DATE: 19991115
DOCKETS: C22677, C22678, C22682, C23434 and C23435

# COURT OF APPEAL FOR ONTARIO

## DOHERTY, LASKIN and CHARRON JJ.A.



IN THE MATTER OF Sections 35 and 48 of the *Land Titles Act*, R.S.O. 1970, Chapter 234;

AND IN THE MATTER OF Caution No. 149765 registered in the Land Registry Office in the Land Titles Division of Nipissing, dated August 8, 1973 and registered August 14, 1973; Caution No. 346923 registered in the Land Registry Office for the Land Titles Division of Sudbury, dated August 8, 1973 and registered August 23, 1973; and Caution No. 176641 registered in the Land Registry Office for the Land Titles Division of Temiskaming, dated August 8, 1973 and registered August 7, 1973.

B E T W E E N :

| | | |
|---|---|---|
| THE BEAR ISLAND FOUNDATION and GARY POTTS, WILLIAM TWAIN and MAURICE McKENZIE JR. on behalf of themselves and all other members of the Teme-Augama Anishnabai and the Temagami Band of Indians<br><br>Appellants<br>(Appellants in Appeal) | ) | Wendy Earle, for the appellants The Bear Island Foundation and Gary Pots, William Twain and Maurice McKenzie Jr.<br><br>Stephen G. Reynolds and Jeremy Dolgin, for the appellants the Temagami Band of Indians |
| –and– | ) | |
| HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO<br><br>Respondent<br>(Respondent in Appeal) | ) | T.C. Marshall, Q.C. and J.T.S. McCabe, Q.C., for the respondent |
| –and– | ) | |
| MAKOMINISING ANISHNAWBEG<br><br>Interveners | ) | Owen Young for Makominising Anishnawbeg, intervener at first instance, Appellant/respondent on appeal<br><br>Heard: August 27, 1998 |

On appeal from the order of Winkler J. dated August 11, 1995.

**LASKIN J.A.:**

**Introduction**

[1] This appeal is another chapter in the long-running dispute between the Temagami Indians and the Ontario Government, a dispute that originated in the Robinson-Huron Treaty of 1850. The issue on this appeal is whether the principle of *res judicata* precludes the Temagami Indians from maintaining a land claim.

[2] In the early 1970's the appellants, representing the Temagami Indians, claimed aboriginal title to a vast tract of unpatented land in northern Ontario. To protect their claim, they registered cautions under the *Land Titles Act*. When the Director of Titles refused to recognize their claim, they appealed his decisions. Before the caution appeals were dealt with on their merits, Ontario began what became known as the *Bear Island* case. In that case Ontario sought a declaration that the appellants had no interest in the lands they had claimed. After a long trial, Steele J. granted the declaration and related relief. The appellants' appeals to this court and to the Supreme Court of Canada were dismissed.

[3] Ontario then brought an application before Winkler J. for a declaration that the *Bear Island* case determined the caution appeals by rendering them *res judicata*. Winkler J. granted Ontario's application, but relying on passages from the reasons of this court and the Supreme Court in the *Bear Island* case, held that the appellants could start a new proceeding, claiming an interest in the lands because of Ontario's breach of the Robinson-Huron Treaty.[1]

[4] The appellants appeal Winkler J.'s decision. They submit that they should be able to maintain their caution appeals on either of two bases: breach of fiduciary duty or breach of the Robinson-Huron Treaty. Ontario supports Winkler J.'s decision but submits that he did not go far enough: Ontario submits that the appellants' claim to an interest in the lands based on a breach of the Treaty is also *res judicata*. I agree with Ontario's submission, and I would dismiss the appeal.

[1] *Bear Island Foundation v. Ontario* (1995), 38 C.P.C. (3d) 215 (Ont. Gen. Div.).

## Background Facts

[5] A detailed history of the dealings and the dispute between Ontario and the appellants can be found in the reasons of Steele J. in the *Bear Island* case[2] and in the reasons of Winkler J. I will summarize only those facts relevant to this appeal.

### (a) The parties

[6] The parties to this longstanding dispute are the respondent the Ontario government and three aboriginal groups representing the Temagami Indians. The appellant the Teme-Augama Anishnabai ("TAA") is a traditional aboriginal organization, recognized by both status and non-status Temagami Indians. The appellant the Temagami Band of Indians, now called the Temagami First Nation ("TFN"), is a band of status Indians registered under the *Indian Act*.[3] All members of the TFN are also members of the TAA. The intervenor Makominising Anishnawbeg ("MKA") is a group of heads of native families from the Temagami region, whose authority is founded on traditional aboriginal law. The members of the MKA come from the TAA and the TFN.

### (a) The Robinson-Huron Treaty and the Bear Island Reserve

[7] In 1850, eighteen chiefs of various Ojibway First Nations "inhabiting and claiming the eastern and northern shores of Lake Huron" and William B. Robinson, an agent for Her Majesty the Queen, signed what became known as the Robinson-Huron Treaty. By the terms of the treaty, the Chiefs and their tribes surrendered their interest in all of their lands, except for the reservations listed in a schedule to the Treaty, in return for annual annuities and the right to hunt and fish in the surrendered lands. TFN was not specifically referred to in the list of reservations in the schedule.

[8] In the late 1850s, members of the TFN, under pressure from neighbouring lumbering operations, proposed to the federal government to surrender their land in exchange for a reserve and treaty annuities. No formal surrender took place, but beginning in 1883 the federal government paid the TFN annuities under the Robinson-Huron Treaty.

[9] In 1884, a reserve of 100 square miles at the south end of Lake Temagami was surveyed for the TFN. The size of the reserve was comparable to those reserves received by the First Nations who signed the Robinson-Huron Treaty. The federal government asked Ontario to convey the surveyed land to the TFN, but Ontario refused to do so.

---

[2] *A.G. Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.J.).
[3] R.S.C. 1985, c.I-5.

Ontario took the position that the TFN was not a party to the Treaty and therefore was not entitled to a reserve, and that the lumber on the land surveyed was too valuable.

[10] For the next eighty years or so dealings took place between the TFN and the two levels of government. Several times the federal government requested Ontario to set aside a reserve for the TFN. Ontario repeatedly refused these requests, until 1943 when the province finally set aside land on Bear Island in Lake Temagami. But it was not until 1971 that the federal government created the Bear Island Reserve. The reserve is only one square mile in size. None of the affected parties considered that the creation of the Bear Island Reserve satisfied any obligation owed to the TFN under the Robinson-Huron Treaty.



### (a) The Cautions

[11] In 1973, the Bear Island Foundation, acting for the appellants, registered cautions under the *Land Titles Act*,[4] against all unpatented land in 110 townships in the Districts of Temiskaming, Nipissing and Sudbury. These lands covered over 4,000 square miles. In January 1977 the Director of Titles held that the appellants had failed to demonstrate a sufficient interest in the lands to support the cautions. He ordered that the cautions would cease to have effect unless a notice of appeal was filed. The Bear Island Foundation did file a notice of appeal. In April 1977, Gary Potts, William Twain and Maurice McKenzie Jr., also acting for the appellants, attempted to register additional cautions on the same lands. The Director of Titles refused to register these cautions because, in his view, they too did not establish a sufficient interest in the lands.

[12] The appellants appealed the Director's refusal. They also appealed another decision of the Director of Titles in 1978, refusing to renew the existing cautions filed by the Bear Island Foundation. Various preliminary proceedings took place in these three caution appeals, but they had not been dealt with on their merits, when Ontario began the *Bear Island* action.

### (a) The *Bear Island* Case

[13] In 1978, Ontario brought an action in the Supreme Court of Ontario for a declaration that the lands covered by the cautions were public lands, that the appellants had no interest in these lands, and that the government had the right to sell the lands without the appellants' consent. The appellants counterclaimed for a declaration that they had an equitable fee simple in the lands and a better right to possession than the Crown because of their aboriginal rights and their rights derived from the Royal Proclamation of

[4] R.S.O. 1970 c. 234, s.48(1) now *Land Titles Act*, R.S.O. 1990 c. L-5, s.43(1).

1763.[5] Once the litigation was started, the parties agreed to adjourn the caution appeals pending the outcome of the *Bear Island* case. Significantly, counsel for the appellants asserted that the parties had agreed the Bear Island litigation would resolve once and for all whether the appellants had an interest in the lands and therefore would determine the caution appeals. He wrote the Deputy Director of Titles about this arrangement.

> The Attorney General for the Province of Ontario has brought an action in the Supreme Court of Ontario for a series of declarations determinative of the ultimate issue as to the interests in the land in question. It would appear that all parties are agreed that the most reasonable course to follow at this stage would be to get the ruling from the Supreme Court as quickly as possible. When that has been done, it appears that these various appeals relating to registerability of documents will have been rendered redundant.



[14] In the *Bear Island* action, the appellants based their claim to an interest in the lands on aboriginal title. They did not claim an interest in the lands because of a breach of fiduciary duty or a breach of the Robinson-Huron Treaty. The trial judge in the *Bear Island* action, Steele J., characterized the litigation as a dispute over whether the appellants had any aboriginal rights in the lands.

> The basic dispute is whether Ontario is the owner of certain lands, free of any aboriginal rights claimed by the Indians, or whether the band or registered band has aboriginal rights in the lands that prevent Ontario from dealing with the lands until those rights are properly extinguished.[6]

[15] After a long trial – consisting of 118 days of evidence over nearly two years, Steele J. gave judgment concluding that the appellants had no aboriginal right to the lands but that even if they did, their aboriginal right had been extinguished by the Robinson-Huron Treaty to which the Temagami Band of Indians was a party or to which it had subsequently adhered in 1883. Steele J. declared that all the lands claimed by the appellants, other than Bear Island, were public lands, that the appellants had no interest in these lands and that Ontario could dispose of these lands without the appellants' consent. He also perpetually enjoined the appellants from continuing proceedings to prevent Ontario from selling the lands.

[16] Although asked to do so, Steele J. refused to remove the cautions, holding that their removal should be dealt with in the caution appeals themselves. He wrote: "I think

---

[5] R.S.C. 1985, App. No. 1.
[6] at p. 358.

it appropriate that the question of their removal should be dealt with in the stayed proceedings under the *Land Titles Act* after considering my reasons herein."[7]

[17] Nonetheless, his reasons show that he thought the cautions should be removed because at the end of his reasons, when discussing the application of the *Limitations Act*, he wrote: "While the personal or aboriginal right or interest of the Indians comes within the extended definition of 'land' in the *Limitations Act*, it is not such an interest in land that gives a right to file a caution against the Crown's title pursuant to the *Land Titles Act*."[8]

[18] The appellants appealed the decision of Steele J. to this court. At the beginning of its reasons, this court set out what was and what was not in issue on the appeal:

> It should be made plain what is in issue in this appeal. The subject-matter of the dispute is the title to land. The province takes the position that its ownership of the land in question is unencumbered by any aboriginal rights of the appellants. The appellants, of course, argue the contrary. What is not at stake in this appeal is the right of the appellants to claim compensation or to claim any other benefit that may accrue to them as an unfulfilled obligation under the Robinson-Huron Treaty.[9]

Winkler J. relied on this passage from this court's reasons to exclude the appellants' claim to an interest in the lands based on a breach of the Robinson-Huron Treaty[10] from the application of the principle of *res judicata*.

[19] However, in recognizing in this passage that the appellants may claim compensation or "any other benefit", this court was likely referring to what Ontario had acknowledged in its factum:

> The respondent submits that the appellants have no right, title or interest in the lands in question and will ask this court to make an order in the appeal that reflects that circumstance. But it is the position of the respondent that the Temi-augama Anishnabay do have historical grievances which give rise to entitlement to compensation ... the issue of compensation does not arise in this appeal. But this Court should know that

[7] at p. 359.
[8] at p. 480.
[9] (1989), 68 O.R. (2d) 394 at 396.
[10] at pp. 240-241.

> the disposition of the appeal sought by the respondent does not dispose of all rights of the appellants.

[20] Moreover, this court dismissed the appellants' appeal without any qualification, holding that any aboriginal rights enjoyed by the Temagami were extinguished by the Robinson-Huron Treaty. In the words of the panel:

> The Temagami were signatories to the treaty. Alternatively they adhered to the treaty by receiving annuities pursuant to it and later asking for a reserve as was promised in the treaty and still later receiving a reserve. Finally, their rights were extinguished, even if the Temagami were not signatories or adherents, because the treaty was at least a unilateral act of extinguishment by the sovereign authority.[11]

[21] The appellants further appealed to the Supreme Court of Canada, which dismissed their appeal. The Supreme Court disagreed with Steele J. on whether the appellants ever had an aboriginal right to the lands. In the Court's view: "… on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right".[12] However, the Court held that: "… whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve."[13]

[22] But the Supreme Court then observed that the Crown had conceded it had failed to comply with its obligations under the Treaty, thus breaching its fiduciary obligations to the Temagami, an observation also relied on by Winkler J. in narrowing his application of *res judicata*. The Supreme Court wrote:

> It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties. It does not alter the fact, however, that the aboriginal right has been extinguished.[14]

[23] The "concession" referred to by the Court was undoubtedly a reference to the factum filed by the Attorney General of Ontario, which – as did its factum filed in this court – acknowledged that the failure to pay annuities regularly under the Treaty and "the

[11] at pp. 400-01.
[12] [1991] 2 S.C.R. 570 at 575.
[13] at p. 575.
[14] at p. 575.

long denial of a reserve at Lake Temagami gives rise to a claim by the Temagami Band under the Treaty". But the Attorney General's factum was explicit: "The claim sounds in compensation or damages". Ontario did not concede that the appellants any longer had a claim to an interest in the lands. Still, after the Supreme Court's decision, the appellants amended their notice of appeal in the caution proceedings under the *Land Titles Act* to include a claim to an interest in the lands based on a breach of fiduciary duty.



**(a) The Agreement in Principle**

[24] The "negotiations" referred to by the Supreme Court in its reasons in the *Bear Island* case were the discussions between Ontario and the appellants that took place within the framework of a memorandum of understanding dated April 23, 1990. Under the memorandum, the parties agreed to negotiate a "treaty of co-existence". On August 17, 1993, the parties reached an agreement in principle under which the TAA would receive 115 square miles of land for their exclusive use. Ontario then took the position the agreement had to be ratified both by the TAA and the TFN. The TAA ratified the agreement, but the TFN voted against accepting it.

[25] During the negotiations, Ontario did not take any steps to remove the cautions. However, the agreement in principle provided that the cautions would be removed on ratification. When the agreement was not ratified by the TFN, Ontario launched the proceedings now before this court.

**(a) The Motion before Winkler J.**

[26] Before Winkler J. Ontario asked for a declaration that the *Bear Island* action determined the appellants' claim to an interest in the lands, rendering the caution appeals *res judicata*. In reasons dated June 4, 1995, Winkler J. held that the *Bear Island* action disposed of and rendered *res judicata* the appellants' claim to an interest in the lands on all bases – including the claim based on breach of fiduciary duty – but one: the appellants' claim to an interest in the lands based on a breach of the Robinson-Huron Treaty. During the hearing before him, the appellants stated that they intended to raise the breach of the Treaty as an additional ground to support their claim in the caution appeals to an interest in the lands. Although Winkler J. held that the breach of Treaty issue was not *res judicata*, he refused to permit the appellants to amend their notices of appeal. The appellants could begin a new proceeding claiming an interest in the lands because of a breach of the Treaty but they could not raise this breach in the outstanding caution proceedings.

[27] After his decision on the *res judicata* motion, Ontario brought a separate motion before Winkler J. to quash the caution appeals relying on the judgment of the Supreme

Court of Canada in the *Bear Island* case and on Winkler J.'s earlier ruling. In reasons dated November 16, 1995, Winkler J. granted Ontario's motion and quashed the caution appeals. He held:

> In light of my above conclusions, the decision of the Supreme Court of Canada in the Bear Island action and the order of this Court in the *res judicata* motion both operate to remove the substratum of the appeals in these proceedings. It has been finally and conclusively decided that the appellants do not have an interest in the subject lands within the meaning of s.48 of the *Land Titles Act* capable of supporting the cautions. Consequently, there is no issue in the cautions appeals left to be decided between the parties.[15]



This decision is the subject of a separate appeal.

**Discussion**

[28] The question on this appeal is whether the *Bear Island* action renders the appellants' caution appeals *res judicata*. This question raises three issues. First, is the appellants' claim to an interest in the lands based on breach of fiduciary duty *res judicata*? Second, is the appellants' claim to an interest in the lands based on breach of the Robinson-Huron Treaty *res judicata*? Third, if the appellants' claim to an interest in the lands based on breach of the Treaty is not *res judicata*, may it be raised in the outstanding caution appeals?

[29] Before dealing with these issues, I will briefly discuss the reach of the principle of *res judicata*. The principle of *res judicata* is well-established in our law. It applies to claims by aboriginal peoples against the Crown in the same way as it applies in other cases. *Res judicata* is a form of estoppel. It means that any action or issue that has been litigated and decided cannot be retried in a subsequent lawsuit between the same parties or their privies. The object of *res judicata* is judicial finality. Two reasons are commonly put forward for the principle: no person should be sued more than once for the same claim, and our law should not tolerate needless litigation.[16]

[30] Two aspects of *res judicata* are relevant to this appeal. The first aspect, relied on by Ontario, is that *res judicata* prevents a party from relitigating a claim that was decided or that could have been raised in an earlier proceeding. As our court said in *Parna v. G.*

---

[15] (1995), 44 C.P.C. (3d) 170 at 179 (Gen. Div.).
[16] See *Angle v. M.N.R.*, [1975] 2 S.C.R. 248.

*& S. Properties Ltd.*: "The rule of *res judicata* embraces not only those things which were proven in the earlier action, but those which might have been proven in that action."[17] Cartwright J. invoked this aspect of *res judicata* in *Maynard v. Maynard*,[18] in a passage that is particularly germane to this appeal:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle …



[31] The second aspect of *res judicata* relevant to this appeal and relied on by the appellants is that the court retains a discretion to refuse to apply *res judicata* when to do so would cause unfairness or work an injustice. As Lord Upjohn wrote in *Carl Zeiss Stiftung v. Rayner Keeler Ltd. No. 2*: "All estoppels are not odious but must be applied so as to work justice and not injustice."[19] Although the principle of *res judicata* reflects the public interest in the finality of litigation, sometimes an unyielding application of the principle would be unfair to a party who is precluded from relitigating an issue. Judicial discretion is required to achieve practical justice without undermining the object of *res judicata*.[20]

[32] As is apparent from the case law, the courts have always exercised this discretion. For example, the House of Lords has refused to apply issue estoppel (a form of *res judicata*) in "special circumstances", which include a change in the law or the availability of further relevant material. Lord Keith discussed this special circumstances exception in *Arnold v. National Westminster Bank plc*[21]:

> … there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced

[17] (1973), 2 O.R. 765 at 766-67.
[18] [1951] S.C.R. 346 at 358-59, adopting the reasons of the Privy Council in *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 at 165-66.
[19] (1967), 1 A.C. 853 at 947 (H.L.).
[20] See *Minott v. O'Shanter Development Co.* (1998), 168 D.L.R. (4th) 270 at 288-289 (Ont. C.A.).
[21] (1991), 3 All E.R. 41 at 50 (H.L.).

> in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result …



[33] The resolution of this appeal turns on these two aspects of *res judicata* and on what the Court of Appeal and the Supreme Court of Canada said about the Robinson-Huron Treaty in the *Bear Island* case.

**First Issue: Is the Appellants' Claim to Interest in the Lands Based on Breach of Fiduciary Duty *Res Judicata*?**

[34] The appellants claim an interest in the disputed lands as a remedy for Ontario's breach of fiduciary duty. I am doubtful whether the provincial Crown owes fiduciary duties to aboriginal people that, on breach, would allow for the transfer of land. The fiduciary duty of the Crown to aboriginal people is fundamentally a duty of the federal Crown. It is the federal government that has legislative responsibility for Indians and lands reserved for Indians under s.91(24) of the *Constitution Act 1867*. As the Supreme Court said in *Mitchell v. Peguis Indian Band*: "The provincial Crown bears no responsibility to provide for the welfare and protection of native peoples."[22]

[35] In *Perry v. Ontario*, this court recognized that the province may have a fiduciary duty to aboriginal peoples who have an aboriginal or treaty right to hunt and fish and whose exercise of that right is affected by a provincial regulation.[23] In such a case, the province's duty is "a restraint against regulations improperly affecting aboriginal [or treaty] rights." Breach of the duty may render the provincial regulation unenforceable against aboriginal people exercising these rights. But the fiduciary duty owed by the provincial Crown is a "shield and not a sword". Ordinarily, the affirmative obligation to provide for the welfare of aboriginal peoples and to implement the terms of treaties belongs to the federal Crown. Nonetheless, for the purpose of this appeal, I will assume, without deciding, that Ontario has a fiduciary obligation to the appellants and that a breach of that obligation may be remedied by the grant of an interest in land.

[36] Winkler J. concluded that the decision in the *Bear Island* case prevented the appellants from claiming an interest in the lands based on a breach of fiduciary duty. In so concluding, he relied on the principle that *res judicata* embraces both those issues raised in the earlier litigation and those issues that could have been raised but were not.

---

[22] [1990] 2 S.C.R. 85 at 143. See also *Grand Council of the Crees v. Canada (A.G.)*, [1994] 1 S.C.R. 159 at 183.
[23] (1997), 33 O.R. (3d) 705 (C.A.).

[37] The appellants make three arguments to avoid the application of *res judicata* to their breach of fiduciary duty claim. First, they argue that the court should exercise its discretion against applying *res judicata* because of "special circumstances", especially the "groundbreaking" decision of the Supreme Court of Canada in *Guerin v. The Queen*.[24] Second, the appellants argue that *res judicata* should not be invoked because Ontario negotiated over the agreement in principle in bad faith. Third, they argue that the claims based on breach of fiduciary duty and breach of the Treaty are interrelated and, accordingly, it was illogical for Winkler J. to preserve one and not the other. In my view, none of these arguments can overcome the application of *res judicata* to the appellants' land claim based on a breach of fiduciary duty.

[38] In *Guerin*, the Supreme Court of Canada held that the federal Crown breached its fiduciary obligation to the Musqueam Indian Band by obtaining an unfavourable lease of land surrendered by the Band. Although the Court ordered the Crown to compensate the Band in damages for the breach, its reasons recognized that the Crown owed an equitable or fiduciary obligation to Indians in dealing with surrendered land on their behalf. A breach of that obligation could, in an appropriate case, be remedied by an award of an interest in land.

[39] The appellants submit that *Guerin* was a dramatic change in the law and, together with what should be the court's reluctance to extinguish land claims and the Crown's honour in dealing with Indians, provide special circumstances for the court to exercise its discretion not to apply *res judicata*. I disagree. I would not invoke the special circumstances exception to *res judicata*.

[40] *Guerin* was decided over a month before Steele J. released his decision in the *Bear Island* action and was referred to by him in an addendum to his reasons. Steele J. concluded that nothing in *Guerin* changed his conclusions.[25] The Court of Appeal's decision came five years later and the Supreme Court's decision two years after that. Thus, the appellants had ample time to raise their theory of breach of fiduciary duty in the *Bear Island* litigation, but chose not to do so. They cannot realistically assert that new material was needed to support this theory because both sides had combed the archives and presented to Steele J. virtually every shred of evidence concerning the dealings between the appellants and the Crown over the disputed lands. Steele J. observed: "The evidence called at trial was extremely lengthy, far ranging and comprehensive."

[41] Therefore, even accepting that *Guerin* dramatically changed the law and even acknowledging that the court should not lightly extinguish Indian land claims, I do not

[24] [1984] 2 S.C.R. 335.
[25] at p. 480.

think that *Guerin* provides a basis for permitting the appellants now to assert an interest in the disputed lands based on a breach of fiduciary duty. As Winkler J. wrote:

> … Counsel for the appellants, for whatever reason, chose not to pursue the breach of fiduciary duty argument, notwithstanding that the trial judge had himself placed the question in issue. The proper time for the appellants to pursue it was on appeal. They did not do so, and are estopped from now attempting to relitigate the question.[26]

[42] The appellants submit that Ontario negotiated the agreement in principle in bad faith and that these bad faith negotiations provide an alternative basis for not applying *res judicata* to the breach of fiduciary duty claim. This submission has no merit. Whatever took place in the negotiations between the parties in the 1990s has no relevance to the *Bear Island* litigation and thus cannot be used to avoid the application of *res judicata*.

[43] The appellants also submit that Winkler J.'s reasons are illogical or inconsistent in preserving the appellants' breach of treaty claim but not their breach of fiduciary duty claim because the two are "intimately connected". The connection, according to the appellants, is reflected in the following sentence in the Supreme Court's reasons in the *Bear Island* action: "It is conceded that the Crown has failed to comply with some of its obligations under the agreement, and thereby breached its fiduciary obligations to the Indians."[27] Indeed, after the Supreme Court's decision, the appellants relied on that sentence from the Supreme Court's reasons to amend their notice of appeal in the caution proceedings.

[44] Even if the two claims are connected as the appellants maintain, as I said earlier, I think Winkler J. was correct to hold the claim to an interest in the lands based on a breach of fiduciary duty was *res judicata*. If he erred at all, his error was in not holding the claim to an interest in the lands based on a breach of the Robinson-Huron Treaty was also *res judicata*, an issue I will discuss in the next part of these reasons.

[45] In the *Bear Island* action, the appellants had to put forward all of their defences to Ontario's claim and their failure to do so is fatal to now asserting a claim based on a theory – breach of fiduciary duty – that they did not raise in the earlier proceeding.[28]

---

[26] (1995), 38 C.P.C. (3d) 215 at 237.
[27] at p. 575.
[28] See *Glatt v. Glatt,* [1936] O.R. 75 (C.A.); *aff'd* [1937] S.C.R. 347.

**The Second Issue: Is the Appellants' Claim to an Interest in the Lands Based on a Breach of the Robinson-Huron Treaty *Res Judicata*?**

[46] The appellants also claim an interest in the disputed lands because Ontario breached the Robinson-Huron Treaty. In principle, this claims stands on the same footing as their claim based on breach of fiduciary duty. The appellants could have defended the *Bear Island* action by arguing breach of the Treaty but chose not to do so. Ontario therefore submits that the *Bear Island* litigation renders the appellants' claim to an interest in the lands based on a breach of the Treaty *res judicata*.

[47] Winkler J., however, concluded that: "the issue of the alleged violation of the Robinson-Huron Treaty and the question of what remedy may flow from that are not *res judicata*."[29] He thus left open the possibility that the appellants could still maintain a claim to the disputed lands based on a breach of the Treaty though, in his view, they could not do so in the caution proceedings but would have to start a new action. He held that the breach of Treaty claim was not *res judicata* because of what Steele J., this court and the Supreme Court of Canada said about the Treaty in their reasons in the *Bear Island* action. I do not read these reasons the same way that Winkler J. did. He viewed the reasons in the *Bear Island* action as preserving the appellants' claim to an interest in the lands for breach of the Treaty. I view these reasons as preserving only a claim to compensation or related relief, but not to an interest in the lands.

[48] The effect of the Robinson-Huron Treaty on the appellants' aboriginal right to the lands was a central issue before Steele J. He devotes several pages of his reasons to this issue and concludes that even if the appellants had an aboriginal right to the lands, that right was extinguished by the Treaty. He did not consider whether Ontario had subsequently breached the Treaty and, if so, what remedy flowed from the breach because the appellants did not defend the action on the basis of a Treaty breach. Instead, the appellants advanced a single defence at trial to support their land claims: an aboriginal right to the lands. However, Steele J.'s judgment is unqualified and unequivocal: the appellants had no interest in the disputed lands (other than the Bear Island Reserve), Ontario had the right to sell the lands without the appellants' consent and the appellants were forever enjoined from continuing proceedings to prevent Ontario from selling the lands.

[49] On appeal, this court did say that what was not in issue before them was the appellants' right to claim not only compensation but "any other benefit" because of "an unfulfilled obligation under the Robinson-Huron Treaty". In my opinion, the phrase "any other benefit" was not meant to include an interest in the disputed lands. I say this for

[29] at p. 241.

several reasons. First, the court said expressly what was in issue before them: title to the lands. It did not qualify that issue in any way. Second, this court dismissed the appellants' appeal. The court did not amend the judgment of Steele J. to permit the appellants to claim an interest in the lands because of a breach of the Treaty. Third, in excluding from their consideration the appellants' claim to relief for breach of the Treaty, this court undoubtedly was responding to Ontario's acknowledgement in its factum that the appellants had legitimate grievances over the Treaty, grievances which entitled them to compensation. Ontario never acknowledged that any Treaty breach would entitle the appellants to an interest in the disputed lands. Fourth, the parties agreed – as reflected in the letter from the appellants' counsel to the Director of Titles – that the *Bear Island* litigation would resolve the appellants' land claim.



[50] The Supreme Court of Canada also referred to Ontario's concession that it had breached some of its Treaty obligations and observed that negotiations were then taking place to try to settle that matter. Again, however, in my opinion, the Supreme Court by its reasons did not intend to preserve the appellants' right to claim an interest in the lands because of a breach of the Robinson-Huron Treaty. The Supreme Court dismissed the appellants' appeal and thus affirmed the unqualified judgment of Steele J. The Supreme Court – as did this court – was responding to Ontario's "concession" in its factum, a concession that at its highest recognized the appellants' right to compensation or damages for breach of the Treaty. And the parties' arrangement that the *Bear Island* litigation would settle once and for all the appellants' land claim was still in place when the Supreme Court handed down its decision.

[51] The appellants, having asserted one theory – aboriginal title – in all courts in the *Bear Island* case to support their claim to an interest in the lands, and having had that claim rejected at every level, cannot now assert new theories to maintain their 21 year old caution appeals under the *Land Titles Act*. *Res judicata* applies to these new theories. Thus, I agree with Ontario's position in this appeal. The *Bear Island* action determined and made *res judicata* the appellants' claim to an interest in the lands, whether asserted on the basis of aboriginal right or breach of fiduciary duty or breach of the Robinson-Huron Treaty. The appellants do have a claim for compensation for alleged breaches of the Treaty and that compensation may, in a negotiated settlement, include land. But the appellants' claims in the caution appeals have been rendered *res judicata* by the *Bear Island* case.

[52] My proposed resolution of this appeal would grant Ontario more relief than that ordered by Winkler J. However, the position of the Attorney General, which I have adopted, was fully argued in its factum. Therefore, I do not think that my proposed order

is unfair to the appellants. And ss.134(1)(a) and 134(5) of the *Courts of Justice Act*[30] provide the statutory authority for it. Nonetheless, I will consider the appellants' position on the assumption that Winkler J. was correct to exclude the breach of Treaty claim to an interest in the lands from the application of *res judicata*.



**Third Issue: If the Appellants' claim to an interest in the lands based on a breach of the Robinson-Huron Treaty is not *res judicata*, can they assert this claim in the caution appeals?**

[53] Even if I am wrong on the effect of the judgments in the *Bear Island* action and even if the appellants could still claim an interest in the lands based on a breach of the Treaty, I agree with Winkler J. that they cannot do so in their outstanding caution appeals. I come to this conclusion, however, for different reasons than he did. Winkler J. held that breach of the Robinson-Huron Treaty had not been raised as a ground of appeal in the appellants' notices of appeal or amended notices of appeal in the caution proceedings. He then refused to permit the appellants to add this ground of appeal in response to his reasons. To do so, in his view, was analogous to seeking to amend a nullity. Thus, he concluded that: "The appellants may commence a fresh proceeding claiming the alleged breach of the treaty" but "they cannot … properly pursue that issue within the framework of this proceeding".

[54] I would agree with Winkler J.'s reasoning if I were convinced that the existing notices of appeal did not include breach of the Treaty as a ground of appeal. However, in response to the Supreme Court's decision in the *Bear Island* case, the appellants amended their notices of appeal in the caution proceedings to include the following ground:

> …The Supreme Court of Canada found that the Crown had breached its fiduciary obligations to the Appellants herein in connection with an agreement pursuant to which the Appellants surrendered their aboriginal right in the subject lands in exchange for treaty annuities and a reserve.

[55] Although not well-drafted, this ground can reasonably be read to refer to a claim to the lands based on a breach of the Treaty.

[56] However, at least two other reasons support the order that Winkler J. made. First, as I have already said, the parties agreed that the *Bear Island* litigation would decide the outcome of the caution appeals. I find no good reason why the court should overlook the parties' agreement. This agreement is reflected in the wording of the judgment of

[30] Section 134(1)(a) of the *Courts of Justice Act* R.S.O. 1990, c. C.43, permits this court to "make any order or decision that ought to or could have been made by the court or tribunal appealed from", and s. 134(5) provides that this court's powers in s. 134 "may be exercised in favour of a party even though the party did not appeal".

Steele J., which deliberately tracks the language of s.48(1) of the *Land Titles Act*,[31] authorizing the registration of a caution.

[57] Second, the cautions registered by the appellants in 1973 cover over 4,000 square miles. Cautions over such a vast tract of land are consistent only with a claim of aboriginal title. They cannot possibly support a claim to a far more limited area for a reserve, similar to the reserves set aside under the Robinson-Huron Treaty itself. Therefore, I do not think that the appellants can use the existing cautions to support their new theory of the case. They might have tried to register new cautions based on a breach of the Treaty, but these new cautions would differ radically from those registered in 1973.



**Conclusion**

[58] For all of these reasons, I would dismiss the appellants' appeals, with costs if demanded by Ontario. I would also modify the order of Winkler J. to give effect to my conclusion that *res judicata* precludes the appellants from claiming an interest in the lands because of a breach of the Robinson-Huron Treaty. Winkler J. ordered no costs of the application before him and I would not disturb that order.

Released: NOV 15 1999

Signed: "John Laskin J.A."
"I agree Doherty J.A."
"I agree. Louise Charron J.A."

[31] now s.43(1).