Court File Nos: C-3512-14 & C-3512-14A

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MIKE RESTOULE, PATSY CORBIERE, DUKE PELTIER, PETER RECOLLET, DEAN SAYERS and ROGER DAYBUTCH, on their own behalf and on behalf of all members of the OJIBEWA (ANISHINABE) NATION who are beneficiaries of the Robinson Huron Treaty of 1850

Plaintiffs

- and -

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

Defendants

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties

Court File No. 2001 – 0673

AND BETWEEN:

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

FACTUM OF THE DEFENDANTS,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
and the ATTORNEY GENERAL OF ONTARIO

September 16, 2019

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office, Civil Law
720 Bay Street, 8th Floor, Toronto, ON M7A 2S9

Michael Stephenson LSO #29697R
Lisa La Horey LSO #31148M
Mark Crow LSO #45624S
Brent Kettles LSO #61568E

Counsel for the Defendants,
Her Majesty the Queen in right of Ontario and
the Attorney General of Ontario

T: 416-326-4008
F: 416-326-4181

TO: **ARVAY FINLAY LLP**
1512 – 808 Nelson Street
Box 12149 Nelson Square
Vancouver, BC V6Z 2H2

Joseph J. Arvay, QC (LSBC#6441)
Catherine Boise Parker, QC
T: (604) 696-9828
F: (888) 575-3281

Lawyers for the plaintiffs/respondents

AND TO: **NAHWEGAHBOW, CORBIERE**
5884 Rama Road, Suite 109
Rama, Ontario L3V 6H6

David C. Nahwegahbow, IPC, LSM, LSO #22473L
Dianne G. Corbiere, IPC, LSO# 401720
Christopher E. J. Albinati
Jim Ratis
T: (705) 325-0520
F: (705) 325-7204

Lawyers for the plaintiffs/respondents

AND TO: DUBOFF EDWARDS HAIGHT & SCHACHTER
1900 - 155 Carlton Street
Winnipeg, Manitoba R3C 3H8

Harley I. Schachter
Kaitlyn Lewis
Tel: 204-942-3361
Fax: 204-942-3362

Lawyers for the plaintiffs/third parties/respondents

AND TO: ATTORNEY GENERAL OF CANADA
c/o Deputy Attorney General of Canada
Department of Justice
Ontario Regional Office
4th Floor
120 Adelaide Street West
Toronto M5H 1T1

Owen Young
Scott Warwick
T: (416) 973-9268
F: (416) 973-2319

Lawyers for the defendant
Attorney General of Canada

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PART I – OVERVIEW

1. The plaintiffs bring these motions seeking declarations that: (1) as a matter of statutory interpretation, none of Ontario's pleaded limitations defences apply to defeat the claims made against it; (2) Ontario enjoys no Crown immunity in respect of any annuity entitlements due; and (3) Ontario and Canada are jointly and severally liable to pay the plaintiffs the full amount of any compensation payable in respect of the annuity augmentation promise. Ontario submits that this Honourable Court should not grant the declarations sought and that the motions should be dismissed.

2. The parties have agreed that these motions will determine legal issues only, without testimony or affidavit evidence. The only evidence relied upon will be: (1) this Court's reasons for judgment in Stage 1; (2) *Hansard* evidence relevant to the statutes pleaded by Ontario; and (3) the text and photographs of the Robinson Treaties.

3. The parties have agreed that these motions will not determine questions of liability or whether the plaintiffs' claims are, in fact, barred by any statutory limitation period. The constitutional applicability and validity of the statutes relied upon by Ontario are also not at issue on these motions. Such issues remain to be resolved in Stage 3.

4. Ontario submits that it is immune from the plaintiffs' claims for breaches of fiduciary duty prior to the enactment of Ontario's *Proceedings Against the Crown Act* in 1963. The *Proceedings Against the Crown Act* bars claims prior to its enactment for which a petition of right was not, at that time, available. No petition of right was ever available for breaches of fiduciary duty or analogous equitable claims before 1963. Crown immunity remains

deeply entrenched in Canadian law. It may only be limited or removed by an express act of the legislative, and not judicial, branch of government.

5. Ontario submits that the plaintiffs' claims are subject to statutory limitations periods set out in the *Limitations Act*, 1990 and its predecessors. Specifically, the plaintiffs' claims are: (1) actions upon a specialty; (2) actions of account; and/or (3) actions for breach of contract. They are therefore subject to either a 20-year limitation period, in the case of a specialty, or a six-year limitation period, in the case of an action for an account or for breach of contract.

6. Ontario submits that the honour of the Crown is not a plenary principle of interpretation in construing statutes of general application. Although the Robinson Treaties are unique agreements, they remain subject to applicable statutes and limitation periods. The honour of the Crown is not inconsistent with the application of the Crown liability and limitation statutes in this case.

7. Ontario submits that issues of joint and several liability and Canada as Treaty "paymaster" cannot be severed from the determination of respective Crown liability in Stage 3. As a result, like Canada, Ontario does not consent to proceeding by way of partial summary judgment to decide these issues in Stage 2.

8. Specific theories of Crown liability cannot properly be considered in isolation from other theories that may impose liability on one or both defendants, and it has been agreed that the Court's determination of respective Crown liability will await the Stage 3 hearing. Moreover, in light of Canada's positions raised in their defence, evidence is required to

determine respective Crown liability and the relevant evidence is not presently before the Court. It is thus premature to make an order on this issue at this time.

9. Critically, if such an order is made at this time in the absence of evidence, there is a significant risk of inconsistent findings if a different or contrary order is made in Stage 3 after relevant evidence is before the Court. Such an order would also not be of any utility at this time, as no money judgments have yet been made and the Crown always pays money judgments when made (unless stayed while under appeal).

10. If the Court nevertheless decides to hear these issues now, Ontario submits that joint and several liability does not apply in this context. The *Constitution Act, 1867* has specific provisions governing Crown liability in this area – ss. 111 and 112. Joint and several liability is a common law concept (subsequently altered by statute) applicable to negligence and other private law matters. It does not apply to public law matters generally, much less where the Constitution governs. Neither the common law nor statutes can alter the Constitution.

PART II – THE FACTS

11. For the purpose of these motions, Ontario adopts this Honourable Court's description of the making of the Robinson Superior Treaty and the Robinson Huron Treaty in the Reasons for Judgment from Stage 1.[1] The Treaties described in those Reasons are referred to hereinafter as the "Robinson Treaties".

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[1] *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 208–237 [*Restoule*].

12. The text of the Robinson Treaties states that they are “Signed, sealed and delivered at Sault Ste. Marie”. Official typed copies of the Treaties bear the letters “L.S.”, signifying “*locus sigilli*” – the place of the seal.[2]

13. It was agreed at the most recent Case Management Conference that the Court could also examine colour photographs of the original Treaty texts in order to confirm that they, in fact, bear seals. The original Treaty documents have white, square paper wafers affixed next to the “X” mark signatures of the Anishinaabe signatories. On the Robinson Huron Treaty, some of the paper wafers have fallen off, leaving behind the red adhesive originally used to affix the wafers.[3] The signed and sealed Treaties were presented to Prime Minister Louis-Hippolyte LaFontaine. On November 29, 1850, an Order-in--Council declared the Robinson Treaties to be ratified and confirmed.[4]

14. Both the Robinson Superior Treaty and the Robinson Huron Treaty contain an “augmentation clause” as follows:

> The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, <u>to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order…</u>[5] (emphasis added)

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[2] *Ibid*, Stage 1, Appendices A and B.

[3] Photographs of the Original Robinson Treaties Documents, Supplementary Historical and Ethnohistorical Review and Reply Report of Jean-Philippe Chartrand, dated May 19, 2017, pages 54 to 58, Brief of Statutes and Legislative History of Ontario at Tab C-2 [Brief of Statutes].

[4] *Restoule*, *supra* at para 237.

[5] *Restoule*, *supra* at para 243.

15. The Red Rock and Whitesand First Nations are parties to the Robinson Superior Treaty and commenced litigation in 2001 against the Attorney General of Canada ("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 (the "Robinson Superior Action").

16. In 2014, Mike Restoule and five other Indigenous leaders commenced a similar action against Canada and Ontario in Sudbury, on behalf of all Indigenous beneficiaries of the Robinson Huron Treaty (the "Robinson Huron Action"). Ontario added Red Rock and Whitesand as third parties to the Robinson Huron Action in 2015. Both actions are being case managed together.

17. On this motion, the plaintiffs seek summary judgment, as against Ontario, for:

a) A DECLARATION that the defendants are jointly and severally liable to pay the plaintiffs the full amount of any compensation payable in respect of the annuity augmentation promise, and in the alternative, regardless of whether the obligation is joint or several or both, a declaration that Canada is obligated to pay to the plaintiffs the full amount of any compensation payable in respect of any failure to augment the annuities, irrespective of which level of government, is ultimately liable for the compensation to be paid.
[…]
c) A DECLARATION that, as a matter of statutory interpretation and apart from any issues of discoverability, knowledge and capacity, constitutional validity, constitutional applicability, estoppel, concealment, and equitable fraud, which the plaintiffs reserve the right to raise later if necessary, the allegedly applicable limitations legislation, relied upon by Ontario, being:

i. *An Act for the further Amendment of the Law, and the better Advancement of Justice*, S.U.C. 1837 (7 Will. IV), c. 3, s. 3; 1859 (22 Vict.) C.S.U.C., c.78, s. 7;

ii. The *Limitations Act*, R.S.O. 1990, c. L.15, s. 45 (1) (b) and its predecessors1; and

iii. The *Limitations Act*, 2002, S.O.2002, c. 24, sch. B, ss. 2 (1) (e) (f), (2),

do not contain any provisions that apply so as to defeat the plaintiffs' claims made against the defendants.

d) A DECLARATION that Ontario enjoys no Crown immunity in respect of any annuity entitlements due, including those calculated in respect of any period prior to the coming into force of the Proceedings Against the Crown Act on September 1, 1963.[6]

18. The parties have agreed that the following issues are not to be determined on this motion:

(i) Whether the defendants have in fact breached any obligation owed pursuant to the Treaties or as alleged in the claim.

(ii) Whether any annuity augmentation amount is owing.

(iii) Any claims to contribution or indemnity that either Crown defendant may have as against the other.

(iv) Whether the plaintiffs' action is, in fact, barred by any limitation period if following Phase 2, there remain any limitation provisions that might be applicable; and,

(v) Issues pertaining to the applicability of any limitation period, namely issues of discoverability, knowledge and capacity, constitutional validity, constitutional applicability, estoppel, concealment, and equitable fraud.[7]

19. These motions are proceeding to determine legal issues only, without testimony or affidavit evidence. The parties have agreed that only the following facts and evidence will be relied upon for this motion:

> The findings made by the court in Stage One as contained in the judgement and reasons for judgment of the Court, the Debates of the Legislative Assemblies of the Province of Canada and of Ontario (as reported in newspapers for the period 1841 to 1946 and in Hansard from 1947 onwards) providing evidence of the legislative history of the relevant legislative provisions relied upon by Ontario, and any formal agreement as to facts that the parties may conclude and file.[8]

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[6] Notices of Motion, at paras 1(a)–(d).

[7] Notices of Motion, at para 4.

[8] Notices of Motion, at para 42.

PART III – THE ISSUES

20. This motion raises the following questions:

i. Is Ontario immune from actions based on a breach of fiduciary duty prior to September 1, 1963?

ii. Considered as a matter of statutory interpretation only, are the plaintiffs' claims barred by the 20-year statutory limitation period for "specialties"?

iii. In the alternative, considered as a matter of statutory interpretation only are the plaintiffs' claims barred by the 6-year statutory limitation period for contracts?

iv. In the further alternative, considered as a matter of statutory interpretation only, are the plaintiffs' claims barred by the 6-year statutory limitation period for actions of account?

v. Are the issues of whether Ontario and Canada are jointly and severally liable to the plaintiffs, or whether instead Canada is fully liable for whatever damages may be awarded (subject to possible indemnity from Ontario), severable from the determination of liability in Stage 3?

vi. In the alternative, and in any event, are Ontario and Canada jointly and severally liable for any breaches of duties owed to the plaintiffs?

vii. Should Canada be the Treaty "Paymaster"?

21. Ontario submits that Questions 1-4 should be answered in the affirmative. Questions 5-6 should be answered in the negative. Question 7 should be answered in the negative at this stage. Accordingly, Ontario submits that the motion should be dismissed.

PART IV – LAW AND ARGUMENT

A. Principles of Honour of the Crown are Not Engaged in Interpreting Statutes of General Application at this Stage

22. The parties have agreed that that these motions will be limited to narrow legal questions of statutory interpretation and common law. In particular, the parties have agreed that issues pertaining to the applicability of any limitation period and the constitutional validity of the statutes relied upon by Ontario, will not be addressed at this stage. Contrary to the plaintiffs' submissions, that principles of honour of the Crown and

reconciliation must govern the interpretation of statutory or common law defences, Ontario submits that such principles do not arise on these motions, at Stage 2. Rather, the role of the honour of the Crown in the application of Ontario's defences to the plaintiffs' claims, if any, is appropriately addressed at Stage 3.[9]

23. 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.[10] However, the honour of the Crown in no way imposes a statutory interpretation 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.

24. The honour of the Crown has been described as a "constitutional principle."[11] The parties have agreed that the limitations issues are to be determined "as a matter of statutory interpretation". Issues of the constitutional validity and applicability have been expressly excluded from this Stage 2 hearing, with the plaintiffs reserving their rights to argue the constitutional applicability and validity of the limitation provisions along with other limitations issues of discoverability, knowledge and capacity, estoppel, concealment and fraud in a later stage, if necessary.[12]

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[9] Factum of the Robinson Superior Plaintiffs, Issue 1 at paras 23–30. Factum of the Robinson Huron Plaintiffs, at paras 52, 61, and 65.

[10] *Manitoba Métis Federation Inc v Canada*, 2013 SCC 14 at para 68 [*Manitoba Métis*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [*Haida*]; *Mikisew Cree First Nation v Canada (Governor in Council)*, 2018 SCC 40 at para 140;

[11] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.

[12] Notices of motion, at para 1(c).

25. Further, the plaintiffs have not delivered notices of constitutional question which are required before this Court has jurisdiction to make any finding on the constitutional validity or applicability of the statutes in question.[13]

26. When interpreting statutes of general application, courts do not invoke interpretive principles regarding the honour of the Crown, liberal construction or presumptions that doubtful expressions will be resolved in favour of Indigenous people.[14] As the Court of Appeal for Ontario held in *Wasauksing First Nation v. Wasausink Lands Inc.*, laws of general application apply equally to Indigenous and non-Indigenous people.[15] In *Wasauksing*, the Court held that:

> [W]e do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject matter, for non-aboriginals. *Nowegijick, Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome. To the contrary, as observed by the Supreme Court in *Nowegijick* at p. 36: "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.[16]

27. The statutes at issue on this motion are not Treaties and do not relate specifically to Indigenous people. Accordingly, they do not attract the presumptions of statutory interpretation described in decisions such as *Nowegijick v.R* or *Marshall v.R*.[17]

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[13] *Courts of Justice Act*, RSO 1990, c C43, s 109.
[14] Ruth Sullivan, *Statutory Interpretation*, 3rd ed, (Toronto: Irwin Law, 2016) at 255 [Sullivan, *Statutory Interpretation*].
[15] *Wasauksing First Nation v Wasausink Lands Inc*, [2004] OJ No 810 (CA) [*Wasauksing First Nation*]; *Ibid* at 255; *R v Kokopenace*, 2015 SCC 28 at 97-102.
[16] *Wasauksing First Nation, supra* at para 94.
[17] Sullivan, *Statutory Interpretation*, *supra* at 254.

28. The statutes relied upon by Ontario in support of its defences of Crown immunity and limitations are statutes of general application and are to be interpreted in accordance with the usual rules of statutory interpretation. There is no authority to support the proposition that the honour of the Crown is inconsistent with these rules. Equally, for the reasons described at paragraphs 88 – 90 and 102 – 105 below, the honour of the Crown is not inconsistent with the application of the defences Ontario relies upon in any event.

B. The Crown is Immune from Claims for Breach of a Fiduciary Duty Before 1963

29. Ontario's position on this motion is that the Ontario Crown is immune from suit for breaches of fiduciary duty which occurred prior to September 1, 1963. To be clear, however, Ontario is not immune for breaches of the Treaties themselves. Should it be established that Ontario otherwise is liable for the Crown's breach of a Treaty, Ontario acknowledges that, historically, the Crown had no immunity from suit for breaches of contractual agreements. The law is clear that Treaties are contractual agreements, albeit of a special kind.

30. For the purposes of these actions only, the Crown is not relying upon a defence of Crown immunity for any breach of fiduciary duty post September 1, 1963.

31. Ontario asks that this Honourable Court not make any findings as to the availability of a Crown immunity defence for breach of fiduciary duty after September 1, 1963 in view of the fact that Ontario is not relying upon it. Rather, Ontario respectfully submits that this issue should be left to be decided by a court hearing a case in which the Crown asserts this defence.

i. The Scope and Development of Crown Immunity

<u>The Crown's Procedural Immunity</u>

32. Historically, at common law, the Sovereign could not be sued in his or her own courts. This immunity had both substantive and procedural components. As a matter of procedure, no jurisdiction existed in any court to entertain an action against the Crown unless the King consented. In Ontario, this procedural immunity from suit came to an end with the passage of *The Petitions of Right and Crown Procedure Act, 1872* ("Petitions of Right Act"), which provided a statutory basis for bringing an action against the provincial Crown. A version of that statute was in force in Ontario until September 1, 1963, when the *Proceedings Against the Crown Act* ("*PACA*") came into force.[18]

33. In all cases where the relief sought was a remedy against the Crown's estate, the party was required to use the petition of right procedure. Petition of right referred to both the form of pleading (similar to a statement of claim) and to the proceeding itself. Under the petition of right proceeding, a royal fiat had to be granted before any court had jurisdiction to hear a proceeding by petition of right. The fiat was an endorsement by the Crown's representative on the petition stating: "let right be done".[19]

34. The granting of a fiat is a "pure act of grace" which the courts have no jurisdiction to review. Historically, the Crown had no obligation to answer a petition for a fiat and, "it does not appear that the Crown was bound to do so, and certainly there appears to have

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[18] *An Act to Provide for the Institution of Suits against the Crown by Petition of Right, and respecting Procedure in Crown Suits*, SO 1871-2, c 13 [*Petitions of Right and Crown Procedure Act, 1872*]; *Rudolph Wolff & Co Ltd and Noranda Inc v Canada*, [1990] 1 SCR 695 at 699–700 [*Rudolph Wolff*]; Peter W Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Scarborough, Ont: Carswell, 2000) at 4.
[19] *Canada v Central Railway Signal Co*, [1933] SCR 555 at 563 [*Central Railway*]; Hogg & Monahan, *supra* at 7.

been no method of compelling it to do so".[20] A fiat is an endorsement which is nothing more than the answer of the Crown to the prayer of the petition. The Crown retains discretion to refuse a fiat or to add whatever special terms and conditions it thinks proper.[21]

35. The Crown does not lose its substantive immunity by waiving its procedural immunity through the issuance of a fiat.[22] Even in cases where the Crown lifted the procedural bar by issuing a fiat, permitting a petition of right to proceed to court, the relief sought would not be granted to the extent that the Crown was substantively immune to the claim.[23]

36. The fiats granted by the Lieutenant Governor in Council in this case expressly reserve the Crown's right to assert its substantive Crown immunity.[24] The question of whether or not the plaintiffs were entitled to bring these actions without first obtaining a fiat is irrelevant in view of the fact that a fiat was sought and was granted.

37. The fiats were, in fact, issued, and this waived the Crown's procedural immunity. There is therefore no issue regarding the plaintiffs' procedural entitlement to bring their claim.

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[20] Walter Clode, *The Law and Practice of Petitions of Right* (London: William Clowes and Sons, 1887) at 165 cited in *Fitzpatrick v The King* (1925), 57 OLR 178 (SCHC) at para 64, aff'd (1926) 59 OLR 331 (SCA) [*Fitzpatrick* CA].

[21] Clode*, supra* at 164–167; *Orpen v Ontario (Attorney General)* (1924), 56 OLR 327 at para 20 (SCHC), aff'd (1925) 56 OLR 530 at para 6 (SCA); *Petitions of Right and Crown Procedure Act, 1872*, *supra* (the Lieutenant Governor, "…if he shall think fit, may grant his fiat that right be done…" at s 2).

[22] *Arishenkoff v British Columbia*, 2005 BCCA 481 at paras 33–49 [*Arishenkoff*], leave to appeal to SCC refused [2005] SCCA No 556.

[23] *Fitzpatrick* CA*, supra* at para 56*; Hereford Railway v The Queen* (1894), 24 SCR 1 (reasons of Stong CJ, and Fournier and King JJ) [*Hereford Railway*]; *Western Dominion Coal Mines Ltd v R*, [1946] 4 DLR 270 at para 48 (Ex Ct Can) [*Western Dominion*].

[24] Fiat issued in Court File No. 2001-0673, September 30, 2004; Fiat issued in Court File No. 2001-0674, September 30, 2004, Authorities of the Robinson Superior Plaintiffs.

38. Moreover, there is no issue as to the Crown's entitlement to make the fiat without prejudice to its substantive defences. The issuance of a fiat, in whatever form, is not a substantive waiver of the Crown's immunity.[25] The "conditions" imposed upon the fiats in this case, that the issuance was without prejudice to the Crown's right to assert the defences of immunity and limitations, do nothing more than clarify the procedural nature of the petition of right. The conditions on the face of the fiat do not therefore affect the substantive rights of either the plaintiffs or the Crown.

The Crown's Substantive Immunity

39. At common law, petitions of right for claims based on personal injury and property damage were routinely refused, not because of a procedural bar, but because of the Crown's substantive immunity derived from the legal principle that "the King can do no wrong". The Crown's substantive immunity was with respect to supposed civil and criminal wrongs of the Crown and the Crown's servants. In *Tobin v. the Queen*, the court noted that:

> The maxim that the King can do no wrong is true in the sense that He is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally, the law presumes will not be wrong: that which the Sovereign does by command to his servants, cannot be a wrong in the Sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command.[26] (emphasis added)

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[25] *Hereford Railway*, *supra* (reasons of Strong CJ, and Fournier and King JJ).

[26] *Tobin v The Queen* (1864), 143 ER 1148 at 1165; Halsbury's Laws of England, 1st ed, vol 6, *The Nature of the Prerogative* "Sovereignty and Pre-eminence of the Sovereign" at 374; *Rudolph Wolff*, *supra* (the SCC confirmed that "[t]here can be no doubt that without the passage of [Petition of Right legislation], no jurisdiction existed in any court to entertain an action claiming damages against the Crown in right of Canada" at para 9); *Canada (National Harbours Board) v Langelier* (1968), [1969] SCR 60 at 66.

40. The Crown's substantive immunity would typically be asserted by the Crown or the Attorney General by way of pleadings motion or demurrer after the issuance of a royal fiat.

41. In the *Queen v. McFarlane*, the plaintiffs sought to recover damages for losses for lost lumber when a boom in the Ottawa river broke. The plaintiffs asserted negligence on the part of a government appointee. Chief Justice Ritchie of the Supreme Court of Canada held:

> …the claim set forth in the petition is a tort pure and simple, and it is clear beyond all dispute that a petition of right in respect of a wrong in the legal sense of the word shews no title to legal redress against the Sovereign.[27] (emphasis added)

42. A petition of right was only available to seek relief against the Crown in certain types of cases. Contract and property claims were brought against the Crown under the petition of right procedure routinely, without offending the substantive immunity of the Crown. A petition of right did lie for such claims. As noted by Holmested and Langton in *The Judicature Act of Ontario* (1940):

> Apart from special statutory provision the only cases in which the procedure by petition of right is available are (1) where the land or goods or money of the suppliant have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or (2) when the suppliant's claim arises out of contract, as for goods supplied to the Crown or to the public service, and (3) where the supplicant's claim is for statutory compensation, as when a statute imposes a liability upon the Crown to pay for the use and occupation of property.[28]

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[27] *Queen v McFarlane* (1882), 7 SCR 216 as reported in 1882 CarswellNat 9 at para 7 [*McFarlane*]; See also, *Queen v McLeod* (1883), 8 SCR 1 as reported in 1883 CarswellNat 9 at para 19.
[28] Donald Alexander MacRae, Ed, *Holmested and Langton on The Judicature Act of Ontario*, 5th ed (Toronto: The Carswell Company, Limited, 1940) at 1661.

43. Although some equitable claims could be pursued against the Crown, these claims were rooted in restitution claims for money, goods, and property and were ancillary to enforceable common law rights.[29] Equitable relief was not available against the Crown where there was no enforceable right at common law, and the Crown was immune from claims seeking damages for wrongs in equity.[30]

44. In a unanimous 2017 decision regarding the modern applicability of Crown immunity, the Supreme Court of Canada affirmed that Crown immunity remains deeply entrenched in Canadian law. The Court held:

> Crown immunity is deeply entrenched in our law. The Court has held that to override this immunity, which originated in the common law, requires clear and unequivocal legislative language.
> […]
> …unless the immunity is clearly lifted, the Crown continues to have it.[31]
> (emphasis added)

ii. PACA Bars Claims Before 1963 for which No Petition of Right was Available

The Proceedings Against the Crown Act, 1963

45. On September 1, 1963, Ontario enacted the *Proceedings Against the Crown Act*.[32] *PACA* eliminated some of the procedural and substantive immunities of the Ontario Crown. Section 3 of the Act removed the procedural immunity of the Crown by providing that an action could be brought against the Crown "as of right" without the grant of a fiat for claims that, "…if this Act had not been passed, might be enforced by petition of right...". An example of such a claim would be a claim for breach of contract.

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[29] *Central Railway*, *supra* at 563.
[30] *Ibid*; Clode, *supra* at 141–146; *Hereford Railway*, *supra* (reasons of Strong CJ, and Fournier and King JJ).
[31] *Canada (Attorney General) v Thouin*, 2017 SCC 46 at paras 1 and 20 [*Thouin*].
[32] *Proceedings Against the Crown Act, 1962-63,* SO 1962-63, c 109 [*PACA*] (note that references to *PACA* are references to the 1963 enactment unless otherwise noted. See Brief of Statutes and Legislative History, Tab A-6 for full text).

46. Section 5(1) of *PACA* eliminated part of the substantive immunity by making the Crown subject to all liabilities in tort as if it were “a person of full age and capacity” in respect of: torts committed by its servants and agents; breach of employment obligations; breaches of duties attaching to property; and liabilities under statute. Section 5(2) of *PACA* provides that no proceedings shall be brought against the Crown in respect of tort liability under s. 5(1) unless the same proceeding could be brought against the Crown’s servants or agents.[33] Section 5 expressly and unambiguously removes the Crown’s immunity for liability in tort, prospectively from the time *PACA* came into force. By contrast, *PACA* contains no language that expressly or unambiguously removes the Crown’s immunity for breaches of fiduciary duty or other equitable claims.

47. Section 27 of *PACA* provided that no proceeding could be brought against the Crown “under this Act” in respect of any act, omission, transaction, matter or thing occurring or existing “before the day on which this Act comes into force”.[34]

48. Section 27 of *PACA* is a significant departure from the *Canadian Uniform Model Act*, 1950 upon which *PACA* was modelled.[35] The *Canadian Uniform Model Act* was prepared by the Conference of Commissioners on the Uniformity of Legislation in Canada and served as the base for modern Crown proceedings legislation.[36] The transitional provisions of the *Canadian Model Uniform Act* would not bar proceedings against the

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[33] *PACA*, 1963, *supra* ss 5(1) and 5(2).
[34] *PACA*, 1963, *supra* s 27.
[35] *An Act Respecting the Proceedings Against the Crown* (Uniform Model Act delivered at the Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of 1950) Ottawa: Queen's Printer, 1950, s 20; “Bill 127, An Act Respecting Proceedings Against the Crown”, 1st reading, *Legislature of Ontario Debates*, 1-24, vol 27 (March 28, 1952) at B-11 (Hon D Porter) in Brief of Statutes at Tab A-3; “Bill 128, The Proceedings Against the Crown, 1962-63”, 1st reading, *Legislature of Ontario Debates*, 4-26, vol 68 (March 27, 1963) at 2272 (Hon F Cass) in Brief of Statutes at Tab A-5.
[36] Hogg & Monahan, *supra* at 112; Brief of Statutes at Tab A-3.

Crown prior to its enactment. Nor would they preserve a petition of right regime for earlier claims.

49. Sections 27 and 28 (described below) of *PACA* do both, and thus represent a significant and deliberate choice on the part of Ontario's Legislature regarding the availability of claims against the Crown prior to the enactment of *PACA*. Ontario submits that the inclusion of s. 27, in conjunction with the very limited exception to it contained in s. 28, evidences the Legislature's intention to strictly limit the Crown's liability for claims occurring prior to 1963.[37]

50. Section 28 of the Act preserved the petition of right regime for claims prior to the enactment of *PACA*. It required that a party commencing a proceeding today, where the events in question pre-date September 1, 1963, proceed "by petition of right". It provided:

> 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 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.[38] (emphasis added)

51. In *Murray v. Ontario*, the Court of Appeal for Ontario held that sections 27 and 28 of *PACA* remain in effect and apply to claims initiated under the *Proceedings Against the Crown Act*, 1990. This was notwithstanding the fact that sections 27 and 28, which had been re-enacted in the 1970 statute consolidation, were not included in the 1980 or 1990 reconsolidation.[39]

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[37] Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Toronto: LexisNexis, 2014) at 211 and 217 [Sullivan, *Construction of Statutes*].
[38] *PACA*, 1963, *supra* s 28.
[39] *Murray v Ontario* (2003), 67 OR (3d) 97 (CA) at paras 3, 33–35 [*Murray*].

52. A party proceeding under the 1990 Act is only permitted to make a claim against the Crown that "might have been enforced by petition of right".[40] The Crown's substantive immunity for the period prior to September 1, 1963 was thereby deliberately preserved for claims which could not have been "enforced by petition of right".[41] Sections 27 and 28 of *PACA* are interrelated and work together. They bar all proceedings against the Crown based on events occurring before September 1, 1963 except those for which a petition of right was available in 1963.

53. On July 1, 2019, the *Crown Liability and Proceedings Act* ("*CLPA*") was proclaimed into force.[42] The CLPA repealed and replaced the *Proceedings Against the Crown Act*, 1990. The CLPA does not apply to this proceeding.[43] The repeal and replacement of the *Proceedings Against the Crown Act*, 1990 does not imply anything about the previous state of the law.[44]

The Applicability of PACA to Claims for Fiduciary Duty

54. An important Canadian authority for the applicability of Crown proceedings legislation to claims for a breach of fiduciary duty is *Richard v. British Columbia*.[45] *Richard* concerned a class action brought on behalf of disabled children who alleged they had been sexually abused at a residential school operated by the province. The Crown sought to amend the certification order to exclude claims for a breach of fiduciary duty prior to the enactment

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[40] *Ibid* at para 46.
[41] *Ibid* at paras 52, 55 and 57.
[42] *Crown Liability and Proceedings Act*, 2019, SO 2019, c 7, Sched 17 [*CLPA*].
[43] *Ibid*, s 31(3)
[44] *Legislation Act, 2006,* SO 2006, c 21, Sched F, s 56(1).
[45] *Richard v British Columbia*, 2009 BCCA 185 [*Richard*], leave to appeal to SCC refused [2009] SCCA No 274.

of British Columbia's *Crown Proceeding Act*. The relevant provisions of that legislation provide:

> **2**. Subject to this Act,
>
> (a) proceedings against the Crown by way of petition of right are abolished;
>
> […]
>
> **15.** (1) Except as otherwise provided in this Act, this Act does not affect proceedings against the Crown that have been instituted before the coming into force of this Act; and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been submitted for consideration to the Lieutenant-Governor before the coming into force of this Act.
>
> (2) Subject to subsection (1), this Act does not apply to a cause of action that existed on the day before the date this Act comes into force.
>
> **16.** (1) Subject to subsection (2), the *Crown Procedure Act*, being chapter 89 of the *Revised Statutes of British Columbia, 1960*, is repealed.
>
> (2) Notwithstanding the repeal of the *Crown Procedure Act*, that Act applies to a cause of action in respect of proceedings against the Crown that arose before the date this Act comes into force, whether or not it is or is considered to be a cause of action continuing after the date this Act comes into force.[46]

55. In an earlier case, *Arishenkoff*, a five-judge panel of the British Columbia Court of Appeal held that these provisions did not remove the Crown's immunity for torts committed by its servants and agents prior to 1974.[47] Leave to appeal to the Supreme Court of Canada was refused.

56. The issue in *Richard* was whether an equitable claim for breach of fiduciary duty could have been advanced by petition of right prior to the enactment of British Columbia's Crown proceedings legislation. If it could have been, then that statute would abrogate the Crown's immunity for claims for breach of fiduciary duty in addition to tort claims

[46] *Crown Proceedings Act*, SBC 1974, c 24, ss 2, 15–16; *Arishenkoff*, *supra* at paras 23 and 55.

[47] *Arishenkoff*, *supra* at para 55.

prospectively. The plaintiffs asserted that a petition of right was always available for claims in equity, such that the enactment of Crown proceedings legislation was no bar to their action proceeding.[48]

57. The British Columbia Court of Appeal exhaustively canvassed the case law on the availability of a petition of right for equitable claims. It concluded that there was no authority for the proposition that a claim could lie in equity against the Crown for damages prior to the enactment of Crown proceedings legislation.[49]

58. Ontario submits that the decision in *Richard* is correct and that Court's reasoning applies with equal force to the law of Crown immunity in Ontario. Like *PACA*, British Columbia's *Crown Proceedings Act* bars proceedings against the Crown prior to its enactment with the exception of those proceedings for which a petition of right was then available.

This Court Should Not Rely Upon the Decisions in Slark, Seed, and Cloud

59. In three class certification motions, Ontario courts have held that it was not plain and obvious whether the Ontario Crown was immune for breaches of fiduciary duty prior to September 1, 1963. Ontario submits that each of these cases are distinguishable on their factual and legal contexts. They are not binding on this Court, in part because they are not final rulings on the merits, even if the facts in those cases had been identical to the instant case, which they were not. To the extent that these cases purport to hold that the Crown is not immune from breaches of fiduciary duty prior to 1963, Ontario submits that

[48] *Richard, supra* at para 39.
[49] *Ibid,* at para 49.

they are not good authority, are inconsistent with binding authority from the Supreme Court of Canada in *Thouin*, and should not be followed by this Court.

60. In *Cloud v. Canada*, the Court of Appeal allowed a claim for breach of fiduciary duty to proceed even for claims which pre-dated the enactment of the federal *Crown Liability and Proceedings Act* in 1953. On this point, the Court of Appeal accepted the conclusion of Cullity J., in dissent at the Divisional Court, that the claims for breach of fiduciary duty could proceed because they:

> …were claims in equity that were not affected by the provisions of the Crown Liability Act, 1953, and which might have been brought in the Exchequer Court before, or after, May 14, 1953 under the provisions of the *Exchequer Court Act*.[50] (emphasis added)

61. *Cloud* is, thus, distinguishable from the claim in this case because the federal *Exchequer Court Act* allowed a claim in equity to proceed prior to the enactment of the federal Crown liability statute in 1953.[51] In Ontario, there is no similar statute which would have allowed a claim based in equity to proceed prior to *PACA* coming into force. Moreover, in *Cloud* the Court of Appeal did not address the question of immunity from equitable claims because there was a concession by counsel for the federal Crown.

62. In *Slark v. Ontario*, Justice Cullity certified a class action on behalf of former students at a residential facility for individuals with developmental disabilities operated by

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[50] *Cloud et al v Canada (Attorney General)* (2003), 65 OR (3d) 492 (Div Ct) at para 5, rev'd on other grounds (2004) 73 OR (3d) 401 (CA), leave to appeal to SCC refused, [2005] SCCA No 50.

[51] See *Cloud et al v Canada (Attorney General)* (2001), OTC 767 (SCJ) (the trial judge found that section 18(c) of the *Exchequer Court Act*, RSC 1952, c 54 provided for a limited statutory exception to the common law immunity of the Crown by granting the Exchequer Court exclusive jurisdiction to deal with claims, "…resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment" at para 13).

Ontario.[52] The claim alleged breaches of fiduciary duty in the management of the facility. In considering whether such a claim was barred prior to 1963 by Crown immunity, Justice Cullity held that

> …the exception in section 29 (1) [28 in the 1963 Act] is not conditioned expressly on the pre-September 1963 availability of a declaration for breach of fiduciary duty. It is conditioned on 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.
>
> […]
>
> I see no reason why the second condition - that looks to the availability of a petition of right if PACA had not been enacted - should require the court to go back in time and speculate about 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. 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 if the Act had not been passed.
>
> […]
>
> Accordingly, in my judgment, the claims in paragraphs 1(b) and (d) of the statement of claim in respect of matters occurring before September 1963 fall within the section 29(1) exception to the general prohibition in section 28 of PACA, are not outside the jurisdiction of the court, and are not subject to Crown immunity within the meaning of the proviso in the fiat. There should similarly, in my opinion, be no bar with respect to declaratory relief of an entitlement to damages - as distinct from a coercive order to pay - pursuant to the claim in paragraph 1(e) of the pleading.[53]

63. The reasons of Justice Cullity in *Slark* are distinguishable from the instant case. The purpose of the court's inquiry was to determine whether the pleadings disclosed a cause of action for the purpose of the *Class Proceedings Act*. Justice Cullity's legal conclusion, ultimately, is no more than a finding that it was not plain and obvious that the Crown was immune to claims for fiduciary duty prior to 1963.[54] A finding that the Crown's immunity

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[52] *Slark (Litigation Guardian of) v Ontario*, 2010 ONSC 1726 [*Slark* SC], leave to appeal to Div Ct refused 2010 ONSC 6131 (Div Ct) [*Slark* Div Ct].
[53] *Slark* SC*, supra* at paras 119, 121 and 125.
[54] *Ibid,* at para 131.

was not plain and obvious on a class certification motion does not bind this Court in a determination of whether there is no genuine issue requiring a trial.

64. Further, Ontario submits that Justice Cullity's decision is not good authority and should not be followed by this Court for three reasons:

> (1) he misinterpreted section 28 of *PACA* and failed to apply the law as it existed on September 1, 1963. Instead, he asked the wrong question and speculated about how the law would have developed after September 1, 1963 if *PACA* had not been enacted;
>
> (2) he erred when he concluded that the Crown's substantive immunity was restricted to tort claims; and
>
> (3) he concluded that a court could make a declaratory order that the Plaintiffs were entitled to damages.

65. Justice Cullity's interpretation of section 28 of *PACA* in *Slark* was incorrect and inconsistent with the Court of Appeal's decision in *Murray*. When section 28 is read harmoniously with the words in *PACA* and the scheme of *PACA*, the words in the section do not support his interpretation. The law that applies under section 28 is the law in force <u>at the time</u> the Crown's immunity was abolished.[55] The words of section 28 provide that a claim could only be brought against the Crown that was "<u>existing</u> on the 1st day of September, 1963", and, was one that "might <u>have been</u> enforced by petition of right" as of that date.[56]

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[55] Sullivan, *Construction of Statutes, supra* at 752–753.

[56] *Proceedings Against the Crown Act,* RSO 1970, c 365, s 29(1). Note that in the 1970 consolidation, s 28 in *PACA* 1963 was re-enacted as s 29(1) in the 1970 version.

66. When the words "existing before the day on which this Act comes into force" are read together with the words "might have been enforced by petition of right" the meaning of the section is clear: it limits the prohibition on claims from before 1963 to only those which could have been enforced at that time. A party was only entitled to the relief that could be obtained by petition of right on September 1, 1963. As the law stood on that date, the Crown was immune from any claim that could not be enforced by petition of right. Section 28 does not contemplate applying the law that had evolved years later.[57]

67. This interpretation is reinforced when compared as against s. 3 of *PACA,* which removes the Crown's immunity for "a claim against the Crown that, if this Act had not been passed, might be enforced by petition of right". The law presumes that the Legislature will use a consistent expression when it intends for statutory terms to have the same meaning and that any difference in terms must be presumed to evidence a difference in meaning.[58]

68. The difference between the term used in s. 3 ("might be") and s. 28 ("might have been") must be taken to evidence the Legislature's intention that while s. 3 of PACA would apply prospectively to claims which might later develop, s. 28 froze the availability of claims before 1963 to those that "might have been" pursued in 1963. If the Legislature had intended to preserve the petition of right regime for events occurring before 1963 for which a cause of action might crystallize later, it would have used the words, "might be enforced by petition of right", as it did in section 3.

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[57] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21.
[58] Sullivan, *Construction of Statutes*, *supra* at 217.

69. Indeed, this is the interpretation adopted by the Court of Appeal in *Murray*.[59] Justice Cullity's analysis asks the wrong statutory question. It is not whether pre-1963 claims would have been "amenable" to a proceeding by way of a petition of right.[60] The question was whether such claims were "available". In *Murray*, which was also a case based upon a pre-1963 breach of a fiduciary duty, the court concluded they were not. *Murray* was binding upon Justice Cullity and he erred in not giving effect to it.

70. Further, Justice Cullity distinguished and declined to rely upon the decisions in *Richard* and *Arishenkoff*. In doing so, Justice Cullity appears to have misunderstood the exercise that the British Columbia courts were engaged in.[61] The question they posed was not whether, in a general sense, equitable claims based upon fiduciary duties could have been recognized prior to the enactment of Crown proceedings legislation. It was whether such a duty could have been enforceable against the Crown by petition of right at that time. The British Columbia courts concluded it could not.

71. Ontario submits that the Ontario and British Columbia legislation on this point are not, in fact, distinguishable: the scheme, purpose and language are materially the same. Indeed, the British Columbia courts' description of its scheme is virtually identical to that of the Court of Appeal in *Murray* – it bars claims prior to the enactment of Crown proceedings legislation except for those claims for which a claim was then known to law. Although the Divisional Court refused leave to appeal on this point, the Divisional Court

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[59] *Murray, supra* at paras 46–47.
[60] *Slark* SC*, supra* at para 88.
[61] *Slark* SC*, supra* at para 88.

simply accepted, without analysis, Justice Cullity's description of section 28 as applying to claims which would have been recognized today.[62]

72. This erroneous interpretation of section 28, as permitting claims that existed before 1963 for which a petition of right may have eventually developed in 2010, is contrary to the plain words of the statute and the scheme of the statute itself. *PACA's* purpose is to remove some of the Crown's immunity prospectively, while prohibiting claims prior to 1963 except those from which the Crown was not historically immune. Ontario submits that, particularly in view of the Supreme Court of Canada's holding in *Thouin* in 2017, that Crown immunity cannot be removed in the absence of clear statutory language, Justice Cullity's reasons in *Slark* are not good law.

73. Justice Cullity's error regarding the temporal applicability of section 28 of PACA led him to speculate about whether a petition of right for breaches of fiduciary duty would inevitably have become available in or before 2010. He concluded that it would on the basis that the Crown's substantive immunity was restricted to tort claims and that the Court could make a declaratory order regarding the plaintiffs' entitlement to damages. For the reasons set out at paras. 95 – 101 of this factum, both of those propositions were incorrect. Ontario submits that this Court should not rely upon the decision in *Slark* in determining the scope of the Crown's immunity for claims prior to 1963.

74. Finally, in *Seed v. Ontario*, 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. In that case, faced with a pleading of breach of fiduciary duty identical to that in *Slark*, the Court

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[62] *Slark* Div Ct, *supra* at paras 8–10.

accepted the reasons of the Divisional Court's decision in *Slark* that "it is not plain and obvious that the fiduciary duty claims for events prior to 1963 will fail."[63] The Court in *Seed* provided no independent analysis of *PACA* or Crown immunity and was, in any event, bound to reach this conclusion by the Divisional Court's decision in *Slark*.

75. Ontario submits that reliance on *Slark* is misguided in view of the Court of Appeal's reasons in *Murray*, the British Columbia Court of Appeal's reasons in *Richard* and *Arishenkoff* and the Supreme Court of Canada's decision in *Thouin*.

iii. No Petition of Right Available for Breach of Fiduciary Duty

76. As discussed above, as a matter of common law and the Court of Appeal's interpretation of *PACA*, the Ontario Crown is immune from suit for causes of action for which a petition of right was not available in 1963. Ontario submits that no petition of right for a breach of fiduciary duty was or could have been available to the plaintiffs in 1963. To the contrary, equitable claims analogous to those advanced by the plaintiffs in this case were refused when pursued by petition of right.

No Petition of Right Available for Equitable Claims for Damages

77. The concept of fiduciary duty has its origins in equitable doctrines of trust and agency.[64] Equitable claims for damages, including those where a form of trust was in effect, were not enforceable against the Ontario Crown before *PACA* came into force. The Crown was immune to such claims. Sir Walter Clode's text on the practice of petition of right is considered to be the definitive text on the historical development of the regime.

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[63] *Seed v Ontario*, 2012 ONSC 2681 at para 102.
[64] *Guerin v R*, [1984] 2 SCR 335 at paras 94, 97–105 [*Guerin*]; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 73 [*Wewaykum*].

Writing in 1887, he described the availability of petitions of right for equitable relief against the Crown as follows:

> At the present time, and in the face of numerous petitions of right claiming equitable relief against the Crown which have been represented and allowed to proceed in the Court of Chancery, it seems late to say that there is no authority for making claims enforceable, and yet with some qualification such a statement would be substantially correct…
>
> It is quite true … that a suppliant may sometimes obtain relief by process issuing from the Chancery, as ancillary to and in aid of his common law right, instead of following out the usual procedure upon petition of right; but they do not show that a suppliant was ever entitled to equitable relief where he had non-enforceable right at common law …
>
> Now, although it cannot be denied that in a certain sense the foregoing cases are applications to the Chancery, yet it was not with a view of enforcing any equitable claim against the Crown, but only to ask for assistance to enable the suppliant to obtain more quickly that to which he had a good common law right by petition, and the Chancery in this connection does not mean the Court of Equity but the office out of which issued all original writs passing under the Great Seal; and it may be asserted that none of the above authorities afford any ground for supposing that equitable claims are enforceable against the Crown.[65] (emphasis added)

78. Even as late as the 1940s in Ontario, the only equitable petitions of right that were available in Ontario were claims for restitution of land, money and goods which had wrongfully fallen into the possession of the Crown.[66]

79. In its review of the case law on the availability of a petition of right for equitable damages prior to the enactment of Crown proceedings legislation, the British Columbia Court of Appeal held that:

> Nor, in my view, do the authorities cited by the appellants support the proposition a claim could lie in equity against the Crown for damages, prior to the enactment of Crown proceedings legislation. While there was in England a limited class of cases in which the courts of equity permitted an action for a declaration for legal title, as shown by *Hodge v. Attorney-*

[65] Clode, *supra* at 141–42, cited in Hogg & Monahan, *supra* at 5; McRae, *supra* at 1661.
[66] McRae, *supra* at 1661.

General (1839) , 3 Y. & C. Ex. 343, 160 E.R. 734 (Exch.), and *Pawlett v. Attorney-General*, these cases did not provide a direct remedy against the estate of the Crown. In *Esquimalt and Nanaimo Railway Company v. Wilson* the Privy Council, at 365-66, recognized the possibility that the Crown could be brought before the Court of Chancery, citing as example *Pawlett v. Attorney-General*. However, in none of the cases cited was an order made requiring the Crown to transfer property to a party, and even in *Esquimalt and Nanaimo Railway Company v. Wilson*, the order contemplated was only declaratory of rights the Crown may have. The method by which such a declaration is obtained is by joining the Attorney General as a party, but of course no order for transfer of property could be made against the Attorney General, who stands only as a proxy for the Crown.[67] (emphasis added)

80. The authorities are clear that prior to the enactment of *PACA* in 1963, no claim for damages in equity was available against the Ontario Crown. The only petitions of right then available were in aid of or ancillary to providing restitution for claims founded on well recognized causes of action available at common law. Petitions of right seeking damages for "wrongs", whether tortious or equitable in nature, were refused. While fiduciary duty, as a cause of action available against the Crown, did not crystallize until approximately 1984, courts routinely refused to grant relief in claims based on equitable trust and agency which would today be understood as claims for breach of fiduciary duty.

81. In *Kinloch v. Sec. of State for India in Council*, a soldier brought a petition of right against the Secretary of State for India in Council seeking a share of war booty that had been granted to him and other soldiers by a Royal Warrant from the Crown "in trust" for officers.[68] The object of the action was to force the Secretary of State to provide an accounting of the funds in his possession. In rejecting the petition of right, the House of Lords concluded that although the Royal Warrant had been intended to create an express

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[67] *Richard, supra* at para 49.

[68] *Kinloch v Secretary of State for India in Council* (1882), 7 App Cas 619 (HL) at 621.

trust, as regarded the duties and functions of the Crown, no enforceable trust could be created.

82. In *Rustomjee v. The Queen*, a treaty was concluded between the Queen of England and the Emperor of China.[69] The treaty provided that the Emperor of China would pay the English Crown $3 million on account of debts owed to British subjects from Chinese merchants. A petition of right was commenced by a British subject seeking equitable compensation under the treaty, arguing that the funds were held by the Crown "in trust". The Court of Appeal held that the making of treaties between sovereign nations was the highest prerogative of the Crown and that in the performance of such a treaty, the Crown could not be considered to be either an agent or a trustee of its subjects. The petition of right was refused.

83. In *Hereford Railway v. The Queen*, the Supreme Court of Canada rejected a petition of right seeking to enforce an equitable trust on behalf of a railway company which had been granted a subsidy by Order in Council.[70] The Order in Council stated "it shall be lawful for the lieutenant governor to grant" certain funds for the construction of the railroad. After incurring expenses in doing so, a dispute arose between the Crown and the railway company. The railway company alleged that the Crown held funds pursuant to a trust. The Chief Justice of the Supreme Court of Canada held that:

> There remains the ground of trust. Can it be said that the Crown is by the statute made a trustee or *quasi* trustee of this money to hold it until the railway should be completed and then pay it over to the company? Several cases have been before the English courts where moneys have come into the hands of the Crown for the purpose of being distributed amongst a certain class of persons. Such were the cases

[69] *Rustomjee v R*, [1876] 2 QBD 69 (CA) at 69.
[70] *Hereford Railway*, *supra* (reasons of Strong CJ, and Fournier and King JJ).

> of *Kinloch v. The Queen* and *Rustomjee v. The Queen,* in both of which it was determined that money so held by the Crown could not be considered as subject to a trust enforceable by means of a petition of right. I see no reason why the principle of these cases should not apply here.[71]

84. In each of these cases, courts rejected petitions of right where the Crown could be said to have owed an equitable or trust-based duty to its subjects where the nature of the trust engaged the Crown's prerogatives or its discretion. Although the authorities acknowledge that the Crown could be bound by the terms of an express, equitable trust over money or property,[72] that is not the nature of the duty alleged to be owed in this case. Indeed, in the "annuities cases" before the Supreme Court of Canada and the Judicial Committee of the Privy Council regarding the Robinson Treaties, the courts expressly rejected arguments that the Treaties created a trust or gave the plaintiffs an entitlement to "proceeds of land".[73]

85. The cases discussed above support the proposition that Crown immunity protects the Crown's prerogatives in recognition of the Crown's role as the executive branch of government, charged with acting in the public interest. In this way, Crown immunity can be understood as an essential element of Canada's separation of powers. This understanding of the nature of Crown immunity supports the conclusion reached by the Supreme Court of Canada in *Thouin* in 2017: changes to the scope of the Crown's immunity are a question for the legislative, and not judicial, branch of government.

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[71] *Hereford Railway*, *supra* (reasons of Strong CJ); See also*, Western Dominion*, *supra* at para 48.
[72] *Miller v Canada*, [1950] SCR 168 at paras 15–20 [*Miller*].
[73] *Ontario v Dominion of Canada,* 25 SCR 434 at paras 33 and 93, aff'd [1897] AC 199 (PC) at paras 16 and 18 [*Ontario v Dominion of Canada*].

86. No petition of right was ever available seeking damages where the Crown was held to have breached its obligation to act in a subject's "best interest".[74] Ontario submits that the decisions of the Supreme Court of Canada in *Hereford* and the House of Lords in *Kinloch* – which rejected equitable claims seeking an accounting and disbursement of funds pursuant to an equitable duty to act in a person's interest – are applicable to the claims advanced by the plaintiffs. Petitions of right are not available where they conflict with the Crown's prerogatives and immunity.

87. Until the advent of Crown proceedings legislation, the common law always imposed limits on the types of claims which could be enforced as against the Crown. The type of claim asserted in this case is one that could never have been asserted against the Crown prior to 1963.[75] In the absence of an enforceable common law right to the return of monies, no equitable right to restitution could have been asserted against the Crown.

Fiduciary Duties Owed to Indigenous People Remain Subject to Crown Immunity

88. In *Guerin v. R*, the Supreme Court of Canada recognized that the Crown could owe a fiduciary duty to Indigenous people in certain contexts. In describing the nature of the fiduciary duty, Dickson J. (as he then was), described the equitable origin of the duty:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.[76] (emphasis added)

[74] *Ibid*; *Restoule, supra* at para 519.
[75] *Henry v R*, [1905] 9 Ex CR 417 (Can) at paras 8-9 [*Henry*].
[79] *Guerin*, *supra* at para 83.

89. Justice Dickson rejected the dichotomy between "true trusts" and "political trusts" and between "higher" and "lower" trusts owed by the Crown to Indigenous people in favour of the concept of a *sui generis* fiduciary duty. In doing so, however, he recognized that courts had drawn such distinctions before 1984. Justice Dickson's recognition of a *sui generis* fiduciary duty in 1984 does not mean that a petition of right in respect of that duty would have been available in 1963. Nor does it mean that courts considering such a claim prior to 1963 would have accepted such a claim as an exception to the general principle of Crown immunity from claims for wrongs. Justice Dickson did not decide that the Crown's immunity would not have applied to fiduciary claims prior to the enactment of Crown proceedings legislation.

90. There is no authority to support the argument that the Crown's substantive immunity to claims for equitable damages prior to 1963 does not apply to claims made by Indigenous people. To the contrary, the Supreme Court of Canada has repeatedly held that principles of equity that apply to private law fiduciary duties, including principles related to damages, defences and the scope of the duty itself, are equally applicable to claims regarding Aboriginal rights.[77] The Supreme Court of Canada has also held that Crown immunity can operate to bar equitable relief in claims involving Aboriginal rights.[78]

Breach of Fiduciary Duty is an Equitable Wrong for Which No Petition of Right Would Have Been Available

91. In Stage 1 of this proceeding, this Court held that the Crown owed the plaintiffs:

> …an ad hoc fiduciary duty […] to act exclusively in the best interest of the Treaties' beneficiaries in their promise to engage in a process to determine if the economic circumstances warrant an increase to the annuities.[79]

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[77] *Wewaykum, supra* at paras 73–74.
[78] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at paras 53–63, Wilson J.
[79] *Restoule*, *supra* at para 519.

92. Although the concept of fiduciary duty, in both the modern sense and in the sense described by this Court, was unknown to law prior in 1963, it is clear an action seeking enforcement of such a duty by petition of right would have been refused. As the British Columbia Court of Appeal held in *Arishenkoff*, the concept of a petition of right being available for a breach of fiduciary duty, "would have astonished the legal profession."[80]

93. This is because the Crown's substantive immunity extended to all claims seeking damages based upon a "wrong". The plaintiffs narrowly construe the Crown's immunity as being applicable only to tortious wrongs. However, the authorities are clear that the Crown's immunity applies to actions seeking damages for all "wrongs", whether civil, criminal, tortious, or equitable.[81]

94. A breach of an element of a fiduciary duty, whether of loyalty, good faith, or disclosure is a "wrong".[82] Such a wrong is one to which the Crown is immune from suit for damages at common law.

iv. Dyson Procedure Inapplicable to Claims Directly Affecting the Crown's Estate

95. The plaintiffs assert that even if the Crown is immune, they are entitled to seek a declaration pursuant to the "*Dyson* procedure" that may entitle them to claim damages.[83] This argument is legally incorrect and misapprehends the nature of the declaration available pursuant to the decision in *Dyson*.

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[80] *Arishenkoff*, *supra* at paras 51–52.
[81] *McFarlane*, *supra* at para 7; *Tobin v The Queen*, [1864] 16 CB (NS) 310 at 1152–1153 [*Tobin*]; *Rudolph Wolff*, *supra*; *Arishenkoff*, *supra*; *Richard, supra* at paras 38 & 63.
[82] *B (KL) v British Columbia*, 2003 SCC 51 at para 45; *Wewaykum*, *supra*, Binnie J (the equitable remedies available are described through the lens of the "wrongdoer" at para 107).
[83] Factum of the Robinson Superior Plaintiffs, at para 212.

96. Historically, a declaratory order could not be made against the Crown where the estate of the Crown was directly affected. In other words, if a party sought a remedy such as an award of damages against the Crown, the party was required to proceed by petition of right. In *Dyson v. Attorney General,* Farwell L.J. held that:

> It has been settled law for centuries in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown…[84] (emphasis added)

97. A declaratory order could only be made against the Crown in situations where the Crown's interests were indirectly affected, and by naming the Attorney General as proxy. In *Dyson* the court observed that:

> … when the interests of the Crown are indirectly affected the Courts of Equity … could and did make declarations and orders which did affect the rights of the Crown.[85] (emphasis added)

98. In *Dyson*, the plaintiff commenced an action against the Attorney General seeking a declaration that he was under no legal obligation to provide particulars about the valuation of his land to the Commissioner of Inland Revenue. The declaration sought by the plaintiff challenged the legality and authority of the Commissioner's conduct. The plaintiff did not seek any damages or other remedy directly as against the Crown.[86]

99. A party was not permitted to seek a declaration using the *Dyson* procedure to, in effect, circumvent the requirement for a petition of right when seeking pecuniary damages against the Crown. In *Bombay and Persia Steam Navigation Company Limited* the court noted that:

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[84] *Dyson v Attorney General*, [1911] 1 KB 410 at 421 [*Dyson*].
[85] *Dyson*, *supra* at 421; *Richard*, *supra* at para 50.
[86] *Dyson, supra* at 417.

> The machinery of *Dyson v. Attorney General* cannot be used to prejudge the issue of what may have to be adjudicated upon in a petition of right as to the money claim against the Treasury.[87]

100. Further, no order for the transfer of Crown property could by made against the Attorney General under the *Dyson* procedure because he was only a proxy for the Crown.[88]

101. Although a Dyson declaration may be available to plaintiffs, depending on its form and content, such a declaration cannot require the Crown to pay damages or in any way impair the Crown's estate.

C. The Plaintiffs' Actions are Subject to Statutory Limitation Periods

102. Ontario's position on this motion is that the plaintiffs' actions are subject to statutory limitations periods contained in the *Limitations Act* of 1990. Ontario submits that the actions in this case are "an action upon a…specialty" and were therefore required to be commenced within twenty years after the cause of action arose.[89]

103. In the event that this Court holds that the plaintiffs' actions are not upon a specialty, Ontario submits, in the alternative, that the actions are "actions of account" and/or "actions for contract without specialty". In either case, the plaintiffs' actions were required to be commenced within six years after the cause of action arose.[90]

104. Ontario's limitations defence applies to breaches of the Robinson Treaties. Ontario acknowledges that there is no statutory limitation period for a breach of a fiduciary duty.

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[87] *Bombay and Persia Steam Navigation Company Limited v Maclay*, [1920] 3 KB 402 at 408; Hogg and Monahan, *supra* at 27.

[88] *Richard*, *supra* at para 49.

[89] *Limitations Act*, RSO 1990, c L. 15, s 45(1)(b). References in this factum to the to the "Limitations Act" are to the 1990 enactment unless otherwise noted.

[90] Actions of account are subject to s 46 of the *Limitations Act*; actions for a simple contract or contract without specialty are subject to s 45(1)(g) of the *Limitations Act*.

Ontario also acknowledges that there is no statutory limitation period for a proceeding for a declaration if no consequential relief is sought. However, in this case, extensive consequential relief is sought.

105. Ontario's submits that, as a matter of statutory interpretation, the *Limitations Act* and its predecessors contain provisions that apply to the plaintiffs' actions. This submission is made apart from factual and legal issues of discoverability, knowledge and capacity, constitutional validity, constitutional applicability, estoppel, concealment, and equitable fraud which the parties agree do not arise on this motion.[91] Issues of whether Ontario has, in fact, breached any obligation owed pursuant to the Robinson Treaties, whether any annuity augmentation amount is owing, and whether the plaintiffs' action is, in fact, barred by the *Limitations Ac*t, are not to be determined on this motion.[92]

i. The Applicable Limitations Regime

106. The Robinson Superior Action was commenced in 2001. The Robinson Superior Action seeks, *inter alia*, to require that Ontario:

> account for and pay to the Plaintiffs annually, their proportionate share of the gross revenues produced, or which could have been produced from the territory subject to the Treaty after deducing only the direct costs, if any, of producing those revenues[93] [emphasis added]

107. The Robinson Huron Action was commenced in 2014. The Robinson Superior Action seeks, *inter alia*, to require that Ontario:

> provide an accounting to the Plaintiffs of the net revenue from the Treaty Territory, being the revenues produced in the Treaty territory, deducting therefrom the direct costs to produce such revenues, for each calendar year from 1850 to the date of the order or declaration, so as to determine if the Crown was able to increase the annuity without incurring loss;

[91] Notices of Motion, at paras 1(c) and 4(e).
[92] Notices of Motion, at para 4(a)-(d).
[93] Robinson Superior Action, Fresh as Amended Statement of Claim, at para 1(C)(xi).

Judgment after such accounting that the Crown is to forthwith provide payment of a fair share of the net profit…[94]

108. Both actions are subject to the limitation periods set out in the 1990 enactment of the *Limitations Act*. The *Limitations Act*, *2002* does not apply to either action by virtue of sections 2(1)(e) and (f) which provide that the 2002 Act does not apply to proceedings based on existing Aboriginal and treaty rights or to proceedings based on equitable claims by Aboriginal peoples against the Crown.[95] Such proceedings are "governed by the law that would have been in force" if the 2002 Act had not been passed.[96]

109. The 1990 *Limitations Act* provides as follows:

> *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 commencement of the action is enforceable by action by reason only of some other matter of claim comprised in the same

[94] Robinson Huron Action, Amended Statement of Claim, at paras 1(k) and (l).
[95] *Limitations Act*, SO 2002, c 24, Schedule B, ss 2(1)(e), (f).
[96] *Limitations Act*, 2002, s 2(2).

account having arisen within six years next before the commencement of the action.

110. The *Limitations Act* bars actions:

i. upon a specialty more than 20 years after the cause of action arose;
ii. of account more than six years after the cause of action arose; and
iii. for a "simple contract" or a "contract without specialty" more than six years after the cause of action arose; and

111. Versions of these same limitation periods have existed in Ontario since the 1837 enactment of *Act for the further Amendment of the Law, and the better Advancement of Justice* for Upper Canada and the 1859 enactment of *An Act respecting Remedies for and against executors and administrators and respecting the Limitation of certain actions in the Province of Canada (West)*.[97] The 1859 statute was made part of the law of Canada by virtue of s. 129 of the *Constitution Act, 1867*.[98] Its provisions regarding these three causes of action (specialty, accounting, contract) have remained effectively unchanged since that time.[99]

112. The Supreme Court of Canada has repeatedly affirmed that limitations statutes apply to claims made by Indigenous persons and in the context of the assertion of Treaty rights.[100] In *Canada (Attorney General) v. Lameman*, the Supreme Court of Canada unanimously reaffirmed their holding in *Wewaykum* regarding the applicability of limitations statutes to Indigenous claims and the rationale for their applicability:

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[97] *An Act for the further Amendment of the Law, and the better Advancement of Justice*, SUC 1837 (7 Will IV), c 3, s III; *An Act respecting Remedies for and against executors and administrators and respecting the Limitation of certain actions*, CSUC 1859 (22 Vict), c 78, s 7.
[98] *Constitution Act, 1867*, s 129.
[99] See Schedule B(2) for a detailed chart regarding the provisions of Ontario limitations statutes relevant to this motion. See also *Chippewas of Sarnia Band v Canada (Attorney General)* (1999), 40 RPR (3d) 49 (Ont SCJ) at para 530, aff'd (2000) 51 OR (3d) 641 (CA) at para 225.
[100] *Wewaykum*, *supra* at paras 114–16, 121; *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 13 [*Lameman*]; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 107 [*Blueberry River*].

> This Court emphasized in [*Wewaykum*], that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of [*Wewaykum*]:
>
>> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

113. Ontario submits that there is there is no legal basis which would exclude the applicability of the *Limitations Ac*t to the claims advanced in these actions.

ii. The Robinson Treaties are "Specialties" Subject to a 20 Year Limitation

114. A specialty is a contract or disposition of property made in a particular form. The requirement for a specialty is that the document contain a promise, obligation, or covenant which is signed, sealed and delivered with the intention that it should bind the parties in their act and deed.[101] A specialty can refer to a bond, a contract under seal or covenant, deeds, guarantees, some insurance contracts, a judgment, and a statute.[102]

115. The rationale for drawing a distinction, for the purposes of limitations legislation, between an ordinary contract and a specialty is that the latter is made with a high degree of ceremony (being signed, sealed and delivered) and is more easily amenable to proof. The permanence of the form in which specialties, covenants, bonds and deeds are made, has historically justified a different treatment from other contracts.[103]

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[101] Jeremy S Williams, *Limitation of Actions in Canada*, 2nd ed (Toronto: Butterworths, 1980) at 154.
[102] Williams, *supra*; *Ontario v Williams Estate*, [1942] JCJ No 3 at para 8 [*Williams Estate*].
[103] *Williams Estate*, *supra* at para 8.

116. Courts interpreting specialties within the meaning of limitations legislation have held that a specialty is a stand-alone obligation, which exists independent of the actual debt. As a result of this independence, it is traditionally a contract under seal.[104] A seal is a necessary, but not a sufficient condition, for a document to be a specialty. The creation of a specialty depends on whether the parties intended to create an instrument under seal.[105] Appellate courts in Ontario, Newfoundland, and Nova Scotia have held that specialty means an obligation under seal securing a debt.[106]

117. However, the debt secured by the specialty need not exist at the time the specialty is made and sealed. In *Mortgage Insurance Co of Canada v. Grant*, a case concerning whether an indemnity under seal constituted a specialty, the Court of Appeal for Ontario held that:

> …to constitute a specialty, the obligation under seal pertains to a debt created *through the advancement of money.* [Emphasis added.] This statement does not imply, as argued by the appellants, that the money must be advanced at the time the documents are entered into. As Robertson J.A. stated in *Kenmont Management*, at para. 56, a typical bond that is a specialty evidences a present or *future debt*. The same is true for a mortgage, which often secures future advances. The money does not have to be advanced at the time of execution for a bond, mortgage or other debt obligation to qualify as a specialty, when made under seal with the intent to create a specialty.[107] (emphasis in original)

118. A contract under seal which secures a potential future debt is a specialty.[108] An

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[104] Graeme Mew, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis, 2016) at §9.222, citing *Watmough v Trust* (1999), 95 OTC 69 (SCJ) at para 12, aff'd (1999) 128 OAC 370 (CA).
[105] *Mortgage Insurance Co of Canada v Grant*, 2009 ONCA 655 at para 11 [*Mortgage Insurance*], citing *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 at para 36.
[106] *Suburban Construction Ltd v Newfoundland and Labrador Housing Corp*, [1987] NJ No 173 (NFCA) at para 7; *Williams Estate*, *supra* at 554–56; *872899 Ontario Inc. v Iacovoni* (1998), 40 OR (3d) 715 (CA) at para 27, leave to appeal to SCC refused [1998] SCCA No 476; *Kenmont Management Inc v Saint John Port Authority*, [2000] NBJ No 495 (QB) at 46–47, additional reasons [2002] NBJ No 32 at 31–33 (CA), leave to appeal to SCC refused [2002] SCCA No 143.
[107] *Mortgage Insurance*, *supra* at para 13.
[108] *Ibid.*

obligation to pay an annuity by virtue of contract is, by definition, a future contingent debt.[109] Documents evidencing a future debt from the Crown have been held to be specialties.[110] Equally, a promissory note exchanged under seal has been held to be a specialty.[111]

119. In *Henry v. R*, the Exchequer Court of Canada held that the Crown was a “debtor” to the Mississaugas of the Credit on account of unpaid annuities owing to them.[112] A similar position was accepted by the Federal Court in a case regarding the assignability of Treaty annuities in *Beattie*.[113]

120. Ontario submits that the actions commenced by the plaintiffs in this case are actions upon a specialty. They seek payment of arrears of unpaid annuities which are a form of contingent liability made pursuant to a contractual promise made under seal. Any unpaid arrears in the annuities constitute a debt arising from a sealed contract.

121. The Robinson Treaties include the words “signed, sealed and delivered”. Each signatory’s name and mark is accompanied either by a notation for *locus sigilii* (“L.S.”) or individual paper wafers affixed by adhesive next to each signatory.[114] The Treaties themselves were delivered to the then Prime Minister of the Province of Canada and ratified by Order-in-Council.

122. Ontario’s position is that the Robinson Treaties were made, and were intended to

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[109] Halsbury’s Laws of England, 2nd ed, vol 17, *Income Tax* “Annuities or other annual payments” at 180; *Mail Printing Co v Clarkson* (1898), 25 OAR 1 (CA) at para 20; *O’Connor v Canada (Minister of National Revenue)*, [1943] Ex CR 168 (Can) at para 32; *Grant v West* (1896), 23 OAR 533 (CA).
[110] *Royal Trust Co v Alberta (Attorney General)*, [1930] 1 DLR 868 (PC) at paras 11–12.
[111] *Fast v Nieuwesteeg* (2006), 16 BLR (4th) 192 (Ont SCJ) at para 60.
[112] *Henry*, *supra* at paras 12–15.
[113] *Beattie v R*, 2004 FC 674 at paras 30–46, aff’d 2005 FC 715 at para 115.
[114] Brief of Statutes, *supra* at Tab C-2.

be made, under seal. To the extent that the plaintiffs assert that the Treaties were not, in fact, sealed or that the parties to the Treaties would not have understood them to have been sealed, Ontario submits that such arguments are questions of fact which are beyond the scope of this motion.

123. The parties have agreed that this motion would proceed without evidence aside from this Court's Reasons and Judgment from Stage 1 and photos of the Treaties. The parties have also agreed that summary judgment on Ontario's limitations defences is being sought, "as a matter of statutory interpretation". Ontario submits that a determination of whether the Treaties were, as a question of fact, sealed, is beyond the scope of this motion and must be decided with the benefit of evidence on that issue.

124. As the plaintiff's actions seek recovery of a debt obligation created by an instrument under seal, they are subject to the 20-year limitation period for specialties set out in the s. 45(1)(b) of the *Limitations Act*.

iii. In the alternative, the Actions are Subject to the Six Year Limitation for an Accounting

125. The plaintiffs in these actions seek relief requiring Ontario to "account" for revenues obtained in the territory covered by the Robinson Treaties and to pay them annuities corresponding to a "proportionate" or "fair" share of such revenue. As such, Ontario submits both actions are an "action of account" within the meaning of s. 46 of the *Limitations Act* and are thus subject to a six-year limitation period.

126. An action for an account is incidental to an action brought in contract or any other relationship where there is a legal or equitable duty to account.[115] Section 46 of the

[115] Williams, *supra* at 45.

Limitations Act bars a court from granting an accounting, although it may not operate to bar other, unrelated elements of the claim.[116] An action seeking to direct a reference for an accounting of profits or "gain" retained by a wrongdoer is an action of account.[117]

127. In *Lameman*, the Crown brought a motion for summary judgment in an action alleging wrongful surrender of reserve lands in Alberta.[118] The plaintiffs sought an accounting for any proceeds of sale from the lands that the Crown may still have in its possession.[119] The relevant portion of Alberta's *Limitations of Actions Act* for actions of account is identical to the *Limitations Act* in Ontario. It provides:

> **4** (1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
> […]
> (c) actions
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose[120]

128. The Supreme Court of Canada held that the chambers judge had correctly struck out the plaintiffs' claims on the basis that they were barred by Alberta's *Limitations of Actions Act*, with the exception of the claim for an accounting of the sale proceeds.[121] The

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[116] *Ibid*. *Hanemaayer v Freure* (1999), 2 BLR (3d) 269 (Ont SCJ) at paras 92–93.
[117] *Ibid*. *Waxman v Waxman* (2002), 25 BLR (3d) 1 (Ont SCJ) at para 1648, citing I.E. Davidson, "The Equitable Remedy of Compensation" (1982) 13 Melbourne U Law Rev 349 at 354, rev'd on other grounds (2004) 186 OAC 201 (CA).
[118] *Lameman*, *supra* at paras 4–5.
[119] *Lameman*, *supra* at para 7.
[120] *Lameman*, *supra* at para 14. Alberta's *Limitations of Actions Act* also provided a six-year limitation for equitable claims (s 4(1)(e)) and for all other actions not specifically provided for in the Act (4(1)(g)) which barred other of the plaintiffs' claims but were not applicable to their claim for an accounting. These provisions have no equivalent in Ontario's *Limitations Act*.
[121] *Ibid,* at para 12.

court held that such a claim was a "continuing claim" not caught by Alberta's limitations statute.

129. The decision in *Lameman* is factually distinguishable from the instant case. The basis upon which both the chambers judge and the Supreme Court of Canada found a continuing claim for an accounting was the possibility that the defendant Crown may have continued to hold proceeds from the sale of the reserve lands in an "express trust" for the plaintiffs.[122] Absent such a possibility, it appears that the action would have been statute-barred.

130. In this case, the plaintiffs do not assert that a trust was created by the Robinson Treaties and Ontario holds no funds in trust for the plaintiffs.[123] For this reason, *Lameman* supports Ontario's position that the express provisions of s. 46 of the *Limitations Act*, identical in this regard to its Alberta counterpart, bar the plaintiffs' action for an accounting.

iv. In the further alternative, the Actions are Subject to the Six Year Limitation for Contracts

131. In the event that the plaintiffs' actions are not held to constitute an "action upon a specialty" or an "action of account", Ontario submits that they remain subject to the six-year statutory limitation period applicable to a "simple contract" or "contract without specialty" provided for in s. 45(1)(g) of the *Limitations Act*.

132. Ontario acknowledges that the Robinson Treaties are not "simply" contracts. They are unique agreements and evidence a solemn exchange of promises made by the Crown

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[122] *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655 at paras 127, 225 [*Papaschase*], rev'g 2006 ABCA 392, rev'd in *Lameman*, *supra*. See also *Blood Band v Canadian Pacific Railway*, 2017 ABQB 292 at para 177.

[123] The annuities have been held by the Supreme Court of Canada and the Judicial Committee of the Privy Council not to constitute a trust. See *Ontario v Dominion of Canada, supra*.

and Indigenous Peoples.[124] However, Ontario submits that the Robinson Treaties are "contract[s]" within the meaning of the *Limitations Act*. Canadian courts have repeatedly affirmed that Treaties are contractual agreements and, therefore, that contractual limitation periods apply to Treaties in the Aboriginal law context. Actions, such as those at bar, to enforce contractual obligations, must be commenced within six years after the cause of action arose.[125]

133. In *Pawis v. R*, the plaintiffs brought actions alleging breach of contract and breach of trust regarding fishing rights arising from the Lake-Huron Treaty.[126] The court held that:

> On the other hand, the Court cannot entertain today an action whose cause occurred as far back as 1868, when the first *The Fisheries Act* was enacted, or 1889 when the first *Ontario Fishery Regulations* were made. The plaintiffs contend that their actions were commenced within the time limited by law (namely *The Limitations Act*, R.S.O. 1970, c. 246), since they were denied the privilege allegedly granted to them by the Treaty and suffered the damage for which they seek compensation, only when they were apprehended by the fishery officer, charged, and finally convicted. Such a contention is unacceptable. If it can be argued that the privilege granted by the Treaty was intended to be unconditional, it certainly cannot be denied that from the moment the legislation was passed the situation changed. The act complained of which removed the privilege occurred at that moment, and the limitation period therefore started then.[127]

134. In *Lameman*, the chambers judge held that:

> While a treaty is not in all respects like a contract, breaches of their provisions are arguably covered by the limitation periods on contracts, to which the principle of discoverability does not apply: *Luscar Ltd. v. Pembina Resources Ltd., supra*. Time would therefore run from the moment of breach. In any event, if the Defendant failed to establish the Reserve in a timely way, failed to provide relief in times of famine, failed to provide farming implements required under the Treaty, and was otherwise in breach of the Treaty, the Papaschase Band must have known of those breaches

[124] *Missanabie Cree First Nation v Ontario*, 2016 ONSC 5874 at para 118 [*Missanabie*]; *Restoule*, *supra* at para 324.

[125] *Limitations Act*, 1990, s 45(1)(g).

[126] *Pawis v Canada*, [1979] FCJ No 233 at para 7 [*Pawis*].

[127] *Pawis*, *supra* at para 25.

immediately. Again the limitation period has long since expired.[128]

135. In *Missanabie Cree First Nation v. Ontario*, the court compared legal principles flowing from Treaty rights to contractual rights in the context of interpreting the common intention regarding reserve size. The court held:

> While treaties are not the same as commercial contracts, they are analogous to them. They represent "an exchange of solemn promises between the Crown and various Indian nations". Treaties are characterized by "...the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity". The special, unique and public nature of treaties is reflected in special rules that have developed to guide their interpretation. The overall goal is to choose "'from among the various possible interpretations of the common intention the one which best reconciles' the parties' interests"[129] (citations omitted)

136. The court's reasons in *Missanabie* were not made in respect of a limitations argument. However, Ontario submits that remedies for breaches of enforceable obligations created by Treaties are subject to the same statutory limitations as remedies for breach of contract. The Supreme Court of Canada has repeatedly affirmed the applicability of limitations statutes to claims made by Indigenous people.[130] Accordingly, Ontario submits that, in the event the Robinson Treaties are not specialties as Ontario submits, then the plaintiffs' claims for breaches of the Treaties are subject to the six-year limitation for contracts set out in s. 45(1)(g) of the *Limitations Act*.

137. Subject to arguments regarding issues of discoverability, knowledge and capacity, constitutional validity, constitutional applicability, estoppel, concealment, and equitable fraud which are not part of this motion, Ontario submits that the plaintiffs' actions are subject to the limitations periods set out in ss. 45 and 46 of the *Limitations Act*.

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[128] *Papaschase*, *supra* at para 155. See also *McCallum v Canada (Attorney General)*, 2010 SKQB 42 at paras 34–49.

[129] *Missanabie*, *supra* at para 118. See also *Sides v Canada*, 2019 FC 789 at para 232.

[130] *Lameman*, *supra* at para 13; *Wewaykum*, *supra* at paras 144–116, 121; *Blueberry River*, *supra* at para 107.

D. Issues of Joint and Several Liability and Canada as Treaty "Paymaster" Cannot be Severed from the Determination of Liability at Stage 3

138. Ontario submits that issues of joint and several liability and Canada as Treaty "paymaster" cannot be severed from the determination of respective Crown liability in Stage 3. As a result, like Canada, Ontario does not consent to proceeding by way of partial summary judgment to decide these issues in Stage 2.[131]

139. Specific theories of Crown liability cannot properly be considered in isolation from other theories that may impose liability on one or both defendants, and it has been agreed that the Court's determination of respective Crown liability will await the Stage 3 hearing. Moreover, evidence is required to determine respective Crown liability and the relevant evidence is not presently before the Court.[132] It is thus premature to make an order on this issue at this time.

140. Ontario respectfully disagrees with the plaintiffs that the issue of joint and several liability can be determined without evidence.[133] While it is true that "there is nothing in the Constitution that prevents either Crown from making payment of the amounts that might come to be calculated" (Superior plaintiffs factum para. 50), that is not the issue. The issue is that the Constitution provides for which Crown is liable. Evidence is required to properly understand the governing Constitutional provisions (primarily s. 111 of the *Constitution Act, 1867*, in Ontario's submission, but also s. 112, etc.).

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[131] Ontario disagrees with the Robinson Superior Plaintiffs' statement, at para 33 of their factum, that "the Crowns are not of the view that a trial of those issues [joint and several liability and Canada as Treaty 'paymaster'] is necessary". Stage 3 will be a trial, on pleadings and with evidence, and is where these issues can be properly decided.

[132] The Robinson Superior Plaintiffs submit that the Crowns should have placed relevant evidence before the Court at this time (factum paras 39–46) but expressly agreed that Stage 2 was to proceed without any new evidence and also concede that the prior 2016 date to introduce this evidence was altered when "circumstances changed" under case management to join the Superior and Huron cases (para 42).

[133] The substantive argument on which is in the Robinson Superior Plaintiffs' factum at paras 49–52.

141. Further, if such an order is made at this time in the absence of evidence, there is a significant risk of inconsistent findings if a different or contrary order is made in Stage 3 after relevant evidence is before the Court. This is because both Ontario and Canada plead that the other Crown is exclusively liable for the augmented annuities at issue. If either Crown prevails in this argument, then liability is not joint and several.

142. The Court of Appeal has repeatedly, and recently, stressed the importance of avoiding making determinations on motions for partial summary judgment (or other bifurcated proceedings) that may result in inconsistent findings at a later date.[134]

143. As referenced above and discussed in detail below (under sub-heading E), joint and several liability does not apply in this context in any event as the *Constitution Act, 1867* has specific provisions governing Crown liability in this area. Joint and several liability is a common law concept (subsequently altered by statute) applicable to negligence and other private law matters. It does not apply to public law matters generally, much less where the Constitution governs. Neither the common law nor statutes can alter the Constitution.

144. Finally, an order as to joint and several liability would not be of any utility at this time. No money judgments have yet been made and the Crown always pays money judgments when made (unless stayed while under appeal).[135]

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[134] See e.g. *Service Mold + Aerospace Inc v Khalaf*, 2019 ONCA 369 at paras 14-18 (and cases cited therein).
[135] Hogg & Monahan, *supra* at 52–53.

E. Ontario is Not Jointly and Severally Liable with Canada for any Damages Owing to the Plaintiffs

145. Joint and several liability does not apply in this context as the *Constitution Act, 1867* has specific provisions governing Crown liability in this area. Ontario pleads that Canada is exclusively liable for any augmented annuities owing because they are a pre-Confederation debt or liability of "each Province existing at the Union", which s. 111 of the *Constitution Act, 1867* expressly assigns as being a liability of Canada.[136] Ontario further pleads that s. 112 of the *Constitution Act, 1867* does not apply to trigger contribution for any such liability by Ontario due to the previous final settlement of this issue by arbitration (in 1900), the final set-off and closure between Canada and Ontario (in 1908) and because s. 112 is now spent.[137]

146. These pleadings and contrary positions advanced by Canada will be central to the allocation of Crown liability in Stage 3. The plaintiffs are incorrect to state that these Constitutional provisions are irrelevant to the issue of joint and several liability because they were enacted after the Robinson Treaties were signed and therefore are only internal to the Crown (Superior plaintiffs factum at paras. 67-99). There is no basis in law for this argument. The Crowns are divisible for legal purposes in Canada[138] and the *Constitution Act, 1867* directly governs Crown liability to the plaintiffs, not just between the Crowns.

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[136] Section 111, *Constitution Act, 1867*: "Canada shall be liable for the Debts and Liabilities of each Province existing at the Union." Even if some other theory was to be applied for the period following Confederation, there is no question that s 111 would apply for the period 1850-1867.
[137] Section 112, *Constitution Act, 1867*: "Ontario and Québec 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."
[138] See Hogg & Monahan, *supra* at 12–13; see also *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*, [1892] AC 437 (PC).

Ontario adopts Canada's submissions on this point, namely that historical constitutional changes (altering the assignment of responsibilities to governments that did not exist at the time a treaty was made) affect the legal rights of everyone, including First Nations.

147. Further, joint and several liability is a common law concept (subsequently altered by statute) applicable to negligence and other private law matters.[139] There is no basis in law to apply the concept here. It does not apply to public law matters generally, much less where the Constitution governs. As Justice Horkins stated in *Good v. Toronto Police Services Board*:

> Vicarious liability is a concept that belongs to negligence. In effect, the plaintiff seeks to import the private law concept of "joint and several liability" into the Charter violation claims. This is wrong in law and must be struck. A claim for *Charter* damages is a public law remedy distinct from private law tort concepts.[140] (citation omitted)

148. Finally, neither the common law nor statutes can alter the Constitution.[141]

149. If Ontario is correct in its pleaded position, which will be determined in Stage 3, then Canada is exclusively liable to the plaintiffs. Conversely, if Canada were to succeed on its pleaded position (also to be determined in Stage 3), then Ontario would be

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[139] For a brief history of joint and several liability both at common law and as subsequently codified by statute see Chapter I and Chapter II, Section A of The Law Reform Commission of British Columbia, *Report on Shared Liability* (Vancouver: August 1986) at Chapters I and II (Section A) and Ontario Law Reform Commission*, Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988) at 7-20.

[140] *Good v Toronto Police Services Board*, 2013 ONSC 3026 at para 142, rev'g on other grounds and without comment on this passage 2014 ONSC 4583 (Div Ct), aff'g 2016 ONCA 250, leave to appeal to the SCC refused [2016] SCCA No 255.

[141] Canada's constitutional supremacy clause is now enshrined in s 52 of the *Constitution Act, 1982*: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." See discussion in Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thompson Reuters, 2018) (loose-leaf 2019 supplement) at paras 1.4, 5.4 and 40.1.

exclusively liable to the plaintiffs. Under neither scenario would liability be joint and several.

F. The Plaintiffs' Alternative "Canada as Treaty 'Paymaster' " Argument

150. The plaintiffs' alternative argument that "Canada is required to act as the 'paymaster' of the annuities" (Huron factum paras. 68-87; Superior factum paras. 100-103) accords with Ontario's pleaded position that Canada is exclusively liable to pay augmented annuities under s. 111 of the *Constitution Act, 1867*. However, the application of s. 111 is a central and contested issue with respect to allocation of Crown liability in this case. Accordingly, Ontario agrees with Canada that making such a "paymaster" determination now would be inappropriate when it has been agreed that Crown allocation issues will be decided in Stage 3, on evidence.

151. Ontario disagrees, however, with Canada's submissions (to be argued in Stage 3) that s. 111 of the *Constitution Act, 1867* does not apply to the augmented annuities at issue because they were not known or ascertainable at the time of the Union and therefore follow the migration of Crown assets and revenues at Confederation, based on s. 109 and the division of powers under ss. 91, 92 and 92A of the *Constitution Act, 1867*. Ontario submits that the augmented Robinson Treaties annuities are liabilities of the old Province of Canada that were known in 1867 and thus subject to s. 111.[142] Again, however, this is an issue for Stage 3.

[142] Ontario also disagrees with Canada that an alternative approach not based on s 111 would allocate responsibility in relation to which government receives relevant revenues. Canada's exclusive jurisdiction in relation to "Indians" under s 91(24) of the *Constitution Act, 1867* and its administration of Robinson Treaty annuities at all times since Confederation call for a different result, as does the settlement reached in 1900 between Canada, Ontario and Québec regarding augmented annuities.

152. As between the plaintiffs' alternative arguments for joint and several liability and Canada as Treaty "paymaster", ordering Canada to act as Treaty "paymaster" would be consistent with the existing case law. Such a result would accord with the previous decisions of the Supreme Court of Canada and the Judicial Committee of the Privy Council concerning which Crown is responsible for the payment of augmented annuities under the Robinson Treaties. In rejecting arguments that Ontario was liable to pay these augmented annuities under s. 109 or other provisions of the *Constitution Act, 1867*, and affirming the Supreme Court of Canada's decision that Canada was exclusively liable under s. 111, Lord Watson stated:

> Their Lordships are of opinion that the language of the treaties in question does not warrant the conclusion that payment of the original annuities and of their augmentations was to be derived from different sources … it is clear that, for the purposes of the present question, the construction of the treaties must be dealt with on the same footing as if it had arisen between the Indians and the old Province of Canada…[143]

153. To be clear, however, Ontario's primary position is that making such a "paymaster" order at this time engages with a central Stage 3 issue concerning allocation of Crown liability. Ontario agrees with and adopts Canada's submissions that this issue cannot be properly decided until Stage 3.

[143] *Ontario v Dominion of Canada*, *supra* at para 15.

PART V – ORDER REQUESTED

154. Ontario respectfully requests that this motion be dismissed with costs.

September 13, 2019

MINISTRY OF THE ATTORNEY GENERAL

Michael Stephenson	Lisa La Horey
Mark Crow	Brent Kettles

Counsel for Her Majesty the Queen in right of Ontario and the Attorney General of Ontario

SCHEDULE A
LIST OF AUTHORITIES

Case Law

Tab	Authority
1	*872899 Ontario Inc. v Iacovoni* (1998), 40 OR (3d) 715 (CA), leave to appeal to SCC refused [1998] SCCA No 476.
2	*Arishenkoff v British Columbia*, 2005 BCCA 481, leave to appeal to SCC refused [2005] SCCA No 556.
3	*B (KL) v British Columbia*, 2003 SCC 51.
4	*Beattie v R*, 2004 FC 674, aff'd 2005 FC 715.
5	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53.
6	*Blood Band v Canadian Pacific Railway*, 2017 ABQB 292.
7	*Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.
8	*Bombay and Persia Steam Navigation Company Limited v Maclay*, [1920] 3 KB 402.
9	*Canada (Attorney General) v Thouin*, 2017 SCC 46.
10	*Canada (National Harbours Board) v Langelier* (1968), [1969] SCR 60.
11	*Canada v Central Railway Signal Co*, [1933] SCR 555.
12	*Chippewas of Sarnia Band v Canada (Attorney General)* (1999), 40 RPR (3d) 49 (Ont SCJ), aff'd (2000) 51 OR (3d) 641 (CA).
13	*Cloud et al v Canada (Attorney General)*, [2001] OTC 767 (SCJ), aff'g (2003) 65 OR (3d) 492 (Div Ct), rev'd on other grounds (2004) 73 OR (3d) 401 (CA), leave to appeal to SCC refused, [2005] SCCA No 50.
14	*Dyson v Attorney General*, [1911] 1 KB 410.
15	*Fast v Nieuwesteeg* (2006), 16 BLR (4th) 192 (Ont SCJ).
16	*Fitzpatrick v The King* (1925), 57 OLR 178 (SCHC), aff'd (1926) 59 OLR 331 (SCA).

17 *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34.

18 *Good v Toronto Police Services Board*, 2013 ONSC 3026, rev'g on other grounds 2014 ONSC 4583 (Div Ct), aff'g 2016 ONCA 250, leave to appeal to the SCC refused [2016] SCCA No 255.

19 *Grant v West* (1896), 23 OAR 533 (CA).

20 *Guerin v R*, [1984] 2 SCR 335.

21 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

22 *Hanemaayer v Freure* (1999), 2 BLR (3d) 269 (Ont SCJ).

23 *Henry v R*, [1905] 9 Ex CR 417 (Can).

24 *Hereford Railway v The Queen* (1894), 24 SCR 1.

25 *Kenmont Management Inc v Saint John Port Authority*, [2000] NBJ No 495 (QB), rev'd on other grounds [2002] NBJ No 32 (CA), leave to appeal to SCC refused [2002] SCCA No 143.

26 *Kinloch v Secretary of State for India in Council* (1882), 7 App Cas 619 (HL).

27 *Mail Printing Co v Clarkson* (1898), 25 OAR 1 (CA).

28 *Manitoba Métis Federation Inc v Canada*, 2013 SCC 14.

29 *McCallum v Canada (Attorney General)*, 2010 SKQB 42.

30 *Mikisew Cree First Nation v Canada (Governor in Council)*, 2018 SCC 40.

31 *Miller v Canada*, [1950] SCR 168.

32 *Missanabie Cree First Nation v Ontario*, 2016 ONSC 5874.

33 *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85.

34 *Mortgage Insurance Co of Canada v Grant*, 2009 ONCA 655.

35 *Murray v Ontario* (2003), 67 OR (3d) 97 (CA).

36 *O'Connor v Canada (Minister of National Revenue)*, [1943] Ex CR 168 (Can).

37 *Ontario v Dominion of Canada* (1895), 25 SCR 434, aff'd in *Reference re: British North America Act, 1867, ss 109, 111*, [1897] AC 199 (PC).

38 *Ontario v Williams Estate*, [1942] JCJ No 3.

39 *Orpen v Ontario (Attorney General)* (1924), 56 OLR 327 (SCHC), aff'd (1925) 56 OLR 530 (SCA).

40 *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655, rev'g 2006 ABCA 392, rev'd in *Canada (Attorney General) v Lameman*, 2008 SCC 14.

41 *Pawis v Canada*, [1979] FCJ No 233.

42 *Queen v McFarlane*, [1882] 7 SCR 216, 1882 CarswellNat 9.

43 *Queen v McLeod* (1883), 8 SCR 1, 1883 CarswellNat 9.

44 *Restoule v Canada (Attorney General)*, 2018 ONSC 7701.

45 *Richard v British Columbia*, 2009 BCCA 185, leave to appeal to SCC refused [2009] SCCA No 274.

46 *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27.

47 *Royal Trust Co v Alberta (Attorney General)*, [1930] 1 DLR 868 (PC).

48 *Rudolph Wolff & Co Ltd and Noranda Inc v Canada*, [1990] 1 SCR 695.

49 *Rustomjee v R*, [1876] 2 QBD 69 (CA).

50 *Seed v Ontario*, 2012 ONSC 2681.

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

52 *Sides v Canada*, 2019 FC 789.

53 *Slark (Litigation Guardian of) v Ontario*, 2010 ONSC 1726, leave to appeal to Div Ct refused 2010 ONSC 6131 (Div Ct).

54 *Suburban Construction Ltd v Newfoundland and Labrador Housing Corp*, [1987] NJ No 173 (NFCA).

55 *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*, [1892] AC 437 (PC).

56 *Tobin v The Queen* (1864), 143 ER 1148 (Ct Com Pl).

57 *Wasauksing First Nation v Wasausink Lands Inc* (2004), 184 OAC 84 (CA).

58 *Watmough v Trust* (1999), 95 OTC 69 (SC), aff'd (1999) 128 OAC 370 (CA).

59 *Waxman v Waxman* (2002), 25 BLR (3d) 1 (Ont SCJ), rev'd on other grounds (2004) 186 OAC 201 (CA).

60 *Western Dominion Coal Mines Ltd v R*, [1946] Ex CR 387 (Can).

61 *Wewaykum Indian Band v Canada*, 2002 SCC 79.

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Tab	Authority
62	Donald Alexander MacRae, Ed, *Holmested and Langton on The Judicature Act of Ontario*, 5th ed (Toronto: The Carswell Company, Limited, 1940).
63	Graeme Mew, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis, 2016).
64	Halsbury's Laws of England, 1st ed, vol 6, *The Nature of the Prerogative* at 374 "Sovereignty and Pre-eminence of the Sovereign".
65	Halsbury's Laws of England, 2nd ed, vol 17, *Income Tax* "Annuities or other annual payments".
66	Jeremy S Williams, *Limitation of Actions in Canada*, 2nd ed (Toronto: Butterworths, 1980).
67	Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988).
68	Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thompson Reuters, 2018) (loose-leaf 2019 supplement).
69	Peter W Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed (Scarborough, Ont: Carswell, 2000).
70	Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016).
71	Ruth Sullivan, *Sullivan on the Construction of Statutes*, (Markham: LexisNexis Canada, 2014).
72	The Law Reform Commission of British Columbia, *Report on Shared Liability* (Vancouver: August 1986).

73 Walter Clode, *The Law and Practice of Petitions of Right* (London: William Clowes and Sons, 1887).

Additional Case

74 *R v Kokopenace*, 2015 SCC 28

SCHEDULE B(1)
LIST OF STATUTORY AUTHORITIES

CROWN IMMUNITY

***An Act to Provide for the Institution of Suits against the Crown by Petition of Right, and respecting Procedure in Crown Suits*, SO 1871-2, c 13, s 2.**

...

Petitions to be submitted to Lieutenant-Governor for his fiat

2. The said petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he shall think fit, may grant his fiat that right be done; and no fee or sum of money shall be payable by the suppliant on so leaving such petition or upon his receiving back the same.

...

***An Act Respecting the Proceedings Against the Crown* (Uniform Model Act delivered at the Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of 1950) (Ottawa: Queen's Printer, 1950), s 20.**

...

Pending Proceedings

20. Except as otherwise provided in this Act, this Act does not affect proceedings against the Crown that have been instituted before the coming into force of this Act; and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been submitted for consideration to the Lieutenant Governor in Council before the coming into force of this Act.

...

***Proceedings Against the Crown Act, 1962-63*, SO 1962-63, c 109, ss 5(1)–(2), 27–28.**

...

Liability in Tort

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;

(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

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

(2) No proceedings shall be brought against the Crown under clause a of subsection 1 in respect of an act or omission of a servant or agent of the Crown unless proceedings in tort in respect of such act or omission may be brought against that servant or agent or his personal representative.

...

No Retroactive Effect

27. 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. 1952, c. 78, s. 28, *amended.*

Pending Claims

28.(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 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.

(2) A claim arising under a contract with the Crown that was entered into before this Act comes into force may be proceeded with under subsection 1, but not otherwise.

(3) This Act does not affect proceedings against the Crown by petition of right that have been instituted before this Act comes into force, and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been left with the Provincial Secretary before this Act comes into force. 1952, c. 78, s. 26 (1).

(4) Subject to subsections 1, 2 and 3, proceedings againsSt the Crown by petition of right are abolished, and, except for the purposes of subsections 1, 2 and 3, the rules of court respecting petitions of right are revoked. 1952, c. 78, s. 26 (2), *amended.*

...

***Proceedings Against the Crown Act*, RSO 1970, c 365, ss 5(1)–(2), 28–29.**

...

Liability in Tort

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;
>
> *(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
>
> *(d)* under any statute, or under any regulation or by-law made or passed under the authority of any statute.

(2) No proceedings shall be brought against the Crown under clause a of subsection 1 in respect of an act or omission of a servant or agent of the Crown unless proceedings in tort in respect of such act or omission may be brought against that servant or agent or his personal representative.

...

No Retroactive Effect

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 1st day of September, 1963. 1962-63, c. 109, s. 27, *amended.*

Pending Claims

29.(1) A claim against the Crown existing on the 1st day of September, 1963 that, if this Act had not been passed, might have been enforced by petition of right may be 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.

(2) A claim arising under a contract with the Crown that was entered into before the 1st day of September, 1963 may be proceeded with under subsection 1, but not otherwise.

(3) This Act does not affect proceedings against the Crown by petition of right that have been instituted before the 1st day of September, 1963, and, for the purposes of this

section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been left with the Provincial Secretary before this Act comes into force.

(4) Subject to subsections 1, 2 and 3, proceedings against the Crown by petition of right are abolished, and, except for the purposes of subsections 1, 2 and 3, the rules of court respecting petitions of right are revoked. 1962-63, c. 109, s. 28, *amended.*

...

***Crown Liability and Proceedings Act*, 2019, SO 2019, c 7, Sched 17, s 31.**

...

Transition

Application of Act to claims

31 (1) This Act applies with respect to a claim against the Crown or an officer, employee or agent of the Crown regardless of when the claim arose, except as provided in subsection (3).

Application of Act to new proceedings

(2) This Act applies with respect to a proceeding commenced by the Crown, or against the Crown or an officer, employee or agent of the Crown, on or after the day this section comes into force, regardless of when the facts on which the proceeding is based occurred or are alleged to have occurred.

Application of former Act to existing proceedings

(3) Subject to subsection (4), the *Proceedings Against the Crown Act*, as it read immediately before its repeal, continues to apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force, and to the claims included in those proceedings.

Exception, extinguishment of causes of action

(4) Section 11 and the extinguishment of causes of action and dismissal of proceedings under that section apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force.

...

Crown Proceedings Act, **SBC 1974, c 24, ss 2, 15–16.**

...

Liability of Government

2. Subject to this Act,

(a) proceedings against the Crown by way of petition of right are abolished;

...

15. (1) Except as otherwise provided in this Act, this Act does not affect proceedings against the Crown that have been instituted before the coming into force of this Act; and, for the purposes of this section, proceedings against the Crown by petition of right shall be deemed to have been instituted if a petition of right with respect to the matter in question has been submitted for consideration to the Lieutenant-Governor before the coming into force of this Act.

(2) Subject to subsection (1), this Act does not apply to a cause of action that existed on the day before the date this Act comes into force.

16. (1) Subject to subsection (2), the *Crown Procedure Act*, being chapter 89 of the *Revised Statutes of British Columbia, 1960*, is repealed.

(2) Notwithstanding the repeal of the *Crown Procedure Act*, that Act applies to a cause of action in respect of proceedings against the Crown that arose before the date this Act comes into force, whether or not it is or is considered to be a cause of action continuing after the date this Act comes into force.

...

SCHEDULE B(2)
LIST OF STATUTORY AUTHORITIES

LIMITATIONS ACTS

***An Act for the further Amendment of the Law, and the better Advancement of Justice*, SUC 1837 (7 Will IV), c 3, s III.**

...

Limitation of time for commencement of particular actions.

III. And be it further enacted by the authority aforesaid, That all actions of debt for rent, upon an indenture of demise; all actions of covenant or debt, upon any bond or other specialty; and all actions of debt or Scire Facias, upon any recognizance; and also all actions of debt upon any award, where the submission is not by specialty, or for an escape, or for money levied on any Fieri Facias; and all actions for penalties, damages, or sums of money given to the party grieved, by any Statute now or hereafter to be in force, that shall be sued or brought at any time after the passing of this Act, shall be commences and sued within the time and limitation hereinafter expressed, and not after, that is to say: The said actions of debt for rent, upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt, or Scire Facias upon recognizance, within ten years after the passing of this Act, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the passing of this Act, or within two years after the cause of such actions or suits, but not after; and the said other actions, within three years after the passing of this Act, or within six years after the cause of such actions or suits, but not after: Provided, that nothing herein contained shall extend to any action given by any Statute, where the time for bringing such action is or shall be by any Statute specially limited.

...

***An Act respecting Remedies for and against executors and administrators and respecting the Limitation of certain actions*, CSUC 1859 (22 Vict), c 78, s 7.**

...

Limitation of time for commencement of particular actions.

7. Actions for debt for rent, upon indenture of demise, - actions of covenant or debt, upon a bond or other specialty, - actions of debt, or *scire facias* upon a recognizance, -

actions of debt upon an award where the submission is not specialty, or for an escape, or for money levied on a *fieri facias*, - and actions for penalties, damages, or sums of money given to the party aggrieved by any Statute, shall be commenced and sued within the time and limitation hereinafter expressed, and not after, that is to say: The said actions of debt for rent upon an indenture of demise or covenant, or of debt upon a bond or other specialty, and actions of debt, or *scire facias* upon a recognizance, within twenty years after the cause of such action arose; the said actions by the party aggrieved, within two years after the cause of such actions arose, and the said other actions, within six years after the cause of such actions arose; but nothing herein contained shall extend to any action given by any Statute, where the time for bringing such action is the Statute specially limited.

...

***An Act respecting the Limitation of certain actions,* RSO 1877, c 61, s 1(b).**

...

Limitation of time for commencing particular actions.

1. The action hereinafter mentioned shall be commenced and used within the times respectively hereinafter mentioned, and not after, that is to say:

...

(b) Actions of covenant or debt, upon a bond, or other specialty,

...

within twenty years after the cause of such actions arose.

...

Actions of account, etc., to be commenced within six years.

2. All actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced and sued within six years after the cause of such actions or suits arose; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit, shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same accounts, having arisen within six years next before the commencement of such action or suit.

...

An Act respecting the Limitation of certain actions, **RSO 1887, c 60, s 1(1)(b)**

...

Limitation of time for commencing particular actions.

1. - (1) The actions hereinafter mentioned shall be commenced within and not after the times respectively hereinafter mentioned, that is to say:

...

(b) Actions upon a bond, or other specialty,

...

within twenty years after the cause of such actions arose.

...

Actions of account, etc., to be commenced within six years.

2. All actions of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such actions arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be 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.

...

An Act respecting the Limitation of certain actions, **RSO 1897, c 72, s 1(1)(b).**

...

Limitation of time for commencing particular actions.

1. - (1) The actions hereinafter mentioned shall be commenced within and not after the times respectively hereinafter mentioned, that is to say:

...

(b) Actions upon a bond, or other specialty, except upon the covenants contained in any indenture of mortgage made on or after the 1st day of July, 1894,

...

within twenty years after the cause of such actions arose.

...

Actions of account, etc., to be commenced within six years.

2. All actions of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such actions arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account, having risen within six years next before the commencement of the action.

...

An Act respecting the Limitation of Actions, **RSO 1914, c 75, s 49(1)(b)(g).**

...

Limitation of time for commencing particular actions.

49. – (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 good 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.

50. 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 which arose more than six years before the commencement of the action, shall be 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.

...

The Limitations Act, **RSO 1950, c 207, s 48(1)(b), (g).**

...

Limitation of time for commencing particular actions.

48. – (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.

49. 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 which arose more than six years before the commencement of the action shall be 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

...

***Limitations Act*, RSO 1990, c L. 15, s 45(1)(b), (g).**

...

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, detenue, 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 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.

...

***Limitations Act*, SO 2002, c 24, Schedule B, ss 2(1)(e), (f).**

...

Application.

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.

...

Exception, aboriginal rights.

(2) 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."

SCHEDULE B(3)

OTHER STATUTORY AUTHORITIES

***Constitution Act, 1867*, ss 91(24), 111–112, & 129.**

...

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

24. Indians, and Lands reserved for the Indians.

...

Canada to be liable for Provincial Debts

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Marginal note:Debts of Ontario and Quebec

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

...

Continuance of existing Laws, Courts, Officers, etc.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject

nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

...

***Constitution Act, 1982*, s 52(1).**

...

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

...

***Courts of Justice Act*, RSO 1990, c C43, s 109.**

...

Notice of a constitutional question

109 (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings.

...

***Legislation Act, 2006*, SO 2006, c 21, Sched F, s 56(1).**

...

No implication

56 (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force. 2006, c. 21, Sched. F, s. 56 (1).

Same

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different. 2006, c. 21, Sched. F, s. 56 (2).

Same

(3) The re-enactment, remaking, amendment or changing under Part V (Change Powers) of an Act or regulation does not imply an adoption of any judicial or other

interpretation of the language used in the Act or regulation, or of similar language. 2006, c. 21, Sched. F, s. 56 (3).

...

Restoule, et al Plaintiffs	**and**	**Attorney General of Canada, et al** Defendants	Court File Nos: C-3512-14 & C-3512-14A and 2001 - 0673
Red Rock First Nation, et al Plaintiffs	**and**	**Attorney General of Canada, et al** Defendants	

ONTARIO SUPERIOR COURT OF JUSTICE
Proceedings commenced in Sudbury and Thunder Bay
MOTIONS FOR SUMMARY JUDGMENT

FACTUM OF THE DEFENDANTS

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
T: 416-326-4008
F: 416-326-4181

Michael Stevenson LSO# 29697R
Lisa La Horey LSO# 31148M
Mark Crow LSO# 45624S
Brent Kettles LSO# 61568E

Lawyers for the Defendants,
Her Majesty the Queen in right of Ontario and the Attorney General of Ontario