CITATION: Restoule v. Canada (Attorney General), 2020 ONSC 3932
COURT FILE NO.: C-3512-14, C3512-14A and 2001-0673
DATE: 2020-06-26

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
Court File No.: C-3512-14 & C3512-14A	
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 (Anishinaabe) Nation who are beneficiaries of The Robinson Huron Treaty of 1850	Joseph J. Arvay Q.C., Catherine Boies Parker Q.C., David C. Nahwegahbow and Christopher Albinati, for the Plaintiffs
Plaintiffs	
– and –	
The Attorney General of Canada, the Attorney General of Ontario and Her Majesty the Queen in Right of Ontario	Owen Young, Scott Warwick and Glynis Evans for the Defendant The Attorney General of Canada / Michael R. Stephenson, Lisa La Horey, Brent Kettles and Mark Crow for the Defendant The Attorney General of Ontario
Defendants	
The Red Rock First Nation and The Whitesand First Nation	Harley Schachter and Kaitlyn Lewis, for the Third Parties.
Third Parties	
-AND-	
Court File No.: 2001-0673	
The Chief and Council of Red Rock First Nation, on behalf of the Red Rock First Nation Band of Indians, The Chief and Council of the Whitesand First Nation on behalf of the Whitesand First Nation Band of Indians	Harley Schachter and Kaitlyn Lewis, for the Plaintiffs.
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	Owen Young, Scott Warwick and Glynis Evans for the Defendant The Attorney General of Canada / Michael R. Stephenson, Lisa La Horey, Brent Kettles and Mark Crow for the Defendant The Attorney General of Ontario
Defendants	
	HEARD: October 15-24, 2019

HENNESSY, J.

DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT - STAGE TWO

REASONS ON MOTION FOR PARTIAL SUMMARY JUDGMENT - STAGE TWO

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REASONS ON MOTION FOR PARTIAL SUMMARY JUDGMENT - STAGE TWO

I - INTRODUCTION

[1] The combined trial of the two actions involving the 1850 Robinson Huron & Robinson Superior Treaties has been divided into three stages. Stage One, 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. Stage Two involves the determination of specific issues by way of partial summary judgment. Stage Three is to resolve all remaining issues, including a quantification of net resource-based revenues and expenses from the Territories and the "fair share" which is to be allocated to the annuities along with other remedies issues.

[2] Whether the issue of allocation of responsibilities and liability between Crowns is a Stage Two or Stage Three issue is in dispute in this motion.

[3] In Stage Two the plaintiffs move for partial summary judgment. Their motions, brought under Rules 20.01(1) and 20.04(2), seek declarations under five heads:

a. that Ontario's limitations legislation does not apply to the plaintiffs' claims;

b. that Ontario does not benefit from the doctrine of Crown immunity;

c. that Ontario's limitations defence cannot apply to the benefit of Canada;

d. 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

e. that, in any event, Canada is a "paymaster" and "obligated to pay 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."

[4] The plaintiffs say that all of the issues on this motion are suitable for determination on a summary judgment motion. The defendants have agreed that the first two issues are amenable to partial summary judgment but submit that the last two issues cannot be determined by means of a summary judgment motion.

[5] Decision on the defences of limitations and Crown immunity raised by Ontario are appropriate at this point in the proceedings in the circumstances of this significant and complex litigation and will allow the Stage Three trial to proceed with a more focused approach.

[6] However, the issues of joint and several liability and paymaster do not clearly lend themselves to severance from the outstanding issue of quantification of damages, which will be argued at Stage Three on a full evidentiary record. While the costs and burden to the plaintiffs of including these issues in the Stage Three trial weigh in favour of a partial summary judgement, on

balance, I find that there are risks involved in that approach and less litigation efficiency than predicted by the plaintiffs.

[7] Finally, on the issue of the statutory interpretation principles for the issue of limitations and Crown immunity, I find that the *Nowegijick* principles of large and liberal interpretation[1] and the principles of honour of the Crown apply.

[8] For the reasons that follow the motions are disposed of as follows:

a. There shall be partial summary judgment for the plaintiffs on the question of limitations and a declaration that the plaintiffs' claims are not barred by Ontario's limitations legislation.

b. There shall be partial summary judgment for the plaintiffs on the question of Crown immunity and a declaration that Ontario does not benefit from the doctrine of Crown immunity.

c. There is no need to answer the question of whether Canada can shelter behind any limitations' defence of Ontario, given the result in a. above.

d. The motion for partial summary judgment on the questions of whether both Crowns are jointly and severally liable or in the alternative whether Canada is the paymaster is dismissed. The questions shall be considered as part of the Stage Three trial.

e. Costs are reserved, to be considered on the basis of written submissions.

II - CROWN IMMUNITY

[9] The plaintiffs claim that the Robinson Treaties imposed upon the defendants a fiduciary obligation to fulfil the treaty promises to increase the annuities when the economic circumstances warrant was successful in Stage One of the trial.[2]

[10] In their statement of defense, Ontario pleads that Crown immunity shields it from claims based on facts existing as of September 1, 1963, being the date of the coming into force of the *Proceedings Against the Crown Act*, S.O. 1962-63. c. 109 ("PACA"). This Crown immunity, asserts the provincial Crown, would mean that the plaintiffs would not be entitled to damages based on any facts which existed as of 1963.

[11] In this motion at Stage Two of the matter, the plaintiffs seek summary judgment and a declaration that Ontario does not enjoy Crown immunity in respect their fiduciary duty claims arising prior to September 1, 1963. The plaintiffs submit that the doctrine of Crown immunity does not apply to equitable claims including fiduciary claims or treaty claims.

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[1] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36
[2] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at para. 3.

[12] Ontario has clarified its position on two related questions. Ontario concedes that it is liable for breaches of fiduciary duty based on facts in existence post September 1, 1963 and submits that it is not relying upon a defence of Crown immunity for any breach of fiduciary duty post September 1, 1963. Secondly, Ontario does not argue that it was immune from breaches of the Treaties themselves. Ontario concedes that the Crown has no immunity from suit for breaches of contractual agreements which, it argues, include treaties, even where the breach took place prior to 1963. However, as discussed in the section on limitations, Ontario asserts that the claims for breaches of treaty, are defeated by the *Limitations Act*, R.S.O. 1990, c. L.15 ("*Limitations Act*, 1990").

Overview

[13] PACA eliminated some of the procedural and substantive immunities of the Ontario Crown as part of the general legislative intent to expand liability of the Crown. In general terms, PACA abrogates Crown immunity for tort claims prospectively and otherwise preserves the Crown's liability for claims, including contracts, which could have been historically brought by a procedure called petition of right.

[14] The issue of whether Crown immunity applies in Ontario to equitable claims against the Crown focuses on the extent of Crown immunity before the reform of PACA. The plaintiffs say that although there was Crown immunity covering torts pre-statutory reform, that immunity did not apply to equitable claims against the Crown. The plaintiffs assert that equitable claims against the Crown were available before PACA and that PACA preserved this right. The plaintiffs rely on recent Ontario jurisprudence for this view.

[15] Ontario takes the position that prior to the statutory reform of PACA, Crown immunity covered all wrongs, not simply torts. Ontario submits that equitable claims against the Crown were not available prior to statutory reform and therefore remain subject to Crown immunity for facts in existence as of September 1963. The fiduciary obligations, which are the subject of this claim, arose in 1850. Therefore, the right to bring these claims for equitable relief against the Crown is dependent upon the state of the law prior to PACA.

[16] To support their argument Ontario primarily relies on their interpretation of the scholarly texts discussed below, pre-1900 jurisprudence, two decisions of the British Columbia Court of Appeal and the Supreme Court of Canada decision in *Thouin*.[3] They submit that the Ontario caselaw which is contrary to their view is wrong and should not be followed.

[17] The plaintiffs' position is based on an opposite interpretation of the scholarly texts and upon the Ontario jurisprudence which has already examined and distinguished the British Columbia jurisprudence and pre-1900 cases. The plaintiffs also submit that *Thouin* is distinguishable from this case.

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[3] *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184.

[18] The plaintiffs have pleaded in the alternative that a *Dyson* procedure for a declaration was historically available and overcomes any Crown immunity upon which Ontario could otherwise rely.[4]

[19] Finally, the plaintiffs submit that the doctrine of the honour of the Crown is implicated in this exercise of statutory interpretation and would otherwise defeat an argument in support of Crown immunity in this case. I will deal with this issue in the section on statutory interpretation.

Excerpts from PACA

[20] PACA, in force as of September 1, 1963, and later consolidated in 1970, provides:

> 3. Except as provided in section 28, a claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act without the grant of a fiat by the Lieutenant Governor.
>
> …
>
> 5. (1) Except as otherwise provided in this Act and notwithstanding section 11 of *The Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its servants or agents;
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> (b) in respect of a breach of the duties that a person owes to his servants or agents by reason of being their employer;
>
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
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> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.
>
> …
>
> 28. No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the day on which this Act comes into force.
>
> …
>
> 29. (1) A claim against the Crown, existing when this Act comes into force that, if this Act had not been passed, might have been enforced by petition of right may be

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[4] *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.).

> proceeded with by petition of right, subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.

[21] The relevant provisions of this statute were included in the consolidations of 1970, 1980, and 1990, except that ss. 27 and 28 of the 1962-63 Act became ss. 28 and 29 in the 1970 consolidation (as provided above), and these sections were omitted from the consolidating statutes of 1980 and 1990.[5] Despite this, these sections have been held to remain in force.[6]

[22] Section 5 of the Act expressly and specifically abrogated the prohibition of bringing claims against the Crown in tort. Section 5 does not speak to any other category of Crown immunity.

[23] Section 28 is a temporal restriction on claims against the Crown, which covers claims for acts or omissions occurring prior to September 1, 1963.

[24] Section 29(1) carves out an exception to the s. 28 restriction, permitting claims against the Crown if those claims could have been enforced by petition of right. Unless the claims of the plaintiffs for breach of fiduciary duty fall within the exception in s. 29(1) they — like claims in negligence — will be limited to those that arose on, or after, September 1, 1963.[7]

[25] The issue is whether, if PACA had not been enacted, a claim for breach of fiduciary duty could have been pursued by petition of right. In other words, could equitable claims be historically pursued by petition of right.

[26] Ontario argues that the plaintiffs' fiduciary claims could not have been pursued by petition of right prior to 1963 and that the statutory reform which abrogated Crown immunity prospectively applies to these equitable claims pursuant to s. 28 of PACA. Ontario submits, therefore, that the equitable claims are not covered by the s. 29 exception.

[27] The plaintiffs claim that the breaches of the fiduciary duty could be brought by petition of right prior to PACA and as a result there is no Crown immunity from these claims. They say that if the Crown was not historically immune from claims in equity, PACA does not alter this status, and thus the plaintiffs would be entitled to damages accumulated pre-September 1963. PACA was not meant to restrict the historic liability of the Crown.

Historical Evolution of Crown Immunity

[28] At common law, the Crown could not be sued. This changed with the introduction of the petition of right, a procedure to allow legal claims against the Crown to be adjudicated. However,

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[5] For the purposes of clarity, all subsequent references to PACA will be to the 1970 consolidation, R.S.O. 1970, c. 365.
[6] *Murray v. Ontario* (2003), 67 O.R. (3d) (C.A.), [*sub nom. M. (S.) v. Ontario*], at para. 45.
[7] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 90, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).

the petition of right was not available for claims in tort, hence the Crown was effectively immune from liability in tort.[8]

[29] As part of the petition of right procedure the suppliant/plaintiff was required to secure the permission of the Crown through a fiat. This common law practice continued until 1872 when Ontario passed a *Petition of Right Act*, 35 Vict., c. 13, which was followed by rules of practice governing the procedure.[9]

Petition of Right and Equitable Claims Pre-PACA

[30] The historical extent of Crown immunity and the status of claims for equitable relief have been discussed by legal scholars and the following texts were cited by counsel in their arguments:

- Walter Clode, *The Law and Practice of Petition of Right* (1887);[10]
- W.S. Holdsworth, "The History of Remedies Against the Crown" (1922) and *History of English Law* (1926);[11] and
- Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown*.[12]

[31] The plaintiffs submit that on their reading of the above texts, equitable claims could historically be brought in Ontario by petition of right and that nothing in the Ontario legislation affects the nature of the relief that was historically available. Ontario interprets the same texts in support of the opposite position.

[32] Hogg *et al.* concluded that "equitable relief was available on a petition of right."[13] They came to this conclusion based on an examination of the early jurisprudence, including the decision in *Pawlett*,[14] and their reading of the texts of Clode and Holdsworth.

[33] Ontario cites Clode's text for the view that the Crown's substantive immunity was not limited to torts, but to all claims seeking damages based upon a "wrong," including civil, criminal, tortious, or equitable.[15]

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[8] Hogg, Peter, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th Ed. (Toronto: Carswell, 2011), at p. 7; Morris, Michael & Jan Brongers, *The 2019 Annotated Crown Liability and Proceedings Act* (Toronto: Thomson Reuters, 2018), at p. 1.
[9] See *e.g.* the *Judicature Act*, R.S.O. 1897, c. 51, s. 129.
[10] Walter Clode, *The Law and Practice of Petition of Right* (London: William Clowes and Sons, 1887).
[11] W.S. Holdsworth, "The History of Remedies Against the Crown" (1922) 38 L.Q.R. 140; W.S. Holdsworth, *A History of English Law*, 3rd Ed. Vol. 9 (London: Methuen & Co., 1926).
[12] Hogg, Peter, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th Ed. (Toronto: Carswell, 2011).
[13] *Ibid*, at p. 6
[14] *Pawlett v. Attorney General* (1668), 145 E.R. 550, (1667) Hardres 465.
[15] *The Queen v. McFarlane*, [1882] 7 S.C.R. 216, at p. 236; *Arishenkoff v. British Columbia*, 2005 BCCA 481, at paras. 51-52, leave to appeal refused [2005] S.C.C.A. No. 556; *Richard v. British Columbia*, 2009 BCCA 185, at paras. 38, 63, leave to appeal refused [2009] S.C.C.A. No. 274.

[34] With respect, it appears that Ontario has taken Clode's comments out of context. It reads Clode's criticism of the practice of bringing equitable claims by way of petition of right as a statement that such a procedure was not in law available. Clode was critical of "the nineteenth-century cases in which this procedure had been permitted in respect of claims in equity."[16] He wrote that he could see no authority for the use of petitions of right for equitable claims, notwithstanding that there were "numerous petitions of right claiming equitable relief against the Crown which have been presented and allowed to proceed."[17] Clode asked:

> How has this practice of proceeding in Equity against the Crown arisen? It appears to have originated in a practice, not sixty years old, of obtaining the consent of the Crown upon a petition of right to be sued as a subject through one of its superior officers, usually the Attorney-General.[18]

[35] From there, Clode traces the jurisprudence from 1864 where the petition of right procedure was in fact used for equitable claims.[19]

[36] Holdsworth wrote on petitions of right, 30 years after Clode, in a 1926 chapter "Remedies Against the Crown" in his multi-volume *History of English Law*. Holdsworth's views are consistent with the idea that aside from tort, a petition of right is available against the Crown for any claim that a subject would have against another subject. Holdsworth also commented on the *Pawlett* case from 1668,[20] saying that: "it was first clearly recognized that the subject was entitled to *this* relief against the Crown,"[21] and that "[i]t is now settled law, therefore, that any Court administering an equitable jurisdiction can give relief in this way."[22]

[37] To support their reading of Clode, Ontario relies on the pre-1900 decisions, of *Kinloch* and *Hereford Railway* where the courts rejected equitable claims brought by petition of right.[23] However, in these cases the courts found that trust-based duties were involved and that the trusts at issue were unenforceable, as they were in the nature of political trusts and engaged, among other things, the Crown's prerogatives or its discretion.

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[16] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 109, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[17] Walter Clode, *The Law and Practice of Petition of Right* (London: William Clowes and Sons, 1887), at p. 141.
[18] *Ibid*, at p. 143.
[19] *Ibid*, at pp. 147-53.
[20] *Pawlett v. Attorney General* (1668), 145 E.R. 550, (1667) Hardres 465.
[21] W.S. Holdsworth, *A History of English Law*, 3rd Ed. Vol. 9 (London: Methuen & Co., 1926), at p. 30 [emphasis added].
[22] *Ibid*, at p. 32.
[23] *Kinloch v. Secretary of Slate for India in Council* (1882), 7 App. Cas. 619 (HL) at p. 621; *Hereford Railway v. The Queen* (1894), 24 S.C.R. 1 (reasons of Stong C.J., and Fournier and King J.J.), at pp. 13-15.

[38] In any event, the Crown's fiduciary obligation to the signatory First Nations is of a significantly different nature. The equitable claim here is not based on a trust. These cases cannot help us interpret the petition of right scheme as it applies to the equitable claim in this case.[24]

[39] Although equitable claims against the Crown had been brought by petition of right long prior to PACA, fiduciary claims against the Crown in Canada were only first recognized by the Supreme Court in 1984 in the *Guerin* decision.[25]

[40] In *Guerin* the Supreme Court articulated the concept of a *sui generis* fiduciary duty owed by the Crown to Indigenous people.[26] Ontario reasons that a claim for breach of fiduciary duty could not have been asserted against the Crown prior to 1963, that is prior to *Guerin*, and thus an action seeking enforcement of a fiduciary duty by way of petition of right would have been refused prior to the enactment of PACA. Following this logic, Ontario concludes that the present claims do not fall within the exception carved out in s. 29 of PACA. It follows, submits Ontario, that claims based on breaches of fiduciary duties owed to Indigenous people remain subject to Crown immunity.

[41] Claims for breach of duties arising from the treaties' promises may have been unknown in 1963 because the cause of action for breach of fiduciary duty by the Crown was not "known in law" before *Guerin* in 1984. However, in my view the fiduciary duty, grounded in the fiduciary relationship between the Crown and Indigenous peoples, as found in the Stage One decision,[27] and flowing from the promises made by the Crown in the Treaties, could still be the foundation for an equitable claim if breached.

Ontario Jurisprudence on the Question of Crown Immunity from Claims for Breach of Fiduciary Duty: *Slark*, *Seed*, and *Cloud*

[42] Ontario and Canada have faced a number of claims for breach of fiduciary duty for acts arising before Crown immunity legislation. In *Slark* and *Seed*, the defendant Ontario argued that claims of this nature are subject to Crown immunity which protects them from such claims.[28] It relied on many of the arguments that it makes on this motion. Canada made a similar argument in the *Cloud* case, with respect to the federal *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("CLPA"), and claims arising prior to 1953.[29] In *Slark*, *Seed*, and *Cloud*, Ontario courts have not accepted this position.[30]

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[24] See *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 96; Hogg, Peter, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th Ed. (Toronto: Carswell, 2011), at p. 374.
[25] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[26] *Ibid* at pp. 382, 385, 387; Hogg, Peter, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th Ed. (Toronto: Carswell, 2011), at p. 373.
[27] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at para. 513.
[28] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 72, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.); *Seed v. Ontario*, 2012 ONSC 2681, at para. 100.
[29] *Cloud et al. v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492 (Div. Ct.) at para 10, rev'd on other grounds (2004) 73 O.R. (3d) 401 (CA), leave to appeal refused, [2005] S.C.C.A. No. 50.
[30] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 125, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.); *Seed v. Ontario*, 2012 ONSC 2681, at paras. 101-102.

[43] In a series of decisions beginning with the reasons of Cullity J. in *Slark*,[31] Ontario courts have dealt with the question posed above: is a claim for breach of fiduciary duty against the Crown captured by exception in Crown liability legislation?[32]

[44] In *Slark* and *Seed* the courts found that there is no Crown immunity covering claims for breaches of fiduciary duty that existed prior to 1963. The decisions establish that equitable claims are not excluded from the petition of right regime at the time PACA was enacted.[33] Section 29(1) therefore includes equitable claims in the exception. Ontario urges the court not to follow these decisions.

[45] *Slark* was a class action on behalf of former vulnerable students at a residential facility operated by Ontario. The claim alleged breaches of fiduciary duty in the management of the facility. In his certification decision in *Slark*, Cullity J. examined the historical status of equitable claims against the Crown and made two findings that are relevant to the question before this court.

[46] First, Cullity J. clarified Clode's and Holdsworth's interpretations of the historical status of equitable claims:

> [I]t was accepted that equitable relief by way of petition of right could be obtained in the Court of Chancery in support of a common law right. The learned author [Clode] was, however, critical of the nineteenth-century cases in which this procedure had been permitted in respect of claims in equity, but recognized a practice of allowing this had developed. Holdsworth refers to this practice without expressing similar doubts (above at pages 31-32) and in Holmstead's *Ontario Judicature Act*, 1915, (at page 1395) it was indicated that, despite earlier uncertainty, the procedure was in practice available in this jurisdiction to enforce equitable rights.[34]

[47] Second, Cullity J. held that it was consistent with the evolution of Crown liability, as well as the developments in the law governing fiduciary duties since 1963, to ask what the position of the court would be now if the Act had not been passed.[35] He went on to say that it is "not necessary for this purpose to treat the evolution of the law governing petitions of right as frozen at the end

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[31] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[32] *Ibid*, at para. 72; *Seed v. Ontario*, 2012 ONSC 2681, at para. 100; *Cloud et al. v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492 (Div. Ct.) at para 10, rev'd on other grounds (2004) 73 O.R. (3d) 401 (CA), leave to appeal refused, [2005] S.C.C.A. No. 50.
[33] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 125, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.); *Seed v. Ontario*, 2012 ONSC 2681, at paras. 101-102; *Cloud et al. v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492 (Div. Ct.) at para 5; *Cloud et al. v. Canada (Attorney General)* (2004) 73 O.R. (3d) 401 (C.A.), at para. 47, leave to appeal refused, [2005] S.C.C.A. No. 50.
[34] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 109, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[35] *Ibid*, at para. 121.

of August 1963, and to ignore developments in the equitable jurisdiction of the court since that time."[36]

[48] In *Slark*, Cullity J. rejected the exercise of speculating "whether a Court sitting in August, 1963 would, or would not, have granted a petition of right for such a claim in respect of what was then an unknown cause of action."[37] He found that it would be artificial to ask how equitable claims that were effectively unknown to the law before the recognition of an enforceable Crown fiduciary duty in *Guerin* would have been treated if they had been considered by a court before 1963.[38] Instead, relying on *Murray*,[39] Cullity J. reasoned that the word "claim" in s. 29(1) of the 1970 consolidation of PACA, was to be read in conjunction with s. 28 as meaning a sub-category of acts or omissions, etc., occurring or existing before September 1, 1963. Therefore, Cullity J. found that the claims against the Crown in respect of such matters are claims "existing" on September 1, 1963, within the meaning of s. 29(1).[40]

[49] In his reasons in *Slark*, Cullity J. held that the petition of right procedure would have and should develop consistently and in alignment with the judicial recognition of the new fiduciary duties of the Crown, [41] writing:

> Rather, I believe it is perfectly consistent with the words of section 29(1), more realistic, and more consistent with the evolution of Crown liability as described by Holdsworth—as well as the developments in the law governing fiduciary duties since 1963—to ask what the position would now be in the Act had not been passed."
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> Cullity J. concluded that by virtue of s. 29(1), the proper question to ask was whether a court today would recognize an equitable claim against the Crown and the answer to that question is yes. Following this logic, Cullity J. found there was no Crown immunity for claims for breaches of fiduciary duty existing or arising prior to September 1963.

[50] Cullity J. based his analysis of PACA on the evolutionary nature of the common law of equitable rights.[42] The law constantly evolves; statutory law preserves the rolling, evolving process. Fiduciary claims may now be made against the Crown. Even though *Guerin* was only decided in 1984,[43] one cannot reasonably argue that the Crown's liability for fiduciary claims only arose on that date. What is preserved in 1963 is not a closed list of claims, it is the petition of right

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[36] *Ibid* at para. 118.
[37] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 121, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[38] *Ibid*, at para. 117.
[39] *Murray v. Ontario* (2003), 67 O.R. (3d) (C.A.) [*sub nom. M. (S.) v. Ontario*], at para. 47.
[40] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 120, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[41] *Ibid*, at para. 124.
[42] *Ibid*, at para. 118.
[43] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

process and all that it entails. Anything that might have been brought is preserved. PACA did not freeze the law.

[51] Following the reasoning in *Slark*, the failure of the Crown to revisit or increase annuities pursuant to the augmentation clause in the Robinson Treaties constitutes acts or omissions occurring or existing before September 1, 1963, which could be enforced by petition of right, and therefore would fall within the meaning of s. 29(1) of PACA.[44]

[52] The reasoning and conclusion in *Slark* was upheld by Herman J., in dismissing an application for leave to appeal at the Divisional Court. She found that, given the wording of PACA, there was no reason to doubt the correctness of the decision and that the question as framed by Cullity J. was correct.[45]

[53] In *Seed*, the court certified a class proceeding alleging, *inter alia*, a breach of fiduciary duty in the province's operation of a school for the blind. The claim alleged facts prior to 1963. The court rejected Ontario's argument that *Slark* was wrongly decided and adopted the reasoning of Herman J. and Cullity J in *Slark*.[46]

[54] In *Cloud*, a claim for breach of fiduciary duty proceeded on consent, including claims which pre-dated the enactment of the federal *Crown Liability and Proceedings Act* in 1953. The Court of Appeal accepted the conclusion of Cullity J., in dissent at Divisional Court, that the plaintiffs' equitable claim discloses a cause of action for the purposes of class certification.[47] The federal Crown conceded this point at the court of Appeal.[48]

The Crown's Request that this Court not Follow the *Slark* Line of Jurisprudence

[55] In this case, Ontario asks the court not to rely on *Slark*, *Seed*, and *Cloud* on the grounds that they are not good or binding jurisprudence, because they were based on the test for class certification and were not a final decision on the merits, and also that they are inconsistent with the decision of the Supreme Court in *Thouin*.[49]

[56] I do not agree with the submission that the test on certification is so different from the test for summary judgment that the reasoning in *Slark* and *Seed* should not be applied in this case.

[57] Cullity J.'s reasoning in *Slark* followed a thorough examination of the historical background of petitions of right and equitable claims leading up to an interpretation of PACA. His decision considered the legal history of equitable claims against the Crown and ancient and modern

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[44] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at para. 120, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[45] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Her Majesty*] 2010 ONSC 6131 (Div. Ct), at para. 10.
[46] *Seed v. Ontario*, 2012 ONSC 2681, at para. 100.
[47] *Cloud et al. v. Canada (Attorney General)* (2004) 73 O.R. (3d) 401 (C.A.), at para. 24, leave to appeal refused, [2005] S.C.C.A. No. 50.
[48] *Ibid*, at para. 42.
[49] *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184.

jurisprudence and statutes.[50] On appeal, Herman J. held that there was no reason to doubt the correctness of the decision nor were there conflicting decisions. [51] Herman J. accepted Cullity J.'s reasons and rejected the proposition that *Slark* was wrongly decided.

[58] I accept the soundness and depth of Cullity J.'s reasoning in those cases and apply it to the task before this court. The principles of *stare decisis* and comity, both horizontal and vertical, require that I follow the decisions of this court and the Divisional Court unless they are plainly wrong.[52] As Strathy J., as he then was, wrote:

> The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them … the judgment should be followed unless the subsequent judge is satisfied that it was plainly wrong.[53]

[59] The Crown has shown no good basis for their claim that the decision in *Slark* is plainly wrong, particularly in light of the appellate decisions in *Cloud* and *Carvery* which adopt the reasoning.[54]

Other Jurisprudence Cited by The Ontario Crown

[60] Ontario also cites a number of cases which, it submits, support the proposition that fiduciary duties owned to Indigenous people remain subject to Crown immunity. With respect, I do not agree with this submission.

[61] In *Mitchell*, an accountant, retained by the bands to negotiate tax rebates with the Manitoba government, requested the Court to garnish settlement funds held by the Crown for the benefit of the First Nation to pay his fees. The Court found that Crown immunity protected the Crown from the garnishment order and that the *Garnishment Act*, C.C.S.M. 1970, c. G20, s. 3, of Manitoba did not apply to the Crown.[55]

[62] *Mitchell* is distinguishable from the present case. The decision focused on statutory interpretation principles where the statute related to Indigenous people. The Court interpreted the *Garnishment Act* of Manitoba in a way that prevented non-natives from interfering with property situated on reserves that inures to Indians, within the meaning of s. 89(1) of the *Indian Act*, R.S.C. 1970, c. I-6, as a result of the Crown's obligations under treaties.[56]

[63] There was no relationship between or promise to the accountant Mitchell from the Crown, no *sui generis* fiduciary relationship, nor any prior relationship between Mitchell and the Crown.

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[50] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at paras. 98-116, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[51] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Her Majesty*] 2010 ONSC 6131 (Div. Ct), at paras. 10, 15, 24.
[52] *R. v. Chan*, 2019 ONSC 783, at paras. 37-39.
[53] *R. v. Scarlett*, 2013 ONSC 562, at para. 43.
[54] *Carvery v. Nova Scotia (Attorney General)*, 2015 NSSC 199, at paras. 59-61, aff'd 2016 NSCA 21.
[55] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 118, *per* Wilson J. concurring.
[56] *Ibid*, at pp. 136-137, *per* La Forest.

Mitchell does not provide authority for shielding the provincial Crown from a claim that the Crown is in breach of its fiduciary duty arising out of the promises contained in treaties with the signatory nations.

[64] Ontario also relies on the decision in *McFarlane* for the proposition that historical Crown immunity extended to any wrong, whether civil, criminal, tortious or equitable.[57] In *McFarlane* there was a claim for damages sustained through the negligence of a boom master in the driving of logs. Ontario underscores the use of the word "wrong" in the following passage as their basis to conclude that the court included all non-contractual claims as outside the petition of right scheme.:

> [C]learly all this claim is based on an injury sustained by a wrong properly so called, and it is clear beyond all dispute that a petition of right in respect of a wrong in the legal sense of the term shews no right to legal redress against the sovereign.[58]

[65] However, as Ritchie C.J. also found, the claim was a tort pure and simple.[59] There is no discussion of the distinction between torts and wrongs and no suggestion that the Court considered anything other than a simple tort when it rejected the claim. The decision does not help us understand the scope of the petition of right regime *vis-à-vis* equitable claims or claims of breach of fiduciary duty arising from non-performance of a solemn promise. The decision in *McFarlane* is reconcilable with *Slark*.

[66] I reject the submission that *McFarlane* is authority for the proposition that Crown immunity for a "wrong" extends beyond simple tort to encompass equitable claims.

[67] Ontario also cites two British Columbia Court of Appeal decisions, *Arishenkoff* and *Richard*, in which the courts take a different approach and arrive at a different conclusion than *Slark* on the question of Crown immunity pre-legislative reform.[60] Ontario submits that the reasoning and result in the British Columbia jurisprudence should be preferred to the *Slark* line of cases.

[68] In *Arishenkoff*, the court was solely focused on tort claims.[61] There is no discussion in *Arishenkoff* of breach of fiduciary duty as included in their conception of torts.

[69] In *Richard*, the British Columbia Court of Appeal relied on and found that it was bound by the decision in *Arishenkoff* to hold that the ratio of *Arishenkoff* applied equally to claims for breach of fiduciary duty.[62] The court in *Richard* found that all claims for wrongs were protected by Crown immunity.

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[57] *The Queen v. McFarlane*, [1882] 7 S.C.R. 216, at p. 236.
[58] *Ibid*
[59] *Ibid*, at p. 235
[60] *Arishenkoff v. British Columbia*, 2005 BCCA 481, leave to appeal refused [2005] S.C.C.A. No. 556; *Richard v. British Columbia*, 2009 BCCA 185, leave to appeal refused [2009] S.C.C.A.
[61] *Arishenkoff v. British Columbia*, 2005 BCCA 481, at para. 56, leave to appeal refused [2005] S.C.C.A. No. 556.
[62] *Richard v. British Columbia*, 2009 BCCA 185, at paras. 43, 47, leave to appeal refused [2009] S.C.C.A.

[70] The British Columbia decisions of *Arishenkoff*, and *Richard*,[63] have already been considered in *Slark*.[64] Cullity J. rejected the proposition that the Crown's substantive immunity historically extended and continues to extend to all claims based on a wrong, including equitable claims.[65]

[71] In his discussion of the decisions in *Arishenkoff* and *Richard*[66] Cullity J. distinguished the Ontario and British Columbia legislation, *Crown Proceeding Act*, S.B.C. 1974, Chap. 24.[67] The British Columbia decisions contain no reference to any statutory provision in British Columbia that mirrors the precise terms of found in s. 29(1) of PACA. Secondly, Cullity J. noted that s. 2 (c) of the British Columbia *Crown Proceeding Act*, which provides that "the Crown is subject to all those liabilities to which it would be liable if it were a person," does not have an equivalent in PACA, which provides for Crown liability in tort (s. 5) and indemnity and contribution (s. 6), as if it were a person.[68]

[72] In the Divisional Court *Slark* decision, Herman J. considered the decision in *Richard* and held that it was not a conflicting decision.[69] She noted that the different provisions in the two statutes are central to the different results, writing: "There is no difference in principle where the different results stem from the interpretation of different statutes."[70]

[73] I have nothing to add to the analysis of the *Richard* decision other than to say that I adopt the reasons of Cullity and Herman J.J. on this point.

[74] Ontario also contends, relying on *Murray*,[71] that the proper question to ask is not whether the pre-1963 claims would have been "amenable" to a proceeding by way of petition of right, but rather whether such claims were "available."

[75] Again, this point has been thoroughly reviewed in the reasons of Cullity J. He accepted the reasoning in *Murray* and distinguished it from the approach taken in the British Columbia cases.[72] The exception in s. 29(1) of PACA is conditional upon a person having a claim against the Crown that (a) existed on September 1, 1963, and (b) might have been enforced by petition of right if PACA had not been passed.[73] Cullity J. did not ignore *Murray*, he went one step further in his analysis. His decision is not inconsistent with *Murray*.

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[66] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at paras. 73, 79-84, 90, 117-22, 126, 128, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[67] *Ibid*, at paras. 82-83.
[68] See *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Her Majesty*] 2010 ONSC 6131 (Div. Ct), at para. 14.
[69] *Ibid*, at paras. 14-15.
[70] *Ibid*, at para. 15.
[71] *Murray v. Ontario* (2003), 67 O.R. (3d) (C.A.), [*sub nom. M. (S.) v. Ontario*]
[72] *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at paras. 118-22, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.).
[73] *Ibid*, at para. 119.

[76] *Thouin* is a recent decision of the Supreme Court of Canada and was not discussed in *Seed*, *Slark*, or *Cloud*. [74] Ontario argues that the decision in *Slark* is inconsistent with *Thouin* and, therefore, is not good law.

[77] In *Thouin*, the Supreme Court considered the Crown's obligation to submit to pre-trial discovery in cases in which the Crown is not a party. Historical Crown immunity from these obligations was abrogated by the federal CLPA, s. 27, in instances where the Crown was a party. However, the language of the CLPA did not extend to instances where the Crown was not a party. The Court found that historical Crown immunity in cases where the Crown was not a party had not been clearly abrogated.[75] The Court held that it requires clear and unequivocal legislative language to override Crown immunity.[76]

[78] I am not persuaded that the decision in *Thouin* addresses the issue in this case, nor in *Slark* and *Seed*. The Court in *Thouin* confronted the issue of the jurisdiction of the court to abrogate existing and admitted Crown immunity in the area of discovery.[77] There is no admitted Crown immunity here and the courts in *Slark* and *Seed* were not exercising any jurisdiction to abrogate or abolish a presumptive or established immunity. The decision in *Thouin* does not determine whether Crown immunity did in the past or does now extend to equitable claims. Hence, the decisions in *Slark*, *Seed*, and *Cloud* are not inconsistent with *Thouin*; the decision in *Thouin* does not cast doubt on the decision in *Slark*.

Conclusion on Crown Immunity

[79] I accept that equitable claims against the Crown could be pursued by way of petition of right prior to 1963 and therefore that the claims for breach of fiduciary duty in these actions, including those claims existing before September 1, 1963, are captured by s. 29(1) of PACA and are not subject to Crown immunity.

[80] I do not accept the Ontario's proposition that historically all wrongs were covered by Crown immunity.

[81] The consensus of the scholarly writers is that historically a claim for equitable relief, including for breach of fiduciary duty, could have been pursued by way of petition of right.[78] There is no current authority that squares with the defendant's reading of these texts.

[82] The Hansard prior to the enactment of PACA explicitly gives the rationale for the reform: "At the present time, no action in tort can be brought against the Crown…"[79] This statement lends

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[74] *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184.
[75] *Ibid*, at paras. 3, 27, 40.
[76] *Ibid*, at paras. 1, 20.
[77] *Ibid*, at para. 17.
[78] See, *e.g.* Walter Clode, *The Law and Practice of Petition of Right* (London: William Clowes and Sons, 1887); W.S. Holdsworth, "The History of Remedies Against the Crown" (1922) 38 L.Q.R. 140; W.S. Holdsworth, *A History of English Law*, 3rd Ed. Vol. 9 (London: Methuen & Co., 1926); Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown*, 3rd Ed. (Toronto: Carswell, 2000).
[79] "The Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no. 68 (March 27, 1963) at 2272.

support to the view that the purpose of the Act was to abrogate Crown immunity for claims in tort and that the legislature at the time was not addressing an extended idea of Crown immunity for all wrongs. In addition, the Act also provided that those claims previously pursued by petition of right would henceforth be available without that procedure.[80]

[83] The decisions in *Slark*, *Seed* and *Cloud*, that equitable claims based on facts existing pre-statutory reform against the Crown are not subject to Crown immunity, remain good law at this time. I am not satisfied that these decisions fall within one of the rare exceptions where the court should decline to follow the previously decided law. The reasoning in *Slark*, including the analysis of the pre-1963 status of equitable claims against the Crown, the differences between the Ontario and the British Columbia legislation, and the framing of the question, is robust and the logic sound. I am entitled to adopt, and I do adopt, the reasoning in the *Slark* line of cases.

[84] In this respect, I am guided by the principle of comity, that decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed unless there are compelling reasons that justify departing from the earlier ruling.[81]

[85] When Ontario relies on the reasoning in the decisions of *McFarlane*, *Richard*, *Arishenkoff*, it does not take into consideration that Ontario courts have already distinguished these decisions from applying to equitable claims in Ontario. But there is one other important distinction between these cases and the ones before the court. In Stage One, this court found that the Treaty promises created fiduciary obligations within the context of a *sui generis* fiduciary relationship.[82] The above decisions could not possibly apply to claims arising from breaches of solemn promises made as part of treaty-making with Indigenous people. The breach of the promises in the Robinson Huron and Robinson Superior Treaties cannot be considered in the broad and simple concept of a "wrong." The claims allege breaches of express promises on which the signatory First Nations relied when they entered into the Treaties.

[86] In my view the plaintiffs have shown that there is no genuine issue requiring a trial on the question of Crown immunity as it relates to the claims for breach of fiduciary duty prior to September 1, 1963. I find that there is no Crown immunity in respect of the claims for fiduciary breaches or Treaty breaches in these actions.

[87] The motion for summary judgment on the question of Crown immunity is granted.

Plaintiffs' Alternative Argument on the Distinction Between a Tort Tied to Promise and an Independent Tort

[88] While a great deal of time was taken up with Ontario's position that this court should decline to follow the recent Ontario jurisprudence, the plaintiffs ultimately took the position that they did not need to rely on the decisions in the *Slark* line of cases to support their position that

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[80] "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); "The Proceedings Against the Crown Act, 1962-63" 1st reading, *Legislature of Ontario Debates*, no. 68 (March 27, 1963) at 2272-2273.
[81] *R. v. Chan*, 2019 ONSC 783, at paras. 37-39; *R. v. Scarlett*, 2013 ONSC 562, at para. 43.
[82] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at paras. 529-33.

there was no historical Crown immunity for equitable claims. The plaintiffs note that the *Richard* decision and the *Slark* line of cases involve claims for wrongs that are independent of any agreement between the parties. Most of the cases involved allegations of abuse of children in the care of the state.[83]

[89] The foundational claim in this case, on the other hand, arise from the non-performance of a promise made by the Crown to Indigenous Nations as part of solemn treaty making.

[90] The plaintiffs point out that their claims are not based on independent torts. They submit that even if *Slark* and the following line of cases had decided, as did the British Columbia Court of Appeal in *Richard*, that equitable claims for pre-statutory breach of fiduciary wrongs that do not involve Crown promises may not be pursued by petition of right, the plaintiffs' claim in this case could still be pursued by way of petition of right because it arises from a breach of promise.

[91] Counsel did not cite any cases involving a Crown immunity argument where the distinction was made between a breach of a duty as one element of an independent tort, as in *McFarlane* or *Slark*, and a breach of fiduciary duty arising from the non-performance of a Crown promise.

[92] However, I still find this distinction compelling, especially as it leads to the discussion of honour of the Crown and the circumstances under which this claim arises.

[93] The plaintiffs cite the decision in *Strother* for authority that a breach of a contract in a fiduciary relationship is a breach of fiduciary duty.[84] In a retainer agreement between a client and solicitor the lawyer agreed not to act for other clients in related matters. The lawyer breached this term of the retainer agreement. The Court found that the breach of the promise in the retainer agreement was an equitable breach and equitable remedies arose.[85]

[94] The plaintiffs contend that the decision in *Strother* provides a framework for considering the claim for breaches of treaty promises. They say that the breach of fiduciary duty in the cases before the court arise from breaches of a legal instrument containing promises and from the fiduciary relationship. In this framework, the entire question of historical immunity for standalone torts becomes irrelevant.

[95] As I have said above, the circumstances of an equitable claim for breach of fiduciary duty to fulfil treaty promises stands in stark distinction to any of the cases cited by the Crown. The plaintiffs argue that even if the decision in *Slark* had gone the other way, such decisions would not have undermined their position that equitable claims for breach of treaty promises could have been pursued by way of petition of right along the lines of *Strother*.

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[83] *Cloud et al. v. Canada (Attorney General)* (2004) 73 O.R. (3d) 401 (C.A.), at para. 1, leave to appeal refused, [2005] S.C.C.A. No. 50; *Richard v. British Columbia*, 2009 BCCA 185, at para. 1, leave to appeal refused [2009] S.C.C.A. No. 274; *Slark (Litigation Guardian of) v. Ontario*, [*sub nom. Dolmage v. Ontario*] 2010 ONSC 1726, at paras. 9, 13, 21, leave to appeal refused, 2010 ONSC 6131 (Div. Ct.); *Seed v. Ontario,* 2012 ONSC 2681, at para. 2.
[84] *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177
[85] *Ibid*, at para. 50.

[96] Because I accept the original argument, it is not necessary to consider this alternative conception of the claim that was only made in the final stages of the argument. It is set out here simply as an alternative framework for the claims.

Dyson Procedure an Alternative Argument

[97] The plaintiffs plead, in the alternative, a claim for relief under a *Dyson* procedure.[86]

[98] The plaintiffs assert that even if the Crown is historically immune from a claim in equity, they are entitled to seek a declaration pursuant to the *Dyson* procedure. In *Dyson*, the English Court of Appeal determined that the plaintiff could sue the Attorney General for a declaration in an ordinary action without having to proceed by petition of right and without having to obtain a fiat. However, a *Dyson* declaration cannot result in an award of damages directly attaching to the property of the Crown.[87]

[99] The plaintiffs submit that the purpose of any request for a *Dyson* declaration is based on the expectation that the Crown would honour the declaration made in litigation, in which case, the declaration would be seen as the preliminary litigation step to determine rights.[88]

[100] I do not accept the Crown's position that simply because the request for declaratory relief is coupled with a claim for damages that it is somehow tainted. There is no authority for this proposition. In fact, s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, specifically authorizes the Superior Court to make binding declarations whether or not any consequential relief is or could be claimed.

[101] The plaintiffs advance the claim for a *Dyson* declaration only in the alternative. Having already found that there is no Crown immunity in respect of the claims for fiduciary breaches or Treaty breaches in these actions, I need not make a finding on a *Dyson* declaration.

III - LIMITATIONS

Overview

[102] Ontario pleads that the claims for breach of treaty are statute barred by limitations legislation.

[103] Canada does not plead limitations as a bar to claim for breach of treaty.

[104] On this motion, the plaintiffs seek a declaration that there is no limitation period which applies to the claims brought in these actions.

[105] Ontario's claim that a limitation period applies to the claims is based upon their characterization of the claims as actions "upon a specialty" which would be subject to a twenty-

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[86] *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.).
[87] Hogg, Peter, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th Ed. (Toronto: Carswell, 2011), at pp. 38-39.
[88] *Eastern Trust Company v. McKenzie, Mann & Co.* [1915] A.C. 750, 22 D.L.R. 410 (P.C.) at p. 417.

year limitation period or, in the alternative, as actions of account, or actions for contract without specialty, which would be subject to a six-year limitation period

[106] For this position Ontario recognizes that specialties are a type of contract and submits that the Treaties are contracts for the purpose of limitations.

[107] The plaintiffs reject the notion that the Treaties are contracts for any purpose and, in response to Ontario's position, reject the characterization of the Treaties as contracts for the purpose of a limitations defence.

[108] The dispute over the applicability of limitations to these claims is in essence a dispute over whether a treaty can be considered a contract.

The Applicable Limitations Regime

[109] The two actions were commenced in 2001 and 2014. The *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, does not apply to the claims advanced in both actions by virtue of ss. 2(1)(e) and (f) which provide that:

> 2 (1) This Act applies to claims pursued in court proceedings other than,
>
> …
>
> (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the Constitution Act, 1982;
>
> (f) proceedings based on equitable claims by aboriginal peoples against the Crown…

[110] Subsection 2(2) further provides that:

> Proceedings referred to in clause (1) (e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed.

[111] The within proceedings are therefore governed by the *Limitations Act*, 1990, which was in place prior to the 2002 legislation.

[112] Ontario relies on the 1990 legislation in support of its limitations' argument.

The Structure of the *Limitations Act*, 1990

[113] Ontario's limitations statutes over the years, and until the 2002 Act, have imposed limitations only on a closed list of enumerated causes of action.[89]

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[89] *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at p. 69.

[114] Although modern limitation statutes (i.e. the *Limitations Act, 2002*) have moved away from the strict classification of causes of action for the determination of limitation periods, the 1990 Act represents a more traditional regime where different limitation periods are assigned to specific, some say "ancient" causes of action.[90] This means that whether and when a limitation period applies varies depending on the cause of action. If there is no applicable statutory limitation period applicable to a cause of action, a proceeding may be commenced at any time.[91]

[115] Other provincial limitation statutes, notably those of British Columbia and Alberta, have "basket clauses" where the statute imposes a limitation period for all other causes of action not otherwise mentioned in the statute. In this way those statutes impose a limitation period to any common law or equitable claim, irrespective of the specific cause of action. The *Limitations Act*, 1990 does not have a basket clause. In s. 2(1) of the *Limitations Act, 2002* there is effectively a basket clause, with specific exceptions.

[116] The proper characterization of the causes of action is fundamental to the determination of whether any limitation period applies and, if so, which one. A single claim can advance multiple causes of action.

[117] The *Limitations Act*, 1990 does not specify an action on a treaty in its list of enumerated causes of action. There was no history in Canada of a plea for breach of treaty as a unique cause of action prior to the 1990s.[92]

[118] It can be said that the cause of action of breach of treaty was first created by s. 35 of the *Constitution Act, 1982*, being Schedule B. to the Canada Act 1982 (UK), 1982, c. 11.[93] Section 35 provides:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Causes of Action in the Robinson Treaties Claims

[119] The Statements of Claim plead both a claim for equitable compensation for breach of fiduciary duty and a claim for damages arising from a breach of treaty. It is settled law that there

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[90] Graeme Mew, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis Canada, 2016), (online), at para. 3.1.
[91] *Ibid*, at para. 2.2.
[92] *Sides v. Canada*, 2019 FC 789, at para. 49.
[93] *Ibid*, at para. 475.

is no limitation period in Ontario for breach of fiduciary duty.[94] This motion concerns only the defence of limitations to the claim for breach of treaty.

[120] The plaintiffs submit that a finding that there is no limitation period for the breaches of fiduciary duty resolves all limitations issues in the plaintiffs' favour. However, they also ask, in the alternative, if the court finds on appeal that there was no breach of fiduciary duty, that no limitation period applies for claims for breach of treaty and further that a treaty is not a contract or a specialty as those terms are used in the *Limitations Act*, 1990.

Ontario's Position on Limitations

[121] Ontario asserts that there is no legal basis which would exclude the applicability of the *Limitations Act*, 1990 to the claims advanced in these actions. It submits that the *Limitations Act*, 1990 captures the plaintiffs' claims under one of the following causes of action which attracts the following limitations, as provided in ss. 45-46:

> *Limitation of time for commencing particular actions*
>
> 45.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> …
>
> (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;
>
> …
>
> within twenty years after the cause of action arose…
>
> …
>
> (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,
>
> …
>
> *Actions of account etc.*
>
> 46. Every action of account, or for not accounting, or for such accounts as concerns the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of action arose, and no claim in respect of a matter that arose more than six years before the

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[94] *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. 3d 641, at para. 220.

> commencement of the action is enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of the action.

Is the Claim for Breach of Treaty a Claim on a Simple Contract or a Specialty?

[122] For Ontario to succeed on its defence that there is a limitation period for a claim for breach of treaty, it would have to establish that the actions can be characterized as claims on a specialty or, in the alternative, as a claim on account or a simple contract.

[123] Contracts can be classified as either simple contracts or special contracts.[95] A specialty is a specific type of contract. If the treaty is not a contract, it cannot be a specialty. A specialty must be a contract first. Then, if other elements are present, it may be a specialty.

[124] If a treaty is not a contract, then a claim for breach of treaty cannot be a claim for breach of contract nor for a breach of a specialty.

[125] The plaintiffs submit that the Treaties are not contracts, neither specialties nor simple contracts. The jurisprudence describes treaties as sacred and *sui generis* agreements that involved the exchange of solemn promises.[96] Thus, submit the plaintiffs, actions for breach of treaty cannot be characterized as claims for breach of contract, either simple or special.

[126] In the Stage One decision, this court found:

> 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.[97]

[127] While treaties share some characteristics of contracts, that is they contain "enforceable obligations based on the mutual consent of the parties,"[98] the Supreme Court jurisprudence of the last three decades has been clear that treaties constitute a unique type of agreement. The following excerpts from the Supreme Court jurisprudence are examples of this view:

> *Sioui*:
>
> > A treaty with the Indians is unique … it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[99]

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[95] Graeme Mew, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis Canada, 2016), (online), at para. 7.20.
[96] *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78; *Sides v. Canada*, 2019 FC 789, [2019] F.C.J. No. 892, at para. 488.
[97] *Ibid*, at para. 423.
[98] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 76.
[99] *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043.

Badger:

> First it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.[100]

Sundown:

> 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 promise 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 a denial of fair dealing and justice between the parties.[101]

Marshall:

> Aboriginal treaties constitute a unique type of agreement and attract special rules of interpretation.[102]

[128] Finally, constitutional scholar, Peter W. Hogg, writes:

> An Indian treaty has been described as unique or "sui generis". It is not a treaty at international law, and is not subject to the rules of international law. It is not a contract, and is not subject to the rules of contract…[103]

[129] The courts in *Badger* and *Marshall* set out distinct guidelines for interpretation of treaties, including that, "[a] technical or contractual interpretation of treaty wording should be avoided."[104]

[130] I note here that Canada does not join Ontario in the position that the Treaties may be characterized as contracts, and instead acknowledges that the Treaties cannot be characterized as a contract.

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[100] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.
[101] *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24
[102] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78.
[103] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2019), (online), at para. 28.6(c).
[104] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78.

[131] Ontario acknowledges that the Robinson Treaties are not "simply" contracts. They assert, however, that treaties are contracts within the meaning of the *Limitations Act*, 1990 for the purpose of a limitations' analysis.

[132] Ontario submits that Canadian courts have repeatedly affirmed that treaties are contractual agreements and, therefore, that contractual limitation periods apply to treaties in the Aboriginal law context.

[133] I do not agree that this is the current state of the law.

[134] In support of their position Ontario cites the cases of *Pawis*, *Lameman*, and *Missanabie Cree*[105] Which I review below.

[135] In *Pawis*,[106] the Aboriginal plaintiffs brought actions alleging breach of contract and breach of trust regarding fishing rights under the Robinson Huron Treaty. The Court did note that the agreement could be said to be tantamount to a contract and it may be admitted that a breach of the Treaty promises may give rise to an action in the nature of breach of contract.[107]

[136] However, the pleadings and the decision in *Pawis* must be appreciated in their proper historical and jurisprudential context. That case was pleaded and decided prior to most of the jurisprudence which clarified the nature of treaty rights and interpretative principles (see above).

[137] In the 1979 decision in *Pawis*, neither the plaintiffs nor the trial judge had the benefit of s. 35 of the *Constitution Act, 1982*, nor the jurisprudence on treaty interpretation or treaty claims which followed. It does not appear that there was any argument in *Pawis* on the characterization of the treaty as a contract. In other words, the parties and the court were to some extent limited in their ability to conceive of the claim other than within the confines of contract law. In the comment above, the trial judge simply attempted to find an analogy with contract to situate the Treaty as a legal instrument. The legal landscape has changed dramatically since 1979. The jurisprudence on the unique principles of treaty interpretation were distilled in *Marshall*, twenty years later in 1999.[108]

[138] The decision in *Pawis* is not good authority now on the question of the characterization of treaties and does not provide us with any assistance for the task at hand.

[139] Ontario also relies on *Lameman* for the proposition that the limitations analysis for breach of treaty can be conducted as if the Treaty were a contract.

[140] In *Lameman*, when the chambers judge suggested that the actions for breach of treaty could "arguably covered by the limitation periods on contracts,"[109] he was simply distinguishing the

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[105] *Pawis v. Canada* (1979), [1980] 2 FC 18, 102 D.L.R. (3d) 602; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Missanabie Cree First Nation v. Ontario*, 2016 ONSC 5874.
[106] *Pawis v. Canada* (1979), [1980] 2 FC 18, 102 D.L.R. (3d) 602, at para. 7.
[107] *Ibid*, at para. 10.
[108] *R. v. Marshall*, [1999] 3 S.C.R. 456
[109] *Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2004 ABQB 655, at para. 15, rev'd 2006 ABCA 392, rev'd in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372.

claims at issue from equitable claims that were subject to discoverability. One way or the other, the claims would be captured by the catch-all limitations clause in the Alberta limitation statute. It was not necessary to fit a claim for breach of treaty into an otherwise specific cause of action for it to be captured by a limitation period.

[141] In *Lameman*, there was no analysis or specific finding, at trial or at the Supreme Court, that claims for breach of contract include claims for breach of treaty. The focus of the Supreme Court of Canada decision in *Lameman* was discoverability, an issue relevant to equitable claims and the finding was specific to the fiduciary claim and the basket limitations clause.

[142] The *Limitation of Actions Act*, R.S.A. 1980, c. L-15 which, unlike the 1990 Ontario legislation, had a basket or catch-all clause which captured all causes of action not specifically named and imposed a limitation period of six years. The Court found that the causes of action pleaded were captured by the catch-all provisions of the Alberta legislation.

[143] The decision in *Lameman* does not support Ontario's proposition that Canadian courts have affirmed that treaties are contractual agreements.

[144] In *Missanabie Cree*, Lederer J. synthesized the principles of treaty interpretation for the purpose of determining the obligation under the treaty to set aside reserve lands. Where the trial judge commented that treaties were "analogous" to contracts, this was not a conclusive finding but rather a way to look at the impact of the promises made by the parties to the treaties. [110] It certainly was not a finding for the purposes of a limitations' analysis. In any event, this comment can be distinguished from the finding of fact in *Restoule,* Stage One on the specific Robinson Treaties.[111]

[145] The decisions in *Lameman, Missanabie Cree*, and *Pawis* all include a superficial reference to the similarity of treaties and contracts. But none of the decisions includes any analysis of the differences between contracts and treaties. In the context of treaty interpretation principles, as they have now been developed in the jurisprudence, the similarities between contracts and treaties are superficial. However, the differences between treaties and contracts are profound. Those differences are highlighted in *Sundown, Sioui, Badger*, *Marshall* and in the *Restoule,* Stage One decision.[112]

[146] The most recent decision dealing with the question of treaties as contracts is the Federal Court decision of Zinn J. in *Sides*, released in June 2019.[113]

[147] In *Sides,* the court quoted with approval from *Sundown* and noted that "First Nations Treaties are no longer considered as mere contracts - they have unique status…"[114]

[148] I have been advised that this trial decision in *Sides* is under appeal.

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[110] *Missanabie Cree First Nation v. Ontario*, 2016 ONSC 5874, at para. 118.
[111] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701.
[112] *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701.
[113] *Sides v. Canada*, 2019 FC 789
[114] *Ibid*, at para. 488.

Conclusion: A Treaty is not a Contract for the Purpose of Limitations

[149] The findings in Stage One with respect to the characterization of the treaties were based on the jurisprudence since the decision in *Sioui* in 1990, as well as the evidence presented at the Stage One trial. Both led me to conclude then that the Treaties were not mere contracts for the Anishinaabe. The three cases on which Ontario relies, *Lameman*, *Missanabie Cree*, and *Pawis*, do not offer any analysis on this issue. I do not agree with Ontario's reading of these cases. The current state of Canadian law does not hold that treaties are contractual agreements for the purpose of the limitations analysis or that causes of action for breach of treaty are covered by provincial limitations periods for claims in contract.

[150] I find that the Robinson Treaties are not contracts for the purpose of the application of the limitations regime of the *Limitations Act*, 1990.

[151] The Treaties represent unique agreements by the Crown and the First Nations of the Lake Huron Territory and the Lake Superior Territory whose long-term goal was peaceful and respectful co-existence in a shared territory. Treaties are part of the constitutional fabric of this country. Simple contracts they are not. The Robinson Treaties did not start out as contracts nor did they somehow transform into contracts for the purpose of a statutory limitations defence.

Is the Treaty a Specialty?

[152] Ontario submits that the claims for breach of the Treaties were actions on "specialties" and only in the alternative submits that, if they failed on this point, the claims should be considered actions on account or actions on simple contracts. As I found above, the analysis must actually start with the question of whether the Treaties are contracts, since a specialty is a form of contract.

[153] Whether the Treaties are a specialty may be a moot question in light of the finding above that treaties are not contracts. However, I will address the issue considering the heavy reliance Ontario has put on this point.

[154] A specialty is a contract under seal.[115] And a specialty must secure a debt that is "enforceable by virtue of the form of the instrument."[116]

[155] Ontario submits that the presence of seals on the treaty documents, along with the fact that the Treaties secure the debt of unpaid arrears makes the Treaties a specialty.

[156] With respect, I do not agree with either of these assertions.

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[115] Graeme Mew, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis Canada, 2016), (online), at para. 9.224; *The Dictionary of Canadian Law*, 2nd ed. (Toronto: Carswell, 1995), cited in *872899 Ontario Inc. v. Iacovoni et. al.* (1998), 40 O.R. (3d) 715 (C.A.), at para. 15)

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

What, if Anything, is the Significance of the Possible Seals?

[157] The presence of seals is a necessary but not sufficient element for a document to be a specialty.[117]

[158] Ontario submits that the photographs of the Robinson Treaties, Exhibit 1 on this motion, show the possible presence of remnants of wax seals or wafers next to the signatures of the Anishinaabek signatories. Ontario asks the court to assume for the purpose of the motion that the documents were sealed.

[159] The plaintiffs do not agree that the photographs before the court are good or sufficient evidence that seals were ever affixed to the Treaties at the time of the Treaty Council.

[160] Even if a document is sealed, not all documents under seal are specialties.[118] In determining whether a contract is a specialty, "the relevant question is whether the party intended to create an instrument under seal."[119] The "sealed contract" rule, "at once historical and technical, should not be given any wider effect than necessary."[120]

[161] I observe from the coloured photographs in Exhibit 1 red marks, which may represent the past presence of seals beside the X marks (in lieu of signatures) and/or names of each Anishinaabek signatory. Ontario concedes, however, that there was no seal beside the signature of Treaty Commissioner W.B. Robinson.

[162] There was no evidence on the intention of the Anishinaabek signatories to affix seals to the documents or evidence of when the documents were sealed, if in fact they were.

[163] It is not necessary on this motion for me to make a finding on the presence or absence of seals nor the presence or absence of an intention to create a document under seal.

[164] However, even if one were to assume that the Treaties were sealed and that the presence of seals somehow transformed these Treaties into specialties, this characterization would conflict with the findings on Stage One that the Treaties must be understood in their full historical and cultural context.[121] In contrast, the meaning of specialties comes from the form of the document itself.

[165] In *Friedmann*, the Supreme Court briefly outlined the history of the practice of sealing documents, stating:

> The seal rendered the terms of the underlying transaction indisputable, and thus rendered additional evidence unnecessary…

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[117] *Ibid*, at para. 37.
[118] Graeme Mew, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis Canada, 2016), (online), at para. 9.221.
[119] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 SCR 842, at para. 36.
[120] *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), *per* Laskin J.A. at para. 30.
[121] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at para. 14.

> A contract under seal derived, and still derives, its validity from the form of the document itself. [Citations omitted.][122]

[166] Such a document is, by definition, in stark contrast to the findings on Stage One, with respect to the vast historical, cultural, and Anishinaabe legal perspective that underlies the meaning of the Treaty documents.

[167] The Treaties must be interpreted according to treaty interpretation principles settled in the jurisprudence, which is fully outlined in Stage One of this proceeding.

[168] On the other hand, the form controls the substance in a speciality. But relying only on the form of the written document is anathema to the task of treaty interpretation. The finding in Stage One was that the treaty represented a vast body of understanding of the parties in their dealings with one another beyond the mere words of the document. Although the issue of intention to create a document under seal was not specifically before the court in Stage One, there was a mass of evidence on the intention of the parties which was reviewed in the reasons. There is nothing in the decision or reasons of Stage One which is consistent with the intention of the parties to create a document under seal.[123]

[169] I note that there was no mention in the Stage One reasons of:

- any evidence that the Anishinaabek would have known what a specialty was or what wax wafers signified;
- any knowledge or understanding on the part of the Anishinaabek of stand-alone obligations to secure a debt;[124]
- whether Robinson explained the significance of a seal on a document, the implications of signing a document under seal, or whether seals were affixed at the Treaty Council or some other time;
- whether the Anishinaabek had an understanding, appreciation, or acceptance of the British commercial protocol of affixing seals to a treaty for the purpose of giving it a particular status.

There was, however, a finding that Robinson did not explain a number of British legal concepts.[125]

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[122] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 SCR 842, at para. 19.
[123] See e.g. *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at paras. 317-18).
[124] *Ibid*, at paras. 414, 423, 442, 447, 465
[125] *Ibid*, at para. 442

Do the Treaties Secure a Debt?

[170] Apart from the issue of seals, a specialty contract must secure a debt.[126] In *Kenmont Management*, the New Brunswick Court of Appeal found that for limitations purposes, a "specialty" is akin to a bond, a recognizance, and a mortgage covenant.[127]

[171] Until the parties in these proceedings go through the process of determining the fair share of the net revenues from the territory, there is no fixed sum payable by the Crown to the Anishinaabe. At the time the Treaties were signed there was no fixed debt and there will be no fixed amount owing until the process has been completed. At this time, there is no fixed debt.

[172] The Treaty promise, which the plaintiffs claim was breached, was to engage in a process to determine the net revenues and the fair share. Once the net revenues are calculated, then the fair share can be determined. Only once the fair share is determined does the amount of the increase, pursuant to the promise to pay, crystallize.

Conclusion on Specialty

[173] I make no finding on whether the Treaties were sealed, but in any event, the Treaties do not meet the fundamental definition of a specialty. I find that the Treaties do not constitute a bond nor secure a debt. In addition, they are not to be interpreted solely on the face of the documents themselves. They are not specialties, even if, they could somehow be construed as contracts, which I find they cannot.

[174] Neither the Robinson Huron Treaty nor the Robinson Superior Treaty can be reduced to a contract, whether a simple contract or a specialty. Therefore the 20-year limitation period for specialties does not apply.

Action on Account

[175] Ontario argues in the alternative that the claims are subject to a six-year limitation period for actions of account within the meaning of s. 46 of the *Limitations Act*, 1999. The plaintiffs reject this proposition.

[176] Ontario notes that the pleadings include a claim that Ontario account for and pay to the plaintiffs their proportionate share of the gross revenues produced and provide an accounting to the plaintiffs of the net revenue from the Treaty Territory, and, after such accounting, that the Crown is to forthwith provide payment of a fair share of the net profit.

[177] Ontario relies on the Supreme Court decision in *Lameman*, where the Court found that the continuing claim for an accounting of sale proceeds was not statute barred by operation of the

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[126] *R. v. Williams*, [1942] 3 D.L.R. 1 at p. 11; *The Mortgage Insurance Company of Canada v. Grant Estate*, 2009 ONCA 655, at para. 12.
[127] *Kenmont Management Inc. v. Saint John Port Authority*, 2002 NBCA 11, [2002] 210 D.L.R. (4th) 676, cited in *The Mortgage Insurance Company of Canada v. Grant Estate*, 2009 ONCA 655, at para. 12.

Alberta *Limitation of Actions Act*.[128] The accounting claimed was based on an allegation of the mismanagement of sale proceeds.

[178] *Lameman* can be distinguished from this case in that, to the extent that the plaintiffs in this case claim for an accounting, that accounting flows from the claim for a breach of fiduciary duty.

[179] I agree with the plaintiffs' characterization of the action that the compensation sought in this case is unlike any common law accounting. The plaintiffs are seeking equitable compensation. In order to quantify the "fair share" of Crown resource revenues the Crown will be required to disclose Crown information, including the historical revenues and expenses, in other words to perform an accounting function. The plaintiffs do no assert a separate "action" of account. The claim for disclosure is not transformed into an action on account. The decision in *Lameman* does not provide any helpful analysis for the issues before this court.

[180] The claims in this action are not claims for an accounting. They are not captured by s. 46 of the *Limitations Act*, 1990. Hence, the six-year limitation period in s. 46 does not apply to the plaintiffs' claims for breach of treaty.

Summary on Limitations

[181] In summary, I find that there is no specific limitation for claims of breach of treaty. The limitation periods in s. 45 and 46 of the Ontario *Limitations Act*, 1990 do not capture the claims in these actions. There are no *Limitations Act* provisions which bar the claims in these actions.

[182] It is a principle of statutory interpretation that statutes of limitations contain provisions which restrict the ability of parties to obtain redress for legal wrongs. As such they "attract a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated."[129] I have not had to consider the application of this principle because I have found no ambiguity in the language of the statutory provisions. The language and structure of the limitations legislation in Ontario do not capture the claims in these actions.

Policy Considerations in the Jurisprudence of the Supreme Court of Canada

[183] Ontario urges the court to have regard to the Supreme Court cases that examined the policy rationale for limitations and applicability of provincial limitations statutes to Indigenous and treaty claims. The policy issues are only significant if the court accepts as a matter of law that limitations apply to the specific causes of action in these claims. I have not found that the claims are captured by the Ontario *Limitations Act*, 1990.

[184] The plaintiffs specifically ask the court to refrain from making any finding that would prejudice the plaintiffs in any future constitutional challenge to provincial limitations statutes that they may bring in Stage Three. Nothing in this decision should be considered to be a comment or

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[128] *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 12.
[129] *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, at p. 280.

finding on the issue of the constitutionality of limitations legislation on Indigenous and treaty claims.

[185] However, as this issue was extensively canvassed in argument before me, I will deal with it in a general way.

[186] Ontario submits that *Wewaykum*[130] and *Lameman* support the proposition that limitation periods apply to Indigenous and treaty claims and that the traditional policy rationale for limitations — repose, certainty, evidentiary issues, and diligence — apply equally to Aboriginal and treaty claims.

[187] In *Lameman*, the Supreme Court restored the trial judge's ruling that Indigenous claims are not immune from limitations defences.

[188] In *Wewaykum*, two bands sought declarations of possession against the other and equitable compensation for breach of fiduciary duty by the Crown. There was no claim for breach of treaty. The Court imposed the limitations in the British Columbia, *Limitations Act*, S.B.C. 1975, c. 37, and found that the claims for possession were extinguished and statute barred. The claims for breach of fiduciary duty was captured by the catch-all provision of the British Columbia *Limitations Act*.

[189] In both *Lameman* and *Wewaykum*, the Court affirmed that the traditional policy rationale for limitations applies to Aboriginal and treaty claims.

[190] Since those decisions, in *Manitoba Metis Federation* ("*MFF*"), the Court has considered the goal of reconciliation as a competing policy rationale. The majority in *MMF* notes that the goals of reconciliation and honour of the Crown must also be considered in some cases before deciding whether an Aboriginal claim can or should be statute barred on the basis of an applicable limitation period, writing:

> Despite the legitimate policy rationales in favour of statutory limitation periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.[131]

[191] The majority in *MMF* emphasized that the goal of reconciliation, recognized in s. 35 of the *Constitution Act*, 1982, must be considered when assessing whether limitation provisions should apply.[132]

[192] Prior to *MMF*, Binnie J., for the majority in *Wewaykum*, signaled that he was alive to other possible competing policy goals for limitations. Having considered the traditional policy

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[130] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245.
[131] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R 623, at para. 141.
[132] *Ibid*, at paras. 140-41.

objectives of limitations statutes Binnie J. concluded that there was "nothing in *the circumstances* of this case to relieve the appellants of the general obligation imposed on all litigants…"[133]

[193] Although the traditional policy rationale for limitations was considered (on the specific fact situation), the Court did not reject the idea that other policy rationales could, in different fact situations, be the correct result.

[194] I do not see the decisions in *Wewaykum* and *Lameman* as irreconcilable with *MMF*.[134]

[195] The Supreme Court decision in *Ravndahl* deals with a constitutional challenge to the application of limitations. The Court held that personal claims for constitutional relief were claims brought as an individual and had to be distinguished from claims benefitting affected members of a group.[135] Therefore, the Court held that the damage claim was subject to the Saskatchewan *Limitation of Actions Act*, R.S.S. 1978, c. L-15. The individual nature of the *Ravndahl* claim distinguishes it from *Wewaykum, Lameman, MMF*, and this case which are all collective claims.

[196] The policy considerations discussed in *Wewaykum*, *Lameman* and *MMF* reflect important principles and policies. However, in this case, where the plaintiffs are not asking the court to reject otherwise applicable limitations and the language is sufficiently clear to interpret the statute, it is not necessary to consider the policy rationale for limitations.

Summary/Conclusion on Limitations

[197] The onus is on the moving party to establish that there is no genuine issue requiring a trial with respect to the limitations defence (r. 20.04(2)(a)).

[198] I do not accept the defendant's assertion that the limitations periods in the *Limitations Act*, 1990 for the specifically named actions for breach of contract, actions on a specialty, and actions for account, capture a claim for breach of treaty.

[199] I am able to reach a fair and just determination on the merits on this motion with respect to the applicability of limitation periods for claims for breach of treaty. I am satisfied that there is no genuine issue which requires a trial on the question of limitations.

[200] I am satisfied that there is no limitation period applicable to any of the plaintiffs' claims and, in particular, there is no limitation period applicable to claims for breach of treaty.[136] The claims in this action are not statute barred by the operation of limitation periods. There shall be summary judgment that no limitations legislation applies to bar the plaintiffs' claims.

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[133] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 135 [emphasis added].
[134] Whether the ruling in *MMF* is ultimately interpreted narrowly to apply only to actions for declarations regarding constitutional obligations and only in cases where no other relief is available is an open question (*Peepeekisis First Nation v. Canada*, 2013 FCA 191, at para. 62).
[135] *Ravndahl v. Sasketchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, at paras. 16-17.
[136] It is accepted by the defendants that there is no limitation period applicable to claims for breach of fiduciary duty.

[201] Canada has not pleaded a limitations defence and, therefore, no limitations apply to their direct liability.

IV - STATUTORY INTERPRETATION PRINCIPLES

[202] Statutes relating to Indigenous peoples and/or having an impact upon treaty or Aboriginal rights attract specific guidelines of interpretation, specifically the *Nowegijick* rules of large, liberal, and purposive interpretation, and the principle of honour of the Crown.[137] On this motion, where the interpretation of both PACA and the limitations statutes are at issue, the question is whether these interpretive guidelines apply at all and, if they do apply, what impact they have on the interpretation exercise.

[203] In the decision and reasons above, I have found that the statutory defences of Crown immunity and limitations do not defeat the plaintiffs' claims. The plaintiffs will have summary judgment on those questions. Those findings are based on an analysis that does not require the application of these specific principles of statutory interpretation. Therefore, it was not necessary on this motion to consider whether these principles apply. However, the issue was argued on the motion and in my view merits consideration in the event the within findings are considered afresh.

[204] The plaintiffs submit that because the statutes at issue on this motion bear on the Crown's treaty promises to the Anishinaabek, they must be interpreted according to the liberal interpretive principle as expressed in *Nowegijick* and the principle of the honour of the Crown. Had Ontario been successful on either of these statutory defences, the plaintiffs' claim to enforce the promises made in the Treaties would be defeated.

[205] Ontario submits that the statutes at issue on this motion are of general application and therefore these special interpretive principles do not apply.

[206] The primary question is whether the limitations and Crown immunity statutes, as they are invoked by Ontario can be characterized as statutes of general application or as statutes relating to Indigenous peoples and/or having an impact on Treaty rights.

Nowegijick Principles

[207] Over the last few decades, the courts have developed well established principles to guide interpretation of legislation relating to Indigenous peoples, including legislation that affects Indigenous rights.[138] The Supreme Court of Canada has held that legislation relating to Indigenous peoples should receive a large, liberal, and purposive interpretation, and that linguistic ambiguities should be resolved in favour of the Indigenous peoples.[139]

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[137] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 98, 142-43; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.
[138] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), (online), at para. 20.1.
[139] *Ibid* at para. 20.3; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 98, 142-43; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1107.

[208] The leading authority establishing this principle is found in *Nowegijick*, which states: "…treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[140]

[209] In *Mitchell*, Dickson C.J. expanded on these rules of statutory interpretation, writing:

> 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 responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.
>
> … The only limitation to the principle articulated in *Nowegijick* was that that treaties or statutes must "relat[e] to Indians" for the liberal interpretive principle to apply. [141]

[210] LaForest J., for the majority, agreed with Dickson, C.J.C. on the canons of interpretation relating to Indigenous peoples as those set out in *Nowegijick*, writing:

> [I]t is clear that in the interpretation of any statutory enactment dealing with Indians … it is 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.[142]

[211] Thus, as a matter of statutory interpretation, it is presumed that a legislature does not intend to narrow, extinguish, or otherwise interfere with Aboriginal rights or treaty rights.[143] These interpretative practices are in keeping with the principle of reconciliation and the spirit of s. 35 of the *Constitution Act, 1982*.[144]

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[140] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
[141] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 99-101.
[142] *Ibid* at p. 143.
[143] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), (online), at para. 20.29.
[144] See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31.

[212] Although the *Nowegijick* principles apply to legislation that expressly deals with Indigenous peoples, it does not apply to legislation of general application which may apply to Indigenous peoples of its own accord or by virtue of s. 88 of the *Indian Act*, R.S.C. 1985 c. I-5.[145]

[213] The plaintiffs take the position that both PACA and the limitations statutes attract liberal interpretation since the legislation "relates to Indians,"[146] and bears upon the Crown's treaty promises. They contend that if either or both of the statutes are laws of general application, liberal interpretation rules are "otherwise warranted."[147]

[214] Ontario, on the other hand, argues that PACA and the limitations legislation are not treaties, do not relate specifically to Indigenous peoples and, consistent with the rules of statutory interpretation for statutes of general application, that a liberal interpretation is not "otherwise warranted." Hence Ontario contends that PACA and the limitations legislation are to be interpreted in accordance with the usual rules of statutory interpretation.

[215] In certain circumstances, statutes of general application may attract special rules of statutory interpretation. In *Wasauksing* and *Kokopenace* the courts found, respectively, that the statutes setting out the corporate membership requirements and the method of selecting jurors, were statutes of general application and did not otherwise warrant the application of the *Nowegijick* principles.[148] Ontario submits that the limitations and Crown immunity statutes are similar to the statutes at issue in these cases. [149]

[216] However, the court in *Wasauksing* did not reject the notion that liberal rules of interpretation could sometimes apply to statutes of general application. The Ontario Court of Appeal specifically held that the *Nowegijick* principle does not "mandate the expansive interpretation of laws of general application *where such a reading is not otherwise warranted*."[150]

[217] The circumstances and subject legislation in *Wasauksing* and *Kokopenace* are in clear distinction with the historic facts and the statutory defences argued in this case. In any event, the decision in *Wasauksing* requires the court to determine whether the circumstances "otherwise warrant" the application of liberal interpretation rules even with respect to laws of general application. I do not find that these decisions dilute the strength of the Supreme Court of Canada's dictum in *Mitchell* and *Nowegijick* with respect to the importance of applying liberal interpretive principles in this case.

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[145] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), (online), at para. 20.8; *Council of the Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, at paras. 92-94, leave to appeal refused, [2004] S.C.C.A. No. 200.
[146] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 99-101.
[147] *Council of the Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, at para. 94, leave to appeal refused, [2004] S.C.C.A. No. 200.
[148] *Ibid*, at paras. 97-102.
[149] *Juries Act*, R.S.O., 1990 c. J.3; *Corporations Act* R.S.O. 1990, C.38
[150] *Council of the Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84, at para. 94, leave to appeal refused, [2004] S.C.C.A. No. 200 [emphasis added].

[218] In approaching any statute, the court must take the entire context scheme and object of the Act into consideration.[151] Nowhere is this more important than where the statutes impact treaty rights and Indigenous peoples. Contracts, whatever their form, were never meant to be a stand in for treaties. Nothing in the Act is consistent with this interpretation. To ignore the primacy of context in this exercise is to also ignore treaty interpretation and implementation principles as developed by the Supreme Court of Canada.

[219] The plaintiffs submit, and I agree, that the limitations legislation is no longer a law of general application. The *Limitations Act*, 1990 may have been a law of general application; however, by virtue of the *Limitations Act, 2002*, ss. 2(1)(e) and (f), 2(2), which incorporates the 1990 Act only with respect to Aboriginal claims, the 1990 provisions, applicable in this case, relate only to Aboriginal claims. In this respect it can no longer be said that the limitations legislation is a law of general application. When applying the 1990 Act, it is unique and specific to Aboriginal people.

[220] It is clear that the provisions of the 2002 and the 1990 limitations legislation "relate to Indians" or have an impact upon treaty or Aboriginal rights and therefore attract the *Nowegijick* principles of interpretation. Additionally, in my view, PACA and the limitations legislation, even if they could be considered laws of general application, do otherwise warrant a more expansive interpretation for this court to meet the standard set out in *Mitchell* by LaForest J.:

> [I]f 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.[152]

[221] There is no doubt that the application of these statutes "bears on Treaty promises." In his majority reasons in *Mitchell*, LaForest J. underscores that the interpretive principles apply whenever the interpretation of legislation puts at risk the ability of Indigenous peoples to rely on the treaty commitments of the Crown.[153] In this case, the Anishinaabek rely on the Treaty commitments and seek to enforce the promises made in 1850 by the Crown. To give effect to Ontario's argument would entirely abrogate those promises in opposition to LaForest J.'s dictum in *Mitchell*.[154]

[222] A technical defence based upon strictly and narrowly interpreted statutes would deprive the plaintiffs of putting the Crown to the test of disclosing the net resource-based profits of the territories from over more than a century and effectively terminate the Treaty rights of the Anishinaabek of the Huron and Superior territories. The preferred approach must recognize the

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

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. *R. v. Stipo*, 2019 ONCA 3, at para. 175.

[152] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 143.

[153] *Ibid.*

[154] *Ibid.*

significant role that context and constitutional norms play when courts construe the written words of a statute.[155]

[223] In my view it is clear that both PACA and the Ontario *Limitations Act* of both 1990 and 2002 relate to the Anishinaabe people of the Huron and Superior territories and have an impact upon their treaty rights.

Honour of the Crown as a Principle of Statutory Interpretation

[224] The *Nowegijick* principles are tightly woven with the threads of the principle of honour of the Crown.

[225] In *Badger*, Cory J. relied on the decisions in *Nowegijick* and *Mitchell*, to further articulate the statutory interpretation guidelines that courts must adopt when dealing with Indigenous peoples:

> [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 the Crown intends to fulfil its promises. … A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.[156]

[226] The plaintiffs submit that if necessary, for the proper interpretation of PACA and the limitations legislation, the principle of honour of the Crown must guide the interpretive exercise of both statutes relied upon by Ontario as defences to the plaintiffs' claim.

[227] Ontario submits that the honour of the Crown is not inconsistent with the usual rules of statutory interpretation for statutes of general application or with application of the defences.

[228] The principle and duty of the honour of the Crown, as it relates to treaty interpretation is more fully discussed in the Stage One decision.[157] There, I found that the principle was mandated in the exercise of treaty interpretation[158] and, in my view, the same jurisprudence mandates that the principle of honour of the Crown inform the approach to the interpretation of the statutes pleaded in defence in this motion. This approach to statutory interpretation seems obviously necessary when the specific purpose of pleading the statutory defences is to defeat an Aboriginal claim in respect of treaty promises.

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[155] *R. v. Stipo*, 2019 ONCA 3, at paras. 176, 179; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 20.
[156] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.
[157] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at paras. 476-81.
[158] *Ibid*, at paras. 478, 481.

Duties Flowing from the Honour of the Crown

[229] The Supreme Court of Canada has developed the principles of the honour of the Crown and the obligations flowing therefrom to the Indigenous people through its decisions in, among others, *R. v. Sparrow*,[159] *Mitchell*,[160] and *Haida Nation*.[161] The principles and obligations were recognized in the context of treaty and statutory interpretation in *Badger*[162] and *MMF*,[163] where the Court mandated that: "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."[164]

[230] The Ontario Crown specifically rejects the idea that there is any role for the principle of the honour of the Crown in the interpretation of the *Limitations Act*, of both 1990 and 2002, or the concept of Crown immunity as they are invoked here to defeat the plaintiffs' claims. However, Ontario acknowledges that the honour of the Crown applies to the making and interpretation of treaties and informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*. When the honour of the Crown is engaged, it speaks to how the Crown fulfils its obligations to specific Indigenous peoples. Ontario contends that the honour of the Crown does not impose a statutory interpretation mandate upon this court and is not available as a plenary principle of interpretation in construing statutes of general application and the common law applicable to these motions.

[231] There can be no doubt that both PACA and the *Limitations Act*, 1990 are legislation which bears on the Crown's Treaty promises to the Anishinaabek. As the plaintiffs submit, and I agree, Ontario's proposed interpretation of this legislation would have the effect of abrogating a great portion of the obligations undertaken by the Crown.

[232] Ontario seems to find some distinction between the interpretation of a treaty, the implementation of the treaty, and the interpretation of a statute, which impacts upon the interpretation or implementation of a treaty, when it comes to the applicable principles of the honour of the Crown. But this distinction is not founded on the jurisprudence. The duty of the honour of the Crown has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carry out its promises. The duty requires that the Crown ensure that its treaty obligations are fulfilled.[165] Time and again, the honour of the Crown duty is imposed on both the interpretation and implementation of treaties and of statues.[166]

[233] The treaties promises have not been implemented for over 160 years. The Crown cannot avoid their duty of honour to implement the Treaty promises in a diligent and purposive manner by simply not implementing the terms of the Treaty. The duties flowing from the honour of the

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[159] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[160] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.
[161] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.
[162] *R. v. Badger*, [1996] 1 S.C.R. 771.
[163] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R 623.
[164] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R 623, at para. 68.
[165] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R 623, at para. 79.
[166] *Simon v. The Queen*, [1985] 2 S.C.R. 387 at p. 402; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R 623, at paras. 66-80.

Crown, which apply to the implementation phase of the Treaty, continue through the process the Indigenous people pursue to enforce the implementation of the Treaties.

[234] It is because "the honour of the Crown is itself a fundamental concept governing treaty interpretation and application,"[167] statutes with such enormous impact upon the enforcement of those promises must also be interpreted according to the duties inherent in the honour of the Crown. Similarly, because the idea of Crown immunity as a response to a treaty claim is repugnant to the Crown's promises, any statutory provision designed to impose Crown immunity must therefore be interpreted with the principle of honour of the Crown at the core. Following the same logic, the specific preservation of Indigenous treaty claims in the *Limitations Act, 2002*, ss. 2(1)(e), calls for that statute to be interpreted in light of the duties included in the principle of honour of the Crown. As the Supreme Court has said in other circumstances, but applicable here: "The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies."[168]

[235] The Superior plaintiffs contend that for the Crown now to seek to rely on historic Crown immunity from tort claims to shield them from equitable claims arising from non-performance of solemn promises would upend any notion of good faith or honourable bargaining at the time of the Treaty Council. However, the court cannot presume that there was sharp dealing at the time of the treaty negotiation. Rather, the court must apply the principle of the honour of the Crown to the interpretation of these statutes in order to fulfil the dictum of the Supreme Court set out in *Badger* by Cory J.: "…the Crown's honour *requires* the Court to assume that the Crown intended to fulfil its promises."[169]

[236] The only way for this court to interpret these statutes and at the same time assume that the Crown intended to fulfil its 1850 promises is to ensure that the honour of the Crown is part of the interpretive exercise.

Conclusion to Application of *Nowegijick* Guidelines and Honour of the Crown

[237] In my view, the decisions in *Nowegijick*, *Mitchell*, *Badger*, and *MMF* strongly support the application of principles of the honour of the Crown and the *Nowegijick* guidelines when considering the meaning and intention of legislation which is pleaded in order to defeat a claim or parts of a claim based on constitutionally recognized treaty promises of a collective people.

[238] Although it was not necessary to rely on either the *Nowegijick* guidelines of liberal interpretation nor the principle of the honour of the Crown on this motion, had it been necessary to do so, I am convinced that both principles apply.

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[167] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51.
[168] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24.
[169] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 47 [emphasis added].

V - JOINT AND SEVERAL LIABILITY OR PAYMASTER

[239] This motion asks the court to make a declaration 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 in the alternative that Canada is, in any event, a "paymaster" and obligated to pay the plaintiffs the full amount of any compensation order irrespective of which level of government is ultimately liable.

[240] The claims for a finding of joint and several liability and paymaster arise in the face of pleadings by each Ontario and Canada that the other Crown is exclusively liable for any increases to the annuities.

[241] Canada has cross claimed against Ontario under s. 112 of the *Constitution Act, 1867*, which provides:

> 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.

[242] Section 112 would apply if the court concludes that there is a money judgment "existing at the Union" and thus fall within the scope of s. 111, which reads: "Canada shall be liable for the Debts and Liabilities of each Province existing at the Union," in which case, Ontario would be insulated from liability.

[243] Canada has also pleaded as a defence that the liabilities follow the administration and control of Crown assets and arose after 1867. Responsibility for such assets would thus follow the constitutional division of assets, revenues, and powers provided for in s. 109, which grants the provinces jurisdiction over lands, mines, and minerals located within their territories as well as overall sums payable for such,[170] together with the division of powers set out in ss. 91, 92, and 92A of the *Constitution Act*, 1867. The division of assets, revenues, and powers is particularly relevant to the determination of any increases to the annuities which will be based on resource-based revenues from the territories. In the above scenario, submits Canada, separate liability would result in separate judgments against each of the federal and provincial Crowns.

[244] The plaintiffs disagree that these defence theories define the approach to damages and contend that Indigenous nations who are signatory to the Robinson Treaties are not interested in this dispute between the federal and provincial Crowns; either in waiting for it to be resolved, participating in the fact finding that may be necessary for a resolution, or bearing the costs of participation.

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[170] "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," s. 109, *Constitution Act, 1867*.

[245] These concerns and the plaintiffs' own legal theory are at the heart of the request for partial summary judgment on the substantive issues of "joint and several liability" and paymaster before embarking on Stage Three of this matter.

[246] On the question of whether partial summary judgment is appropriate, the primary point of contention is whether the issues can be determined as a question of law alone without an evidentiary record. For the plaintiffs, the issue is framed as an issue of access to and costs of justice. The plaintiffs submit that, based on their theory, the liability flows directly from the Treaty promises made pre-Confederation. Pursuant to that theory, the issues can be determined as a question of law and no evidentiary record is necessary. On the other hand, if the issue is approached according to the constitutional framework proposed by the Crown defendants, an evidentiary record will be required.

The Plaintiffs' Theory on the Substantive Issues

Joint and Several Liability

[247] The plaintiffs' argument is that the joint and several liability of the Crown is part of the constitutional order of Canada. They submit that as in the *St. Catharines Milling* case,[171] the Treaty was "from beginning to end a transaction between the Indians and the Crown."[172]

[248] The plaintiffs contend that the Crown's obligation to make payment to the plaintiffs, and the liability for any failure to do so, flows from the Treaties themselves and predate Confederation by almost three decades. Therefore, they submit, the liability to pay is not impaired by the *Constitution Act, 1867*, and that ss. 109, 111, 112, and 142 do not have the effect of severing or dividing the pre-existing Crown treaty obligation to make the payment due pursuant to the Treaty annuity augmentation promise.

[249] The plaintiffs submit that both levels of government are responsible for fulfilling treaty promises when acting within the division of powers under the *Constitution Act*, 1867.[173]

[250] The plaintiffs submit that as a result of constitutional principles governing the devolution of Crown responsibility, the obligation to make annuity increases has become a joint and several obligation of the Crowns having jurisdiction in the treaty territory (Canada and Ontario). Further, the plaintiffs submit that as a matter of constitutional law, including the honour of the Crown, the payment obligation is not divided to align with federal or provincial administration and control of assets and revenues, but is dependent on the Crown having the jurisdictional authority under the *Constitution* to make payment.

[251] The plaintiffs further submit that, if either the provincial or the federal Crown wishes to bring evidence and make argument as to the effect on its obligations to the other pursuant to ss. 109, 111, 112, and 142 of the *Constitution Act, 1867*, or pursuant to other constitutional decisions

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[171] *St. Catharines Milling and Lumber Co. v. R.*, [1888] UKPC 70, 1888 CarswellOnt 22, at para, 16.
[172] See also, *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447 at para. 33.
[173] *Ibid* at paras. 33-35, 39.

or agreements, in an attempt to establish rights of contribution or indemnity from the other, they will have every opportunity to do so, but the plaintiffs need not be involved in that dispute. On the unique facts of this case, argue the plaintiffs, they are entitled to pursue their case with complete indifference to the dispute between the Crowns and the only way that this Crown dispute can remain a "matter of absolute indifference" to the Anishinaabe is if liability is joint and several, or if Canada is ordered to be the paymaster.[174]

[252] Finally, the plaintiffs contend that neither Crown lacks the constitutional capacity to make payment, notwithstanding which Crown currently benefits or receives revenues from the activities within the territories at issue. Each Crown's spending power is unfettered and unconstrained by the limits of their respective legislative jurisdiction.

Paymaster

[253] In the alternative, the plaintiffs argue that the honour of the Crown requires an order that Canada pay to the plaintiffs the amounts owing for increases to the annuities not made since 1875, regardless of which Crown is ultimately liable to fund those increases. In other words, Canada is required to act as the paymaster of the annuities as part of its duties flowing from the honour of the Crown.

Plaintiffs' Position on Summary Judgment Procedure

[254] With respect to the defendants' position that the claims of joint liability and paymaster are not amenable to summary judgment, the plaintiffs say that if the court accepts the plaintiffs' theory, then no evidence is needed for a determination of joint and several liability and there is no genuine issue requiring a trial.

[255] The plaintiffs assert that a determination of these claims prior to Stage Three will alleviate further delay and the unnecessary and costly process of imposing the dispute between the defendants into this Treaty claim proceeding. The plaintiffs submit that since the Stage One decision on interpretation of the Treaties, the Crown has a duty of implementation which must be fulfilled in accordance with the duty flowing from the honour of the Crown. They say that this dispute between the Crowns, unknown at the time of the Treaty, should be a matter of complete indifference to the plaintiffs, is inconsistent with the honour of the Crown, and does not facilitate the diligent implementation of the Treaty promises.

[256] The plaintiffs further submit that the question of joint liability and paymaster should and can properly be dealt with on a question of partial summary judgment. It is necessary to do so, argue the plaintiffs, in order to avoid the extraordinary time, effort, and expense of participating in a trial in which the federal and provincial Crowns continue their fight over which of the two is liable to the plaintiffs to fulfill the Treaty promises made in 1848.

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[174] *Canada (Attorney General) v. Ontario (Attorney General)*, [1897] A.C. 199, 1896 CarswellNat 44, at para. 16.

Overview of the Position of the Defendants

[257] Canada asserts that the court requires a full evidentiary record in order to determine the issues of joint and several liability and paymaster. Thus, the Crown defendants ask the court to adjourn these issues to the Stage Three trial. The defendants contend that these issues are not appropriate for partial summary judgment.

[258] On the substantive issues, Canada submits that the question of allocation of liability between Canada and Ontario is properly considered under constitutional and public law principles. Canada contends that the responsibility for payment of the augmented annuity must, as a matter of constitutional law, be divided to align with federal or provincial administration and control of assets and revenues and jurisdictional authority under the *Constitution*.

[259] Canada further submits that before the court can make any finding on allocation of liability it must first make findings on the basis and nature of Crown liability for breach of treaty or associated duties based on evidence and within the context of addressing other remedies issues. Canada says that this evidence will include expert and other efforts to reconstruct what territorial resources have been available to the two post Confederation Crowns, the nature of the expenses to be attributed to such revenues, and histories of the economic dimensions of the treaty and non-treaty relationships from 1850 to the present.

[260] Ontario adopts Canada's submission that the *Constitution Act, 1867* directly governs Crown liability to the plaintiffs, not just between Crowns, and that neither common law nor statutes can alter the *Constitution*. Ontario further submits that there is no basis in law to apply the private law concept of joint and several liability to Crowns. Ontario adopts Canada's view on the nature of the evidence required.

The Defendants' Position on the Partial Summary Judgment Issue

[261] The defendants contend that there is a threshold issue which must be addressed before the joint and several or paymaster claims are addressed; that is, into which constitutional and public law categories does the liability fit.

[262] Canada contends that the allocation of financial responsibility between Canada and Ontario falls to be determined by the application of one of the following established legal models that are grounded in the *Constitution* or in public law principles:

- Section 111 of the *Constitution Act, 1867*:

  applies to liability "existing at the Union" within the scope of s. 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 s. 111; or

- Sections 109, 91, 92, and 92A of the *Constitution Act, 1867*:

> apply to a liability based on treaty obligations or associated Crown duties that arose after 1867, 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.

[263] The defendants submit, therefore, that the issues of joint and several liability and paymaster are not amenable to partial summary judgment.

[264] The heart of the dispute on these questions is captured by Canada's argument that 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. The Crowns submit that the *Constitution Act, 1867* fundamentally changed which emanation of the Crown was to be responsible for performing the Robinson Treaty obligations even though the plaintiffs' substantive and procedural rights were not changed.

[265] Ontario has cross claimed against Canada and pleaded that the entirety of the Stage Three money judgment will constitute or represent a debt or liability of the old Province of Canada, "existing at the Union," within the meaning of s. 111 of the *Constitution Act, 1867*, thereby insulating the provincial Crown from direct liability to the plaintiffs.

[266] The defendants submit that the above issues cannot be resolved in the abstract. They contend that the determination of the source and nature of the obligations and duties, as well as the appropriate constitutional framework under which these claims fit, requires a full evidentiary record and the context provided by the other Stage Three remedies issues. Without the features of the trial process, submit the defendants, the two claims cannot be adjudicated fairly and therefore are not amenable to partial summary judgment.

[267] In any event, the defendants argue, the evidence on these issues will be intertwined with the evidence on the other Stage Three issues, including whether, when, and how the different obligations and/or duties were breached.

[268] Canada asserts that these issues of joint and several and paymaster are not appropriate for summary judgment determination because of the risk of future inconsistent findings and, importantly, that there will be no time or costs saved nor judicial utility in deciding these issues ahead of the trial, given the overlap of evidence to be presented in Stage Three on remedies.

Is the Question of Joint Liability and Paymaster Suitable for Determination on Motion for Partial Summary Judgment?

[269] The parties agree that the law on the appropriateness of proceeding with a partial summary judgment motion is set out in the case of *Service Mold*,[175] where the Court of Appeal for Ontario, applying the Supreme Court of Canada's decision in *Hryniak*,[176] posed the following questions:

> 1. Is there a risk of duplicative proceedings?
>
> 2. Is there a risk of inconsistent findings of fact?
>
> 3. Is there a risk that partial summary judgment will frustrate the *Hryniak* objective of using summary judgment to achieve proportionate, timely, and affordable justice?
>
> 4. Will any partial summary judgment cause delay, increase expense, and increase the danger of inconsistent findings at trial on a more complete record?
>
> 5. Given that partial summary judgment "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," is this case one of those rare circumstances? [177]
>
> 6. Is the motions judge satisfied affirmatively that the issue before the court can readily be bifurcated without causing overlap that could lead to inefficient duplication or a material risk of inconsistent findings or outcomes?[178]

[270] Since these claims were filed, there has been consistent and productive case management. Within that process, issues have been identified and segmented to achieve judicial and litigation efficiencies and maintain progress. The question now is whether a further bifurcation on liability questions is appropriate.

[271] I am of the view that it is not.

[272] Even if the plaintiffs are correct that the issues can be decided as a question of law and require no evidence there will still be a significant evidentiary record required for the Stage Three trial. There is no avoiding the requirement of a significant evidentiary record to determine the quantum of liability at Stage Three. It appears from all that I have heard throughout the case management process that the evidence required for Stage Three quantification of damages is intertwined with the evidence on apportionment as between Crowns.

[273] Furthermore, to make findings in the abstract on joint and several liability and paymaster runs the risk of depriving the defendants the opportunity to fully argue and defend themselves on

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[175] *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135.
[176] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.
[177] *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135, at para. 14.
[178] *Ibid* at para. 18.

their cross claims and defences, which will frustrate the *Hryniak* objective of using summary judgment to achieve proportionate justice.[179]

[274] In my view, there is a material risk of duplication of evidence if the quantification evidence is not part of the evidentiary foundation for the Crown's apportionment dispute.

[275] The parties are now engaged in a process to design an efficient and fair process to present the evidence to court of Stage Three. Absent a resolution on damages or a finding at trial, the time and expense of a trial on quantification is inevitable and without it the litigation will not end.

[276] I do not perceive that material judicial or litigation efficiencies will result if the plaintiffs succeed in obtaining an answer to the joint and several and paymaster questions before damages are quantified in Stage Three. They cannot complete this litigation without marshalling the evidence of the resource-based revenues and expenses for last 140 years.

[277] The plaintiffs suggest that an early answer to the question of joint and several and paymaster will be most appreciated in extra-judicial resolution efforts and that it will motivate conduct that fulfils the duty of treaty implementation consistent with the honour of the Crown.

[278] In my view, the argument in favour of a partial summary judgment would have been stronger if the decisions on limitations and Crown immunity had gone in favour of the defendants. However, given that I have found that Ontario cannot succeed on either of those defences, the plaintiffs do not need the assurances on these questions going into Stage Three.

Conclusion

[279] Ther4e will not be partial summary judgment or a declaration on the question of joint and several liability or paymaster questions. It does not appear that material litigation or judicial efficiency can be achieved by making a determination of the issues outside of the evidence which will necessarily be called in the Stage Three trial. In that way it does not appear that it will be the most proportionate, timely, or cost-effective approach. There remains also the risk, in partial summary judgment, of impairing the ability of the Crowns to ultimately defend themselves from the cross claims. Ultimately the evidence at issue must be put before the court to determine quantum of damages. It should not have to be called a second time for the Crowns to pursue their cross claims. That would be inefficient and also raise the risk of inconsistent findings should the evidence differ.

[280] Everyone would agree that resolution in this case is a laudable goal and one that must be encouraged at every stage of the litigation. However, I find the plaintiffs' speculation, that an early finding on these issues will contribute to resolution, somewhat optimistic. I note that this dispute has continued over the years at great expense to all parties; key issues have already been determined; cost awards have been made; appeals have been launched. The litigation continues. Resolution appears elusive.

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[179] *Ibid* at para. 14.

[281] The litigation efficiency that may result from an early determination of these liability questions will come if the plaintiffs do not have to participate in the dispute between the Crowns. But there are other methods to work towards litigation and judicial efficiency. With the cooperation of all counsel, there may be ways to manage the Stage Three trial so that evidence going strictly to apportionment is presented in a manner or on a schedule that relieves the plaintiffs from participating.

[282] I want to be clear, however, that declining to make the decision at this stage on the plaintiffs' theory of liability, is not a rejection of that theory. It is simply a deferral.

The Century Old Dispute

[283] This century old dispute between the federal and provincial Crowns is one of the reasons why no increase has been made to the annuities for over 150 years. This delay has had enormous negative consequences for the plaintiffs, not the least of which is the cost and complications of litigating this dispute based on two centuries of evidence. It is the stage on which this dispute plays out.

[284] The plaintiffs are concerned that the defendants approach at Stage Three, which is ostensibly to determine the quantum of damages, will be turned into a never ending exercise to examine every single incident of revenue and expense over the last century and a half for the purpose of determining whether the item goes to the credit or debit of one or the other of the Crowns. This is not an unreasonable concern. However, all mans will be taken to ensure that the most fair, proportionate and efficient process is followed.

[285] However, it should not be lost that the apportionment dispute between the defendants does not concern the plaintiffs. Although both defendants underscore their obligation to satisfy any judgment against them, this reassurance brings little comfort to the plaintiffs as they absorb the costs of preparation for the Stage Three trial. At the same time, it is not controversial that ultimately the plaintiffs should not have to bear the burden or absorb the costs of watching or participating in the dispute between the Crowns.

[286] I agree with the plaintiffs and adopt the reasons of the Privy Council in *Canada (Attorney General) v. Ontario (Attorney General)*, in which Lord Watson wrote:

> [T]heir Lordships think it must still be a matter of absolute indifference to the Indians whether they have to look for payment to the Dominion, to which the administration and control of their affairs is entrusted by s. 91 (24) of the Act of 1867, or to the Province of Ontario.[180]

[287] Whether through case management or judicious decision making in how to present the evidence, the Crowns must remain vigilant to their duty and to the plaintiffs' entitlement to remain indifferent to the dispute between the Crowns.

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[180] *Canada (Attorney General) v. Ontario (Attorney General)*, [1897] A.C. 199, 1896 CarswellNat 44, at para. 16.

VI - COSTS

[288] Counsel may serve and file Stage Two cost outlines and submissions according to the following schedule:

a. plaintiffs by July 31, 2020;

b. defendants by August 28, 2020;

c. plaintiffs in reply by September 15, 2020; and

d. defendants in reply, only on issues where they are seeking costs, by September 30, 2020.

Submissions shall be no more than five pages.

P. C. Hennessy J.

The Honourable Madam Justice Patricia C. Hennessy

Released: June 26, 2020

CITATION: Restoule v. Canada (Attorney General), 2020 ONSC 3932
COURT FILE NO.: C-3512-14 & C3512-14A and 2001-0673
DATE: 2020-06-26

Court File No.: C-3512-14 & C3512-14A

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 (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty Of 1850

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

-AND-

Court File No.: 2001-0673

The Chief and Council of Red Rock First Nation, on behalf of the Red Rock First Nation Band of Indians, the Chief and Council of the Whitesand First Nation on behalf of the Whitesand First Nation Band of Indians

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

DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT - STAGE TWO

Hennessy, J.

Released: June 26, 2020