust for the general use of the public, according to the Town. The Town submits that there have never been any legislative steps taken to alter, amend, or eliminate the public's right to continue to use the Roads. The Town, should its claim to ownership of the USL, the 1910 Park, or the Point Park fail, maintains a claim to the Roads as trustee of the Roads for the general use and enjoyment of the public.

[78] The Town's alternative claim for a declaration that it or its citizens hold a public interest in the USL, the 1910 Park or the Point Park is based on the doctrine of public dedication. The Town submits that, where dedication of a use of land to the public is claimed, the onus is on the party to prove the following:

1. That there was, on the part of the owner, an actual intention to dedicate; and
2. The intention was carried out, for example, by the subject land being thrown open to the public for that use, and that it has been so accepted by the public.

[79] The Town submits that, once these elements are satisfied, the public at large has an interest in the public land that cannot be withdrawn absent unequivocal expression from the dedicating legislative body.

[80] The Town submits that the historical communications between it, Ontario, and Canada evidence Ontario's intention to grant the Town the lands requested by it for park purposes. The Town submits that the 1908 OIC demonstrates the express legislative intention of Ontario to

publicly dedicate the 1910 Park and Point Park to the public to be used and enjoyed by the citizens of the Town as a park. The Town notes that the dedication of the lands to the public for park purposes was clearly accepted by the public, as the Point Park has been used and enjoyed by the Town's citizens and the First Nations since 1910.

[81] The Town submits that the 1908 OIC, an extant and binding legal instrument of Ontario, grants the land to the Town for park purposes. The Town contends that this public dedication cannot be withdrawn except by unequivocal legislative intervention. The Town suggests that unless and until that occurs, Point Park should continue to remain dedicated to the public for park purposes and held in trust by the Town for the use and enjoyment of the public.

[82] The Town submits that the ten-year limitation period set out in s. 4 of the *Real Property Limitations Act* (the "*RPLA*") does not apply to the Town's claim in respect of the USL because any rights the Town had in the USL, the 1910 Park or the Point Park as of the 1908 OIC remain because of the continued operation of the 1908 OIC, which all parties agree has never been revoked or rescinded. The Town submits that any suggestion that the Town "discovered" its claim to the USL, the 1910 Park and/or the Point Park as of the dates of the 1910 Lease and 1927 Lease ignores the fact that the 1908 OIC remains extant, valid and binding, according to the Town.

[83] The Town further submits that, in any event, s. 5 of the *RPLA* stipulates that possession of the property in question can operate to delay the start of the limitation period until the claimant loses possession. The Town submits that it is not in issue that it has had continued possession of the Point Park since 1910 and 1927. As a result, the limitation period for the Town's action to

recover the park lands has not yet begun to run, as it remains in possession of the subject lands, according to the Town.

[84] The Town submits that the equitable doctrine of laches can only apply to the Town's claim for equitable relief for a declaration that the Point Park is held in trust for the benefit of the public as a result of public dedication. The Town notes that defences of laches and acquiescence do not apply to the Town's legal claim to ownership of or continued lease of the USL, the 1910 Park or the Point Park pursuant to the 1908 OIC.

[85] The Town contends, however, that laches cannot bar the Town's claim for public dedication because the Town could not have been aware that the First Nations, Canada and Ontario intended on removing the public's access to and use of the park until the start of the litigation. The Town suggests that there has been no acquiescence – its counterclaim was commenced as soon as it became aware that the opposing parties were attempting to deny the Town continued use of the park.

[86] The Town submits that the defendants' reliance on the doctrine of estoppel is misplaced because it requires, among other things, a defendant to establish detriment and reliance on a representation. The Town submits that the defendants are unable to point to any such detrimental reliance. The Town notes that estoppel does not apply to its claim for public dedication, nor to the claim for a continued lease in Point Park pursuant to the extant 1908 OIC.

The First Nations

[87] The First Nations submit that the Town's argument as to the status of the Agency One Reserve lands at the time of the 1908 Surrender can be distilled to the following points:

1. That the Agency One Reserve was never properly created, and the land which was set aside for the reserve was therefore "Ontario's land" to dispose of as it wished, pursuant to *St. Catherines Milling*, *Seybold* and *Smith*; or, in the alternative,

2. If the Agency One Reserve was properly created, upon surrender in 1908, the First Nations' interest in the surrendered lands was extinguished and the surrendered lands vested in Ontario to dispose of as it saw fit, pursuant to *Smith.*

[88] The First Nations submit that the issue of reserve creation is collateral to the salient issue in this case; that being the interpretation of the 1908 OIC within the prevailing historical context and consistent with the honour of the Crown. The First Nations submit that the wording of the 1908 OIC, considered within the historical record, compels a conclusion that the 1908 OIC did nothing more than provide Ontario's consent to Canada to deal with the Agency One Reserve lands anticipated to be surrendered pursuant to the 1908 Surrender.

[89] The First Nations submit that *St. Catherines Milling* created uncertainty about the status of lands within Ontario, which had previously been set aside as reserves by Canada pursuant to the obligations imposed by Treaty 3. The First Nations submit that the 1891 Legislation and the 1894 Agreement represent the joint, collaborative efforts of Canada and Ontario to resolve that uncertainty and the issue of how the two levels of government would address reserve lands set aside by Canada pursuant to Treaty 3 located in Ontario.

[90] The First Nations contend that Ontario, pursuant to the 1894 Agreement, acknowledged that Canada had set aside Treaty 3 reserves within Ontario and undertook to inquire into reserves laid out within Ontario's boundaries "with a view of [Ontario] acquiescing in the location and extent [of the reserves] unless some good reason presents itself for a different course." The First Nations further submit that Ontario never exercised its right, as provided for in the 1894

Agreement, to have a joint commission established to resolve disputes in the event Ontario was dissatisfied with the location and extent of reserves Canada had set aside.

[91] The First Nations submit that the 1894 Agreement created an ongoing process by which Ontario would confirm or acquiesce to the location of Treaty 3 reserves set aside within Ontario. The First Nations contend that the 1894 Agreement, however, did not address the issue of which emanation of the Crown had jurisdiction over Treaty 3 reserve lands after the reserve interest was surrendered and prior to Ontario's confirmation pursuant to the 1894 Agreement.

[92] The First Nations submit that this latter issue was resolved by the Blake-Newcombe Agreement, as observed by the JCPC in *Seybold*. The First Nations contend that the Blake-Newcombe Agreement applied to Treaty 3 reserves contemplated by the 1894 Agreement, and which "have been or shall be duly surrendered by the Indians to sell or lease for their benefit". The First Nations submit the Agency One Reserve falls squarely within the terms of the Blake-Newcombe Agreement, which provides as follows:

1. Ontario will "confirm the titles heretofore made by the Dominion";
2. Canada "shall have full power and authority to sell or lease and convey title in fee simple or for any less estate"; and
3. Neither Canada or Ontario concede any constitutional or legal rights in relation to the sale or title to Indian reserves – "it is intended that as a matter of policy and convenience the Reserves may be administered as hereinbefore agreed".

[93] The First Nations submit that *Seybold* and the Blake-Newcombe Agreement resolved the dispute as to whether Canada or Ontario had the authority to grant an interest in Treaty 3 reserve lands after the reserve interest had been surrendered. The First Nations contend that the Blake-Newcombe Agreement, recognized in *Seybold* to incorporate what is now known as the honour of

the Crown, stipulated that joint action of Ontario and Canada was required in the administration of surrendered Treaty 3 lands. The First Nations further suggest that, in *Seybold*, the JCPC recognized that Ontario, having benefitted from the surrender in Treaty 3, was bound by the honour of the Crown to confirm the reserves that Canada had set aside. The First Nations submit that the terms of the Blake-Newcombe Agreement were later incorporated into the reciprocal 1924 Legislation.

[94] The First Nations submit that the 1915 Act reflects a federal-provincial agreement as to the surplus acreage of Treaty 3 reserves that Canada had set aside in Ontario, and that it accounts for the full 170 acres of the Agency One Reserve. The First Nations submit that, pursuant to the 1915 Act, Ontario fully and finally released any interest it may have had in the Agency One Reserve lands and Canada acquired constitutional authority to administer the reserve lands, accept surrenders, and dispose of surrendered land.

[95] The First Nations submit that the purpose and intent of the foregoing agreements and reciprocal legislation was to facilitate federal-provincial cooperation in the administration of surrendered reserve lands within Ontario during the confirmation process, and to resolve the larger issue of Treaty 3 reserves having been set aside by Canada within Ontario. The First Nations contend that Treaty 3 was signed by Canada on behalf of the "Crown", and that Ontario, as an emanation of the Crown, was also bound by the promises made to the First Nations in Treaty 3. The First Nations submit that Ontario could not receive the benefits of Treaty 3 and ignore the obligations the Crown assumed, as observed by the JCPC in *Seybold.*

[96] The First Nations submit that the Town is erroneously relying on *St. Catherine's Milling*, *Seybold* and *Smith* in support of their submission that Canada had no authority to dispose of the USL after the 1908 Surrender because the lands became "Ontario's land" upon surrender. The First Nations submit that *St. Catherines Milling* and *Seybold* are distinguishable on the basis that they concerned federal-provincial disagreement over which order of government had authority to dispose of surrendered reserve lands. The First Nations submit that *Smith* is distinguishable on the basis that it concerned an absolute surrender of reserve land and on the basis that it is no longer good law.

[97] The First Nations contend that, in this case, the statutory agreements and reciprocal legislation stipulate which order of government had authority to dispose of the lands in question, making *St. Catherine's Milling* and *Seybold* inapplicable. The First Nations suggest that the federal and provincial Crowns recognized, from the JCPC's decisions in *St. Catherines Milling* and *Seybold*, that joint action was required to resolve the issue of surrendered Treaty 3 reserve land in Ontario and that the 1894 Agreement and the Blake-Newcombe Agreement were in direct response to that requirement.

[98] The First Nations submit that Ontario, as represented by Cochrane, in the years immediately preceding the 1908 OIC and 1908 Surrender, recognized the First Nations' interest in the Agency One Reserve lands and acknowledged the need for Ontario to "acquiesce" or "confirm" this and other reserves before Canada could seek a surrender so that the land could then be opened for settlement. The First Nations suggest that Ontario's efforts in this regard were consistent with the terms of the 1894 Agreement and resulted in Ontario's 1907 OIC.

[99] The First Nations note that Canada, as represented by Pedley, refrained from seeking a surrender immediately following the 1907 OIC expressly because he believed Ontario had not yet properly confirmed the Agency One Reserve or other Treaty 3 reserves. The First Nations submit that Pedley's request that Ontario confirm the location of the reserve in question, "as a preliminary step" prior to Canada seeking a surrender, is consistent with the terms of the 1894 Agreement. The First Nations further note that Pedley, in his July 8, 1908, correspondence to James Conmee, M.P., comments on the need to "[safeguard] the Indian interest in this land".

[100] The First Nations submit that the 1908 OIC, pursuant to which Ontario's "consent be given to the Government of Canada granting such part of Pither's Point Indian Reserve as may be asked for by the Town of Fort Frances for Park purposes", simply cannot, given the historical record, be interpreted as conveying a permanent, legal interest in the USL from Ontario to the Town, either by grant or by dedication to the public, as suggested by the Town.

[101] The First Nations submit that the plain and ordinary meaning of the text of the 1908 OIC does not support the suggestion that it is a grant of land by Ontario to the Town. The First Nations contend that the 1908 OIC did exactly what the plain reading of the text says – it provided Ontario's consent to Canada, which had, pursuant to the Blake-Newcombe Agreement, "full power and authority to sell or lease and convey in fee simple" surrendered reserve lands and "granting" a portion of the Agency One lands to the Town for park purposes.

[102] The First Nations submit that the use of the word "grant" in the 1908 OIC included the possibility of granting a leasehold interest, as opposed to the transfer of the permanent legal and beneficial interest sought by the Town. The First Nations submit that the terms "grant" and

"granting" encompass, in 1908 and currently, the transfer of any right or interest in property, including a leasehold interest. The First Nations contend that the term "grant" was not limited to the transfer of a freehold or permanent interest in land. It was understood at the time that one could "grant" a lease, according to the First Nations.

[103] The First Nations note that the 1907 OIC contained the phrase "sale to actual settlers" and that Pedley, in his July 13, 1908 letter to White, suggested that Ontario use the term "dispose of" in the operative OIC. The First Nations submit that the word "dispose", like the word "grant", is broader that the word "sale" and can include "lease" or "leasing". The First Nations suggest that Ontario's choice of the word "grant" in the 1908 OIC, as opposed to the previous use of the word "sale", indicates Ontario's understanding that Canada had the authority to dispose of the lands as it saw fit.

[104] The First Nations submit that, in any event, the 1908 OIC could not itself legally grant a permanent interest in the USL to the Town. The First Nations note that the 1908 OIC does not describe the parcel of land to be granted or the amount – only "such part of Pither's Point Indian Reserve as may be asked for" by the Town. The First Nations contend that this simply cannot be a valid, legal conveyance from Ontario of a permanent interest in land, as suggested by the Town.

[105] The First Nations submit that, in the event the 1908 OIC is found to be ambiguous, then this court must interpret the 1908 OIC to give effect to the honour of the Crown such that an interpretation that impairs the Aboriginal interest as minimally as possible must be preferred. The First Nations suggest that the law is now well established that both the federal and provincial

Crowns are bound by the honour of the Crown, treaty promises in general and Treaty 3 promises in particular.

[106] The First Nations contend that the Town's reliance on *St. Catherine's Milling* and *Smith* in support of their argument that the First Nations' interest in the surrendered lands "disappeared" upon surrender, and that the surrendered lands were therefore "freed from Indian claim", ignores more recent, binding authority applicable to the issues raised in this case. The First Nations submit that the 1908 OIC must be interpreted in a manner that is consistent with the fundamental principles of current Aboriginal law. The First Nations argue that the Town's suggested interpretation of the 1908 OIC – that Ontario unilaterally gave the USL to the Town – is contrary to the express terms of the 1908 Surrender and is wholly inconsistent with the honour of the Crown and modern Aboriginal law principles.

[107] In further defence of the Town's counterclaim, the First Nations submit that the Town had all the information necessary to advance its claims in 1910 when it signed the 1910 Lease, or at the latest, in 1927, when it signed the 1927 Lease. The First Nations rely on the *RPLA* and the doctrines of estoppel by convention and laches to bar the Town's claims. The First Nations adopt and endorse the submissions of Canada and Ontario on the application of these defences to the Town's counterclaim.

[108] The First Nations submit that the Town's alternative argument – that the USL, including the 1910 Park lands and the Roads were dedicated for public use – must be rejected. The First Nations submit that the test for public dedication of land, including roads, has three components:

1. The owner must intend to dedicate the land;
2. That intention must be carried out by an act of dedication; and

3. The public must accept the dedication.

[109] The First Nations submit that there is no evidence to support the assertion that Canada or Ontario intended to publicly dedicate the lands, and that the law is clear that such an intention cannot be inferred. The First Nations further submit that the evidence does not support the Town's submission that either Canada or Ontario intended for the Roads to be dedicated to public use. The First Nations submit that dedication of the Roads has not taken place, either by statute or by common law.

Canada

[110] Canada joins with the First Nations in submitting that the issue of whether the Agency One Reserve was validly created need not be addressed on this motion. Canada submits that this issue was decided in *Canada (Attorney General) v. Anishnabe of Wauzhusk Onigum Band*, [2002] O.T.C. 722, which confirmed both the creation of and the beneficiaries of the Agency One Reserve.

[111] Canada submits that the historical context of Treaty 3 lands and the Crown's Treaty 3 obligations are essential to a proper understanding of the 1894 Agreement, the Blake-Newcombe Agreement, the 1908 OIC, the 1908 Surrender and the authority of Canada to enter into the 1910 Lease with the Town.

[112] Canada submits that the resolution of the Canada/Ontario boundary dispute, formalized with the passage of the *Canada (Ontario Boundary) Act* in 1889, led to the negotiations which resulted in the 1891 Legislation authorizing the making of the 1894 Agreement to address the issue of reserves selected by Canada before the settlement of the boundary dispute. Canada contends that pursuant to the 1894 Agreement, Ontario confirmed it would inquire into Treaty 3 reserves

within Ontario with a view to acquiescing in the location and extent of the reserves "unless some good reason presents itself for a different course", in which case a joint commission would be established to settle any issues. The parties agree that a joint commission was never established.

[113] Canada submits that, while Ontario was engaged in the process of reviewing the Treaty 3 reserves set aside by Canada within Ontario as contemplated by the 1894 Agreement, the federal and provincial Crowns entered into the Blake-Newcombe Agreement. Canada submits that, pursuant to the Blake-Newcombe Agreement, the federal and provincial Crowns agreed that the federal Crown had "full power and authority to sell, lease, and convey in fee simple or for any lesser estate" any Treaty 3 reserve lands, including the Agency One Reserve lands, once surrendered by the Indians.

[114] Canada submits that it was against this historical backdrop that the following occurred:

1. The Town and Ontario began lobbying for the Town to have the Agency One Reserve, or part of it, for a park;
2. Ontario passed the 1908 OIC;
3. The First Nations surrendered a portion of the Agency One reserve lands in 1908; and
4. Canada leased a portion of the surrendered lands to the Town in 1910.

[115] Canada submits that, given the terms of the 1902 Agreement, Ontario's consent to the 1910 Lease was not strictly required, but that it was obtained via the 1908 OIC out of an abundance of caution.

[116] Canada suggests that the Blake-Newcombe Agreement, the 1908 OIC and the 1908 Surrender provide Canada with full authority to enter into the 1910 Lease with the Town. Canada

submits that the reciprocal 1924 Legislation retroactively confirmed leases of reserve land by the federal Crown and resolved any remaining doubt regarding the validity of the 1910 Lease.

[117] Canada also joins with the First Nations in submitting that the Town's reliance on *Smith* in support of their submission that the legal and beneficial ownership of the surrendered lands reverted to Ontario upon the 1908 Surrender, such that Canada lacked authority to lease the land to the Town, is misplaced. Canada submits that this reasoning overlooks subsequent Supreme Court of Canada authority in relation to the Crown's obligations with respect to Aboriginal reserve land in general and surrendered reserve land in particular.

[118] Canada submits that, following *Smith*, the Supreme Court has confirmed in numerous decisions that the "Crown", be it federal or provincial, is subject to a fiduciary duty, required to act in a manner consistent with the honour of the Crown, and must minimally impair the First Nations interest in their lands whenever dealing with Aboriginal lands, not just surrendered reserve lands. Canada argues that to interpret the 1908 OIC as a unilateral transfer of title from Ontario to the Town is inconsistent with modern jurisprudence concerning Aboriginal land.

[119] Canada contends that the events leading to the passage of the 1908 OIC refute the Town's argument that the provincial Crown had somehow undertaken to convey a titled interest in the USL or the 1910 Park to the Town. Canada submits that the record for the period preceding the 1908 OIC clearly establishes that it was passed at Canada's request for the sole purpose of resolving any lingering jurisdictional impediment to Canada's authority to deal with the lands sought by the Town and anticipated to be surrendered by the First Nations. Canada submits that this court's interpretation of the 1908 OIC must consider the Crown's fiduciary duties towards the First

Nations. Canada contends that neither Canada nor Ontario intended to ignore the Crown's fiduciary obligations and that the proper interpretation of the 1908 OIC, within the context of historical record, confirms that they did not do so.

[120] Canada submits that the Town's suggested interpretation of the 1908 OIC is inconsistent with the plain and ordinary meaning of the words used in this legislative enactment. Canada submits that the language used in the 1908 OIC is capable of only one interpretation – Ontario was providing consent to Canada's exercise of its authority in relation to the Town's request for land from the Agency One Reserve. Canada suggests that the language of the 1908 OIC simply cannot be read as creating a transfer of title of land or a promise to do so on the part of Ontario. Canada contends that the words "consent be given to the Government of Canada" would be unnecessary if Ontario's intention was to transfer title for an (unidentified) parcel of land to the Town.

[121] Canada suggests that the Town's focus on Ontario's use of the term "granting" in the 1908 OIC to argue that the 1908 OIC conveyed a fee simple interest, without consideration, in all of the USL or the 1910 Park, to the Town is in error. Canada submits that contemporary and current legal definitions of the terms "grant" and "granting" describe the transfer of any form of property, including a lease. Canada contends that it simply acted in accordance with the 1908 OIC when it granted a lease for a portion of the surrendered lands to the Town. Canada notes that the Town accepted the fact of a lease in 1910 and 1927, and for approximately 100 years thereafter.

[122] Canada submits that the plain language of the 1908 OIC, interpreted in a manner consistent with the honour of the Crown and the Crown's fiduciary obligations to the First Nations

in the context of surrendered First Nations land, is determinative. The 1908 OIC could not and did not effect a transfer of the 1908 surrendered lands to the Town, according to Canada.

[123] Canada further submits that the Town's suggested interpretation of the 1908 OIC runs contrary to both common law principles and the statutory scheme applicable to Crown grants of public lands in place at the time. Canada notes that, at common law, any Crown grant of public lands must have been preceded by letters patent under the Great Seal describing the lands to be granted. The *Public Lands Act*, 1897, the statutory authority governing the sale of public lands in 1908, restricted Crown grants of public lands to ten acres or less and stipulated that letters patent must precede any Crown grant. Canada notes that it is not disputed that neither the common law nor the statutory requirements were met in the 1908 OIC.

[124] Canada submits that, in any event, the Town's claims are barred by limitations, laches and estoppel. Canada submits that the ten-year limitation period set out in s. 4 of the *RPLA* applies in respect of all the Town's claims to the 1908 surrendered lands and the Roads. Canada submits that the equitable doctrine of laches is an alternative basis on which the Town's equitable claims in constructive trust, unjust enrichment, and breach of fiduciary are barred. Canada further submits that, if neither limitations nor laches bar the Town's legal and equitable claims to title over the 1908 surrendered lands, the Town is nonetheless estopped from making any claim to title over the lands as it has accepted the legality of the 1910 Lease and the 1927 Lease for over 100 years.

[125] Canada submits that the Town's alternative claim for a declaration that it holds a public interest in the USL, or the 1910 Park, or the Point Park, pursuant to a public dedication is based on a fundamental mischaracterization of the 1908 OIC. Canada submits that the Town has not

discharged its onus of establishing an intention on the part of "the owner" of the subject land to dedicate the surrendered lands to the Town for public use, as required to establish dedication of land.

[126] Canada contends that there is no legal or factual basis upon which to infer that the Crown, federal or provincial, intended to dedicate the surrendered lands to the Town. Canada submits that the record does not support the submission that Ontario believed it had the authority to convey the lands to the Town, nor that Ontario intended to do so in 1908. Canada notes that neither Canada nor Ontario ever expressed any intention to dedicate the surrendered lands, and Ontario never objected to the fact that Canada leased the land to the Town. Canada submits that the fact of the 1910 Lease, and Ontario's acceptance of the lease, runs contrary to the suggestion that the Crown intended to dedicate any of the surrendered lands to the Town for public use. Canada acknowledges that Ontario did object to the amount of rent Canada charged the Town.

[127] Canada's submissions on the law of dedication, as set out above, also apply to the Town's claim for dedication of the Roads at common law. Canada submits that the Roads within the lands in issue have not been dedicated to the Town by operation of the *Municipal Act* because the lands in issue were federal lands and the *Municipal Act* cannot apply to lands under administration and control of the federal Crown. Canada submits that the Town's reliance on the Gillon Plan to argue that the Roads identified and laid out on that plan belong to it is also incorrect. Canada notes that the Gillon Plan is dated November 24, 1916 - well after the First Nations' reserve interest in the surrendered lands was confirmed.

[128] Canada submits that the Town, as a tenant subject to the terms of the 1910 Lease and the 1927 Lease, both of which are silent in relation to compensation for improvements, has no legal basis to claim damages for unjust enrichment in relation to any improvements made within the USL. Canada submits that, in the absence of language in a lease setting out the parties' respective entitlements to the benefit of improvements, the terms of the lease constitute a "juristic reason" to bar recovery in an unjust enrichment claim. Canada submits that any improvements made with municipal funds were in relation to the Town's chosen use of the leased land.

Ontario

[129] Ontario joins with the First Nations and Canada in submitting that the Town's argument that the Agency One Reserve was not a validly created reserve is without merit. Ontario notes that it has never disputed the existence of the Agency One reserve, nor did it ever treat the reserve as land over which the province had sole jurisdiction.

[130] Ontario submits that *St. Catherines Milling* created uncertainty regarding Treaty 3 reserves in Ontario, including the Agency One Reserve. Ontario submits that following *St. Catherine's Milling*, Canada necessarily sought Ontario's confirmation of Treaty 3 reserves in Ontario, and Ontario logically sought information concerning the location and extent of the same reserves. This, in turn, led to the 1891 Legislation, which authorized the 1894 Agreement with respect to reserves set aside by Canada within Ontario prior to the settlement of the Ontario boundary dispute.

[131] Ontario submits that the purpose of the Blake-Newcombe Agreement was to enable the federal and provincial Crowns to jointly address the issues created by *St. Catherine's Milling*

pending Ontario's confirmation of Treaty 3 reserves in Ontario. Ontario draws the court's attention to the following specific wording of the Blake-Newcombe Agreement:

> As to all Treaty Indian Reserves in Ontario [including Treaty 3 reserves] which are or shall be duly established pursuant to the [1894 Agreement] and which have been or shall be duly surrendered by the Indians to sell or lease for their benefit Ontario agrees to confirm the titles heretofore made by the Dominion and that the Dominion shall have full power and authority to sell or lease and convey title in fee simple or for any less estate.

[132] Ontario submits that a fair reading of the 1894 Agreement and the Blake-Newcombe Agreement is that they contemplate the Treaty 3 reserves in Ontario, including the Agency One Reserve, as existing, with the federal Crown having authority to deal with surrendered reserve lands pending confirmation by Ontario.

[133] Ontario submits that the 1915 Act transferred title to all Treaty 3 reserves in Ontario, but for Indian Reserve 24C, to Canada and confirmed the Agency One Reserve as originally surveyed at 170 acres. Ontario contends that the 1924 Legislation consolidated the Blake-Newcombe Agreement into reciprocal legislation intended to finally settle outstanding questions relating to reserves in Ontario, including any prior sale, lease or other disposition made by Canada from reserve land.

[134] Ontario submits that the 1908 OIC must be interpreted within this historical context. Ontario submits that the 1908 OIC did not transfer title of any portion of the USL from Ontario to the Town. Ontario suggests that the words of the 1908 OIC, read in context and in their ordinary sense, and with regard to the purpose of the 1908 OIC, inevitably lead to the interpretation that the 1908 OIC simply provided Ontario's consent to Canada granting, whether by sale or lease, some or all of the USL to the Town for a park.

[135] Ontario disputes the Town's fundamental submission in relation to the interpretation of the 1908 OIC, namely that the word "grant" means a transfer of complete legal and beneficial title. Ontario submits that numerous sources contemporary to the 1908 OIC indicate that "grant" was used as a broad, generic, conveyancing term that included "lease" within its meaning.

[136] Ontario submits that the terms of the First Nations' 1908 Surrender, and the obligations on the Crown which flow from the surrender, are also relevant to the interpretation of the 1908 OIC. Ontario notes the 1908 Surrender was to the Crown "[i]n trust to sell… upon such terms as [the Crown] may deem most conducive to our welfare… reserving the right to the various Bands… to hold a general meeting on the lands… surrendered, to hold any future gatherings thereon."

[137] Ontario submits that neither it nor Canada could, when dealing with the surrendered lands and in accommodating the Town's request for land out of the Agency One Reserve for a park, ignore the conditions of the 1908 Surrender and the Crown's fiduciary obligations. Ontario submits that the 1908 OIC can only be interpreted as providing Ontario's consent to Canada leasing the land to the Town for a park, subject to the conditions of the 1908 Surrender, which Canada did in the 1910 Lease and the 1927 Lease. Ontario submits that, upon expiration of the lease, the 1908 OIC was fulfilled and any interest the Town had in the land ceased.

[138] Ontario supports the positions taken by the First Nations and Canada in respect of the Roads within the USL never having been dedicated either through statute or at common law. Ontario further submits that the Town has failed to discharge the onus of establishing the two required elements for a public dedication of any of the USL and/or the Roads.

[139] Ontario submits that, in any event, all of the Town's claims are barred by the ten-year limitation period imposed in s. 4 of the *RPLA*. Ontario submits that the ten-year limitation period began to run in 1910 when the Town signed the 1910 Lease, at which point the Town knew or ought to have known that its interest in the USL and/or the 1910 Park, and/or the Point Park was no greater than that of a tenant.

[140] Ontario further submits, in the alternative, that the Town's equitable claims to an interest in the USL are barred by the equitable doctrine of laches. Ontario submits that the Town was aware of the termination date in the 1927 Lease for almost 100 years and acquiesced by not acting much sooner than it did.

[141] Ontario joins with Canada in disputing the Town's claim for damages based on unjust enrichment.

ANALYSIS OF THE ISSUES

1. Is this an appropriate matter for summary judgment?

[142] All parties agree that this matter is suitable for summary judgment, subject to the Town's request for a trial to establish its right to damages and to determine the quantum of damages sought in its crossclaim against Canada and Ontario, in the event the court determines that the Town has no ongoing legal or beneficial interest in the USL, the 1910 Park, the Point Park or the Roads.

[143] Having reviewed the record and the submissions of all parties, I am satisfied that there are no genuine issues requiring a trial with respect to any of the issues raised in the Town's counterclaim or crossclaims, including the Town's claim for damages. I am satisfied that I am

able to reach a fair and just determination of the issues on the extensive record before the court on this motion.

2. Was the Agency One Reserve a Properly Created Reserve?

[144] The Town argues that the Agency One Reserve was not a "legal reserve" because none of the required constitutional steps were taken to confirm the reserve after it had been provisionally set aside by Canada on land later determined to be within Ontario's confirmed western boundary.

[145] I agree with Ontario's submission that what remained outstanding in relation to the establishment of the Agency One Reserve following *St. Catherine's Milling* was the confirmation of the Agency One Reserve by Ontario. Ontario has never disputed the existence of the Agency One Reserve, nor asserted sole authority over it. The Town has never challenged the existence of the Agency One Reserve, until it did so within this litigation. From the perspective of the First Nations, who surrendered 55,000 square miles of their traditional territory in return for the promise of reserves to be set aside, any inter-jurisdictional squabble about "provisional" or "final" approval of the Agency One Reserve, after it had been surveyed, set aside, and used, is irrelevant.

[146] The test for reserve creation was established by the Supreme Court of Canada in *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816, at para. 67 ("*Ross River*"):

> … [I]n Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the

> setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact sensitive. The evaluation of its legal effect turns on a very contextual and fact driven analysis…performed on the basis of the record. [Citations omitted].

[147] The record as to the creation of the Agency One Reserve is set out paras. 11-15 herein, and in *Couchiching First Nation et al v. AG Canada et al,* 2014 ONSC 1076, at paras. 175–197 ("*Two Chains Decision*"). Treaty 3 was signed on October 3, 1873, and approved by Order-in-Council shortly thereafter. In exchange for the surrender of approximately 55,000 square miles of traditional Ojibway territory, the Crown promised, among other things, reserves "where most convenient and advantageous" to each band.

[148] Dawson and Pither were appointed by the 1874 OIC to select the reserves promised by the Crown in Treaty 3. On December 31, 1874 Dawson provided an interim report on the proposed reserves. Under the heading "Rainy River", Dawson described eight reserves, including the Agency One Reserve "not to be for any particular Chief or Band, but for the Saulteaux Tribe generally… for the purpose of maintaining thereon an Indian Agency".

[149] On February 27, 1875, by Order-in-Council, Canada provisionally approved the Rainy River reserves, including the Agency One Reserve, as set out in Dawson's report, "subject to such further surveys as may be necessary… and subject to final confirmation by the Governor General in Council on completion of such surveys". The Agency One Reserve was surveyed between August 3 and 9, 1875. Pither was appointed as the local Indian Agent and Agency buildings were built on the reserve. The Agency One Reserve was used as an agency reserve until approximately 1882.

[150] In my view, the *Ross River* test for reserve creation is met on this record. The Crown had an obligation to create reserves pursuant to Treaty 3. By Order-in-Council dated ten months after Treaty 3 was signed, Dawson and Pithers were appointed as Crown agents to confer with the First Nations regarding the location and extent of the Treaty 3 reserves to be set aside. Six months after appointment, Dawson provided his report on the proposed reserves, including the Agency One Reserve as described by him, to Canada. Approximately two months thereafter, Canada provisionally approved the Treaty 3 reserves, including the Agency One Reserve. The Agency One Reserve was surveyed in accordance with Dawson's description approximately five months after provisional approval by the Crown.

[151] The Crown's intention to create the Agency One Reserve, and to set apart the land for this reserve for the benefit of the Indians, is evident from these facts. The Agency One Reserve was then used by the First Nations as an agency reserve until 1882, establishing that the "bands concerned accepted the setting apart" of the reserve land and started to make use of "the lands so set apart".

[152] The fact that Canada did not provide any form of "final approval" of the Agency One Reserve following the "provisional approval" in the 1875 OIC, is not, in my view, determinative. Canada's provisional approval has never been revoked, rescinded, or amended in the 150 years since the required actions for reserve creation were completed and neither the federal nor the provincial Crown has ever challenged the validity of the Agency One Reserve.

[153] I conclude that the Agency One Reserve was a validly created reserve at the time of the 1908 Surrender.

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3. Did the 1908 OIC convey the USL, or any portion thereof, to the Town by way of fee simple?

[154] An Order-in-Council is an order made by the Governor General (at the federal level) or the Lieutenant Governor (at the provincial level) on the advice of the executive council (the Premier and Cabinet Ministers). An Order-in-Council does not require legislative approval. In the absence of legislative approval, the authority of the Governor General or the Lieutenant Governor to approve an Order-in-Council comes from the prerogative power of the Crown.

[155] An Order-in-Council is initiated by the recommendation of a minister to the executive council. If accepted by the executive council, the recommendation is put into an order format and presented to the Governor General or Lieutenant Governor for approval. Orders-in-Council are subordinate to legislation.

[156] When a court is interpreting an Order-in-Council, it is considered to be legislative in nature and is to be interpreted in the same way as other legislative enactments. The modern approach to statutory interpretation is set out at para. 446 of the *Two Chains Decision*:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[157] When interpreting an Order-in-Council, a court is required to consider the plain and ordinary meaning of the words used, bearing in mind the object, intent and purposes of the Order-in-Council: see *Two Chains Decision*, at para. 481. Justice Smith in *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band*, [2003] 1 C.N.L.R. 6, at para. 61, quoting from *Driedger on the Construction of Statutes* (3d), summarized the "ordinary meaning rule" as follows:

1. It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning, in the absence of a reason to reject it, the ordinary meaning prevails.

2. Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.

3. In light of these additional considerations the court must adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

[158] I accept the submission of the First Nations, Canada and Ontario that the court's interpretation of the 1908 OIC must also consider the constitutional obligations of both Crowns, the Crown's fiduciary obligations towards Indigenous peoples, and the honour of the Crown, the latter linked to the principle that ambiguities are to be resolved in a way which minimally impairs Indigenous interests.

[159] In light of the necessity to take into consideration all relevant indicators of legislative meaning, and to consider the consequences of adopting a particular meaning, even when the ordinary meaning of a legislative text appears to be clear, it is necessary to briefly review the legal and factual historical context in the period between the creation of the Agency One Reserve and the 1908 OIC.

[160] The resolution of the Canada-Ontario boundary dispute confirmed that a large area of the lands surrendered in Treaty 3 were in fact within Ontario. Both Crowns claimed that the 1873 surrender provided it with the entire beneficial interest in these lands. In 1888, the JCPC in *St. Catherines Milling* held that s. 109 of the *Constitution Act, 1867* gave Ontario the entire beneficial

interest of the Crown in all surrendered lands within its boundaries. The JCPC noted the following at para. 8 of *St. Catherines Milling*:

> It must always be kept in mind that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion, or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

[161] *St. Catherines Milling* created uncertainty about the status of lands in Ontario that had already been set aside as reserves by Canada, pursuant to Canada's Treaty 3 obligations, before the resolution of the boundary dispute. Canada and Ontario jointly addressed this issue in the reciprocal 1891 Legislation and the statutory 1894 Agreement. The relevant sections of the 1894 Agreement are set out at para. 22 herein.

[162] The 1894 Agreement provided a process by which Ontario would "inquire" with a view to acquiescing to the location and extent of Treaty 3 reserves set aside by Canada within Ontario. It did not address which emanation of the Crown had authority to convey an interest in these same reserve lands after the reserve interest had been surrendered but pending Ontario's acquiescence in the location and extent of such reserves.

[163] Once again, Canada and Ontario jointly addressed this issue in the Blake-Newcombe Agreement. The relevant sections of the Blake-Newcombe Agreement are set out at para. 25 above.

[164] In *Seybold*, the JCPC observed that the 1894 Agreement resolved the issue of lands within Ontario that had been set aside as Treaty 3 reserves by Canada. At para. 13 of *Seybold,* the JCPC summarized the 1894 Agreement:

> In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario had been ascertained and declared to include part of the territory surrendered by the Treaty, and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not yet concurred therein; and it is agreed by art. 1 (among other things) that the concurrence of the province of Ontario is required in the selection. By subsequent articles provision is made, "in order to avoid dissatisfaction or discontent among the Indians", for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last-named Government with any of the reserves already selected, or in the case of the selection of other reserves, for the appointment of a joint Commission to settle and determine all questions relating thereto.

[165] The JCPC made two further observations in *Seybold*. First, they affirmed that *St. Catherines Milling* determined that the 1873 surrender gave Ontario the full beneficial interest in the surrendered lands within Ontario; at para. 12 the court states the following:

> Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfill the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and locations of the lands to be so appropriated could only be effectively made by the joint actions of the two Governments.

[166] Second, at para. 16, and in reference to the Blake-Newcombe Agreement, the court noted the joint, collaborative efforts of the federal and provincial Crowns in resolving the issue of Treaty 3 reserves set aside by Canada within Ontario:

> The appeal has had this advantage, that it has enabled Mr. Blake, as counsel for Ontario, to state that he and the learned counsel for the Dominion [Newcombe], acting under authority from their respective Governments, have arranged terms for their adoption which will, it is hoped, have the effect of finally settling in a statesmanlike manner all questions between [Canada and Ontario] relating to the reserves.

[167] I find that, pursuant to the 1894 Agreement and the Blake-Newcombe Agreement, the federal and provincial Crowns sought to collaboratively and jointly address two significant and ongoing issues resulting from Canada having set aside reserves within Ontario, prior to the boundary dispute being resolved, pursuant to the federal Crown's Treaty 3 reserve creation obligation:

1. Canada had set aside reserves within Ontario without Ontario's agreement; and
2. Lands surrendered from these reserves, and/or the resources within the lands surrendered, were increasingly sought after as settlement and development moved west and it was unclear which emanation of the Crown had jurisdiction to deal with the surrendered reserve lands and/or resources within the surrendered lands while the first issue was being addressed.

[168] Pursuant to the 1894 Agreement, the federal and provincial Crowns agreed that Ontario would investigate the "location and extent" of these reserves "with a view to acquiescing in the location and extent", absent good reason not to. The record does not include evidence of Ontario expressing dissatisfaction with the "location and extent" of the Agency One Reserve, but for a single letter on July 24, 1907 from Cochrane to Oliver (see para. 30), and it is agreed that no joint commission was ever requested to settle any questions relating to this or other Treaty 3 reserves. One could argue that the inaction of Ontario falls squarely within the definition of "acquiescence".

[169] The Blake-Newcombe Agreement, statutorily confirmed by the 1924 Legislation, recognized that Ontario had not yet confirmed these reserves. It expressly provided that "Ontario agrees to confirm" reserves set aside by Canada and that the federal Crown "shall have full power and authority to sell or lease and convey title in fee simple…" lands which "have been" or "shall be" surrendered.

[170] I accept the submission of the First Nations that these two statutory agreements were intended to facilitate federal-provincial cooperation in the administration of surrendered reserve lands within Ontario during the confirmation process. I further find that the Blake-Newcombe Agreement provided the federal Crown with authority to deal with surrendered reserve lands pending confirmation by Ontario.

[171] This was the legal framework in place when, in 1903, the Town, with the full and active support of Ontario, began to lobby for land out of the Agency One Reserve for a municipal park. The Agency One Reserve had been set aside by Canada as an agency reserve but had not been used as such for approximately 20 years. Settlement was proceeding in the Rainy Lake-Rainy River area and Ontario, as represented by Cochrane, expressed frustration with valuable land being "locked up by Indian Reserves" resulting in the "continuity of settlement" being broken.

[172] Canada and Ontario were supportive of the Town's request for land from the vacant Agency One Reserve for a municipal park. However, both Canada and Ontario recognized that the Agency One Reserve and other reserves set aside under Treaty 3 had not yet been confirmed by Ontario, as required by the 1894 Agreement and the Blake-Newcombe Agreement.

[173] Ontario's 1907 OIC, issued at Cochrane's urging, provided Ontario's consent "to the surrender to… Canada, and the sale to actual settlers… pending the settlement of the whole reserve question" of the Agency One Reserve. Ontario would have understood that the surrender of the Agency One Reserve could not occur without Ontario's prior confirmation of the reserve. I find that the 1907 OIC is an expression of Ontario's acquiescence to the location and extent of the Agency One Reserve, which Ontario understood was required to facilitate the Town's request.

[174] Canada did not act on the 1907 OIC. Pedley, on July 8, 1908, took the position that the Agency One Reserve, and other reserves set aside under Treaty 3, had not yet been confirmed by Ontario. It is not clear whether Pedley received the 1907 OIC. Canada, represented by Pedley, clearly requested that Ontario complete the "preliminary step" of confirming "the location of the reserve in question", following which Canada would seek a surrender necessary to facilitate the Town's request:

> If the Government of the Province of Ontario would pass an Order-in-Council confirming the Reserve No. 1 at Pither's Point [Canada] will endeavour to obtain from the Indian owners of the property a surrender to the Crown in order that the necessary lands may be sold as a park for the Town…at a fair price to be fixed.

[175] Pedley then provided draft wording, at the request of Ontario, for the required Order-in-Council and advised Ontario that as soon as Canada had the Order-in-Council it would seek the necessary surrender. For whatever reason, Pedley's draft wording did not expressly state that Ontario confirmed the location and extent of the Agency One Reserve, nor did the 1908 OIC, which I find was issued in direct response to Pedley's request for Ontario's confirmation. The 1908 OIC stated the following:

> The Committee of Council advise that consent be given to the government of Canada granting such part of Pither's Point Indian Reserve as may be asked for by the Town…for Park purposes.

[176] Canada had made it clear to Ontario, immediately prior to the 1908 OIC, that it required, by way of an Order-in Council, Ontario's confirmation of the Agency One Reserve. Ontario provided the 1908 OIC as requested, once again knowing that Canada could not seek a surrender prior to Ontario's confirmation. However, approximately one month after the 1908 OIC, Canada sought and obtained the 1908 Surrender of 114 acres of the Agency One Reserve lands.

[177] I find that the 1908 OIC was an expression of Ontario's confirmation of the location and extent of the Agency One Reserve as required by the 1894 Agreement and the Blake-Newcombe Agreement. I accept Canada's submission that the 1908 OIC was requested by Canada and provided by Ontario to resolve any lingering "jurisdictional impediment" to Canada seeking the surrender of Agency One lands prior to conveying an interest in those lands to the Town.

[178] Ontario's confirmation of the Agency One Reserve was expressly conditional on Canada "granting such part of" the [soon to be surrendered] Agency One Reserve to the Town "as may be asked for by the Town… for Park purposes." The 1908 OIC was acted upon by Canada as Ontario's required acquiescence or confirmation, as evidenced by the fact that Canada sought and secured the 1908 Surrender immediately subsequent to the 1908 OIC.

[179] At the time of the 1908 OIC the Agency One Reserve was a validly created reserve, which Ontario confirmed in the 1907 and 1908 OIC's on the condition that Canada "grant" the Town such part of the surrendered lands as the Town asked for to be used as a park. If follows, in accordance with the Blake-Newcombe Agreement, that Canada had "full power and authority to sell or lease and convey title in fee simple or for any less estate" any lands surrendered from the Agency One Reserve, subject to the terms of the surrender and the honour of the Crown.

[180] Considered within this historical context, I find that there is no ambiguity in the 1908 OIC. Canada and Ontario both understood that Canada could not accommodate the Town's request without Ontario's prior confirmation of the Agency One Reserve. Ontario therefore issued the 1908 OIC, confirming the Agency One Reserve and providing Canada, the "Crown", with the

authority to deal with surrendered reserve land, "granting" part of the Agency One Reserve to the Town for a park.

[181] I am not persuaded, despite the very able arguments by counsel for the Town, that the 1908 OIC can be interpreted as an actual conveyance by Ontario of a permanent, legal interest in an undescribed parcel of the First Nations' reserve land directly to the Town, for no consideration. Such an interpretation is inconsistent with the plain and ordinary meaning of the words in the 1908 OIC. It is also inconsistent with the express terms of the 1908 Surrender, pursuant to which the reserve lands were surrendered to the Crown "to sell… upon such terms as [Canada] may deem most conducive" to the welfare of the First Nations, "reserving the right to [the First Nations]… hold any future gatherings" on the surrendered lands. I accept the submissions of the First Nations, Canada and Ontario that the Town's suggested interpretation is, in the circumstances, wholly contrary to the honour of the Crown and the Crown's fiduciary obligations to the First Nations when dealing with surrendered reserve lands.

[182] The honour of the Crown is a constitutional principle flowing from the *sui generis* relationship between the Aboriginal people of Canada and the Crown. The honour of the Crown – be it the federal or provincial Crown – requires the Crown, among other obligations, to do the following:

1. To act honourably to preserve Aboriginal lands and to protect them from exploitation when assuming discretionary control over Aboriginal interests. The creation of a reserve imposes a reciprocal duty on the Crown to protect that reserve: *Wewaykum Indian Band v. Canada,* 2002 SCC 79, paras. 86, 98-100.

2. When interpreting s. 35/Aboriginal treaty rights, the Crown must interpret its obligations broadly and purposively, and act with diligence to fulfill them*: Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14, at paras. 75-82.

3. When making and implementing treaties, the Crown must negotiate honourably and avoid "sharp dealing". This includes both the negotiation and implementation of historic and modern treaties, which must be implemented in a way that accomplishes the intended benefit: *Manitoba Metis*, at paras. 73 and 79, *Haida Nation*, at para 63.

4. In general, act with honour, integrity and good faith: *Manitoba Metis*, at para. 65; *Haida Nation,* at paras. 16 and 32; *Mikisew Cree First Nation v. Canada (Governor General in Council,* 2018 SCC 40, at para. 62.

[183] I accept the arguments of the First Nations, Canada and Ontario that the plain and ordinary meaning of the words used in the 1908 OIC fulfilled the intended purpose of the 1908 OIC – they provided Ontario's consent to Canada, which, pursuant to the Blake-Newcombe Agreement, had full power and authority to deal with surrendered reserve lands, granting a portion of the Agency One Reserve to the Town for a park.

[184] The Town relies heavily on *Smith v. The Queen*, [1983] 1 S.C.R. 554 in support of the submission that any interest the First Nations held in the 1908 surrendered lands was extinguished by the 1908 Surrender, thus restoring complete beneficial interest in the surrendered lands in Ontario to the exclusion of any federal jurisdiction with respect to the surrendered lands.

[185] In *Smith*, the federal Crown brought an action on behalf of the Red Rock band of Indians for possession of certain lands occupied by a non-Indian and located in a surrendered portion of the reserve. The reserve had been set aside before Confederation and non-Indian occupation of the lands in question began in 1838. In 1895, a portion of the reserve, including the lands in question, was surrendered to the Crown. The surrender consisted of a release of the lands, a provision that the Crown hold the land in trust for sale, and a condition that the proceeds be held to the credit of the band. The surrendered land had not been sold.

[186] In addressing "the consequences of a surrender by the occupying Indians of Indian lands under s. 91(24) of the *Constitution Act*", Estey J. endorsed and followed *St. Catherine's Milling*, stating the following at page 562:

> The authority of that decision has never been challenged or indeed varied by interpretations and application… The law therefore came to recognize the right and ability of the benefitted Indians to give up their relationship to lands theretofore devoted to their use and occupation, and the result of such a process is the revival or restoration of the complete beneficial ownership in the Province without further burden by reason of s. 91(24).

[187] Justice Estey concluded as follows at page 578:

> I must with all deference therefore conclude…that an absolute surrender of lands by Indians for whose benefit the lands were set aside, leaves no retained or other interest in the Crown enabling the Government of Canada to retain the surrendered lands within the federal jurisdiction under s. 91(24), and therefore "under the *Indian Act* until finally disposed of". To conclude otherwise would be to allow the federal authority to extend its limited relationship to these lands at the expense of the provincial title in fee simple by the simple device of an "absolute surrender" coupled with a "directive" to sell the lands and to hold the proceeds of sale for the benefit of he who has surrendered his personal possessory right to these lands.

[188] The Town submits that three conclusions arise from *Smith*:

1. Since Confederation, Ontario has held title and beneficial interest in all public lands within the province, "burdened by the Indian interest" in reserve lands.

2. At the time of an absolute surrender by an Indian Band, the Indian interest is extinguished and not transferred to the federal Crown. The effect of a surrender is therefore the restoration of complete beneficial ownership in the province.

3. Section 91(24) of the *Constitution Act* does not provide the federal government with an interest in Indian lands that have been surrendered.

[189] The Town contends that, pursuant to the Supreme Court's decision in *Smith*, the First Nations' interest in the 1908 surrendered lands was entirely extinguished upon the 1908 Surrender and Ontario became the sole beneficial owner of those lands upon surrender. The Town submits

that it follows that, pursuant to the 1908 OIC, properly interpreted in accordance with *Smith*, Ontario, as owner of the surrendered lands, granted the Town the portion of surrendered lands it requested for park purposes.

[190] I respectfully reject this argument.

[191] The surrender in *Smith* was an absolute surrender. Justice Estey's conclusion as to the result of a surrender "of lands by Indians for whose benefit the lands were set aside", at page 578 of *Smith*, specifically refers to "an absolute surrender". The 1908 Surrender was not an absolute surrender. In the 1908 Surrender, the First Nations expressly reserved "the right to the various Bands now entitled to hold a general meeting on the lands hereby surrendered, to hold any future gatherings thereon."

[192] Of note, this reservation in the 1908 Surrender essentially retained, for benefit of the First Nations, the original character of the Agency One Reserve as an agency reserve available for their intermittent use. Also of note, the reservation in the 1908 Surrender was included in both the 1910 Lease and the 1927 Lease. Canada, in the 1910 Lease and the 1927 Lease, retained use of the 1908 surrendered lands for the benefit of the First Nations, as required by the terms of the 1908 Surrender. The conditional nature of the 1908 Surrender is incompatible with the "revival or restoration of the complete beneficial ownership [of the surrendered lands] in the Province".

[193] In my view, the conditional nature of the 1908 Surrender is a materially distinguishing fact from *Smith*. My review of relevant Ontario Court of Appeal and Supreme Court of Canada jurisprudence following *Smith* confirms that the application of *Smith* has been restricted to situations of absolute, unfettered or unconditional surrenders by First Nations: see *Opetchesaht*

Indian Band v. Canada, [1997] 2 S.C.R. 119, paras. 40, 51; *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 31 O.R. (3d) 97, at para. 30 (C.A.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 386. I conclude that I am not bound by *Smith*.

[194] I also accept the submissions of the First Nations, Canada and Ontario that the word "grant" in the 1908 OIC included the "granting" of a leasehold interest, as was done. I agree that both the contemporary and current legal definitions of the terms "grant" and "granting" include the transfer of any interest in property, including a lease.

[195] The Town also argues strenuously, in the alternative, that if the conditional nature of the 1908 Surrender and the terms of the 1908 OIC gave Canada jurisdiction to lease the USL, or parts thereof to the Town for park purposes, regard must be had to the fact that it is undisputed that the 1908 OIC remains extant and valid. The Town submits that Canada remains bound by its terms and must continue to lease the Point Park to the Town for so long as the 1908 OIC is extant.

[196] I reject this submission. Ontario's 1908 OIC cannot, and does not by its terms, create an ongoing contractual obligation between Canada and the Town requiring Canada to continue a contractual lease relationship with the Town on terms agreed to in either 1910 or 1927. The Town's argument ignores the fact that the 1910 Lease and the 1927 Lease were both discretionary and negotiable instruments that the Town freely entered into on the terms set out therein, including the duration of the leases. The actions of the Town in entering into these leases and honouring their terms over the last 100 years is inconsistent with the Town's current position that Canada is somehow obligated, pursuant to the Ontario 1908 OIC, to continue to grant a lease to the Town in perpetuity. The Town freely accepted a lease of lengthy, but limited, duration. The Town has

provided no authority in support of its submission that the 1908 OIC entitles it to a "perpetual lease" of a portion of the USL, and I reject that submission.

[197] In conclusion on this issue, I find that the 1908 OIC did not convey the USL, or any portion thereof, to the Town by way of fee simple. I find that the 1908 OIC provided Ontario's confirmation of the Agency One Reserve and provided Ontario's consent to Canada to "grant" such portion of this reserve "as may be asked for" to the Town for the purposes of a municipal park. Thereafter, the Town entered into the 1910 Lease and the 1927 Lease with Canada, pursuant to which the Town leased the 1910 Park and the Point Park for nominal rent until the term of the 1927 lease expired on April 30, 2009.

4. Did Ontario's 1908 OIC dedicate some or all the USL to the Town by way of a Public Trust?

[198] The Town argues, in the alternative, that the 1908 OIC is an explicit public dedication, by Ontario, of a portion of the USL, being the Point Park (and the 1910 Park), to the public to be used as a park, thereby creating an irrevocable trust. The Town also argues that the doctrine of public dedication and acceptance equally applies to the Roads, which the Town suggests were dedicated to the public when they were identified on registered plans of subdivision such as the 1914 Plan SM88. I reject this submission for the following reasons.

[199] The test for public dedication of land is not in issue. It was stated, as follows, by the Court of Appeal for Ontario in *Blanchard v. Tripp*, 2019 ONCA 559, at para. 14:

> The law respecting dedication and acceptance is well-settled…whether there was dedication and acceptance is a question of fact to be decided in each case on a balance of probabilities. The claimant must prove that the owner had the actual intention to dedicate and that the intention was carried out, and was so accepted by

> the public…The intention to dedicate may be expressed in words or writing, but it is more often a matter of inference. (citations omitted).

[200] The Town's suggestion that the 1908 OIC is evidence of an intention to publicly dedicate a portion of the USL to the public for park purposes is not supported by the plain language of the 1908 OIC, as I have interpreted it at paras. 161–183 herein, nor is it supported by the legislative and factual context in the years prior to when it was passed.

[201] I have found that the Agency One Reserve was a validly created reserve. The 1908 OIC was an expression of Ontario's confirmation of the location and extent of the Agency One Reserve, as required by the 1894 Agreement and the Blake-Newcombe Agreement. The 1908 OIC also provided Ontario's consent to Canada, which, pursuant to the Blake-Newcombe Agreement, had jurisdiction to deal with surrendered reserve lands, granting a portion of the Agency One Reserve to the Town for a park. The 1908 OIC was asked for by Canada and provided by Ontario to resolve any lingering "jurisdictional impediment" prior to Canada seeking the surrender of the Agency One Reserve lands.

[202] The record does not support the submission that Canada intended to dedicate land from the Agency One Reserve to the Town for a park. The historical record confirms that Canada was amenable to the Town's request for land from the Agency One Reserve for a park, but not for free and not to the exclusion of the First Nations' interest in the land. Canada offered the Town a leasehold interest for a 99-year term at nominal rent, and the Town accepted. The leasehold interest honoured the terms of the surrender, to the extent that it preserved the First Nations' right to intermittent use of the leased land. In my view, this is evidence that Canada did not intend to publicly dedicate the land.

[203] In any event, I have found that the Agency One Reserve was a validly created reserve. The 1908 OIC preceded the 1908 Surrender. The Town's argument is therefore that the 1908 OIC is evidence of a Crown intention to publicly dedicate unsurrendered reserve land. However, the common law doctrine of dedication is not applicable to unsurrendered First Nations Land – "the *sui generis* nature of Native title renders impossible an inference of an intention to dedicate", i.e. to transfer permanently to the use of the public a previously private right of way: see *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (C.A.).

[204] Finally, following the 1908 Surrender, the "Crown", be it Ontario or Canada, was required to honour the conditions of the surrender. The Court of Appeal for Ontario, in *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 579, 157 O.R. (3d) 561, at paras. 82–83, stated the following:

> The Crown was under an obligation to ensure the conditions of surrender, which are to be construed liberally and through the lens of the honour of the Crown, were faithfully carried out. And the Province was bound by those obligations if it carried out the Crown power to sell…The Crown is not presumed to act in a manner that ignores its duties. (Citations omitted).

[205] The Town's argument is that Ontario, equally bound to honour the conditions of surrender, carried out its intention to publicly dedicate a portion of the Agency One Reserve lands by way of the 1908 OIC, without consulting or compensating the First Nations. This is an obvious breach of the honour of the Crown, which I am not prepared to infer in the face of evidence to the contrary.

[206] I conclude that the 1908 OIC was not a public dedication of all or some of the USL to the Town to be used for a municipal park.

5. Have the Roads within the USL and/or the Point Park been dedicated for public use either by statute or at common law?

[207] The Town claims ownership of all roads within the 1908 surrendered lands, including the following:

1. The roads and road allowances shown on the original Plan of the Township of McIrvine (the Forneri Plan) extending east-west and north-south through the Agency One Reserve;

2. The roads shown on Plan SM88 (the Gillon Plan), namely Idylwild Drive (previously The Avenue), School Road, Mill Road, Lake Road and Rainy River Colonization Road; and

3. Calder Drive, also referred to as the Avenue Road extension south of Lake Road.

[208] In 1936, the Department of Indian Affairs transferred Lake Road, School Road, Idylwild Drive (previously The Avenue) and Mill Road to Ontario. They were subsequently vested in the Town. These roads are not in dispute in this litigation. The roads remaining in issue are therefore the following:

1. The roads and road allowances shown on the Forneri Plan of the Township of McIrvine extending east-west and north-south through the Agency One Reserve;

2. Rainy River Colonization Road as shown on the Gillon Plan; and

3. Calder Drive.

[209] The Town's claim to these roads is based on the common law doctrine of public dedication and dedication by statute, namely the provisions of the *Municipal Act* and *The Rainy River Free Grants and Homesteads Act, 1866.* For the reasons set out at paras. 198-205 above, the Town's submission that the Roads were dedicated to the Town at common law is dismissed.

[210] The analysis of the Town's claim that the roads were dedicated pursuant to the provisions of the *Municipal Act* must consider the following facts:

- The Agency One Reserve was provisionally approved by Order-in-Council on February 27, 1875, surveyed between August 3 and 9, 1875, and used by the First Nations until 1882.
- The Forneri Plan was surveyed on October 15, 1875, and confirmed by the Dominion Lands Office Surveyor General on August 18, 1876.
- The Agency One Reserve was confirmed by Ontario via the 1908 OIC.
- The Gillon Plan is dated November 26, 1916.

[211] The Agency One Reserve lands were unsurrendered reserve lands until the 1908 Surrender. In *Pamajewon*, the Court of Appeal for Ontario held that the *Municipal Act* highway provisions purporting to apply to Indian lands were *ultra vires* provincial legislative authority for attempting to legislate a matter within exclusive federal jurisdiction. It therefore follows that dedication by provincial statute of any roads within the USL could not have taken place prior to the 1908 Surrender.

[212] I accept the submission of Canada that, by operation of the 1908 OIC, the 1915 Act and the 1924 Legislation, the USL came under exclusive federal jurisdiction to the exclusion of the provisions of the *Municipal Act.* I therefore reject the submission of the Town that any of the roads in issue were dedicated to it by operation of the *Municipal Act.*

[213] The Gillon Plan, relied on by the Town in support of its submission that the roads in issue were dedicated by statute, is dated 1916. The Gillon Plan postdates the creation of the Agency One Reserve, the 1894 Agreement, the Blake-Newcombe Agreement and the 1908 OIC, the latter of which I have found confirmed the Agency One Reserve. The cumulative effect of the foregoing is that Canada had exclusive jurisdiction to dispose of the USL as of the date of the Gillon Plan.

[214] The Town's claim to ownership of the roads in dispute by way of statutory dedication, as set out in paras. 75-77 hereof, is dismissed.

6. Is the Town entitled to damages, as against Canada and Ontario, for breach of promise or agreement and/or for unjust enrichment in respect of capital improvements undertaken by the Town for the Point Park?

[215] In its Amended Fresh as Amended Counterclaim, the Town claims damages, as against Canada and Ontario, in the amount of $50,000,000.00 for breach of promise and agreement, and/or breach of duty, and/or failure, neglect, and/or refusal to comply with the September 1908 OIC, and/or breach of trust. The Town also claims damages, as against Canada and Ontario, in the amount of $2,000,000.00 as reimbursement for capital improvements undertaken by the Town for the Point Park on the basis on unjust enrichment.

[216] As noted at paras. 5 and 6 herein, the Town seeks a trial on these issues and the First Nations, Canada, and Ontario seek an order by way of summary judgment dismissing these claims. As further noted at para. 144 herein, I am satisfied that there is no genuine issue requiring a trial with respect to the Town's claims. I am satisfied that these claims can be fairly and justly determined on the extensive record before the court on this motion.

[217] For the reasons set out above, neither Canada nor Ontario has "failed or refused to comply" with the 1908 OIC. No trust has been established on the record. Neither Canada nor Ontario was at any material time in a fiduciary relationship with the Town and therefore neither was subject to a fiduciary duty in relation to the Town at the time of the 1908 OIC or 1908

Surrender. Canada and Ontario did, however, have a pre-existing fiduciary duty to the First Nations. There is no merit to the Town's claims for any breach of trust, "breach of duty" or for failure or refusal to comply with the 1908 OIC, and these claims are dismissed.

[218] The Town seeks damages as reimbursement for the expenditure of public funds to improve and maintain the Point Park based on unjust enrichment. In *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 32, the Supreme Court set out the three elements a party must establish to make a successful claim in unjust enrichment:

1. An enrichment of or benefit to the defendant;
2. A corresponding deprivation of the plaintiff; and
3. The absence of a juristic reason for the enrichment.

[219] The assessment as to the presence or absence of a juristic reason for the enrichment involves a further two-stage assessment:

1. First, the claimant must demonstrate there is no justification for the enrichment based on any established category: a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations;
2. Second, if none of the established categories apply, a *de facto* burden of proof shifts to the defendant to show some reason why the enrichment should be retained, having regard to the parties' reasonable expectations and public policy: see *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at paras. 56–59.

[220] The terms of the 1910 Lease and the 1927 Lease established the Town's contractual relationship with Canada. These contracts are silent as to the issue of which party is to be responsible for the cost of modifications, improvements and/or repairs and maintenance to the

leased property. As a tenant subject to the terms of a lease, the Town cannot sustain a claim for damages based on unjust enrichment for funds spent to improve and/or maintain the Point Park.

The 1910 Lease and the 1927 Lease, being silent as to improvements to the leased land, constitute a "juristic reason" barring the Town's claim for recovery of damages based on unjust enrichment.

[221] I find that the Town's claim for damages based on unjust enrichment is without merit. This claim is dismissed.

[222] As a result of my conclusion on the issues, it is not necessary to address the issue of whether the Town's claims are barred by the *RPLA*, the equitable doctrine of laches, *res judicata*, or estoppel and I decline to do so.

CONCLUSION

[223] The Town's motion for summary judgment is dismissed. The summary judgment motions of the First Nations, Canada and Ontario, seeking a dismissal of the Town's counterclaim in its entirety, are granted and the Town's counterclaim is dismissed. The Preservation Order, dated April 27, 2010 is hereby rescinded. The Town has no legal or beneficial interest in the USL.

COSTS

[223] The First Nations, Canada and Ontario have been entirely successful on these summary judgment motions and are seeking their costs. I urge the parties to resolve the issue of costs. In the event that matter of costs cannot be resolved, the parties shall file written submissions as to costs, not to exceed ten pages, exclusive of their respective Bills of Costs. The Costs Submissions of the First Nations, Canada and Ontario shall be filed within 30 days of the release of this decision,

and the Costs Submissions of the Town with 30 days thereafter. Reply Costs Submissions are not to be filed. I reserve the right to schedule an oral hearing as to costs following my receipt of all Costs submissions.

The Hon. Mr. Justice J.S. Fregeau

Released: June 17, 2025

COURT FILE NO.: CV-98-0743-00
DATE: 202-06-17

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Couchiching First Nation, Naicatchewenin First Nation, Nicikousemenecaning First Nation and Stanjikoming First Nation

Plaintiffs

- and -

The Attorney General of Canada, His Majesty the King in Right of Ontario and The Corporation of the Town of Fort Frances

Defendants/Plaintiffs by Counterclaim

REASONS ON MOTIONS FOR SUMMARY JUDGMENT

Fregeau J.

Released: June 17, 2025