Court File Nos: C-3512-14 & 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, on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850

Plaintiffs (Moving Parties)

- and -

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

Defendants (Responding Parties)

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties

REPLY OF THE PLAINTIFFS

Stage Two: Crown Immunity, Statutory Limitations and Crown Liability

OCTOBER 7, 2019

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INTRODUCTION

1. The interpretation of ss. 28 and 29(1) of the *Proceedings Against the Crown Act* (PACA) put forward by Ontario is inconsistent with authority, unsupported in law, and contrary to the constitutional obligations owed by the Crown to Indigenous peoples. Ontario cannot point to a single case where the Crown has been held to be immune from a claim for breach of fiduciary duty in a case involving Indigenous peoples and their rights. Nevertheless, Ontario asks this Court to ignore precedent and find that it is insulated from a breach of the Crown's fiduciary obligation to implement its solemn Treaty promises.

2. While Ontario does not assert immunity from claims of breach of treaty, it argues that statutory limitation periods for an action on a speciality, an action for breach of a simple contract, or an action on account can apply to such claims. Ontario's argument ignores the *sui generis* nature of the treaty relationship, and seeks, contrary to this Court's findings in Stage One, to reduce the Treaty to a mere transactional instrument.

3. Ontario and Canada both resist the plaintiffs' request that the Court order Canada to act as paymaster on the basis of an assertion that such an order requires the Court to determine whether liability for treaty payments is properly characterized as one governed by ss. 111 and 112 of the *Constitution Act, 1867*. This fundamentally misunderstands the argument. The plaintiffs seek the paymaster order on the basis that the honour of the Crown requires that the plaintiffs be able to look to Canada for payment, *regardless* of which level of government is ultimately required to bear the financial burden of compensating for the Crown's failure to implement the Treaty. Nothing needs to be determined about the respective liability of the Crowns for the paymaster order to be made.

REPLY TO ONTARIO

A. Legislation that bears on the Crown's Treaty promises must be interpreted according to the interpretive principles of the honour of the Crown

4. It is the plaintiffs' position that even without utilizing the honour of the Crown as an interpretative principle or applying the *Nowegijick* principle to the Ontario legislation at

issue in this motion, Ontario's arguments about the interpretation and application of the PACA and the various provisions of the *Limitations Act, 1990*, must fail.

5. Nevertheless, the plaintiffs submit that the Court should reject Ontario's argument that the honour of the Crown, "is not available as a plenary principle of interpretation in construing statutes of general application and the common law."[1] No authority or citation is given for this statement. Ontario simply goes on to say that the honour of the Crown is a "constitutional principle" and points out that constitutional questions are not at issue in this stage. This is self-evident from the Notice of Motion and does not support Ontario's argument.

6. Ontario cites Ruth Sullivan for the proposition that, "When interpreting statutes of general application, courts do not invoke interpretive principles regarding the honour of the Crown, liberal construction or presumptions that doubtful expressions will be resolved in favour of Indigenous people."[2] Nothing in the portion of Sullivan cited by Ontario supports this proposition. What Sullivan actually says is that, "the courts emphasize that these principles do not entail automatic acceptance of the preferred Aboriginal outcome. Other indicators of legislative intent must also be taken into account."[3]

7. Sullivan goes on to take issue with courts that have imposed limitations on the application of the principle, stating:

> [T]hese limitations on liberal interpretation fly in the face of the social justice concerns recognized in *Nowegijick* and recalled by Dickson C.J. in his dissenting judgment in *Mitchell*:
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> > The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. … It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal

[1] Ontario Response at para 23.

[2] Ontario Response at para 26.

[3] Ruth Sullivan, *Statutory Interpretation*, 3rd ed, (Toronto: Irwin Law, 2016) at 254, (emphasis added).

> responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.[4]

8. In his dissenting judgment, Dickson C.J. goes on to state:

> In oral argument, the appellants also sought to distinguish *Nowegijick* on the basis that the case dealt only with laws touching upon the particular status or qualities of Indians, thus providing a policy basis for the interpretive principle. … The only limitation to the principle articulated in *Nowegijick* was that the treaties or statutes must "relat[e] to Indians" for the liberal interpretive principle to apply.[5]

9. Chief Justice Dickson makes two things clear: 1) that the interpretive principles recognize and are sensitive to the historical and continuing systemic discrimination of Indigenous peoples, and 2) that the only limitation to the application of the principles is that the statutory provisions "must relate" to Indigenous peoples. As to the nature of Dickson C.J.'s dissent, it should be carefully noted that there was no disagreement between the Chief Justice and LaForest J. (writing for the majority) on the disposition,[6] nor on the "canons of interpretation" which define the interpretive principles.[7] The reasons of Dickson C.J. on this point are therefore important to fully understanding the principle and its application.

10. Justice LaForest's judgement also makes clear that the principles apply whenever the interpretation of legislation puts at risk the ability of Indigenous peoples to rely on the treaty commitments of the Crown. Justice LaForest holds that the principles must be applied in a manner that is sensitive to the real-world outcome of any particular interpretation, taking care to ensure that Indigenous peoples are not further disadvantaged as a result:

> As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is

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[4] Sullivan, *ibid* at 255, citing: *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 SCR 85 at 99, (emphasis added).

[5] *Mitchell*, *ibid* at 100.

[6] *Mitchell*, *ibid* at 121.

[7] *Mitchell*, *ibid* at 142.

> appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote. […]
>
> In summary, while I of course endorse the applicability of the canons of interpretation laid down in *Nowegijick*, it is my respectful view that the interpretation proposed in this particular instance takes one beyond the confines of the fair, large and liberal, and can, in fact, be seen to involve the resolution of a supposed ambiguity in a manner most unfavourable to Indian interests.[8]

11. The approach taken by LaForest J. is mindful of the historic and continuing economic marginalization that Indigenous peoples face, and adopts an interpretation which is aimed at not exacerbating that disadvantage. The disposition of the case actually turns on the proper interpretation of the *Garnishment Act*.[9] In the end, no expansive or complicated interpretation was necessary because the result of protecting the settlement funds of the Indian bands from being garnished was achieved.

12. Nothing in the reasons of LaForest J. or Dickson C.J., or in the commentary of Sullivan, supports Ontario's proposition that the interpretive principles do not apply to legislation such as PACA or the limitations acts. What they say is that courts should construe statutes thoughtfully and with a view of the remedial purpose that *all* statutes are presumed to have.[10] They caution against any application of the principles which

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[8] *Mitchell*, *ibid* at 143-47, emphasis added.

[9] *Mitchell*, *ibid* at 149.

[10] *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 64(1); *Interpretation Act*, RSO 1990, c I.11, s 10.

would result in unintended consequences that could perpetuate or aggravate the historical disadvantage of Indigenous peoples that the principles are intended to remedy.

13. The Supreme Court of Canada has repeatedly endorsed these principles, stating in *Badger*:

> [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow, supra*, at pp. 1107-8 and 1114; *R. v. Taylor* (1981), 1981 CanLII 1657 (ON CA), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 36; *Simon, supra,* at p. 402; *Sioui, supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85, at pp. 142-43.[11]

14. Notable among the authorities cited is the portion of LaForest J.'s judgment in *Mitchell* just discussed. This principle was not just developed in *Badger*, as the passage above indicates, it reaffirmed precedents that were set in the 1980s,[12] which were built on by decisions in the early 1990s.[13] Canadian courts have repeatedly reaffirmed these principles in Treaty and non-treaty contexts.[14]

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[11] *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236 (SCC) at para 41, (emphasis added).

[12] *R v Taylor and Williams*, 1981 CanLII 1657 (ON CA), (leave to appeal dismissed, [1981] 2 SCR xi); *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC); *Simon v. The Queen*, [1985] 2 SCR 387, 1985 CanLII 11 (SCC).

[13] *R. v. Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC); *R. v. Sioui,* [1990] 1 SCR 1025, 1990 CanLII 103 (SCC).

[14] *R v Sundown*, [1999] 1 SCR 393, 1999 CanLII 673 (SCC) at para 24; *R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC) at para 49; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 (CanLII) at para 68. See also: *Fletcher v Ontario*, 2016 ONSC 5874 (CanLII) at para 106; *Thessalon First Nation v Huron Shores*, 2016 ONSC 2391 (CanLII) at para 10; *Couchiching FN et al v AG Canada et al*, 2014 ONSC 1076 (CanLII) at para 435; *Paul v R*, 2016 NSSC 98 (CanLII) at para 46.

15. Ontario's argument against applying these principles is based on a superficial contention that it would lead to different statutory regimes; one for Indigenous peoples, and one for everyone else. This ignores the fact, repeatedly recognized by the SCC, and amplified in detail through the reports of the Royal Commission on Aboriginal Peoples,[15] the Truth and Reconciliation Commission,[16] and now the National Inquiry into Missing and Murdered Indigenous Women and Girls,[17] that because of their unique position, vulnerability and historical disadvantage in Canadian society, Indigenous peoples may indeed be impacted by "laws of general application" in a substantially different way than non-indigenous peoples.

16. Ontario cites the Ontario Court of Appeal's (ONCA) decision in *Wasauksing First Nation v Wasausink Lands Inc*, for the proposition that "laws of general application apply equally to Indigenous and non-Indigenous people."[18] In that case, the Court held that the remedy of rectification under s. 309(1) of the *Corporations Act* was not designed to facilitate far-reaching changes to corporate membership,[19] and thus could not be used to alter membership in a First Nations owned corporation to "give effect to the customs, practices and traditions of the [First Nation], a unique aboriginal and cultural community."[20] This is the context in which the ONCA states:

> We do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject

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[15] *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (Ottawa: RRCAP, 1996).

[16] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Ottawa: TRC, 2015).

[17] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Executive Summary of the Final Report*, (2019).

[18] Ontario Response at para 26.

[19] *Council of the Wasauksing First Nation v. Wasausink Lands Inc.*, 2004 CanLII 15484 (ON CA) at para 90.

[20] *Wasauksing*, *ibid* at paras 28-29 and 91.

> matter, for non-aboriginals. *Nowegijick, Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome.[21]

17. All the ONCA says is that the *Nowegijick* principle does not mandate an expansive interpretation when it is not warranted. This is consistent with *Mitchell* discussed above. The ONCA does not say that the principle never applies. Ontario also relies on a portion of Moldaver J.'s reasons at paragraphs 97-102 in the SCC's decision in *Kokopenace* to bolster its proposition.[22] That case, relating to jury selection and in no way involving a treaty, does not assist Ontario. Nothing in *Wasauksing* or *Kokopenance* narrows the application of LaForest J.'s principle that, "if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown."

18. There can be no doubt that under Ontario's argument, both *PACA* and the *Limitations Act, 1990*, are legislation which bears on the Crown's Treaty promises to the Anishinaabek, since Ontario's proposed interpretation has the effect of negating a great portion of the obligations undertaken by the Crown. If accepted, the effect of Ontario's argument will be to impose on the Anishinaabek over a century of burden and historical disadvantage flowing from the Crown's complete failure to fulfill its solemn promises. There can be no doubt that Ontario's argument and proposed interpretation triggers concerns about the integrity and the honour of the Crown.

B. Ontario is not Immune from Claims for Breach of Fiduciary Duty based on its Failure to Implement the Treaty

19. Ontario's argument is based on a conception of Crown immunity that cannot be sustained. Ontario seems to consider the immunity as something that the Crown can assert, in its unfettered discretion, to protect itself from any kind of claim. Ontario suggests that the Crown had unlimited discretion to refuse a fiat, and even if the fiat was granted, could assert another substantive immunity. This is not correct.

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[21] *Wasauksing*, *ibid* at para 94, (emphasis added).

[22] Ontario Response at para 26.

20. In support of its proposition that the granting of a fiat is a "pure act of grace" that cannot be reviewed, Ontario relies on the *Orpen* case, a 1924 decision of the Ontario High Court involving the refusal of fiat for a case challenging the constitutionality of a provincial tax on betting at horse races. [23] Ontario entirely fails to mention the (relatively) more recent Supreme Court of Canada case of *Air Canada v BC (AG)*.[24] In that case, which involved a challenge to provincial taxes on airlines, the Court held that it had authority to issue a *mandamus* order compelling the Attorney General to consider the petition of right and advise the Lieutenant Governor to grant the fiat.[25]

21. The Court in *Air Canada* noted that the Crown could not pass a statute that would allow it to keep monies collected under an unconstitutional statute, and that it could not achieve the same result by refusing a fiat. This demonstrates that the decision to assert or rely on any immunity is not wholly discretionary, but is subject to constraints. In this case, the Crown's fiduciary obligation to implement the treaty right also constrains the ability of the Crown to assert any immunity.

i. Ontario has not discharged its burden to show why this Court should depart from established law in Ontario

22. Ontario asks this Court to decline to follow the decisions of four Ontario courts in *Slark*, *Seed* and *Cloud*. However, Ontario cannot distinguish these cases. Nor has Ontario demonstrated that this case falls within one of the rare exceptions where the Court should decline to follow the previously decided law.

23. Ontario seeks to distinguish *Cloud* on the basis that "the federal *Exchequer Court Act* allowed a claim in equity to proceed prior to the enactment of the federal Crown liability statute in 1953."[26] But there is nothing to suggest that the federal act treated claims in equity differently than the Ontario legislation. Ontario tries to distinguish *Slark* on the basis that it was a certification motion. However, the Court's finding in *Slark* about Crown immunity was not an application of the plain and obvious test to the pleadings.

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[23] Ontario Response at para 34.

[24] *Air Canada v. B.C. (A.G.)*, [1986] 2 SCR 539, 1986 CanLII 2 (SCC).

[25] *Air Canada*, *ibid* at paras 1-4.

[26] Ontario Response at para 61.

Rather, it was a determination regarding the appropriate interpretation of PACA and a substantive determination that Crown immunity did not apply.

24. Justice Cullity's approach and the result he reached were both specifically endorsed by Justice Herman of the Divisional Court when he held:

> Given the wording of s. 29(1) of PACA and the various authorities referred to by the motion judge, it is my opinion that there is no reason to doubt the correctness of the motion judge's approach or his decision, that is, that the question to be asked is whether a court today would recognize such a claim and the answer to that question is yes.[27]

25. Ontario is asking this Court not to follow the holdings in *Slark, Seed* and *Cloud* because Ontario alleges that the decision in those cases were in error. But there is no substance to support Ontario's assertion that *Slark* is inconsistent with *Murray*, which did not involve a claim for breach of fiduciary duty.

26. Ontario is really just asking this Court to come to a different conclusion than previous cases. But this ignore the importance of comity. As Strathy J. (as he then was), has held:

> The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them:[…] Reasons to depart from a decision, referred to in *Hansard Spruce Mills*, include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. These circumstances could be summed up by saying that the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong.[28]

27. As recently held in *R. v. Chan*:

> Stare decisis and comity are both doctrines of precedent.
>
> There are both vertical and horizontal conventions of precedent. The vertical convention provides that lower courts must abide by decisions of

[27] *Dolmage v Ontario*, 2010 ONSC 6131 (CanLII) at para 10.

[28] *R. v. Scarlett*, 2013 ONSC 562 (CanLII) at para 43, (citations omitted).

> courts above them in the judicial pyramid. In the case of this court, that means the Divisional Court, the Court of Appeal for Ontario and the Supreme Court of Canada.
>
> The horizontal convention provides that, while not strictly binding, relevant decisions of the same level of court should be followed as a matter of judicial comity, unless there are compelling reasons that justify departing from the earlier ruling.[29]

28. Ontario cannot demonstrate that any of the conditions set out in *Hansard Spruce Mills* are met in this case. Justice Cullity's reasons, endorsed by Herman J. of the Divisional Court, are well reasoned, thorough and complete. There is no compelling reason why this Court should depart from the established body of law that holds that claims for breach of fiduciary duty by the Crown come within the exception s. 29 of PACA.

ii. Equitable claims could always be brought in Ontario by Petition of Right

29. Ontario is simply wrong when it suggests that claims in equity could not be pursued by way of petition of right prior to 1963. As Professor Hogg writes:

> In 1668, it was held that equitable relief was available against the King on a bill brought in the Court of Exchequer against the Attorney General… The practice of suing the Attorney General for equitable relief fell into disuse until the decision in Dyson v. Attorney General (1910). … The fact that this power had not been exercised between 1841 and 1910, when Dyson was decided, does not mean that no equitable relief was obtained against the Crown during that period; equitable relief was available on a petition of right.[30]

30. Ontario suggests that Sir William Clode's text on the practice of petition of right is definitive. However, an examination of Clode demonstrates that he acknowledged that petitions of right *were* utilized to enforce equitable claims. Although it was his opinion that they ***should*** not be available for such a purpose, it is clear that they ***were*** in fact available.[31] Moreover, an examination of the Petitions of Right legislation in Ontario

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[29] *R. v. Chan*, 2019 ONSC 783 (CanLII) at paras 37-39.

[30] Peter W Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Scarborough, Ont: Carswell, 2000) at 5.

[31] Walter Clode, *The Law and Practice of Petitions of Right* (London: William Clowes and Sons, 1887) at 147; and generally at 141-153.

makes it clear that such petitions could be used to pursue claims in courts of equity or common law.[32] Ontario relies on several cases where the courts refused to enforce equitable or statutory trusts. But those refusals were based on the fact that such trusts were unenforceable, basically because they were in the nature of "political trusts" not because they were not permitted by a petition of right. It is clear that the Crown's fiduciary obligations to First Nations is of a significantly different nature. The Crown cannot decide, in its discretion, whether or not to implement the treaty promises.

31. An examination of the Hansard preceding the enactment of PACA and the text of PACA makes it clear that the statute was meant to do two things: to enable tort claims to proceed against the Crown, and to make those claims previously pursued by petition of right available without that procedure.[33] Nothing in PACA specifically makes equitable claims enforceable against the Crown. Rather, they were enforceable after the enactment of PACA because they were previously able to be pursued by way of a petition of right. Ontario has conceded that it is not relying upon a defence of Crown Immunity for any breach of fiduciary duty post September 1, 1963.[34] This concession by Ontario further supports the Plaintiffs' argument that a breach of fiduciary duty does not engage a defence of Crown immunity irrespective of the *PACA*.

iii. Crown immunity cannot insulate the Crown from its obligations to First Nations

32. Ontario misunderstands the maxim that the "King (or Queen) can do no wrong." It meant that while the law was not enforceable against the King without his permission, he was expected to live by the same rules as his subject, and when they sought to bring him to court, he was expected to grant his permission and "let right be done." It meant that

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[32] *An Act to Provide for the Institution of Suits against the Crown by Petition of Right, and respecting Procedure in Crown Suits*, SO 1871-2, c 13, ss. 1,6,8,17; see also Donald Alexander MacRae, Ed, *Holmested and Langton on The Judicature Act of Ontario*, 5th ed (Toronto: The Carswell Company, Limited, 1940) at 1662.

[33] "Bill 127, An Act Respecting Proceedings Against the Crown", 1st reading, *Legislature of Ontario Debates*, 1-24, vol 27 (March 28, 1952) at B-11 (Hon D Porter) in Ontario's Brief of Statutes at Tab A-4; "the Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no 68 (March 27, 1963) at 2272-2273, in Ontario's Brief of Statutes at Tab A-6.

[34] Ontario Response at para 29.

any order by the King to act in a tortious manner was no order at all. It ***never*** meant that the Crown was free to ignore its obligations with impunity.[35]

33. This is especially the case when the obligation is a fiduciary one owed to a First Nation. Ontario alleges that Crown immunity can operate to bar equitable relief in claims involving Aboriginal rights, relying on *Mitchell*.[36] *Mitchell* does not assist Ontario in this case in any way. In *Mitchell*, an accountant sought to garnish the settlement funds held by the Crown for the benefit of the First Nation in order to pay his fees. As noted above, the Court refused on the basis that the *Garnishment Act* applied only to government debts arising from the provision of work or services and did not lift immunity in respect of the garnishment order sought.[37] *Mitchell* is not authority for shielding a Provincial Crown from a claim that it has, for over a century and a half, been in breach of its own fiduciary obligations to the Anishinaabek. It does not stand for the proposition that Crown immunity can operate to bar equitable relief in claims involving Aboriginal rights. There is no precedent for what Ontario is arguing in this case.

iv. Ontario's reliance on *Thouin* is misplaced

34. Ontario relies on the SCC decision in *Thouin* which found that the provincial rules of discovery do not apply to the Crown in proceedings in which it was not a party.[38] There was no dispute that the Crown enjoyed immunity from discovery and the obligation to provide documents unless a statute provided otherwise. The Court held that the *Crown Liability and Proceedings Act,* which clearly eliminated that immunity in relation to proceedings where the Crown was a party, did not displace the immunity with respect to other proceedings.[39]

35. This case is entirely distinguishable. Here, the Crown is a party, and there is no doubt that the PACA applies. The question is not whether a well recognized Crown

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[35] A.V. Dicey, *Introduction to the Study of the Law of the Constitution, 8th ed.* (London: Macmillan, 1915) at 417-18.

[36] Ontario Response at para 90.

[37] *Mitchell*, *supra*.

[38] *Canada (Attorney General) v. Thouin*, [2017] 2 SCR 184, 2017 SCC 46 (CanLII) at para 18.

[39] *Thouin*, *ibid* at para 43.

immunity has been displaced by PACA, but whether PACA insulates the Crown for breaches of fiduciary duty prior to 1963. There can be no presumption that such an immunity exists.

36. This Court has already determined that the relationship between the Crown and Anishinaabek is a fiduciary one.[40] It would be inconsistent with that finding to give effect to a presumption that the Crown, and now Ontario, intended its fiduciary obligations to be unenforceable on the basis of a presumed immunity. Such a presumption would also be inconsistent with upholding the honour of the Crown and promoting reconciliation.

37. Even if Crown immunity was available to Ontario, it would be a breach of the Crown's fiduciary obligations to assert it against the plaintiffs. Just as *Air Canada* holds that shielding the retention of unconstitutionally collected monies from judicial scrutiny would be another unconstitutional act, asserting an immunity to shield Ontario's actions from judicial scrutiny would be another breach of fiduciary duty.

38. Arguably, even using legislative powers after 1850 to insulate itself from any breaches of its fiduciary duty arising under the Treaty would itself amount to a breach of its fiduciary duty.

39. Asserting crown immunity based on a technical interpretation of when the fiduciary duty was known to the law is not honourable and does not maintain the integrity of the Crown.

40. A distinct constitutional relationship exists between Indigenous peoples and the Crown, both federal and provincial. This formal constitutional recognition requires the Crown to substantively reconcile the interests of Indigenous peoples and those of Canada.[41] Viewed in this light, and interpreted in its full context, PACA cannot be interpreted as providing the Crown immunity from a breach of fiduciary duty relating to a recognized and affirmed Treaty right.

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[40] *Restoule v Canada (Attorney General),* 2018 ONSC 7701 at para 533.

[41] See: Patrick Macklem, "The Form and Substance of Aboriginal Rights: Assimilation, Recognition, Reconciliation" (August 23, 2016) in N. Des Rosiers, P. Macklem and P. Oliver, eds. *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017).

C. Ontario has not met its Burden of Establishing that the Limitations Provisions Apply to the Plaintiffs' Claims as a Matter of Statutory Interpretation

41. Contrary to Ontario's assertion,[42] the issue of whether the limitations provisions relied upon by Ontario apply as a matter of statutory interpretation is not a pure question of law. Ontario confirms this by relying on the colour photographs of the original copy of the Treaty admitted into evidence. Ontario claims that this evidence is relevant to the question of whether the Treaty is a "sealed document" which they say is one of the elements needed to prove that the Treaty is a "specialty".[43]

42. To the extent the issues on this motion raise questions of fact, or mixed fact and law, they are within the scope of the motion and can be determined. Ontario has the burden of proving the defences it has plead. Ontario has not met its burden.

i. There is no limitation period for breach of treaty under the standard approach to statutory interpretation, the honour of the Crown principles only reinforce this

43. Ontario acknowledges that the *Limitations Act*, 2002, does not apply to the plaintiffs' claims because ss. 2(1)(e) and (f) expressly exempt proceedings based on Aboriginal and Treaty rights and equitable claims by Indigenous peoples, while ss. 2(2) states that such proceedings, "are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed."[44]

44. The prior legislative scheme, the *Limitations Act, 1990*, is organized into three parts: real estate, trusts and trustees, and personal actions. Under each part, the Act explicitly lists all of the claims and causes of action to which a limitation period applies. There is no catch-all provision or ultimate limitation period, which marks a significant

[42] Ontario Response at para 19.

[43] Ontario Response at para 116.

[44] *Limitations Act, 2002*, SO 2002, c 24, Sch B, s 2(2).

distinction from the limitation schemes in other jurisdictions where courts have previously found limitation periods applied to claims brought by First Nations.[45]

45. Section 45(1), which Ontario relies on, is listed under the heading, "Personal Actions" with a side note of "Limitation of time for commencing particular actions" (emphasis added). This is an example of how the Act is explicitly organized around "particular actions". It reads in full:

> 45.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
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> (a) an action for rent, upon an indenture of demise;
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> (b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;
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> (c) an action upon a judgment or recognizance,
>
> within twenty years after the cause of action arose,
>
> (d) an action upon an award where the submission is not by specialty;
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> (e) an action for an escape;
>
> (f) an action for money levied on execution; or
>
> (g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,
>
> within six years after the cause of action arose,
>
> (h) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose;

[45] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CanLII 50 (SCC), *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, 2002 SCC 79 (CanLII), *Canada (Attorney General) v. Lameman*, [2008] 1 SCR 372, 2008 SCC 14 (CanLII),

(i) an action upon the case for words, within two years after the words spoken;

(j) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose;

(k) an action upon a covenant contained in an indenture of mortgage or any other instrument made on or after the 1st day of July, 1894, to repay the whole or part of any money secured by a mortgage, within ten years after the cause of action arose or within ten years after the date upon which the person liable on the covenant conveyed or transferred the person's interest in the mortgaged lands, whichever is later in point of time;

(l) an action by a mortgagee against a grantee of the equity of redemption under section 20 of the Mortgages Act, within ten years after the cause of action arose;

(m) an action for a penalty imposed by any statute brought by any informer suing for the informer alone, or for the Crown as well, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose.

46. Depending on how one distinguishes one cause of action from another, there are over 30 distinct causes of action expressly listed under ss. 45(1). In the context of how the Act and ss. 45(1) is organized, it is notable that it is equally silent on any claim for breach of treaty rights, breach of aboriginal rights and "equitable claims by" Indigenous peoples. The same is true in respect of all of the preceding statutes relied upon by Ontario. Ontario acknowledges that there is no limitation period under the *Limitations Act*, *1990*, which would apply to the plaintiffs' equitable claim based on breach of fiduciary duty.[46] Yet, under the same legislative scheme, Ontario asks this Court to read in a limitation period that would apply to breach of Treaty.

47. The choice before the Court can be put thus: The plaintiffs ask the court to give effect to the plain meaning of the statute, and find that there is no limitation period

[46] Ontario Response at para 104.

prescribed in the *Limitations Act, 1990*, for breach of treaty, just as there is no period prescribed for breach of Aboriginal rights or breach of fiduciary duty.

48. Ontario, on the other hand, asks the Court to find that the limitation periods prescribed in the 1990 Act for an action on a speciality, an action for breach of contract, and an action for account should be interpreted as applying not only to those causes of action that are specifically named, but to actions for breach of treaty as well. Ontario must argue that while the legislature spoke explicitly about Aboriginal and Treaty rights in s. 2 of the 2002 Act, it intended implicitly through its silence in the 1990 Act to limit actions for breach of treaty while referring to those actions as actions upon a speciality, a "simple contract" or an account. Such an argument seeks to extend the kinds of actions captured by these provisions, without pointing to anything to indicate that the legislature intended this result.

49. The plaintiffs submit that Ontario's approach is inconsistent with the general rules of interpretation and cannot be sustained. The well-known principle of statutory interpretation holds that, "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."[47] In this case, a plain reading of the 1990 Act, taking into account its overall structure and the references to treaty and aboriginal rights in the 2002 legislation, leads to the conclusion that Ontario's position must be rejected.

50. Taking into account the honour of the Crown as an interpretive principle simply reinforces this result. It is obvious that ss. 2(1)(e)(f) and 2(2) are legislative provisions which bear on the Crown's Treaty promises and which relate to Indigenous peoples, because it is explicit on the face of those provisions. It is only through s. 2(2) that the repealed *Limitations Act, 1990*, and its predecessors, is given any legislative force. As such, the interpretation of s. 2(2) and by extension the provisions relied upon by Ontario requires "an appreciation of societal responsibility and a concern with remedying disadvantage"[48] and "must be approached in a manner which maintains the integrity of

[47] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87

[48] *Mitchell*, *supra* at 99.

the Crown. It is always assumed that the Crown intends to fulfil its promises."[49] While these principles do not mandate the Court to automatically accept an expansive interpretation of the provisions, they do require the Court to "strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown".[50]

51. In the absence of any words in the Act, and any express legislative intent to prescribe limitation periods to actions for breach of treaty, Ontario's proposed interpretation would allow the Crown to neglect its societal responsibility, enrich itself from a historical disadvantage it perpetuated, leave its Treaty promises unfulfilled and negate its undertakings. The plaintiffs respectfully submit that the Court should strain against adopting such an interpretation.

ii. The Treaty is not a "specialty" or a "simple contract"

52. Ontario's assertion that "Canadian courts have repeatedly affirmed that Treaties are contractual agreements"[51] ignores decades of SCC jurisprudence which has clearly held the opposite to be true. In *Sundown*, the SCC unanimously stated:

> Treaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement. In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in *Badger*. Anything else would amount to be a denial of fair dealing and justice between the parties.[52]

53. The interpretative principles summarized in *Badger* were enumerated and reaffirmed in *Marshall*[53] where Binnie J. set out three examples of how Treaties are not treated in law as contracts (emphasis added):

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[49] *Badger*, *supra* at para 41.

[50] *Mitchell*, *supra* at 143.

[51] Ontario Response at para 132.

[52] *Sundown*, *supra* at para 24.

[53] *R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC) at para 78, (McLachlin J.)

Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Rules of interpretation in contract law are in general more strict than those applicable to treaties, yet Professor Waddams states in *The Law of Contracts* (3rd ed. 1993), at para. 316:

> The parol evidence rule does not purport to exclude evidence designed to show whether or not the agreement has been "reduced to writing", or whether it was, or was not, the intention of the parties that it should be the exclusive record of their agreement….
>
> […] For an example of a treaty only partly reduced to writing, see *R. v. Taylor and Williams* (1981), 1981 CanLII 1657 (ON CA), 62 C.C.C. (2d) 227 (Ont. C.A.) (leave to appeal dismissed, [1981] 2 S.C.R. xi).

Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams, supra*, at p. 236:

> . . . if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.
>
> The proposition is cited with approval in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 87, and *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at p. 1045.

Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms.[54]

54. Even in the case of modern treaties, the SCC has admonished the Crown for equating them with contracts, stating In *Little Salmon* (emphasis added):

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the

[54] *Marshall*, *ibid* at para 10.

> Constitution Act, 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.[55]

55. The SCC's holdings underscore the discussion above, and they further underscore the first and fundamental principle that Treaties are *sui generis* legal instruments[56] which means they "constitute a unique type of agreement".[57] Despite Ontario's predilection to selectively ignore history and the Anishinaabek perspective in the interpretation of the Treaty, it cannot be allowed to ignore the SCC's clear and repeated definition of a "Treaty" as a unique legal instrument.

56. In support of its proposition that "Treaties are contractual agreements" (emphasis added), Ontario quotes from judgments that begin by saying, "While a treaty is not in all respects like a contract," and "While treaties are not the same as commercial contracts, they are analogous to them" (emphasis added).[58] There is a serious disconnect between Ontario's proposition and the important qualification that these judgments are making. Ontario confuses the use of metaphor and analogy with the real thing.

57. Courts have considered treaties as analogous to contracts because they both involve enforceable obligations voluntarily assumed. But that doesn't mean treaties are contracts, or specialities. It means only that they share some features with contracts. It is

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[55] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII) at para 10.

[56] *Simon v. The Queen*, [1985] 2 SCR 387, 1985 CanLII 11 (SCC), at para 33; *R. v. Sioui*, [1990] 1 SCR 1025, 1990 CanLII 103 (SCC),

[57] *Marshall*, *supra* at at para 78.

[58] Ontario Response at para 135. (It should be noted that the statement of the chambers judge Slatter J. in *Lameman* was made in the absence of any discussion of the evidence or principles pertaining to the interpretation of the Treaty.).

not enough for Ontario to demonstrate that the actions commenced by the plaintiffs are analogous to, or in some respects like actions upon a specialty, actions for breach of contract, or actions for account. Rather, Ontario must prove that the Plaintiffs claims are actions upon a specialty for breach of contract or actions on an account.

58. Under the SCC jurisprudence discussed above, the Robinson Huron Treaty is a Treaty. It is not just a document, or an agreement reduced to writing. It is the sum of *many* different parts: one of which is the original copy of the written English text, another of which is the understanding of the Treaty terms by the Anishinaabek passed down from generation to generation through oral tradition, and still another is the volumes of extrinsic evidence of the historical and cultural context leading up to the Treaty Council at Bawaating in 1850 when the Treaty was made, and the context afterwards when the Treaty was implemented, or not, in the case of Treaty promises which have been "completely forgotten by the Crown."[59] That is how the Treaty is defined under Canadian laws.

59. Under the same laws, applied equally, a "specialty" could not be more different. A "speciality" is a sealed contract securing a debt that is "enforceable by virtue of the form of the instrument."[60] The point of a "speciality" is that the written document itself has force apart from the debt which it secures. The legal effect of finding a document to be a "specialty" is that the written text will be determinative of the obligations of the parties, regardless of external evidence of their intentions or the circumstances in which the speciality was made.

60. In a side-by-side comparison a "specialty" is the opposite of what a "Treaty". The only attribute that a "Treaty" might have in common with a "specialty" is that they risk being maligned as "anachronistic" and "no longer socially relevant"[61] – at least in the eyes of those who are not aware of their origins and history.

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[59] *Restoule*, *supra* at para 495.

[60] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 SCR 842, 2000 SCC 34, at para 48.

[61] *Friedmann Equity*, *ibid* at paras 45-47.

61. Ontario contends that "the Robinson Treaties were made, and were intended to be made, under seal."[62] It offers no evidence of this other than to point out that the physical documents (admitted into evidence by agreement), "include the words 'signed, sealed and delivered'. Each signatory's name and mark is accompanied either by a notation for locus sigilii ("L.S.") or individual paper wafers affixed by adhesive next to each signatory."[63]

62. Ontario acknowledges that the presence of a seal, while necessary, is not a sufficient condition on its own for a document to be considered a speciality.[64] What matters is the intention of the parties to the instrument.[65] The plaintiffs say that this Court has, in Stage One, heard a great deal of evidence about the intentions of the parties, and has made findings about those intentions. Those findings, we submit, are inconsistent with the finding that Ontario now asks this Court to make – that the parties intended to create a "sealed document" and by extensions a speciality. Ontario expressly adopts this Court's findings at paragraphs 208-237 of its Stage One Reasons for Judgment.[66] At paragraph 214, this Court found that, "The location of the Treaty Council, as well as the protocols and procedures followed, indicate that the British, including Robinson, had developed at least a functional understanding of the Anishinaabe systems of law, diplomacy, and language."[67] At paragraph 222, this Court recognized the existence and operation of Anishinaabe governance when it found that, "Neither Chief could unilaterally accept or reject Robinson's proposal without first discussing it in their own Council."[68]

63. Ontario stops at paragraph 237, but this Court's findings carry on well past that mark. This Court found that:

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[62] Ontario Response at para 122.

[63] Ontario Response at para 121.

[64] Ontario Response at para 116.

[65] Ontario Response at para 116.

[66] Ontario Response at para 11.

[67] *Restoule*, *supra* at para 214.

[68] *Restoule*, *ibid* at para 222.

- [T]he Treaty represented that the Crown now respected the Anishinaabe's authority, and that the Crown was ready to pay compensation for access to the territory.[69]
- From the Anishinaabe perspective, the central goal of the treaty was to renew their relationship with the Crown, which was grounded in the Covenant Chain alliance and visually represented on wampum belts with images of two figures holding hands as part of two links in a chain. To a great extent, the Defendants agree with this proposition.[70]
- [F]for the Anishinaabe of the upper Great Lakes region, treaties were sacred agreements that brought newcomers into the existing relationship the Anishinaabe had will all of creation.[71]
- For the Anishinaabe, the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances.[72]
- [T]he interpretation that imposes a $4 per person cap on the annuities does not reflect either the common intention nor reconcile the parties' interests; it suggests that the Treaties were a one-time transaction. As the historical and cultural context demonstrates, this was not the case; the parties were and continue to be in an ongoing relationship.[73]

64. The plaintiffs submit that Ontario's attempt to subsume the entirety of the legal construct known as a "Treaty" into the words "a specialty", or alternatively "a simple contract", is illustrative of the "unconscionable", "ungenerous" and profoundly regressive approach to Treaties by the Crown that the SCC has strongly rejected. This approach is

[69] *Restoule*, *ibid* at para 274.

[70] *Restoule*, *ibid* at para 412-13.

[71] *Restoule*, *ibid* at para 414.

[72] *Restoule*, *ibid* at para 423.

[73] *Restoule*, *ibid* at para 465.

evident in Ontario's emphasis on the original physical copy of the Treaty, presenting it in full colour like a sacred scroll as if every letter and remnant of wax wafer divines the full truth of its drafter's intentions by its mere existence.[74]

65. This Court also found that, "There is no record of Robinson himself explaining the "cap", the notion of discretion, or royal prerogative",[75] and that while the "Robinson Treaties use formal English and legal terminology" there is no convincing reason why "the presence of interpreters could or should have given Robinson confidence that the Chiefs understood the concepts of discretion, royal prerogative, or Her Majesty's graciousness, if such concepts had been embedded into the Treaties. And, therefore, such concepts could not have informed the common intention of the parties."[76]

66. This same reasoning applies to any inferences which might be drawn from the presence of a seal or seals on the physical copy of the Treaty document. In order to find that the Anishinaabek intended the Treaty to be a "sealed document" and by extension a "specialty", Ontario would have to prove that Robinson satisfactorily explained to the Anishinaabek Chiefs that by placing a seal, the parties were making the Treaty a "specialty", with the result that the only thing which was now legally enforceable were the English words written down in a language they couldn't read or understand. This would be contrary to the understanding of a Treaty under both Anishinaabek and Canadian law.

67. Among this Court's extensive findings about the intentions of the parties, there is no mention of intentions by either party to make the Treaty a "sealed document". As a matter of fact, this Court's findings are clear that the intention of the Anishinaabek were not to make a contract (either sealed or simple). In light of that fact, evidence which would support that it was the Crown's intentions to make the Treaty a "sealed document" and by extension a "specialty" would amount to sharp dealings and violate most if not all of the treaty interpretation principles.

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[74] Ontario Response at para 121.

[75] *Restoule*, *ibid* at para 442.

[76] *Restoule*, *ibid* at para 447.

68. The Treaty is not a “specialty”, nor is it “a simple contract”. With respect to isolated instances of Canadian courts making references to Treaties being like or analogous to contracts, it is submitted that nothing more can be drawn from these statements than the fact that judges, and Indigenous plaintiffs alike, have resorted to using the tools of analogy to find a way into understanding and analyzing Treaties as *sui generis* and unique legal instruments.

69. The decision in *Pawis*[77] is illustrative of this. Although it deals with the Robinson Huron Treaty (referred to as the “Lake-Huron Treaty” in the judgment), it is distinguishable for a number of reasons. The first is that the case was brought as four separate individual actions heard together on common evidence, and was not a representative action.[78] Second, the case predates the emergence of the established set of interpretation principles articulated in *Marshall*. While the “preliminary remarks” of Marceau J. evince a very nascent understanding of some of these principles, all they demonstrate is the use of analogy with contract to attempt to situate the Treaty as a legal instrument:

> (i) It is obvious that the Lake-Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibway's did not then constitute an "independent power", they were subjects of the Queen. Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the "principal men of the Ojibewa Indians" were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.[79]

70. While Marceau J. would not say that the Treaty is a contract, what is more important is Marceau J.’s recognition of all the aspects of the Treaty that stand to make it unique. The framing of the pleadings and the remarks of Marceau J. in *Pawis* must be

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[77] *Pawis v. Canada*, 1979 CanLII 2598 (FC).

[78] *Pawis*, *ibid* at paras 1-5.

[79] *Pawis*, *ibid* at para 9.

appreciated in their proper historical context. In that light, they are an example of the efforts taken by Anishinaabek plaintiffs to use the language available and seek justice for inherent Treaty rights to hunt and fish which had been denied them through more than a century of harsh criminalization conducted by a Province that was, at the same time, utilizing the Treaty territory based on the terms written down in the *very same* instrument that the Anishinaabek plaintiffs sought to rely on.

71. The decision in *Pawis* has been sharply criticized by scholars like Professor Macklem and Professor Burrows for erroneously considering the treaty to be "contractual."[80] *Pawis* was decided prior to most of the jurisprudence which clarified he nature of treaties rights and the special interpretation rules which apply to them.

72. The only other case Ontario relies on in this regard is *Lameman*. The plaintiffs in that case were a group of five individuals, claiming to be descendants of the historic Papaschase Band, who filed an application seeking a declaration to bring a representative action asserting, in part, collectively held Aboriginal and treaty rights.[81] The plaintiffs had to satisfy the court that they had sufficient standing to assert rights of a collective nature. This meant that they had to establish that they were either a "Band",[82] or that there were any individuals who could meet the requirements of being a member of the class in the representative action.[83] They could not establish this, nor could they satisfy the court in the alternative that they were entitled to bring a derivative claim for collective rights.[84] Ultimately, the plaintiffs could not identify one single individual who would qualify.[85] Effectively, all of the claims asserted by the plaintiffs turned on this issue

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[80] Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382 at 434-435. John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629; See also: Michael Coyle, "Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties" (2006-2008) 32 Man LJ 1.

[81] *Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2004 ABQB 655 (CanLII) at para 1.

[82] *Papaschase*, *ibid* at para 184.

[83] *Papaschase*, *ibid* at paras 216-223.

[84] *Papaschase*, *ibid* at para 210.

[85] *Papaschase*, *ibid* at paras 206 & 211.

of standing, and because they lacked standing the claims were summarily dismissed.[86] Not only did the plaintiffs lack standing, they also lacked even the most basic amount of evidence, a problem Slatter J. addressed stating, "The Plaintiffs offer no evidence in support of these allegations, not even the modest amount required to raise a genuine issue for trial."[87]

73. *Lameman* stands in sharp contrast with this case, where the declaration to bring a representative action was uncontested by the Crowns and secured based on the Band Council Resolutions of 21 First Nations representing a class of beneficiaries in the tens of thousands.[88] Furthermore, as this Court is well aware, the evidence put forward to substantiate the claims in this case was extensive and detailed.

74. In terms of limitations, the Alberta statute had a "basket clause" capturing all causes of action not specifically named and imposing a limitation period of six years. When the chambers judge mused that actions for breach of treaty could "arguably" be subject to the limitation period applicable to contracts, he was referring to the fact that under the Alberta statute actions for breach of contract were not subject to discoverability.[89] In restoring the chambers judge's decision on appeal, the SCC did not say what limitation period applied to the breach of treaty claim, but expressed concern with discoverability, and the failure of the plaintiffs to lead evidence in this regard.[90] This suggests that it was likely the basket clause, and not the limitation period relating to contracts, which the SCC thought was applicable.

75. In Alberta, the presence of a basket clause is clear indication of a legislative intent that all forms of action be captured by a limitation period. This is not the case with respect to the *Limitations Act, 1990*. Ontario acknowledges that the legislature was content that actions such as breach of fiduciary duty were not subject to a limitation period. The same

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[86] *Papaschase*, *ibid* at para 212.

[87] *Papaschase*, *ibid* at para 54.

[88] Representation Order of Hennessy J. (Dated May 10, 2016)

[89] This is different than in Ontario, see: *Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd*., 1985 CanLII 159 (ON CA).

[90] *Canada (Attorney General) v. Lameman*, [2008] 1 SCR 372, 2008 SCC 14 (CanLII) at para 18.

is true of breach of treaty claims. The Treaty does not create a contractual arrangement, rather, it establishes a relationship that is infused with the honour of the Crown and fiduciary considerations. This overall context must be kept in mind when assessing the Crown's argument that treaties should be swept into a provision aimed at regulating commercial contracts.[91]

iii. The Plaintiffs' claims are not an "action of account" barred by s. 46

76. The plaintiffs' claim is that the Crown failed to fulfill its treaty promise regarding increased annuities, and that it failed to discharge its fiduciary obligations with respect to the process required to implement the treaty, including the payment of increased annuities. That fiduciary obligation includes the obligation to disclose Crown revenues and expenses. The plaintiffs say that the treaty right itself also includes an obligation to disclose sufficient information to enable the Anishinaabek to know if an increased annuity is payable. While the plaintiffs seek the remedy of an accounting, that is part of the claims for breach of treaty and breach of fiduciary duty. They do not assert a separate "action of account."

77. As Ontario acknowledges, there is no limitation period applicable to the claim for breach of fiduciary duty. As a result, Ontario cannot suggest that the claim for an accounting is barred insofar as it is part of that claim.[92]

78. Ontario states that an "action seeking to direct a reference for an accounting of profits or 'gain' retained by a wrongdoer is an action of account."[93] As the *Waxman* case, cited by Ontario, points out, there is a distinction between "the remedy of an accounting for profits received by a defaulting fiduciary" and "the remedy of compensation."[94] Even with respect to the breach of treaty claim, what is sought by the accounting is information required for quantifying what is required to compensate the plaintiffs for they loss they

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[91] *M.(K.) v. M.(H.)*, [1992] 3 SCR 6, 1992 CanLII 31 (SCC), (quoting *Norberg v. Wynrib*, [1992] 2 SCR 226, 1992 CanLII 65 (SCC) at 290-91).

[92] Jeremy S Williams, *Limitation of Actions in Canada*, 2nd ed (Toronto: Butterworths, 1980) at 45-46.

[93] Ontario Response at para 126.

[94] *Waxman v. Waxman*, 2002 CanLII 49644 (ON SC) at para 1756.

have incurred. The profits of the Crown are only relevant because that is the content of the treaty promise.

REPLY TO CANADA & ONTARIO

D. The Paymaster Argument does not Require the Court to Determine Respective Crown Liability or the Nature of Crown Liability

79. The Plaintiffs rely on the submissions of the Superior Plaintiffs with respect to joint and several liability.

80. Canada and Ontario both suggest that the alternative paymaster argument requires the court to determine at this stage that all awards that may be made in this case constitute or relate to liabilities that come within the scope of s. 111 of the C*onstitution Act 1867*.[95] This is not correct. The paymaster motion does not seek determination of Crown liability. It seeks a declaration that *regardless* of which Crown is ultimately liable to fund the payment of any award, Canada should be required to make payment of those monies to the plaintiffs. If it is Ontario that is ultimately liable, Canada can obtain the funds from Province.

81. Canada asserts that s. 111 "provides the legal basis on which Canada has, historically, been cast as 'paymaster' for annuities."[96] This is not entirely accurate. Historically, Canada assumed responsibility for paying the increased annuities under the Treaty even before there was a determination about whether s. 111 applied. The plaintiffs submit this is not because of any presumption or determination that s. 111 applied, but because of Canada's role in administering the annuity payment.

82. Canada suggests that the paymaster order is unnecessary because it will not "speed up or otherwise enhance the payment of a final judgement."[97] This seems to be based on Canada's view that the amount of compensation payable, the nature of the liability, and the respective liability of the two Crowns will (and can) be determined

[95] Canada Response at para 45; Ontario Response at paras 150 & 154.

[96] Canada Response at para 44.

[97] Canada Response at para 50.

simultaneously. Yet, the defendants have previously changed their view on how and when the respective liability of the Crowns would be determined, and whether it is necessary for the plaintiffs to a participate in that process. They may change their view again.

83. From the plaintiffs' perspective, the assessment of the amount of compensation payable may indeed be amenable to determination (or settlement) separately from the determination of respective liability. As such, the paymaster order sought would make it a matter of indifference to the plaintiffs when or how issues of respective liability of the Crowns are determined or settled.

84. This could in fact lessen the need for the plaintiffs to participate in that aspect of the litigation of that question, encourage settlement, and provide assurance to the Anishinaabek that their compensation for the failure of the Crown to pay them their increased annuities will not be delayed (again) by a dispute between the Crowns over the determination of matters that are of no significance to them.

CONCLUSION & ORDER SOUGHT

85. Based on the arguments set out above, the plaintiffs respectfully seek an order for the declarations set out in their Notice of Motion, as well as costs on a full indemnity basis.

All of which is respectfully submitted,

October 7, 2019

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LIST OF AUTHORITIES

TAB NO. **LEGISLATION**

JURISPRUDENCE

16. *M(K) v M(H)*, [1992] 3 SCR 6, 1992 CanLII 31 (SCC).

17. *Manitoba Metis Federation Inc v Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 (CanLII)

18. *Mitchell v Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 SCR 85.

19. *Norberg v Wynrib*, [1992] 2 SCR 226, 1992 CanLII 65 (SCC).

20. *Nowegijick v The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC).

21. *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655.

22. *Paul v R*, 2016 NSSC 98.

23. *Pawis v Canada*, 1979 CanLII 2598 (FC).

24. *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236 (SCC)

25. *R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC)

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27. *R v Taylor and Williams*, 1981 CanLII 1657 (ON CA), (leave to appeal dismissed, [1981] 2 SCR xi).

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Restoule, et al Plaintiffs (Moving Parties)	-and-	***Attorney General of Canada, et al.*** Defendants (Responding Parties)	Court File Nos: C-3512-14 & C-3512-14A

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced in Sudbury

REPLY OF THE PLAINTIFFS

Stage Two: Crown Immunity, Statutory Limitations and Crown Liability

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