No: C-3512-14 and C-3512-14A

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

MIKE RESTOULE, PATSY CORBIERE, DUKE PELTIER,
PETER RECOLLET, DEAN SAYERS AND ROGER DAYBUTCH ET AL

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF ONTARIO and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties

Court File No. 2001 – 0673

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CHIEF AND COUNCIL OF THE RED ROCK FIRST NATION,
on behalf of THE RED ROCK FIRST NATION BAND OF INDIANS ET AL

Plaintiffs

-and-

THE ATTORNEY GENERAL OF CANADA, and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and
THE ATTORNEY GENERAL OF ONTARIO
as representing Her Majesty the Queen in Right of Ontario

Defendants

FACTUM OF THE ATTORNEY GENERAL OF CANADA

STAGE TWO MOTIONS
(Hearing at Sudbury Commencing October 15, 2019)

OVERVIEW

1. The combined trial of the two actions involving the pre-Confederation Robinson Treaties has been divided into three stages. Stage 1, concerning the interpretation of the Treaties' annuity augmentation promise, has already been decided by partial summary

judgment. In it the court identified Crown obligations and duties associated with the augmentation promise. The Stage 1 ruling did not determine the extent to which the different obligations and duties are borne by each of the two post-Confederation Crowns. Stage 2 involves the determination of specific issues by way of partial summary judgment. Stage 3 is to resolve all remaining issues, including the allocation of responsibility and liability between Canada and Ontario along with other remedies issues.

2. The plaintiffs' Stage 2 motions are now before the court. They seek partial summary judgments that include rulings on the applicability of Ontario's limitations and Crown immunity defences, together with the nature of Crown liability under a future money judgment. In the two issues in which Canada is actively participating, the plaintiffs ask the court to determine, in advance of Stage 3, that Ontario and Canada should be found "jointly and severally" liable for any and all compensation to be paid or, alternatively, that Canada is to be "paymaster" in respect of the full amount of any eventual Stage 3 money judgment.

3. There are well-established constitutional and public law principles in place that provide for the allocation of liability between Canada and Ontario. The private law concept of "joint and several" liability is not available and does not apply. Further, although the concept of "paymaster" is constitutional in stature, its applicability requires the court to first make findings on other issues, including the basis and nature of Crown liability for breach of treaty or associated duties. These are Stage 3 questions on which findings can be made only on the basis of evidence and in the context of addressing other remedies issues.

4. In addition, the "joint and several" and "paymaster" issues should not be dealt with by way of partial summary judgment. Both claims propose unnecessary solutions for problems that do not exist concerning payment of a final judgment. Established constitutional and public law regimes allocate Crown liability in such a way that the plaintiffs will not be left unpaid under a money judgment.

5. Further, premature rulings made in Stage 2 could have significant negative consequences. Such rulings could lead to future inconsistent findings and compromise Canada's ability to advance its full defence in Stage 3. As well, there is little or no utility or saving of judicial and litigation resources to be had in deciding the "joint and several" and "paymaster" issues in advance and in isolation from Stage 3. The evidence going to the allocation of Crown liability will overlap and be intertwined with other Stage 3 evidence on remedies.

6. The appropriate outcome of the Stage 2 motions on the "joint and several" and "paymaster" issues is to adjourn them to the Stage 3 trial where they can be determined together with the companion federal-provincial and other remedies issues on a full record.

PART I – FACTS

7. The trial of the two Robinson Treaties actions has been divided into three stages:

- Stage 1 - interpretation of the Treaties' annuity augmentation promise
- Stage 2 - determination of specific issues by way of partial summary judgment
- Stage 3 - trial of the remedies issues.

(a) Facts: Stage 1 – outcome on treaty interpretation

8. Stage 1 was decided by partial summary judgment. The court's reasons were delivered in December 2018. The formal judgment was issued in June 2019. In its decision, the court identified multiple Crown obligations and duties associated with the annuity augmentation promise:

- a Crown treaty obligation based on a process right to have the availability of government net territorial resource revenues (NTRR) determined from time to time;
- a Crown treaty obligation based on a substantive right to have annuity payments increased if NTRR are available;
- a Crown fiduciary duty in respect of the process and substantive treaty rights;
- a Crown duty flowing from the honour of the Crown to purposively interpret the Treaties; and
- a Crown duty flowing from the honour of the Crown to purposively and

diligently implement the augmentation provisions as interpreted.

(b) Facts: Stage 2 – partial summary judgment motions pending

9. The plaintiffs now move in Stage 2 for partial summary judgment. Their motions, brought under Rules 20.01(1) and 20.04(2), seek declarations under five heads:

(1) that Ontario's limitations legislation does not apply to the plaintiffs' claims;
(2) that Ontario does not benefit from the doctrine of Crown immunity;
(3) that Ontario's limitations defence cannot apply to the benefit of Canada;
(4) that both Crowns are jointly and severally liable "to pay the plaintiffs the full amount of any compensation payable in respect of the [Robinson Treaties'] annuity augmentation promise"; and
(5) that, in any event, Canada is a "paymaster" and "obligated to pay to the plaintiffs the full amount of any compensation payable in respect of any failure to augment the annuities irrespective of which level of government is ultimately liable for the compensation to be paid."

(c) Facts: Stage 3 – description of anticipated Stage 3 issues

10. The trial of Stage 3 has been scheduled to begin in April 2021. With Stage 3 issues being significantly shaped by the outcome to Stage 1, Canada's remedies defence is still in preparation. However, for purposes of providing context for the Stage 2 motions, Canada's defence can be described at least in general terms.

11. In Stage 1, the court identified Crown obligations and duties associated with the annuity augmentation promise made in the 1850 Treaties. Stage 3 issues include (i) whether, when and how each of the different obligations and/or duties arose and were breached, (ii) the consequences of such breaches, (iii) the development of appropriate remedies, and (iv) the allocation of responsibility or liability between the federal and provincial Crowns for the obligations and duties and their breaches.

12. Stage 3 issues will include also the fashioning of remedies that restore the ongoing treaty relationship and promote the reconciliatory imperative of Section 35 of the *Constitution Act, 1982*. This approach to remedies will require the consideration of contextual and other evidence. Such evidence will include expert and other efforts to reconstruct what territorial resource revenues have been available to the Crown in the

past, including the two post-Confederation Crowns, and the nature of the expenses to be attributed to such revenues. Stage 3 evidence will also include histories of the economic dimensions of the treaty and non-treaty relationships between the Crowns and the Robinson Treaties First Nations through the period from 1850 to the present.

13. As framed by the plaintiffs, the "joint and several" and "paymaster" motions are limited to the subject of money compensation. Because assessing fair and proportionate compensation to remedy past Crown failures associated with the treaty augmentation promise is an aspect of the potential remedies to be considered, Canada acknowledges that the results of Stage 3 will almost certainly include a money judgment.

(i) Stage 3 issues described:
Allocation of federal vs provincial liability is integral to Stage 3

14. Included as part of Stage 3 is the issue of the allocation of liability between the federal and provincial Crowns. To resolve this issue, the court will need to determine the nature of the liability resulting from a money judgment itself as well as the source and nature of the obligations and duties that underlie it. Making these determinations will require the court to consider evidence of when and how the particular obligations and duties arose and when and how they were breached. The evidence on these issues will be intertwined with the evidence on the other Stage 3 issues described above.

15. The allocation of financial responsibility between Canada and Ontario falls to be determined by the application of established legal models that are grounded in the constitution or in public law principles. In the context of these cases, the models categorize Crown liabilities in these cases in three possible ways:

- Section 111 *Constitution Act, 1867*:
  applies to a liability "existing at the Union" within the scope of Section 111;
- the common law of state succession:
  applies to a liability linked to the 1850 Treaties but that was not known or ascertainable in 1867 and thus not within the scope of Section 111; or
- Sections 109, 91, 92, 92A *Constitution Act, 1867*:
  apply to a liability based on treaty obligations or associated Crown duties that

arose after 1867 and which should be allocated to the level of government that owns relevant revenue-generating properties and by reference to the division of powers provisions of the constitution.

One of these established models will necessarily apply.

See Sections 91, 92, 92(5), 92A, 109, 111 and 112, *Constitution Act, 1867* (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, Appendix II, No. 5. The provisions are excerpted in Schedule 2.

See *The Attorney General for the Dominion of Canada v. The Attorney General for Ontario,* [1897] A.C. 199. [Commonly referred to as *The Annuities Case*]

Re. the common law of state succession see: *AG. v. Great Southern and Western Rlv. Co. of Ireland,* [1925] A.C. 754 and *R. v. Secretary of State,* [1982] 2 All E.R. 118 (C.A.).

Section 111:
Liabilities "existing at the Union" within the meaning of Section 111

16. Ontario has put in issue whether the entirety of a Stage 3 money judgment will constitute or represent a debt or liability of the old Province of Canada "existing at the Union" within the meaning of Section 111 of the *Constitution Act, 1867*. Pursuant to Section 111, not only would Canada be required to pay the plaintiffs the full amount of such a judgment, but Ontario would be insulated from direct liability to the plaintiffs.

Common law of state succession:
Liabilities not known or ascertainable in 1867 and not covered by Section 111

17. Canada will contend in Stage 3 that Section 111 applies only to debts and liabilities of the old Province that were known or ascertainable in 1867. According to this legal model, liability for paying them is governed not by Section 111 but by public law principles drawn from the common law of state succession. By these principles, liabilities arising under a treaty entered into by the Province of Canada before 1867 but that were not known or ascertainable at the time of the Union would follow the migration of Crown assets and revenues on Confederation. The result would require Ontario to pay the portion of such liabilities associated with assets and revenues over which the provincial government has, since Confederation, assumed administration and control. Similarly, Canada would be required to pay the portion of the liabilities of the old Province that are associated with assets and revenues over which the federal government

has assumed administration and control. Together, both portions would total 100 per cent of the award.

Sections 109, 91, 92, 92A
Liabilities based on obligations/duties arising after 1867

18. Canada also contends that some or all of the amounts that may become payable under a Stage 3 judgment cannot be characterized as debts or liabilities incurred by the old Province but would be based on treaty obligations and associated duties that arose after Confederation. Consistent with the court's findings in Stage 1, this legal model sees the Robinson Treaties as ongoing relationships with Crown obligations and duties arising periodically after 1867, each potentially giving rise to a post-Confederation liability. This defence is also constitutionally grounded. Based on Section 109 and the division of powers under the *Constitution Act, 1867*, it treats each of Canada and Ontario as being legally responsible for fulfilling only the obligations and duties that are associated with revenues and assets over which they have administration and control or in respect of which they have constitutional authority.

19. As with the previous model based on the common law of state succession, any portion of a future Stage 3 money judgment adopting this post-Confederation approach would allocate liability for a monetary award separately to Canada and Ontario based on their respective powers, assets and associated revenues realized over time. In short, judgment for a specific amount would be given against Canada and for a different specific amount against Ontario (with both totalling 100 per cent of the award).

(ii) Stage 3 issues described:
Procedure for determining federal vs provincial liabilities

20. The Stage 3 allocation issues have been presented by Canada through two different procedures.

21. One is a limited cross-claim by Canada under Section 112 of the *Constitution Act, 1867*. It applies only to the extent that the court concludes that a money judgment

represents a liability "existing at the Union" and thus falls within the scope of Section 111. Importantly, because the terms of Sections 111 and 112 make Canada liable for payment of a judgment and insulate Ontario, any need to adjudicate the cross-claim between Canada and Ontario could not delay payment to the plaintiffs of a final Stage 3 judgment based on such pre-Confederation liabilities.

22. The other is a not a cross-claim but a defence. An integral part of Stage 3, it applies to both (i) liabilities generated before 1867 but that fall outside of Section 111, for which federal-provincial responsibility would follow administration and control of Crown assets; and (ii) post-Confederation liabilities based on obligations and duties arising after 1867 and for which responsibility would follow the constitutional division of assets, revenues and powers provided for in Section 109, together with Sections 91, 92, 92A of the *Constitution Act, 1867*. By this defence, the responsibility or liability of each of the two Crowns is separate. Separate liability would result in individual judgment amounts as against each of Canada and Ontario.

(d) Facts: Related proceeding – Ontario's outstanding Stage 1 appeal

23. Ontario's appeal of the Stage 1 judgment also has implications for whether the determination of Motion Items 4 and 5 should be decided in advance of Stage 3. Material features of the Stage 1 decision put in issue on the appeal are whether the Crown retained discretion to determine the amount of resource-based annuity increases, and whether the procedural and substantive treaty rights described above are subject to a fiduciary duty. The outcome of the appeal could affect Crown liability, including how liability to pay compensation is to be properly allocated between Canada and Ontario.

PART II – ISSUES AND CANADA'S POSITION

Re Motion Item 1: applicability of Ontario's limitations legislation

24. Canada is not advancing a limitations defence. The Attorney General makes no submissions concerning the application of Ontario's limitations legislation to the plaintiffs' claims. Whether Ontario's limitations legislation provides the province with a

valid defence against Canada's cross-claim under Section 112 of the *Constitution Act, 1867* has not been put in issue in Stage 2. However, as Canada submits elsewhere in this factum, Stage 3 issues include the questions of when treaty obligations and Crown duties associated with the annuities provisions arose or crystallized, and of when they may have been breached. Consistent with the Court of Appeal's restrictions on the use of partial summary judgment, a Stage 2 ruling on the applicability of Ontario's limitations legislation must not compromise Canada's ability to raise, or the court's ability to determine, such issues as part of Stage 3.

See paras 28 to 30, below.

Re Motion Item 2: applicability of the doctrine of Crown immunity

25. Similarly, Canada has no submissions to make on the application of the doctrine of provincial Crown immunity to the plaintiffs' claims. Canada has not pleaded or put forward for determination in this litigation the question of whether or not it is immune from claims in respect of any of the obligations or duties identified in Stage 1 that pre-date the passage of the federal *Crown Liability and Proceedings Act* in 1953.

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27.
Crown Liability and Proceedings Act, 2019, S.O. 2019, c. 7, Sched. 17.
Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50.

Re Motion Item 3: extension of Ontario's limitations defence to Canada

26. Canada does not, and will not, contend in this litigation that it is sheltered from paying its own liabilities should Ontario succeed on its limitations defence. Whether Canada can benefit from a limitations defence successfully applied to Ontario's liabilities is essentially a restatement of the joint and several issue in Motion Item 4. Canada submits that Motion Item 3 should be adjourned to Stage 3 to determine whether it is, in fact, a live issue requiring judicial determination.

Re Motion Items 4 and 5: joint and several Crown liability and "paymaster"

27. Canada does not consent to proceeding by way of partial summary judgment on Motion Items 4 or 5. Both the "joint and several" and "paymaster" claims propose

unnecessary and inappropriate solutions for problems that do not exist concerning payment of a final judgment. Established constitutional and public law regimes allocate Crown liability in such a way that the plaintiffs will not be left unpaid under a money judgment. Further, to make premature rulings in Stage 2 could have significant negative consequences for Stage 3, including leading to future inconsistent findings and compromising Canada's ability to advance its defence in Stage 3 based on a full record. Canada submits that the appropriate outcome of the Stage 2 motions on these two issues is to adjourn them to the Stage 3 trial where they can be determined together with the companion federal-provincial and other remedies issues.

PART III – LAW AND ARGUMENT

(a) The uses and availability of partial summary judgment are limited
(b) The plaintiffs' argument that the Crown is "indivisible" is not supported
(c) The "joint and several" claim is not amenable to partial summary judgment
(d) The "paymaster" claim is not amenable to partial summary judgment
(e) Additional considerations re the use of partial summary judgment in Stage 2

(a) The uses and availability of partial summary judgment are limited

28. Mega trials of historical cases like the two at bar may need to be segmented in order to achieve judicial and litigation efficiencies. However, partial summary judgment as a means of separating out issues must be used sparingly and with extreme caution. The principles governing the limited uses and availability of the procedure have been summarized by the Court of Appeal in the post-*Hryniak* decision of *Service Mold+Aerospace Inc. v. Khalaf*:

> The principles that guide whether partial summary judgment is appropriate are, however, more complex than those that apply to summary judgment motions generally. In *Hryniak*, at para. 60, Karakatsanis J. recognized that partial summary judgment may "run the risk of duplicative proceedings or inconsistent findings of fact" at trial. There is also the risk that partial summary judgment can frustrate the *Hryniak* objective of using summary judgment to achieve proportionate, timely and affordable justice. If used imprudently, partial summary judgment can cause delay, increase expense, and increase the danger of inconsistent findings at trial made on a more complete record: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 (CanLII), 137 O.R. (3d) 561, at paras. 29-33. These risks, which require careful consideration by motion judges, were known before *Hryniak* and *Butera*, as illustrated by this

> court's decision in *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.T.C. 475 (C.A.), at para. 3. For this reason, while partial summary judgment has its place, it "should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner": *Butera*, at para. 34.
>
> *Service Mold+Aerospace Inc. v. Khalaf*, 2019 ONCA 369, at para 14 [Emphasis added].

29. Achieving judicial and litigation efficiencies was a major purpose of splitting off treaty interpretation from the balance of the issues in Stage 1. But although Stage 1 has sometimes been described as a "partial summary judgment" process, it effectively included a trial. The Stage 1 procedure allowed for production, discovery, the presentation of *viva voce* and other evidence, and findings of fact on a full record. The expansive Stage 1 model is not being applied in the partial summary judgment procedure adopted for Stage 2. A trial process similar to Stage 1 that includes production, discovery and a full evidentiary record will not be available outside of Stage 3.

30. Although it may be appropriate for the limitations and Crown immunity issues, the "joint and several" and "paymaster" claims are not amenable to partial summary judgment. They cannot be adjudicated fairly or properly independently of Stage 3 and should not be severed from Stage 3 for that purpose.

> *Service Mold+Aerospace Inc. v. Khalaf, supra,* at para 14.
> *Butera v. Chown, Ciarns LLP*, 2017 ONCA 783, at para 34.
> *Corchis v KPMC Peat Marwick Thorne*, [2002] OJ No 1437 (C.A), at para 3.
> *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.*, 2019 ONCA 6.
> *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, at para. 9.
> *Mason v. Perras Mongenais*, 2018 ONCA 978, at paras 22, 41.

(b) The plaintiffs' argument that the Crown is "indivisible" is not supported

31. As described in Paragraph 7, above, the court identified Crown obligations and duties associated with the 1850 annuity augmentation promise in Stage 1. The plaintiffs argue in Stage 2 that the post-Confederation Crowns in some way retain the status of the pre-Confederation Crown for purposes of performing these various obligations and duties. On this basis, they maintain that the "indivisible" Crown is liable to pay all compensation

that may be awarded to remedy their breach. The thrust of this argument is that the plaintiffs are not bound by constitutionally established arrangements providing for the management of Crown assets and liabilities on Confederation. This argument is contrary to authority.

32. The Supreme Court considered the principle of the indivisibility of the Crown in *Mitchell v. Peguis Indian Band.* Dickson C.J.C. placed significant limitations on the application of the concept:

> 23. The Court of Appeal relied on the idea that the Crown was indivisible to hold that "Her Majesty" had to apply to both levels of government. With respect, I cannot adopt that approach. The Court of Appeal's interpretation seems grounded in the belief that there cannot be "two Queens". As Professor Hogg succinctly notes in *Constitutional Law of Canada*, 2nd ed. (1985), at p. 216, divisibility of the Crown in Canada does not mean that there are eleven Queens or eleven Sovereigns but, rather, it expresses the notion (at p. 217) of "a single Queen recognized by many separate jurisdictions". Divisibility of the Crown recognizes the fact of a division of legislative power and a parallel division of executive power. If a principle so basic needed the confirmation of high judicial authority, it can be found as far back as the Privy Council decision in *Maritime Bank of Can. (Liquidators) v. N.B. (Receiver Gen.)*, [1892] A.C. 437, in which Lord Watson said at pp. 441-42:
>
> > The object of the [*British North America] Act* [1867] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces ...
>
> *Mitchell v Peguis Indian Band,* [1990] 2 S.C.R 85 at 101-102, 71 D.L.R (4th) 193. [The majority of the court agreed with Dickson C.J.C. in regard to his comments on divisibility, but decided that the *Indian Act*, which was the statute in question, referred only to the Queen in Right of Canada].

33. The *Constitution Act, 1867* treats the two levels of government as separate. Significantly, it allocates limited property and a consolidated revenue fund to Canada and other property and distinct consolidated revenue funds to each of the provinces. In *Re Silver Brothers*, a case involving the relative priority of debts owed to the provincial and federal governments, the Privy Council distinguished the two "purses" of the post-

Confederation Crowns as follows:

> It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown [the *Constitution Act, 1867*] there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.
>
> *In Re Silver Brothers*, [1932] 2 D.L.R 673 at 679-680, [1932] AC 514 (J.C.P.C).

34. Historic constitutional changes may result in the assignment of responsibilities to governments that did not exist at the time a treaty or other Crown agreements were made but that have since become the constitutional governments in and for the jurisdiction. Such changes affect the legal rights of everyone, including First Nations. This is illustrated by the 1982 decision of the English Court of Appeal rejecting a claim by Alberta First Nations that the Crown in Right of the United Kingdom remained responsible for the performance of obligations under treaties made with Her Majesty. As explained by Lord May:

> But, in my opinion, on both the general and particular considerations to which I have referred, I do not think that [Section 7 of the Statute of Westminster] in any way means that any treaty or other obligations into which the Crown may have entered with its Indian peoples of Canada still enure against the Crown in right of the United Kingdom. Quite clearly, to the extent that these still continue - and I think that it is clear that the Canadian Courts have held that they do - they are owed by the Crown in right of the Dominion or in right of the particular province.
>
> *R. v. Secretary of State for Foreign & Commonwealth Office*; *Ex parte Indian Assn. of Alta.*, [1982] 1 Q.B. 892, [1981] 4 C.N.L.R 86 at 117 (C.A.).

35. The plaintiffs' substantive and process rights flowing from their 1850 Treaties were not changed by Confederation. However, in establishing the federation the Constitution did fundamentally change which emanation of the Crown was to be responsible for performing the treaty obligations and associated Crown duties. Although with Confederation both levels of government became responsible for fulfilling such obligations and duties, their respective responsibilities were divided to align with federal or provincial administration and control of assets and revenues and authority under the Constitution. The point was discussed by the Supreme Court in *Grassy Narrows*, a case dealing with an 1873 treaty made only with the federal Crown and covering lands that

were later determined to be in Ontario:

> [35] The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act, 1867*. Thus, when the lands covered by the treaty were determined to belong to the Province of Ontario, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, subject to the terms of the treaty. It follows that the Province is entitled to take up lands under the treaty for forestry purposes.
>
> *Grassy Narrows First Nation v. Ontario (Natural Resources),* 2014 SCC 48; [2014] 2 SCR 447, at para 35. [Emphasis added]

36. According to *Grassy Narrows*, not only did the power to take up lands devolve to Ontario, but so did responsibility under the associated Crown duty to consult:

> [50] I conclude that as a result of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. However, this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.
>
> [51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.
>
> *Grassy Narrows First Nation v. Ontario (Natural Resources), supra*, at paras 50, 51 [Emphasis added].
>
> See also: *Ontario Mining Co. v. Seybold,* [1903] A.C. 73 (On Div Ct), at p. 81; *Smith v. The Queen*, [1983] 1 S.C.R 554, at p. 572; and *Frank v. The Queen*, [1978] 1 S.C.R. 95.

37. The arrangements made in the *Constitution Act, 1867* for allocating the assets and revenues of the old provinces and for distributing federal and provincial powers apply to the rights of the plaintiffs as much as to the obligations of the separate post-

Confederation Crowns. The same is true of the constitutional and public law principles for managing the debts and liabilities of the old provinces. There is no legal basis on which the court can impose liability on both Crowns on other, extra-constitutional, bases as contended in the plaintiffs' "joint and several" and "paymaster" claims.

(c) The "joint and several" claim is not amenable to partial summary judgment

38. The issue of whether the federal and provincial Crowns are jointly and severally liable for "compensation payable in respect of the annuity augmentation promise" is not amenable to determination by partial summary judgment motion.

> *Service Mold+Aerospace Inc. v. Khalaf, supra.*
> See also authorities cited at paras. 28 and 29, above.

39. Before the "joint and several" claim can properly be considered on the merits, a crucial question that must be asked and answered is which of the three constitutional and public law categories does the liability represented by a money judgment fit into: Section 111, the common law of state succession, and/or Sections 91, 92, 92A and 109?

> Sections 111, 112, *Constitution Act, 1867.*
> Sections 91, 92, 92(5), 92A and 109, *Constitution Act, 1867.*
> *The Attorney General for the Dominion of Canada v. The Attorney General for Ontario, supra*
> *R. v. Secretary of State, supra.*
> *AG. v. Great Southern and Western Rlv. Co. of Ireland, supra.*
> *Grassy Narrows First Nation v. Ontario (Natural Resources), supra.*
> See paras. 14 to 19, above.

40. This is a threshold question that the plaintiffs' motions seek to side-step. Yet the question cannot be avoided since each of the alternatives triggers an established constitutional or public law regime that is inconsistent with the private law concept of joint and several liability. Nor can the question be answered in the abstract. Instead, its answer requires a full evidentiary record and the context provided by the other Stage 3 remedies issues.

> *Good v. Toronto Police Services Board*, 2013 ONSC 3026, at para 142.
> See paras. 14 to 19, above.

41. These governing constitutional and public law regimes apply to the Robinson Treaty parties as much as they do to Canada and Ontario. All three legal models would see the plaintiffs paid under a final money judgment. Further, the determination of which model applies will not measurably prolong the Stage 3 trial and cannot sensibly or properly be adjudicated in advance of it.

42. As long as this threshold question remains open, the issue of joint and several Crown liability cannot, and should not, be adjudicated. It is a question that will remain open through Stage 3. The plaintiffs' motions attempt to bypass these determinations.

(d) The "paymaster" claim is not amenable to partial summary judgment

43. The claim that Canada is "paymaster" is also not amenable to determination by partial summary judgment.

> *Service Mold+Aerospace Inc. v. Khalaf, supra*.
> See authorities cited at paras. 28 and 30, above.

44. It is Section 111 of the *Constitution Act, 1867* that provides the legal basis on which Canada has, historically, been cast as "paymaster" for annuities. As explained above, Section 111 can be engaged in these cases only to the extent that the court's future award of compensation constitutes or derives from liabilities "existing at the Union". This determination cannot be made without first establishing the nature of the liabilities on evidence.

45. The plaintiffs' "paymaster" motion asks the court to determine in Stage 2, without evidence and the benefit of the Stage 3 trial, that all awards that may be made in a future judgment will constitute or relate to liabilities that come within the scope of Section 111. Such a ruling in Stage 2 would not only create a risk of inconsistent findings in Stage 3 where such evidence will be available, but would compromise Canada's right and ability to advance its defence that most, or all, Crown liabilities in these cases do not, as a matter of fact and law, come within Section 111.

(e) Additional considerations re the use of partial summary judgment in Stage 2

46. In addition to creating a real risk of inconsistent findings and prejudice to Canada's ability to defend Stage 3, there are other reasons why the issues of "joint and several" Crown liability and of Canada as "paymaster" should not be adjudicated by partial summary judgment.

(i) Partial summary judgment will not save resources or advance the litigation

47. The summary judgment motions will not advance the litigation. The proper basis of Crown liability will be fully, and necessarily, determined as part of Stage 3. Ruling on the "joint and several" or "paymaster" issues in advance of Stage 3 will not avoid the need for evidence and will not shorten the Stage 3 trial in a measurable way.

48. As submitted above, Stage 3 requires determinations on a range of issues that include whether, when and how Crown obligations and/or duties arose and were breached, together with the allocation of liability between the federal and provincial Crowns for such breaches. The evidence going to the multiple Stage 3 issues will overlap and be linked to the evidence to be considered in determining the legal character of the losses and resulting compensation. Accordingly, little or no saving of judicial or litigation resources would be realized by determining that the Crowns will be jointly and severally liable, or that Canada is paymaster, in advance of Stage 3.

See: *Butera v. Chown, Ciarns LLP, supra.*
See: *Corchis v KPMC Peat Marwick Thorne, supra.*
Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc., supra.
Baywood Homes Partnership v. Haditaghi, supra.
Mason v. Perras Mongenais, supra.
See paras. 14 to 19, above.

(ii) Little utility or benefit to be gained through a Stage 2 partial summary judgment

49. There is also little utility to be gained through a Stage 2 ruling that the federal and provincial Crowns are jointly and severally liable. Under a liability scenario in which Section 111 applies, Canada will, indeed, become "paymaster" and be required to pay – leaving it to look to Ontario for reimbursement under Section 112 of the *Constitution Act*,

1867. By virtue of Sections 111 and 112, this claim over cannot delay payment to the plaintiffs. Under the other scenarios described above, no serious suggestion can be made that either Canada or Ontario would not pay final judgments made directly against each of them.

50. Because it cannot be demonstrated that it would speed up or otherwise enhance payment of a final judgment, there is no real benefit to the court's determining either Motion Item 4 or Item 5 in Stage 2. In this respect, Items 4 and 5 represent solutions in search of a problem.

PART IV – ORDER SOUGHT

51. The plaintiffs have moved for partial summary judgment under five heads:

(1) that Ontario's limitations legislation does not apply to the plaintiffs' claims;
(2) that Ontario does not benefit from the doctrine of Crown immunity;
(3) that Ontario's limitations defence cannot apply to the benefit of Canada;
(4) that both Crowns are jointly and severally liable "to pay the plaintiffs the full amount of any compensation payable in respect of the [Robinson Treaties'] annuity augmentation promise"; and
(5) that, in any event, Canada is a "paymaster" and "obligated to pay to the plaintiffs the full amount of any compensation payable in respect of any failure to augment the annuities irrespective of which level of government is ultimately liable for the compensation to be paid."

Re Motion Item 1 – Ontario's limitations defence

52. Canada seeks no specific orders in respect of Item 1. The question of whether Ontario's limitations legislation provides the province with a valid defence against Canada's cross-claim under Section 112 of the *Constitution Act, 1867* is not in issue in Stage 2.

Re Motion Item 2 – Ontario's Crown immunity defence

53. Canada seeks no specific orders in respect of Item 2.

Re Motion Item 3 – Whether Canada benefits from Ontario's limitations defence

54. Canada asks that Item 3 be adjourned to Stage 3 where it can better be determined if

it is, in fact, a live issue.

Re Motion Items 4 and 5 – "joint and several" and "paymaster" claims

55. Canada submits that the appropriate order is to adjourn Items 4 and 5 to be heard and determined as part of Stage 3.

Re costs

56. Canada's costs submission are as follows:

- Re Motion Items 1 and 2: Canada makes no submission on costs, other than that it would not be appropriate to award costs against Canada
- Re Motion Items 3, 4 and 5: Costs should be reserved to Stage 3.

RESPECTFULLY SUBMITTED

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Toronto. September 16, 2019.

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Schedule A - List of Authorities

AG. v. Great Southern and Western Rlv. Co. of Ireland, [1925] A.C. 754

Attorney General for the Dominion of Canada v. Attorney General for Ontario, [1897] A.C. 199

Baywood Homes Partnership v. Haditaghi, 2014 ONCA 450

Butera v. Chown, Ciarns LLP, 2017 ONCA 783

Corchis v KPMC Peat Marwick Thorne, [2002] OJ No 1437 (C.A)

Frank v. The Queen, [1978] 1 S.C.R. 95

Good v. Toronto Police Services Board, 2013 ONSC 3026

Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48, [2014] 2 SCR 447

Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc., 2019 ONCA 6

In Re Silver Brothers, [1932] 2 D.L.R 673 at 679-680, [1932] A.C 514 (J.C.P.C)

Mason v. Perras Mongenais, 2018 ONCA 978

Mitchell v Peguis Indian Band, [1990] 2 SCR 85 at 101-102, 71 D.L.R (4th) 193

Ontario Mining Co v Seybold, [1903] 13 A.C 73 (On Div Ct)

R. v. Secretary of State, [1982] 2 All E.R. 118 (C.A.)

R. v. Secretary of State for Foreign & Commonwealth Office; *Ex parte Indian Assn. of Alta.*, [1982] 1 Q.B. 892, [1981] 4 CNLR 86 (C.A.)

Service Mold+Aerospace Inc. v. Khalaf, 2019 ONCA 369

Smith v. The Queen, [1983] 1 SCR 554

Schedule B – Statutes

Constitution Act, 1867 (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, Appendix II, No. 5

Crown Liability and Proceedings Act, 2019, S.O. 2019, c. 7, Sched. 17

Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27

Constitutional Provisions referred to in Paragraph 15

See Sections 91, 92, 92A, 109, 111 and 112, *Constitution Act, 1867* (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, Appendix II, No. 5.

Section 92: In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, … (5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

Section 92A provides, in part:

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Section 109: All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Section 110: All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Section 111: Canada shall be liable for the Debts and Liabilities of each Province existing at the Union. [For purposes of the Robinson cases, it applies to debts and liabilities of the old Province of Canada existing at Confederation].

Section 112: Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

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