COURT OF APPEAL FOR ONTARIO

CITATION: Restoule v. Canada (Attorney General), 2021 ONCA 779
DATE: 20211105
DOCKET: C66455 & C68595

Strathy C.J.O., Lauwers, Hourigan, Pardu and Brown JJ.A.

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

Plaintiffs

(Respondents)

and

The Attorney General of Canada, the Attorney General of Ontario and Her Majesty the Queen in Right of Ontario

Defendants

(Appellants/Respondent)

and

The Red Rock First Nation and the Whitesand First Nation

Third Parties

(Respondents)

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

(Respondents)

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

(Appellants/Respondent)

Lisa La Horey, Christine Perruzza, Sarah Valair, Mark Crow, Insiyah Kanjee, Richard Ogden, Julia Mc Randall and Kevin Gray, for the appellants the Attorney General of Ontario, Her Majesty the Queen in Right of Ontario, and the Attorney General of Ontario as representing Her Majesty the Queen in Right of Ontario (C66455 & C68595)

Catherine Boies Parker, Q.C., David Nahwegahbow, Dianne G. Corbiere, Christopher E.J. Albinati, Daniel G. McCoy and Alexander Kirby, for the respondents Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch on their own behalf and on behalf of all members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850 (C66455 & C68595)

Harley I. Schachter and Kaitlyn E. Lewis, for the respondents the Red Rock First Nation, the Whitesand First Nation, the Chief and Council of Red Rock First Nation on behalf of the Red Rock First Nation Band of Indians, and the Chief and Council of the Whitesand First Nation on behalf of the Whitesand First Nation Band of Indians (C66455 & C68595)

Glynis Evans and Scott Warwick, for the respondent the Attorney General of Canada (C66455 & C68595)

Brian Gover and Spencer Bass, for the intervener the Biigtigong Nishnaabeg First Nation (C66455 & C68595)

Adam S.R. Williamson and Stuart Wuttke, for the intervener the Assembly of First Nations (C66455 & C68595)

Thomas Slade and Cory Giordano, for the intervener the Blood Tribe (C66455)

Scott Robertson, for the intervener the Indigenous Bar Association of Canada (C66455)

Halie Bruce, for the intervener the Union of British Columbia Indian Chiefs (C66455)

Heard: April 13, 20-23 and 26-28, 2021; June 1-3, 2021

On appeal from the judgments of Justice Patricia C. Hennessy of the Superior Court of Justice, dated June 17, 2019, with reasons reported at 2018 ONSC 7701, 431 D.L.R. (4th) 32, and 2018 ONSC 7712 (C66455).

On appeal from the judgments of Justice Patricia C. Hennessy of the Superior Court of Justice, dated June 26, 2020, with reasons reported at 2020 ONSC 3932, 452 D.L.R. (4th) 604 (C68595).

By the Court:

A. OVERVIEW

[1] In 1850, the Anishinaabe on the northern shores of Lake Huron and Lake Superior entered into two Treaties with the Crown providing for the cession of a vast territory in northern Ontario. As part of the Treaties, the Crown agreed to pay a perpetual annuity to the Anishinaabe. This litigation centres on the nature of that obligation.

[2] The plaintiffs, who are beneficiaries of the Treaties, instituted two actions against Canada and Ontario seeking declaratory and compensatory relief related to the interpretation, implementation and alleged breach of the Treaties' annuity provisions. The actions, which are being tried together, have been divided into three stages: Stage One involved the interpretation of the Treaties; Stage Two considered the Crown's defences of Crown immunity and limitations; and Stage Three, which has yet to take place, will determine remaining issues, including damages and the allocation of liability between Canada and Ontario. The appeals before this court are from the partial judgments resulting from the Stage One and Stage Two decisions.

[3] In her decision on Stage One, the trial judge held that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant. To carry out that obligation, the trial judge found

that the Crown must: (i) engage in a consultative process to determine the amount of net Crown resource-based revenues from the territories; and (ii) pay an increased annuity amount, reflecting a “fair share”, if there are sufficient Crown resource-based revenues to allow payment without incurring loss. The trial judge further determined that the principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown the obligation to diligently implement the purpose of the Treaties’ promise.

[4] In her decision on Stage Two, the trial judge held that Crown immunity and provincial limitations legislation did not operate to bar the claims.

[5] Ontario appeals. Ontario argues that the trial judge erred in her interpretation of the Treaties and in rejecting its defences of Crown immunity and limitations.

[6] The appeals raise several issues. To address these issues, we are issuing both these joint reasons by the court (contained in section I of the reasons) and three sets of individual reasons by (i) Lauwers and Pardu JJ.A. (contained in section II), (ii) Strathy C.J.O. and Brown J.A. (contained in section III), and (iii) Hourigan J.A. (contained in section IV).

[7] The joint reasons provide the factual background to the case and summarize the court’s conclusions on the issues arising in the appeals. As we explain, we unanimously reject the majority of the arguments raised on appeal. We dismiss Ontario’s appeal from the Stage Two proceedings in its entirety and grant the

appeal from the Stage One proceedings in part, though we part company on whether the trial judge erred in her interpretation of the Treaties and the appropriate remedy.

[8] The three sets of individual reasons address in greater detail the particular issues arising in the appeals and provide the rationale and analysis behind our disposition of the various issues.

[9] We begin first by reviewing the facts of this case and the trial judge's reasons.

B. FACTS

(1) Historical Context

(a) The Anishinaabe of the Upper Great Lakes

(i) Territory and Language

[10] The beneficiaries of the Robinson-Huron Treaty and Robinson-Superior Treaty (the "Robinson Treaties" or the "Treaties") are known as the Anishinaabe of the upper Great Lakes. They are members of several First Nations who historically inhabited and continue to inhabit the north shores of Lake Huron and Lake Superior. Today, the beneficiaries of the Robinson Treaties live on and off reserve.

[11] At the time the Treaties were made in 1850, the Anishinaabe of the upper Great Lakes occupied and harvested a territory stretching eastward from the

vicinity of present-day Thunder Bay, across the northern shores of Lake Superior and Lake Huron, to Lake Temiskaming, on the present-day border between Ontario and Quebec. The Robinson Treaties cover a territory that includes the current communities of Thunder Bay, Sault Ste. Marie, Sudbury, and North Bay, among others.

[12] Within this territory, the Anishinaabe were organized in Bands, occupying discrete territories. Bands considered their territories to be communal property. Band members spoke various dialects of Anishinaabemowin, the language of the Anishinaabe.

(ii) Governance

[13] The Anishinaabe have their own systems of governance. At trial, Elder Fred Kelly described two of the organizing principles of Anishinaabe law and governance: *pimaatiziwin* and *gizhewaadiziwin*. *Pimaatiziwin* is the principle that everything is alive and sacred. *Gizhewaadiziwin*, the way of the Creator, encompasses the seven sacred laws of creation. Anishinaabe governance also includes values of trust, responsibility, reciprocity, and renewal, and the understandings that the world is deeply interconnected, and that people must rely on one another to thrive.

[14] *Ishkode*, or fire, is also central to Anishinaabe governance and politics. In the Great Lakes region, *ishkode* could refer to the place where a family lived, to

small or large gatherings, or even to an entire nation. “Council fire” could refer to the location where meetings were held and where decisions and agreements were made. The Anishinaabe had a complex network of council fires, which were hosted by an *Ogimaa* (a Chief or leader). *Ogimaa* were characterized by their prior accomplishments and were expected to be responsible for and generous to their people. *Ogimaa* were not rulers; the Anishinaabe decision-making process was deliberative and consensus based.

[15] The trial judge found that the Anishinaabe system of governance within the Treaty territories was continuous and longstanding.[1]

(b) The Relationship Between the Anishinaabe and Colonial Actors

(i) The Covenant Chain Alliance

[16] The relationship between the Anishinaabe and the Crown was informed by the Covenant Chain Alliance. While the Covenant Chain originally referred to the alliance between the Haudenosaunee Confederacy and the British in the early 17th century, the relationship later extended to Western Nations, including the Anishinaabe of the upper Great Lakes.

[17] The Covenant Chain Alliance was symbolized by a ship tied to a tree, connected with rope and iron, which later became silver. The rope represented an

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[1] Stage One Reasons, at para. 31.

alliance of equals, iron represented strength, and silver represented durability and beauty. The metaphor suggested that if one party was in need, they only had to "tug on the rope" to give a signal that something was amiss and "all would be restored".

[18] The westward extension of the Covenant Chain Alliance was a strategic military decision by the British, who sought to secure the neutrality of Western Nations, including the Anishinaabe, who had previously fought alongside the French during the Seven Years War.

[19] The British were not entirely successful in their efforts. In 1763, Odawa Chief Pontiac, joined by Anishinaabe warriors, led an uprising against the British. In response, the imperial government issued the *Royal Proclamation of 1763* (the "Royal Proclamation") to encourage peace, stability, and further settlement and development in the region.

[20] The trial judge found that the Covenant Chain Alliance was a notable example of the cross-cultural merging of diplomatic protocols and legal orders. These shared protocols continued in the decades leading up to the Robinson Treaties.[2]

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[2] Stage One Reasons, at para. 89.

(ii) The Royal Proclamation and the Council at Niagara

[21] The Royal Proclamation represented a unilateral declaration of Crown sovereignty over what is now Canada, while also affirming Aboriginal title and ownership of unpurchased lands. It represented, as the trial judge described it, a "foundational moment" in the history of Canada's relationship with Indigenous peoples.[3]

[22] The Royal Proclamation created rules for the purchase and sale of "Indian lands" to prevent fraud and abuse. It prohibited private individuals from purchasing Indian lands and stipulated that Indian lands could only be surrendered to the Crown at a public meeting, in exchange for compensation. Ultimately, the trial judge found that the "motivation for and the fundamental concepts in the Robinson Treaties flow from the Royal Proclamation."[4]

[23] After the Royal Proclamation was made, a Council was held at Niagara in 1764 between Crown representatives and over 1700 Indigenous people, including representatives of the Anishinaabe. At the Council, gifts and wampum belts, including the Great sCovenant Chain Wampum, were exchanged.

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[3] Stage One Reasons, at para. 73. The term "Aboriginal" or "aboriginal" is found in s. 35 of the *Constitution Act, 1982* and much of the jurisprudence. In these reasons, we use the term "Aboriginal" or "aboriginal" when referring to this jurisprudence. In addition, we also use the term "Indigenous".
[4] Stage One Reasons, at para. 79.

[24] The Royal Proclamation and the Council at Niagara communicated to the Anishinaabe of the upper Great Lakes and other First Nations that their autonomy and the title to their lands would be maintained and protected. The Royal Proclamation became a crucial part of the Covenant Chain relationship between the Anishinaabe and the British.

(iii) The War of 1812 (1812-1815)

[25] As members of the Covenant Chain relationship, Anishinaabe warriors fought alongside the British in the War of 1812. Some of those warriors played prominent roles in the negotiation of the Robinson Treaties. One such warrior was Chief Shingwaukonse, a key player in the events leading up to the Robinson Treaties and a participant in the Robinson Treaty Council.

[26] The Anishinaabe saw their military alliance with the Crown as an important part of the ongoing relationship.

(c) Civilization Policy and Annuities

(i) The Annuity Model

[27] Beginning in 1818, driven by increased immigration, the Crown changed the compensation model for land cession treaties. It moved from a one-time lump-sum payment or distribution to an annuity. The assumption was that land sales to settlers would generate sufficient funds to finance the annual payments in perpetuity and allow the Crown to control its cash flow.

[28] Annuity payments were structured on a population model. In 1818, the Crown set the annuity amount at two and a half pounds (the equivalent of $10) per person. This amount was used until 1850 in treaties negotiated in the southern portions of Upper Canada and, after 1841, in Canada West, irrespective of the size or value of the land ceded.

(ii) Civilization Policy

[29] As settlement and agricultural development in Upper Canada increased, and the need for military alliances with Indigenous communities decreased, the colonial government changed its Indigenous relations policy.

[30] Until 1820, the Indian Department was a military department, tasked with maintaining the Crown's military alliance with Indigenous nations. When the Crown's need for that alliance diminished, the department's objectives changed from military to civil control. A "civilization" policy was implemented, seeking to "reclaim" Indigenous peoples from "barbarism" and assimilate them into a Christian, agrarian life.

[31] The civilization policy influenced the Crown's approach to treaty-making, and, more specifically, annuity payments. One result of this policy was stronger controls and guidelines for annuity payments, intended to prevent the "misuse" of the funds. In 1830, the Colborne Policy mandated that annuities be paid through a requisition system, whereby Chiefs could request items that promoted a sedentary,

agricultural, European way of life. The Colborne Policy was in place during the negotiation of the Robinson Treaties in 1850.

(2) Pre-Treaty Events

(a) Mining in the Upper Great Lakes Region

[32] During the 1840s, prospectors began exploring for valuable minerals on the south side of Lake Superior. “Copper fever” soon moved north. Despite the absence of a treaty with the Anishinaabe of the upper Great Lakes, in 1845 the Crown began to issue mining licences for the region.

[33] The issuance of mining licences and the encroachment of prospecting miners onto their lands prompted vigorous complaints from the Anishinaabe. Between 1846 and 1849, Anishinaabe Chiefs, including Chief Shingwaukonse, wrote petitions and memorials and met with government leaders to assert claims over their territory and to request compensation. The Anishinaabe Chiefs reminded the Crown of their long history of treaty-making, past promises made by the Crown to respect and protect their lands, and their military support of the Crown through alliances. The Chiefs requested compensation in various forms, including payment for resources already taken and those still to be taken, and a share of the benefits from mining.

[34] As the trial judge noted, the tension generated by Crown-sanctioned mining exploration was one of the triggers for the negotiation of the Robinson Treaties.[5]

(b) Vidal-Anderson Commission (1849)

[35] In 1849, the government appointed a commission to investigate the Anishinaabe grievances. Provincial land surveyor Alexander Vidal and Indian Superintendent Thomas G. Anderson were instructed to travel to the northern shores of Lake Huron and Lake Superior to investigate the Anishinaabe's claims to the land, the size and dispersion of the Anishinaabe population, and their use of their territory. Vidal and Anderson were also asked to assess the Anishinaabe's expectations for a potential treaty. During their travels, Vidal and Anderson met with 16 of the 22 Anishinaabe Chiefs.

[36] The Vidal-Anderson Commission reported on December 5, 1849. The report made several observations, conclusions, and recommendations, including:

- the Anishinaabe's land claim was legitimate;
- the land was unlikely to be useful for agriculture;
- although neither the Anishinaabe, nor the commissioners, knew the monetary value of the territory, its value was understood to stem from revenue from mining locations and surveyed lots at Sault Ste. Marie;

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[5] Stage One Reasons, at para. 118.

- despite encountering treaty demands from the Chiefs that they considered unreasonable, Vidal and Anderson concluded that the Anishinaabe were willing to treat, provided that they could remain in their communities, that they could continue to hunt and fish, and that a perpetual annuity be provided as compensation;
- Vidal and Anderson recommended that the Crown seek a surrender of the whole territory, rather than compensating the Anishinaabe only for the mining locations granted because:
    - the land was comparatively valueless;
    - some land had already been taken;
    - going forward, this would allow the government to dispose of the land “without embarrassment” (meaning without encumbrance in modern terminology); and
    - this would assist the Anishinaabe who were experiencing increasing scarcity of food and clothing;
- Vidal and Anderson recommended that a lower than usual annuity should be offered, given that:
    - the land’s only value derived from the copper deposits along the lake shores;
    - the Anishinaabe would retain their hunting and fishing rights, relinquishing nothing but land title; and

    - the Anishinaabe would be no poorer once they ceded the land to settlers, because trade with the settlers would enable them to draw wealth from their territory;
- Vidal and Anderson strongly recommended that, after the first payment, subsequent payments be made in clothing, provisions, goods, and implements, and should include an annual appropriation for establishing and maintaining schools; and
- because little was known about the value of the territory, Vidal and Anderson recommended including a treaty provision that would, if necessary, promise an increase of payment upon further discovery or development of new sources of wealth.

[37] Vidal and Anderson proposed a compensation model that would take into account the discovery of new wealth in the territory. This was a new approach to treaty-making in Canada. While this idea had been suggested previously by Anishinaabe leaders, including Chief Shingwaukonse, the Vidal-Anderson Report is the first record of government officials engaging with it. The trial judge found that the Commissioners' report prepared the Crown for treaty discussions "that would require an innovative solution to bridging the gap between the parties' expectations".[6]

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[6] Stage One Reasons, at para. 181.

(c) The Mica Bay Incident (1849)

[38] The Anishinaabe's concerns about encroachments on their traditional lands were not assuaged by Vidal and Anderson's visit. They were frustrated by government inaction after three years of discussions about a diplomatic settlement to their claims.

[39] While Vidal and Anderson travelled back to Toronto from the upper Great Lakes region, Chief Shingwaukonse and Chief Nebenaigoching led a party of 100 Anishinaabe to occupy a mining site at Mica Bay. Upon learning of the Anishinaabe's march towards Mica Bay on November 19, 1849, Governor General Lord Elgin issued an Order in Council ("OIC") authorizing the arrest of the participants. The Governor General also directed the provincial government to make a treaty with the Anishinaabe of the upper Great Lakes to finally resolve their outstanding claims.

[40] Chief Shingwaukonse and Chief Nebenaigoching, along with their lawyer, Allan Macdonell, were arrested and brought to a Toronto jail. While in Toronto, the Chiefs met with William B. Robinson.

[41] Robinson was a politician and a member of the Executive Council of government, and he had experience in the fur trade, the mining sector, and the

treaty-making process. The trial judge noted that Robinson had "excellent relations" with the Anishinaabe and spoke some Anishinaabemowin.[7]

[42] Shortly after he met with Chief Shingwaukonse and Chief Nebenaigoching, Robinson offered his assistance to resolve the claims of the Anishinaabe of the upper Great Lakes. On January 11, 1850, the provincial government issued an OIC appointing Robinson as Treaty Commissioner for the negotiations.

(3) The Robinson Treaty Negotiations

(a) Instructions to Robinson

[43] Robinson's mandate was set out in two OICs. The second, dated April 16, 1850, provided detailed instructions in response to Robinson's request for guidance. Robinson was to endeavor to secure a treaty that covered all of the territory on the northern shores of Lake Huron and Lake Superior on the following terms:

- the smallest possible initial payment (less than £5000);
- a perpetual annuity no higher than what could be generated through interest on the notional capital sum of £25,000 less the initial payment; and

[7] Stage One Reasons, at para. 190.

- a provision for a deduction in the annuity if the population fell below 600.

[44] As a “bottom line” alternative, Robinson was to negotiate the surrender of the north eastern coast of Lake Huron and the Lake Superior Coast that included the mining operations at Mica Bay and Michipicoten.

[45] The trial judge identified two concerns likely to have influenced the limited financial authority given to Robinson.[8] First, the Government was of the view that the Anishinaabe were not giving up much, given that the land was not suitable for agriculture and that they would continue to live, hunt, and fish on the territories after a treaty was signed. Second, the Province of Canada was in financial crisis. Robinson was aware, prior to the treaty negotiations, that the amounts available to him could not support the standard $10 per person annuity that had been provided in other treaties negotiated since 1818.

(b) The Treaty Council

[46] The treaty negotiations took place over three weeks in the late summer of 1850. As the trial judge noted, Robinson’s diary and his Official Report were the only documents identified at trial that provided details of the Treaty Council.[9]

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[8] Stage One Reasons, at paras. 201-3.
[9] Stage One Reasons, at para. 209.

[47] Robinson first met with the Superior and Huron delegations, separately, in Sault Ste. Marie (known to the Anishinaabe as Bawaating) and Garden River, respectively. Robinson met with the Superior delegation, led by Chief Peau de Chat, for significantly longer than he did with the Huron delegation, led by Chief Shingwaukonse. The two delegations then came together in Bawaating on September 5, 1850 for the substantive treaty discussions.

[48] The Treaty Council at Bawaating was conducted in Anishinaabemowin and English, and incorporated ceremonies and protocols characteristic of Great Lakes diplomacy. The trial judge noted that these ceremonies indicated that the Crown actors had developed a functional understanding of Anishinaabe law, diplomacy, and language.[10]

[49] Robinson's initial proposal regarding reasonable reservations for the Anishinaabe and continued hunting rights throughout the ceded territory was accepted without further discussion. The provisions for reserves and the protection of harvesting rights were, according to the trial judge, more expansive than the Crown's standard practice.[11]

[50] Robinson then discussed compensation. The Anishinaabe delegations preferred a perpetual annuity in exchange for the entire territory, rather than a

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[10] Stage One Reasons, at para. 214.
[11] Stage One Reasons, at para. 223.

lump-sum payment for only the existing mining locations. Given this preference, Robinson outlined the Crown's proposal, offering the entirety of the cash he had in hand: £4,000 ($16,000) in cash, and a perpetual annuity of £1,000, both amounts to be divided between the Superior and Huron First Nations.

[51] Knowing that this proposal was lower than prior treaties, Robinson sought to justify it based on the unique nature of the land and other promises included in the Treaty. As the trial judge summarized, Robinson explained that:

- the land was vast and "notoriously barren and sterile" when compared to the good quality lands in Upper Canada that were sold readily at prices which enabled the Government to be more liberal with compensation;
- the settlers occupied the land covered by prior treaties in a way that precluded the possibility of Indian hunting or access to them, whereas the Anishinaabe would retain such rights over the lands ceded;
- in all probability the lands in question would never be settled except in a few localities by mining companies; and
- the occupation by settlers would be of great benefit to the Anishinaabe, who would gain a market for selling items and access to provisions at reasonable prices.[12]

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[12] Stage One Reasons, at para. 218.

[52] Chief Peau de Chat of the Superior delegation expressed his satisfaction with Robinson's initial proposal and requested a day to reply to Robinson's offer. Chief Shingwaukonse, from the Huron delegation, also asked for time to respond. The Chiefs both had to speak to their own Councils and determine their responses to Robinson's offer, based on consensus.

[53] The next day, Chief Peau de Chat told Robinson that the Superior delegation was prepared to sign a treaty. Chief Shingwaukonse of the Huron delegation, on the other hand, was not. Chief Shingwaukonse made a counterproposal for an annuity of $10 per head. Robinson rejected this proposal, telling Chief Shingwaukonse that a majority of the Chiefs were in favour of the terms and that he was going to write up the Treaties on the basis approved by the Superior delegation.

[54] After scrutinizing the timing of Robinson's initial offer and the Superior delegation's response, the trial judge found that Robinson's initial offer included the notion of an augmentation clause.[13] She found that there was "no other reasonable conclusion".[14] The proposed augmentation clause stipulated that the annuity would increase if revenues received from the territory permitted the government to do so without incurring loss.

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[13] Stage One Reasons, at para. 220.
[14] Stage One Reasons, at para. 226.

[55] On September 7, 1850, Robinson read the Robinson-Superior Treaty aloud to the Superior delegation. Translation services were provided. Chief Peau de Chat told Robinson he understood the Treaty and was ready to sign it.

[56] Robinson met with the Huron delegation later that day. Chief Shingwaukonse repeated his counterproposal. Robinson responded with an ultimatum: those who signed the Treaty would receive compensation for their people, and those who did not would receive no such compensation and would have no treaty.

[57] On September 9, 1850, Chief Shingwaukonse and Chief Nebenaigoching once again asked Robinson for a $10 per person annuity and raised the subject of land grants for the Métis. Robinson rejected their requests and had the Robinson-Huron Treaty read aloud to the delegation. When Chiefs Shingwaukonse and Nebenaigoching saw that other Chiefs in the Huron delegation were prepared to accept the proposed terms, they signed the Treaty.

[58] Ultimately, the Robinson-Huron Treaty was substantially the same as the Robinson-Superior Treaty, but because the Huron population was greater the initial annuity amount was set at £600, whereas the Robinson-Superior Treaty stipulated £500.

[59] Once the Treaties were signed, Robinson paid the Chiefs the initial sum. The Treaties were presented to Prime Minister Louis-Hippolyte LaFontaine on

September 19, 1850. Robinson's final report, dated September 24, 1850, was delivered to Indian Superintendent Colonel Robert Bruce. An OIC, dated November 29, 1850, declared that the Treaties were to be ratified and confirmed.

(4) The Terms of the Robinson Treaties

[60] The Robinson Treaties each have a surrender clause, a consideration clause, and an augmentation clause, among other terms. The trial judge set out transcriptions of both Treaties from an 1891 text.[15]

(a) The Robinson-Superior Treaty

[61] The trial judge reproduced the following excerpts of the Robinson-Superior Treaty:

> **The Surrender Clause**
>
> [The Anishinaabe of the Lake Superior territory] from Batchewanaung Bay to Pigeon River, at the western extremity of said lake, and inland throughout that extent to the height of the land which separates the territory covered by the charter of the Honorable the Hudson's Bay Company from the said tract [and] also the islands in the said lake … freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described [except for certain reservations (three in all) set out in the annexed schedule]….[16]

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[15] See Stage One Reasons, at Appendices A and B; Canada, *Indian Treaties and Surrenders: From 1680 to 1890*, vol. 1 (Ottawa: Brown Chamberlin, 1891).
[16] See Stage One Reasons, at para. 238. See also Canada, at p. 147.

The Consideration Clause

> [F]or and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer, not later than the first day of August at the Honorable the Hudson's Bay Company's Posts of Michipicoton and Fort William....[17]

The Augmentation Clause

> 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, 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; and provided, further, that the number of Indians entitled to the benefit of this Treaty shall amount to two-thirds of their present number (which is twelve hundred and forty), to entitle them to claim the full benefit thereof, and should their numbers at any future period amount to two-thirds of twelve hundred and forty, the annuity shall be diminished in proportion to their actual numbers.[18]

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[17] See Stage One Reasons, at para. 239. See also Canada, at p. 147.
[18] See Stage One Reasons, at para. 243. See also Canada, at p. 148.

(b) The Robinson-Huron Treaty

[62] The trial judge reproduced the following excerpts of the Robinson-Huron Treaty:

> **The Surrender Clause**
>
> [The Anishinaabe i]nhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shore thereof, and inland to the height of land which separate the territory covered by the charter of the Honorable Hudson's Bay Company from Canada, as well as all unconceded lands within the limits of Canada West to which they have any just claim … on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant, and convey unto Her Majesty, Her heirs and successors for ever, all their right, title and interest to and in the whole of the territory above described [except for certain reservations (15 in all) set forth in the annexed schedule]….[19]
>
> **The Consideration Clause**
>
> [F]or and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose….[20]

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[19] See Stage One Reasons, at para. 240. See also Canada, at p. 149.
[20] See Stage One Reasons, at para. 241. See also Canada, at p. 149.

[63] The augmentation clause in the Robinson-Huron Treaty is not materially different from the augmentation clause in the Robinson-Superior Treaty. It states:

> **The Augmentation Clause**
>
> 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 should the territory hereby ceded by the parties of the second part at any future period produce such an amount which will enable the Government of this Province, without incurring loss, 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; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof; and should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.[21]

(5) The Post-Treaty Payment of the Annuities

[64] Based on the population of the Anishinaabe in 1850, the annuity (£600 for the Robinson-Huron Treaty and £500 for the Robinson-Superior Treaty) was approximately $1.70 and $1.60 per person, respectively. The method of

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[21] See Stage One Reasons, at para. 243. See also Canada, at p. 150.

distribution of the annuities was slightly different as between the Superior and Huron beneficiaries.

[65] Throughout the 1850s the Hudson's Bay Company distributed the Robinson-Superior Treaty annuity payments in cash to the head of each family for nearly 25 years.

[66] Between 1851 and 1854, the Robinson-Huron Treaty annuities were paid in goods to each Band. No individual cash payments were made. Beginning in 1855, the Crown paid the annuity, in cash, to the Robinson-Huron Treaty beneficiaries.

[67] In 1875, the annuity was increased to $4 (£1) per person. This was the first and only time the annuity has been augmented; it has not changed since. In 1877, the Chiefs petitioned for arrears for the period of 1850-1874, arguing that the economic circumstances for an increase to $4 existed long before 1875. Payment of arrears eventually began in 1903.

[68] Part of the reason for the delay in the payment of arrears was a dispute about who was constitutionally required to pay them. In 1895, an arbitration panel determined that Ontario became responsible for paying augmented annuities after Confederation. Ontario appealed that decision to the Supreme Court, which

granted the appeal.[22] Canada's further appeal to the Judicial Committee of the Privy Council was dismissed.[23]

C. THE TRIAL JUDGE'S REASONS

(1) Trifurcation of the Case

[69] As noted above, the litigation surrounding the Robinson Treaties has been divided into three stages. Stage One proceeded by way of summary judgment motions and considered the interpretation of the Treaties. Stage Two, which also proceeded as summary judgment motions, considered Ontario's defences of Crown immunity and limitations. Stage Three, which has yet to take place, will determine the remaining issues, including damages and the allocation of liability between Canada and Ontario.

(2) The Stage One Decision

(a) Overview of the Trial Judge's Decision

[70] In her decision on Stage One, the trial judge held that the Crown has a mandatory and reviewable obligation to increase the Robinson Treaties' annuities.[24] She found that the Crown must engage in a consultative process with the Treaty beneficiaries and pay an increased annuity amount, reflecting a "fair

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[22] *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434.
[23] *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario*, [1897] A.C. 199 (J.C.P.C.).
[24] Stage One Reasons, at para. 3.

share", if there are sufficient Crown resource-based revenues to allow payment without incurring loss.[25] The trial judge interpreted the £1 (or $4) limit in the Treaties' augmentation clause to apply only to "distributive" payments to individuals, not as a limit or cap on the total collective annuity.[26]

[71] The trial judge also found that both the principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown the obligation to diligently implement the purpose of the Treaties' promise.[27] Further, the trial judge provided guiding principles for what constitutes relevant Crown revenues and expenses.[28] Finally, the trial judge rejected Ontario's submission that an indexation term could be implied in the Treaties.[29]

(b) Treaty Interpretation

[72] The trial judge sought to engage in a purposive interpretation of the Treaties, to find the common intention of the parties, pursuant to the three steps set out in *Marshall*.[30]

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[25] Stage One Reasons, at paras. 3, 568-70.
[26] Stage One Reasons, at para. 397.
[27] Stage One Reasons, at paras, 3, 533 and 568.
[28] Stage One Reasons, at paras. 551-54.
[29] Stage One Reasons, at para. 598.
[30] *R. v. Marshall*, [1993] S.C.R. 456, at paras. 82-83.

[73] At step one, the trial judge found that the Treaties were ambiguous with respect to whether the annuity was a “collective” or an “individual” entitlement, and whether the parties intended to limit the collective annuity to £1 ($4) per person.[31]

[74] At step two, the trial judge considered the historical and cultural context leading up to the Treaties. She analyzed the perspective of the Anishinaabe and the Crown, as well as the post-Treaty evidence.[32] She concluded that the Anishinaabe understood the Treaties as an agreement to live in harmony with settlers and to maintain a relationship in evolving circumstances.[33] At the same time, the trial judge acknowledged that the Crown was in a dire financial situation but knew that it needed the consent of the Anishinaabe to fully access the wealth and benefits of the territory.[34] The trial judge also concluded that the post-Treaty record was vague and inconsistent and was therefore of limited assistance to understanding the parties’ common intention.[35]

[75] At step three, the trial judge laid out three possible interpretations of the augmentation clause, based on her understanding of the positions of the parties in 1850:

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[31] Stage One Reasons, at paras. 398-410.
[32] Stage One Reasons, at paras. 410-58
[33] Stage One Reasons, at para. 423.
[34] Stage One Reasons, at paras. 430-32.
[35] Stage One Reasons, at para. 318.

1. the Crown's promise was capped at $4 per person; once the annuity was increased to an amount equivalent to $4 per person, the Crown had no further liability; or
2. the Crown was obliged to make orders "as Her Majesty may be graciously pleased to order" for further payments above $4 per person when the economic circumstances permitted the Crown to do so without incurring loss; or
3. the Treaties were a collective promise to share the revenues from the territory with the collective; the Crown was obliged to increase the lump sum annuity so long as the economic condition was met; the reference to $4 in the augmentation clause was a limit only on the amount that may be distributed to individuals.[36]

[76] The trial judge concluded that the third interpretation best reflected the common intention of the parties in 1850.[37] She noted that an augmentation clause linked to revenues was an innovative solution that reconciled the diverging expectations of the Anishinaabe and the Crown.[38] Ultimately, the Treaties were intended to renew and reinforce an ongoing relationship.

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[36] Stage One Reasons, at paras. 459-61.
[37] Stage One Reasons, at para. 462.
[38] Stage One Reasons, at paras. 468-70.

(c) Crown Obligations and Discretion

[77] The trial judge concluded that the principle of the honour of the Crown and the doctrine of fiduciary duty impose an obligation to diligently implement the Treaties' promise to achieve their purpose.[39] Specifically, the trial judge held that the Crown has a duty to engage in a process to determine whether the annuities can be increased without incurring loss.[40] Further, the Crown does not have unfettered discretion on whether or how to make increases to the annuities but does maintain significant discretion in implementing the Treaties.[41]

[78] The trial judge found that a *sui generis* fiduciary duty did not arise from the Treaties' promise.[42] However, she held that the Crown has an *ad hoc* fiduciary duty because: (i) the Crown undertook to act in the best interests of the Anishinaabe and had no other conflicting demands when engaging in a process to implement the augmentation clause; (ii) the beneficiaries constitute a defined class of persons vulnerable to the Crown's control; and (iii) the beneficiaries stood to be adversely affected because of the discretionary control of the Crown over the annuity increase.[43] The purpose of this duty is to "facilitate supervision of the high

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[39] Stage One Reasons, at paras. 3, 538.
[40] Stage One Reasons, at para. 533.
[41] Stage One Reasons, at paras. 568-69.
[42] Stage One Reasons, at para. 512.
[43] Stage One Reasons, at paras. 522-26.

degree of discretionary control assumed by the Crown over the lives of Indigenous peoples".[44]

(d) Implementation of the Treaty Promise

[79] The trial judge largely left the practical aspects of implementation to Stage Three of the litigation. However, she provided some general principles as a "starting point", subject to further clarification and direction from the court.[45] She outlined the following guiding principles to aid the parties in determining what constitutes relevant Crown revenues and expenses, what constitutes a fair share of net Crown revenues, and the Crown's duties of disclosure and consultation:

- Crown resource-based revenues are those that arise directly or in a closely related way to the use, sale or licensing of land (including water) in the Treaty territory, including mineral and lumber revenues and other analogous revenues. Personal, corporate, and property tax revenues are not included;
- Crown expenses are expenses related to collecting, regulating and supporting relevant revenues, but do not include the costs of infrastructure and institutions built with tax revenues;

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[44] Stage One Reasons, at para. 527.
[45] Stage One Reasons, at para. 553.

- it is impossible to gauge what a “fair share” of new Crown revenues is, but a fair share does not include the Treaty beneficiaries taking 100 percent of the net benefits from the Crown;
- the Crown has a duty to disclose sufficient information for the purpose of determining net Crown resource-based revenues; and
- the Crown may have a duty to consult when implementing the Treaty promise, given that its conduct may have an adverse impact on a Treaty right.[46]

(e) Implied Indexation Term

[80] The trial judge rejected Ontario’s claim (and the Huron and Superior Plaintiffs’ alternative claim) that a term should be implied that the Treaty annuities would be indexed for inflation. The Huron and Superior Plaintiffs and Ontario accepted that the phenomenon of persistent inflation was not within the contemplation of the parties at the time the Treaties were signed, but argued that the parties would have included such a term had they known that the purchasing power of the annuities would be eroded over time. The trial judge found that this would effectively be “imputing knowledge of one historical fact in the absence of the constellation of other historical facts”.[47] Moreover, the effects of inflation could

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[46] Stage One Reasons, at paras. 544-72.
[47] Stage One Reasons, at para. 588.

be addressed adequately through the augmentation of the annuity.[48] The trial judge acknowledged, however, that if an appellate court were to find that the augmentation clause does not operate as she found, a second look at the indexing claim would be necessary.[49]

(f) Costs

[81] The trial judge awarded costs to the Huron Plaintiffs and the Superior Plaintiffs on a partial indemnity basis, fixed at 85 percent of their fees and 100 percent of disbursements.[50] The Huron Plaintiffs were ultimately awarded a total of $9,412,447.50 and the Superior Plaintiffs were awarded $5,148,894.45.

(3) The Stage Two Decision

[82] In her decision on Stage Two, the trial judge held that Crown immunity and provincial limitations legislation did not operate to bar the Huron Plaintiffs' and Superior Plaintiffs' claims. First, she rejected Ontario's argument that Crown immunity shielded the Crown from claims for breach of fiduciary duty arising prior to September 1, 1963, being the date of the coming into force of the *Proceedings Against the Crown Act* ("*PACA*").[51] Second, she dismissed Ontario's argument that claims for treaty breaches are properly characterized as claims on a "simple

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[48] Stage One Reasons, at para. 593.
[49] Stage One Reasons, at para. 595.
[50] Stage One Costs Reasons, at para. 43.
[51] *Proceedings Against the Crown Act, 1962-63*, S.O. 1962-63, c. 109 ("*PACA*"); Stage Two Reasons, at paras. 13-87.

contract" or a "speciality", or as an "action of account", and therefore statute barred by the former *Limitations Act* (the "1990 *Limitations Act*").[52] Third, the trial judge discussed in *obiter* that, had it been necessary to do so, she would have held that the *Nowegijick* principles and the principle of the honour of the Crown applied when interpreting the Crown's statutory defences.[53]

[83] The trial judge accordingly granted partial summary judgment for the Huron and Superior Plaintiffs on the questions of limitations and Crown immunity. She deferred until Stage Three the issue of whether Ontario and Canada are jointly and severally liable or in the alternative whether Canada is the paymaster.

D. DISPOSITION OF THE APPEALS

[84] As noted at the outset, we have written these joint reasons to summarize the background to this case and our disposition of the appeals. Our individual reasons further explain the basis of our disposition of the various issues raised. These issues are the following:

1. What is the standard of review for treaty interpretation?
2. Did the trial judge err in her interpretation of the augmentation clause in the Treaties?

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[52] *Limitations Act*, R.S.O. 1990, c. L.15 (the "1990 *Limitations Act*"); Stage Two Reasons, at paras. 109-201.
[53] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; Stage Two Reasons, at paras. 202-38.

3. Did the trial judge err in finding that the honour of the Crown requires the Crown to act honourably in fulfilling the Treaties' promise?
4. Did the trial judge err in finding that the Crown's discretion to augment the annuities is justiciable and not unfettered?
5. Did the trial judge err in finding that the Crown is under a fiduciary duty regarding the augmentation clause in the Treaties?
6. Did the trial judge err in finding that the Crown is not immune from breaches of fiduciary duty prior to 1963?
7. Did the trial judge err in finding that provincial limitations legislation does not bar the claims for breach of the Treaties?
8. Did the trial judge err in finding that there was no implied term for the indexation of the annuities?
9. Did the trial judge err in her costs award for the Stage One proceedings?
10. Did the trial judge err in her approach to remedies in the Stage One proceedings?

[85] First, on the issue of the standard of review for treaty interpretation, Strathy C.J.O. and Brown J.A. conclude that the trial judge's interpretation of the Treaties is reviewable on a correctness standard. Lauwers J.A. concurs. Hourigan J.A., in contrast, concludes that treaty interpretation is reviewable on a standard of palpable and overriding error, absent extricable errors of law, which are reviewed on a correctness standard. Pardu J.A. concurs with Hourigan J.A.

[86] Second, on the issue of the trial judge's interpretation of the Treaties, Lauwers and Pardu JJ.A. hold that the trial judge did not err in her interpretation of the Treaties' augmentation clause. Hourigan J.A. concurs. Conversely, Strathy C.J.O. and Brown J.A. hold that the trial judge committed errors of law in her interpretation of the Treaties, leading to an unreasonable interpretation.

[87] Third, on the issue of the honour of the Crown, we unanimously agree that the doctrine is engaged in this case. Lauwers and Pardu JJ.A., with whom Hourigan J.A. concurs, conclude that the honour of the Crown obliges the Crown to increase the annuities as part of its duty to diligently implement the Treaties. Strathy C.J.O. and Brown J.A. conclude that the honour of the Crown requires, at a minimum, that the Crown turn its mind from time to time to consider increasing the amount of the annuities.

[88] Fourth, on the issue of the Crown's discretion to augment the annuities, Lauwers and Pardu JJ.A., with whom Hourigan J.A. concurs, conclude that the Crown's discretion to augment the annuities is justiciable and not unfettered. Strathy C.J.O. and Brown J.A. agree that the Crown's discretion is justiciable and not unfettered.

[89] Fifth, on the issue of fiduciary duties, Hourigan J.A., writing for a unanimous court, holds that the trial judge erred in finding that the Crown is under a fiduciary

duty regarding the implementation of the augmentation clause in the Robinson Treaties. We therefore agree that this finding should be set aside.

[90] Sixth, on the issue of Crown immunity, Hourigan J.A., writing for a unanimous court, concludes that it is not necessary to consider whether the Crown is immune from breaches of fiduciary duty prior to 1963 given the court's conclusion that the Crown does not owe a fiduciary duty regarding the implementation of the augmentation clause.

[91] Seventh, on the issue of limitations, Hourigan J.A., writing for a unanimous court, holds that provincial limitations legislation does not preclude the breach of Treaty claims.

[92] Eighth, on the issue of indexation, Lauwers and Pardu JJ.A., writing for a unanimous court, conclude that the trial judge did not err in rejecting the argument that the annuities paid pursuant to the Robinson Treaties should be indexed to mitigate the impact of inflation.

[93] Ninth, on the issue of costs, Lauwers and Pardu JJ.A., writing for a unanimous court, conclude that Ontario's costs appeal from the Stage One proceedings should be allowed in part. We grant leave to appeal from the award of $9,412,447.50 in favour of the Huron Plaintiffs; we uphold the disbursements allowed by the trial judge, but set aside the fees allowed and remit the matter of the Huron Plaintiffs' costs to the trial judge for reconsideration in accordance with

the reasons of Lauwers and Pardu JJ.A. We deny leave to appeal from the costs award in favour of the Superior Plaintiffs in the sum of $5,148,894.45.

[94] Finally, on the issue of remedies in the Stage One proceedings, Lauwers and Pardu JJ.A., with whom Hourigan J.A. concurs, conclude that the trial judge erred in directing, as part of the judgments for the Stage One proceedings, the payment of annuities corresponding to a “fair share” of the value of the resources in the territory. Further, the trial judge also erred in directing in the judgments that tax revenues and the costs of infrastructure and institutions should be excluded from the calculation of net Crown resource-based revenue. Lauwers, Hourigan and Pardu JJ.A. therefore direct that the Stage One judgments should be amended as set out in Appendix “A” to these reasons by:

- deleting “with the amount of annuity payable in any period to correspond to a fair share of such net revenues for that period” in para. 1(a);
- deleting “and the fiduciary duty which the Crown owes to the First Nation Treaty parties” in para. 1(c);
- deleting “so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the value of the resources, including the land and water in the territory” in para. 1(d);
- deleting “but not including personal, corporate or property tax revenues” in para. 3(b)(i);

- deleting “but do not include the costs of infrastructure and institutions that are built with Crown tax revenues” in para. 3(b)(ii);
- substituting “that are fairly and reasonably equal to a fair share of” with “to be disbursed pursuant to the augmentation promise from” in para. 3(c); and
- with respect to the Huron Plaintiffs only, setting aside para. 5 of the partial judgment in the Huron action and remitting the matter of costs to the trial judge for determination in accordance with these reasons.

[95] Strathy C.J.O. and Brown J.A. would vary the judgments on different terms, as set out in their reasons.

[96] The Stage One appeal is therefore granted in part. The Stage One judgments are amended as set out in Appendix A; leave to appeal the costs award in favour of the Superior Plaintiffs is denied; and leave to appeal the costs award in favour of the Huron Plaintiffs is granted, the disbursements allowed by the trial judge are upheld, and the fees allowed are set aside and remitted to the trial judge for reconsideration. The Stage Two appeal is dismissed in its entirety.

[97] If the parties cannot agree on costs for the appeals, they may provide the court with written submissions no more than 10 pages in length, along with their bills of costs. The Huron Plaintiffs, the Superior Plaintiffs and Canada are to

provide their submissions within 15 days of the release of these reasons. Ontario is to provide its submissions within 30 days of the release of the reasons.

Lauwers and Pardu JJ.A.:

A. INTRODUCTION

[98] The primary issue raised in Ontario's appeal from the Stage One judgments turns on the interpretation of a provision in the Robinson Treaties known as the augmentation clause. Briefly stated, the trial judge found that the augmentation clause obliges "the Government of this Province" to "increase the annuity" to the First Nations "from time to time" when it can do so "without incurring loss".

[99] Ontario asserts that the trial judge made errors in the interpretation of the Treaties that we would group into four issues:

1. the interpretation of the augmentation clause;
2. the finding that the doctrine of the honour of the Crown obliges the Crown to increase the annuities as part of its duty to diligently implement the Treaties;
3. the finding that the Treaties do not contain an implied term to index the annuities; and
4. the approach to remedies.

[100] We would largely reject Ontario's submissions for reasons that can be summarized in seven statements:

1. the trial judge correctly instructed herself on the governing principles of treaty interpretation set out in *Marshall* and other cases;[54]

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[54] *R. v. Marshall*, [1999] 3 S.C.R. 456.

2. the trial judge's interpretation of the augmentation clause is grammatically and contextually correct;

3. the trial judge did not make any palpable and overriding errors of fact, errors in principle, or extricable errors of law in her consideration of the evidence, contrary to Ontario's argument;

4. the trial judge did not err in her analysis of the form and content of the Crown's discretion, or the First Nations' understanding of the scope of that discretion, contrary to Ontario's argument;

5. the trial judge correctly found that the honour of the Crown obliged the Crown to increase the annuities as part of its duty to diligently implement the Treaties;

6. the trial judge correctly rejected Ontario's proposal to supplant the augmentation clause by implying a judicially created indexing term into the Treaties; and

7. despite our agreement with the trial judge thus far, her interpretation of the Treaties fell short on the "fair share" issue.

[101] Before turning to our analysis, we note that these appeals raise a number of other issues that are addressed in the reasons of our colleagues. We concur with the reasons of Hourigan J.A. on the issues of fiduciary duty, Crown immunity and limitation defences. On the issue of the standard of review for treaty interpretation, Lauwers J.A. concurs with Strathy C.J.O. and Brown J.A., and Pardu J.A. concurs with Hourigan J.A.

[102] We now turn to the four interpretation issues and also address the issue of costs, then conclude with our disposition.

B. ISSUE ONE: DID THE TRIAL JUDGE ERR IN HER INTERPRETATION OF THE AUGMENTATION CLAUSE IN THE TREATIES?

[103] We begin by setting out the Treaty text. We next address the governing principles and the trial judge's interpretation of the text, and then apply the governing principles to Ontario's arguments.

(1) The Treaty Text to Be Interpreted

[104] For convenience, we will use the text of the Robinson-Huron Treaty, which is almost identical to the text in the Robinson-Superior Treaty. The analysis applies equally. Particularly pertinent text is underlined and we have inserted several guideposts. The other text provides context. The Robinson-Huron Treaty provides:

> [F]or, and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and ***[the collective annuity]*** <u>for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each year</u>, of which due notice will be given, at such places as may be appointed for that purpose, they the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty….
>
> …
>
> And the said William Benjamin Robinson of the first part, on behalf of <u>Her Majesty and the Government of this Province, hereby promises and agrees to make, or cause to be made, the payments as before mentioned; and further to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing</u>; saving and

> excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government.
>
> …
>
> ***[the augmentation clause]*** 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 should the territory hereby ceded by the parties of the second part at any future period produce such an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, ***[the first proviso]*** provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, ***[the graciousness clause]*** or such further sum as Her Majesty may be graciously pleased to order; and ***[the second proviso]*** provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof; ***[the diminution clause]*** and should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

Within the first proviso to the augmentation clause is the clause, "or such further sum as Her Majesty may be graciously pleased to order". The parties called this the "*ex gratia* clause" or the "graciousness clause".[55] We will use the latter term.

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[55] Stage One Reasons, at para. 244.

(2) The Governing Principles of Treaty Interpretation

[105] The trial judge correctly instructed herself on the principles governing the interpretation of historical treaties.[56] No one argues to the contrary.

[106] Principles related to common intention, text, context and purpose inform the interpretation of historical treaties. These principles are well settled, although the facts of any particular case will make some more salient than others.[57] The principles work to instantiate the constitutional principle of the honour of the Crown in the service of the reconciliation of Aboriginal and non-Aboriginal Canadians.

(a) Common Intention

[107] In interpreting a treaty, the court must "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one that best reconciles" the interests of the First Nations and the Crown.[58] The common intention is that of both treaty partners, not one alone.[59]

(b) Text, Context and Purpose

[108] A court must attend to both the written text of a treaty and the evidence about the context in which it was negotiated, consistent with the principle that extrinsic

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[56] Stage One Reasons, at paras. 321-29.
[57] *Marshall*, at paras. 9-14, *per* Binnie J., and as summarized at paras. 78-83, *per* McLachlin J. (dissenting, but not on this point).
[58] *Marshall*, at para. 14, *per* Binnie J. (emphasis in the original), citing *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1069, *per* Lamer J., and see, in *Marshall*, McLachlin J.'s restatement, at paras. 78(3)-(4), 83.
[59] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 ("*Mikisew Cree* (2005)"), at para. 28, *per* Binnie J.

evidence is always available to interpret historical treaties. Mackinnon A.C.J.O. stated in *Taylor and Williams*, "if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms."[60] He accepted the common submission of counsel before him that "recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history."[61] He added: "In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution."[62] The court need not find an ambiguity in a treaty before admitting extrinsic evidence.[63]

[109] Binnie J. explained in *Marshall*:

> The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to [in historical treaties]. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty, the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement, and the interpretation of treaty terms once found to exist.[64]

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[60] *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 236, *per* MacKinnon A.C.J.O., leave to appeal refused, [1981] 2 S.C.R. xi.
[61] *Taylor and Williams*, at p. 236.
[62] *Taylor and Williams*, at p. 236.
[63] *Marshall*, at para. 11, *per* Binnie J. The Supreme Court has approved the approach in *Taylor and Williams* on many occasions and has never doubted it: see e.g., *Marshall; Sioui*; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[64] *Marshall*, at para. 14, *per* Binnie J. (citations omitted).

McLachlin J. added cultural and linguistic differences to this non-exhaustive list of contextual considerations.[65]

[110] Unlike modern treaties, historical treaties are not a "product of lengthy negotiations between well-resourced and sophisticated parties."[66] The historical record of the negotiations shows how quickly the Treaties at issue in these appeals were negotiated and how much they left undefined. The trial judge rightly characterized the Treaties as "lean on details", particularly respecting the future operation of the augmentation clause.[67]

[111] The court must take a purposive approach to the interpretation of a treaty obligation, informed by the honour of the Crown,[68] recognizing that treaty promises are "solemn promises" and that treaties are "sacred".[69]

(c) Reconciliation and the Honour of the Crown

[112] The reconciliation of Aboriginal and non-Aboriginal Canadians is the "grand purpose" of s. 35 of the *Constitution Act, 1982*,[70] and the "first principle" of

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[65] *Marshall*, at para. 78(5), *per* McLachlin J.
[66] *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 9, *per* Binnie J. See also Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54 S.C.L.R. (2d) 475.
[67] Stage One Reasons, at para. 399, and see para. 349.
[68] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76.
[69] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 ("*Mikisew Cree* (2018)"), at para. 28, *per* Karakatsanis J.
[70] *Little Salmon*, at para. 10, *per* Binnie J.

Aboriginal law.[71] This "fundamental objective"[72] flows from "the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples"[73] and the need to reconcile "respective claims, interests and ambitions."[74]

[113] Reconciliation is also the objective of the legal approach to treaty rights and the "overarching purpose" of treaty making and, perforce, treaty promises.[75] Reconciliation underpins the doctrine of the honour of the Crown,[76] which operates as a "constitutional principle."[77] Hence: "The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."[78]

[114] We will consider the honour of the Crown more closely in addressing the second issue.

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[71] *Mikisew Cree* (2018), at para. 22, *per* Karakatsanis J.
[72] *Mikisew Cree* (2005), at para. 1, *per* Binnie J.
[73] *Mikisew Cree* (2018), at para. 21. See also *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32.
[74] *Mikisew Cree* (2005), at para. 1, *per* Binnie J. The Crown's assertion of sovereignty gives rise to the "obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation": *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9, *per* McLachlin C.J.
[75] *Manitoba Metis*, at para. 71, *per* McLachlin C.J. and Karakatsanis J.
[76] *Mikisew Cree* (2018), at para. 22, *per* Karakatsanis J.
[77] *Little Salmon*, at para. 42, *per* Binnie J., and at para. 105, *per* Deschamps J.; *Manitoba Metis*, at para. 69, *per* McLachlin C.J. and Karakatsanis J.; and *Mikisew Cree* (2018), at para. 24, *per* Karakatsanis J.
[78] *Haida Nation*, at para. 45.

(3) The Trial Judge's Interpretation of the Augmentation Clause

[115] As noted, in the task of treaty interpretation, in addition to the treaty text, the court must advert to the larger context in which the treaty was negotiated. The Indigenous perspective is to be considered and given due weight.[79] That perspective was fairly established on evidence that Ontario does not dispute. The trial judge stated:

> From the Anishinaabe perspective, the central goal of the treaty was to renew their relationship with the Crown, which was grounded in the Covenant Chain alliance and visually represented on wampum belts with images of two figures holding hands as part of two links in a chain.[80]

[116] She added:

> These principles of respect, responsibility, reciprocity, and renewal were fundamental to the Anishinaabe's understanding of relationships. For the Anishinaabe, the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances.[81]

[117] The trial judge considered whether the augmentation clause distinguishes between a collective annuity payable to each First Nation as a whole, on the one hand, and the annuity paid to individual band members, on the other hand. She found that the augmentation clause does make a distinction between "the

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[79] *Mikisew Cree* (2005), at para. 28; *Sioui*, at p. 1035.
[80] Stage One Reasons, at para. 412.
[81] Stage One Reasons, at para. 423.

collective annuity (either £500 or £600) paid to the Chiefs and their Tribes and a distributive amount that is paid to individuals from the collective amount and is limited to £1 (equivalent to $4) or such further sum as Her Majesty may be graciously pleased to order".[82]

[118] The trial judge set out her conclusion at the beginning of her reasons:

> I find that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant. The economic circumstances will trigger an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss.[83]

[119] In working her way to that conclusion, the trial judge posited three possible interpretations of the augmentation clause. The first, which Ontario still advances, is that: "the Crown's promise was capped at $4 per person; in other words, once the annuity was increased to an amount equivalent to $4 per person, the Crown had no further liability."[84] The trial judge rejected this interpretation.[85]

[120] The second interpretation was that "the Crown was obliged to make orders (*"as Her Majesty may be graciously pleased to order"*) for further payments above $4 per person when the economic circumstances permitted the Crown to do so

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[82] Stage One Reasons, at para. 347, and see para. 373.
[83] Stage One Reasons, at para. 3.
[84] Stage One Reasons, at para. 459.
[85] Stage One Reasons, at para. 397.

without incurring loss."[86] The trial judge noted that this interpretation had a "certain logic", although she rejected it.[87]

[121] Instead, the trial judge accepted the third interpretation: "that the Treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met."[88] In her view, the third interpretation "includes the second interpretation".[89] She added: "The reference to £1 (equivalent of $4) in the augmentation clause is a limit only on the amount that may be distributed to individuals."[90]

[122] The trial judge held: "Applying the approved treaty interpretation principles, including the honour of the Crown, and examining the full context in which the Treaties were made, only the third interpretation comes close to reflecting the parties' common intention."[91] She added:

> This interpretation holds the parties in a relationship, looking toward the future together. I find that the interpretation that imposes a $4 per person cap on the annuities does not reflect either the common intention nor reconcile the parties' interests; it suggests that the Treaties were a one-time transaction. As the historical and cultural context demonstrates, this was not the case;

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[86] Stage One Reasons, at para. 460 (emphasis in the original).
[87] Stage One Reasons, at para. 456.
[88] Stage One Reasons, at para. 461, and see para. 397.
[89] Stage One Reasons, at para. 461.
[90] Stage One Reasons, at para. 461.
[91] Stage One Reasons, at para. 462.

> the parties were and continue to be in an ongoing relationship.[92]

(4) The Governing Principles Applied

[123] We stated at the outset that, in our view, having properly instructed herself on the principles, the trial judge's interpretation of the augmentation clause is grammatically and contextually correct. In this section, we address and reject two of Ontario's arguments. We address Ontario's textual argument in the section of these reasons on Crown discretion.[93]

[124] Ontario takes the position that the $4 per person amount specified in the Treaties fixes the total amount of the annuity payable by the Crown, which is calculated by multiplying the number of eligible individual recipients by $4. While the Crown is obligated to pay that amount, it has "unfettered discretion" as to when and whether to increase the per person annuity beyond this hard cap and therefore to increase the total annuity paid. The Crown has not done so since 1875.

[125] Ontario makes two basic arguments. First, the trial judge erred in her findings on the common intentions of the Treaty parties because she failed to take into account certain evidence of Crown intention. Second, she erred in finding that the Crown discretion in the augmentation clause to increase the annuity was not

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[92] Stage One Reasons, at para. 465.
[93] Our reasons, at paras. 196-205.

unfettered. These arguments are linked because Ontario asserts that the Crown would never have agreed to fetter its discretion. The idea was unthinkable.

(a) The Trial Judge Did Not Err in Her Findings on the Common Intentions of the Treaty Parties

[126] Ontario stated in its factum:

> There were few disputes at trial regarding primary facts disclosed by the historical record: what was done, said and written, and who was involved in events. Ontario does not challenge the facts set out by the trial judge in the Reasons, although the judge's summary of the facts is materially incomplete; important evidence indicating how the Treaty parties actually understood the annuity promise was ignored. Partly on that basis Ontario challenges certain key inferences drawn by the trial judge.

However, it became clear in oral argument that Ontario does challenge the trial judge's material findings root and branch.

[127] Ontario argues that the trial judge failed to take certain crucial evidence into account. The trial judge acknowledged that her task was to discern the parties' common intention, but Ontario asserts that she failed to accord due weight to the evidence of Crown intention before the Treaty negotiations, during the negotiations, in their immediate aftermath, and later in the post-Treaty period. The trial judge also unreasonably discounted evidence of Anishinaabe intention that was contrary to her interpretation of the Treaties. Ontario labels these as errors in law or palpable and overriding errors of fact that oblige this court to set aside the

judgment and either render judgment in the terms that Ontario seeks or order a new Stage One trial.

[128] The standard of appellate review related to a palpable and overriding error is very deferential:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[94]

[129] Ontario argues that Crown actors and other non-Indigenous individuals understood the Crown's obligation to augment the Treaties to be limited to or capped at a maximum of $4 per person, the amount Ontario has been paying since 1875. The trial judge misapprehended the common intentions of the Treaty parties by unreasonably discounting or ignoring certain historical evidence.

[130] Ontario identifies evidence that contradicts the trial judge's interpretation. In analyzing this evidence, we are mindful of the surfeit of evidence reviewed by the trial judge. To achieve the result Ontario seeks, the countervailing evidence must go to the very core of the trial judge's reasoning and reveal it to be mistaken. With respect, the countervailing evidence falls far short of demonstrating a palpable and overriding error of fact, an error in principle, or an error of law.

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[94] *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286, at para. 46, *per* Stratas J.A. (citations omitted). This paragraph was quoted in full and approved by the majority in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38.

[131] Several of the documents that Ontario relies upon were created close to the time of Treaty formation, some by individuals that were present – or nearby – when the Treaties were negotiated. The rest of the documents, some of which were not expressly addressed by the trial judge, were penned years, even decades, after the Treaties were signed. They are of limited value in discerning the Crown's intentions when the Treaties were signed. The trial judge did not err in her treatment of this evidence.

(i) The Proximate Evidence

[132] Each document in the proximate evidence requires careful evaluation to discern what it reveals about Crown intention when the Treaties were signed. Ontario refers to the Orders in Council ("OICs") instructing Robinson, his Treaty Report, a letter from a Hudson Bay Company factor, correspondence between Robinson and Colonel Robert Bruce, and a newspaper article.

(i) The Orders-in-Council Instructing Robinson

[133] Robinson received instructions in two OICs. The first, dated January 11, 1850, appointed him as Treaty Commissioner and authorized him to negotiate treaties with the Anishinaabe of Lake Superior and Lake Huron. The second, dated April 16, 1850, described Robinson's mandate in more detail. Ontario argues that the trial judge failed to advert to the implications of the second OIC in determining Crown intention.

[134] In describing the instructions to Robinson in the second OIC, the trial judge noted that "the Executive Council intentionally sent Robinson to the Treaty Council without the financial authority to offer to match annuity provisions from previous treaties."[95] She observed that this might well have reflected the financial crisis then facing the Province of Canada.[96]

[135] The trial judge did not mention the second OIC explicitly when she discussed Crown intention, but she implicitly referred to it in her comment that "Robinson's instructions were flexible enough that his augmentation clause proposal could fit within their scope."[97] She added that, in her view, the augmentation clause's "novelty would have compelled him to discuss the idea and seek approval before making it an official offer." On this basis, the trial judge found it reasonable to conclude that when Robinson met Governor General Lord Elgin in Sault Ste. Marie on August 30 and August 31, 1850, he received approval to propose the augmentation clause.[98]

[136] Ontario argues that under any interpretation, the augmentation clause went beyond the instructions in the second OIC. In the context of those instructions,

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[95] Stage One Reasons, at para. 200. The trial judge notes, at para. 101, that in 1818, the Crown moved to an annuity model in making treaties. Between 1818 and 1850, annuities were generally expressed as an aggregate amount, based on multiplying the First Nation's population at the time the treaty was made by roughly two and a half pounds (equivalent to $10): Stage One Reasons, at para. 102.
[96] Stage One Reasons, at para. 203.
[97] Stage One Reasons, at para. 261.
[98] Stage One Reasons, at para. 255.

Robinson was unlikely to have been seeking authorization to promise uncapped annuities, or annuities that could ever rise above $10 per person, as provided in earlier treaties.

[137] The augmentation clause did depart from Robinson's instructions in the second OIC. But the historical circumstances when the Treaties were signed – including the Crown's financial situation and the low expectations for the future productivity of the Treaty territories – do not make Ontario's interpretation of a very low cap, from the First Nations perspective, more likely to have found Lord Elgin's approval. Moreover, the augmentation clause took the approach recommended in the report of the Vidal-Anderson Commission by including a provision "for an increase of payment upon further discovery and development of any new sources of wealth."[99] The augmentation clause would not have been a bolt out of the blue. The trial judge did not err in her consideration of the second OIC.

(ii) Robinson's Treaty Report

[138] Ontario argues that the trial judge failed to give any weight to Robinson's Treaty Report, dated September 24, 1850. To the contrary, it is clear that the trial judge took the Treaty Report into account. She quoted from the following section:

> I trust his Excellency will approve of my having concluded the treaty on the basis of a small annuity and the immediate and final settlement of the matter, rather than

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[99] Stage One Reasons, at para. 161.

> paying the Indians the full amount of all moneys on hand, and a promise of accounting to them for future sales. The latter course would have entailed much trouble on the Government, besides giving an opportunity to evil disposed persons to make the Indians suspicious of any accounts that might be furnished.
>
> Believing that His Excellency and the Government were desirous of leaving the Indians no just cause of complaint on their surrendering the extensive territory embraced in the treaty; and knowing there were individuals who most assiduously endeavored to create dissatisfaction among them, I inserted a clause securing to them certain prospective advantages should the lands in question prove sufficiently productive at any future period to enable the Government without loss to increase the annuity. This was so reasonable and just that I had no difficulty in making them comprehend it, and it in a great measure silenced the clamor raised by their evil advisers.[100]

[139] Robinson did not refer to a $4 cap. His silence cannot be taken to mean, as Ontario argues, that the operation of such a cap is obvious. Focussing on the second section of the text set out above, the trial judge found that augmentation capped at $4 could not have achieved Robinson's purpose in securing the Treaties:

> When Robinson reported that the augmentation clause was so "reasonable and just", it is my view that he could not have been referring to an annuity capped at $4. Chief Shingwaukonse and the other Anishinaabe Chiefs would not have found a $4 cap to their annuities either reasonable or just; it was far less than half of what other bands received as fixed sum annuities and, additionally,

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[100] Stage One Reasons, at para. 251 (emphasis added).

> it did not respond to their demand for a share of the future wealth of the territory.[101]

As noted earlier, this approach was consistent with the recommendations of the Vidal-Anderson Commission. This factual finding was open to the trial judge.

[140] Ontario argues that this part of Robinson's Treaty Report suggests that he could not have intended an uncapped annuity because the trial judge's interpretation requires "precisely the endless accounting and 'trouble' that Robinson reports he avoided."

[141] We would not give effect to this argument for three reasons. First, some rough form of accounting was required in order to determine whether the augmentation clause was triggered, under any interpretation. This is undeniable.

[142] Second, the historical context tells a more nuanced tale. The augmentation clause is not "a promise of accounting … for future sales." Robinson's "trouble" was likely related to the onerous task of tracking each sale of land on the territory and the interest gained on the proceeds of those sales, as the practice had been in other areas of the Province.[102] By contrast, monitoring the overall revenue and expenses linked to the territory would then have been a relatively simple task, whether or not the annuity was capped at $4 per person.

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[101] Stage One Reasons, at paras. 450-453.

[102] Expert Report of James Morrison, Exhibit 14, at para. 59 on p. 53. According to Mr. Morrison, expert witness for the Huron Plaintiffs, Robinson was "well aware" of this system and its use in more southerly parts of the Province: Expert Report of James Morrison, Exhibit 14, at para. 368 on p. 284.

[143] Third, Robinson does not appear to have expected that significant revenues would be generated from the territory. He stated, “these lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies.” Given this, it is unlikely that he would have viewed the ongoing monitoring of total revenues and expenses from the Treaty territories as a particularly complex or troublesome task. The reference to “trouble” is not, therefore, inconsistent with the trial judge’s interpretation.

(iii) Buchanan’s Letter to Simpson

[144] Ontario points to two accounts from individuals who were in the vicinity when the Treaties were signed, neither of which the trial judge referred to in her reasons. On September 11, 1850, mere days after the Treaties were signed, A.W. Buchanan, the Hudson Bay Company Post Factor at Sault Ste. Marie, wrote to George Simpson, the Governor of the Hudson Bay Company:

> The terms of the treaty are that the Indians are to receive £4,000 now to be divided amongst the whole of them, and £1,000 are to be paid them annually for ever, liable to be increased until the sum amounts to £1 for each Indian should sales of land be made to afford that sum.

[145] Jean-Philippe Chartrand, Ontario’s expert witness, testified that while Buchanan was nearby and was responsible for provisioning the Anishinaabe encamped at the Treaty Council, he was not a witness to the negotiation or execution of either Treaty. Mr. Chartrand agreed that Buchanan “seems to be recording not what happened but … Robinson’s first offer”, which was not the one

the First Nations accepted.[103] The trial judge did not err in not referring to this document or in arriving at an interpretation inconsistent with it.

(iv) Correspondence Between Bruce and Robinson

[146] The second account to which Ontario refers is from Colonel Robert Bruce, dated October 16, 1851. Bruce forwarded to Robinson a petition from the Lake Huron Chiefs asking the government to consider distributing annuities based on traditional land areas rather than on population. Bruce did not appear to support the petitioners. He commented: "The following extract from the Treaty seems to show conclusively that the distribution was to be per capita & not as suggested by the Petitioners" (emphasis in the original). Bruce stated that his impression was "gathered from your report, the treaty itself and the numerical lists transmitted as a guide for the distribution of annuities." According to the editors of the British Colonist Newspaper, Col. Bruce did not "attend the treaty."

[147] Robinson responded to Bruce:

> I can only say that the Treaty made by me with the Indians last year was based on the same conditions as all preceding ones I believe. These conditions even fully explained in Council & are also clearly expressed in the Treaty.
>
> …
>
> Nothing was said by the Chiefs [illegible] of the nature mentioned in the extract you sent me & all seemed

[103] Transcript, Vol. 50, at pp. 7340-41.

> satisfied both at the signing of the Treaty & payment of the money with the terms on which I concluded the Surrender by them to Her Majesty.

[148] Robinson's response does not support Ontario's interpretation. His answer addressed the manner of distribution of annuities among the Chiefs, which is what he was asked about. Robinson confirmed that the distribution was to be based on the population of each Chief's community, not the area of land that each Chief had surrendered on behalf of his community.[104] The model of distribution that Robinson described is not inconsistent with the trial judge's interpretation. More importantly, neither Bruce's inquiry nor Robinson's response addressed the operation of the alleged cap in the augmentation clause.

(v) The Newspaper Article

[149] Ontario points to an article published in the British Colonist Newspaper on October 1, 1850, containing an account of the Treaty Council, provided by an individual who was present. An extract from an American newspaper, with details of the Robinson Treaties, was printed in the same edition. Below the eyewitness account, the editor comments:

> The terms, as mentioned in the [American] extract first alluded to are, we believe, nearly correct, except that any future increase to the annuity, which the sale of the ceded

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[104] Robinson's reference to the practice of calculating annuities based on population, not land area, as being "the same conditions as all preceding ones" is consistent with the historical evidence. The trial judge noted, at para. 102 of her reasons, that between 1818 and 1850, annuities tended to be an aggregate amount based on multiplying the population of the First Nation by $10. She states "[t]he multiplier of $10 was unrelated to the value or size of the land surrendered."

> territory may enable the Government to make, is limited to four dollars a head.

[150] The provenance of this information is unclear. The fact that it follows an eyewitness account does not mean that this comment came from the eyewitness. In the absence of evidence about where the editor got this impression, it sheds no light on the Crown's intention in entering the Treaties.

(ii) The Post-Treaty Evidence

[151] The post-Treaty evidence consists of records of requests that the annuities be increased to $4 per person, consideration of those requests by officials, petitions for the payment of arrears, requests for further increases, the 1893 Affidavit of John Mashekyash, and records of the arbitration between Canada, Ontario and Quebec.

[152] According to Ontario, the documents it relies on show that Crown actors and other non-Indigenous individuals unequivocally understood the Crown's obligation as being limited to $4 per person, subject to the possibility of a discretionary increase. Ontario argues that the trial judge failed to take these documents into account and that her interpretation is inconsistent with this evidence of the Crown's intentions and understanding. Ontario argues that this is an error in principle that requires reversal.

(i) The Governing Principles on the Use of Post-Treaty Evidence in Treaty Interpretation

[153] Temporal proximity is not required for post-treaty evidence to be admissible, but evidence from shortly after treaty formation is more likely to reveal the parties' interests and intentions. As Lamer J. noted, "the subsequent conduct which is most indicative of the parties' intent is undoubtedly that which most closely followed the conclusion of the document."[105]

[154] Post-treaty evidence and evidence of the parties' subsequent conduct can play a role in treaty interpretation but must be treated with "extreme caution."[106] In *West Moberly*, Smith J.A. (dissenting) referred to post-treaty events and conduct but noted that they mostly had "limited relevance to the issue of the common intention of the parties to the Treaty in 1899 unless they involve the Treaty parties or conduct that is probative to the intention of a Treaty party."[107]

[155] In *Lac La Ronge*, Vancise J.A. adopted the trial judge's statement in that case:

> It is very useful to read what a signatory said about a treaty provision at or about the time when the document was executed. It is equally useful to know whether or not subsequent conduct by other people accorded with what was said. However, it is of no value to learn that some

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[105] *Sioui*, at p. 1060.
[106] *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, 206 D.L.R. (4th) 638, at para. 103, rev'g 1999 SKQB 218, 188 Sask. R. 1, leave to appeal refused, [2001] S.C.C.A. No. 647. Vancise J.A. agreed with the trial judge in that case that "evidence of subsequent conduct should be used with extreme caution."
[107] *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232, at para. 231, leave to appeal refused, [2020] S.C.C.A. No. 252.

> person, fifty years later, acted differently based on his or her own personal reading of the provision in the treaty. That conduct has no link to the contemporaneous historical circumstances and therefore should not be admitted.[108]

[156] The intervener Biigtigong Nishnaabeg First Nation argues that the risks of relying on subsequent conduct in interpreting contracts, as identified by Strathy C.J.O. in *Shewchuk*,[109] are also present in the treaty context. Tools developed by the court for interpreting contracts are to be applied to treaties only cautiously, particularly historical treaties. We do not find it necessary to borrow from the contract context in this instance.

(ii) The Principles Applied

[157] The trial judge recognized that post-treaty evidence can assist in depicting "how the parties understood the terms of the Treaties."[110] However, she noted that "[t]he weight to be attributed to the post-treaty record will vary in each case and will depend on the nature and context of the accounts and conduct." She considered the frailties of the post-Treaty evidence and concluded:

> [T]he post-Treaty record, both written and conduct, is vague, inconsistent, and conflicting. It is of limited assistance to the exercise of searching for the parties' common intention. It shows that different people at

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[108] *Lac La Ronge*, at para. 103.
[109] *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512.
[110] Stage One Reasons, at para. 284.

> different times and places held different understandings of the Treaties' promise.[111]

[158] The trial judge did not err in her assessment of the post-Treaty evidence. She was not obliged to refer to every document on the record, which would have been virtually impossible given the volume of evidence before her.[112] More importantly, the evidence that Ontario now attempts to rely upon is incapable of establishing that the trial judge erred in determining Crown intention.

[159] The Robinson Treaties were signed in 1850. Of the remaining post-Treaty documents that Ontario relies upon, only two were written prior to 1873. The arbitration documents, on which Ontario places particular emphasis, date from the 1890s. This lack of temporal proximity renders most of the post-Treaty evidence of doubtful probative value, an assessment that is borne out upon consideration of other factors.

[160] Ontario has not demonstrated any connection between the post-Treaty evidence it relies upon and the Crown's intentions or interests on the date the Robinson Treaties were signed. The documents do not recount Treaty negotiations or conversations with Robinson before or after the Treaty Council. They do not

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[111] Stage One Reasons, at para. 318.
[112] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at paras. 91, 128. See also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 34, 37 and 43.

describe the problems facing the Crown in 1850 or the policies the Crown was pursuing in response.

[161] Instead, much of Ontario's evidence consists of personal interpretations of the augmentation clause made by individuals who had no connection with the formation of the Treaties.

[162] In a letter written in 1858, Richard Carney, an Indian Agent, described visiting the Garden River settlement and talking with the Chiefs there. Carney reported explaining to the Chiefs that the annuity "was not to exceed Four Dollars". He stated that he gave this explanation after he "asked for a sight of the Treaty". This was his interpretation of the Treaty, nothing more.

[163] Post-Treaty evidence must also be read carefully in its particular context, which includes the wider historical context and the specific context in which a document was created.

[164] The 1858 Pennefather Report cited the Treaty text and expressed "decided regret, that a Treaty shackled by such Stipulations, whereby a vast extent of Country has been wrung from the Indians for a comparatively nominal sum, should have received the sanction of the Government."[113]

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[113] To give it its full name, the "Report of Special Commissioners (R.T. Pennefather, Froome Talfourd, and Tho. Washington) appointed on the 8th of September, 1856, to Investigate Indian Affairs in Canada."

[165] Ontario argues that no such regret would have been necessary if the augmentation clause was to operate as the trial judge found. But this is an anachronistic reading; the reference to "a comparatively nominal sum" must be read in its historical context. The authors appeared to believe, eight years after the Treaties were signed, that no increase in the annuity was yet warranted.[114] There was, at that point, no reason to believe that revenues would ever warrant a significant increase in the annuity. Viewed in that historical context, the Treaties were not seen as a good deal for the Anishinaabe, even with the prospect of future, uncapped augmentation.

[166] Context is also relevant to post-Treaty evidence relating to Anishinaabe requests for increases in the annuities. The trial judge correctly found that the petitions must be read in their historical and cultural context:

> Dr. Bohaker testified, and Mr. Chartrand agreed, that these petitions could be labelled "pity speeches", a term historian[s] use to describe the use of metaphor to ask relations to meet their obligations within the ongoing relationship. One would not expect a pity speech to set out the full scope of the obligations arising from the treaty relationship, but rather to make modest requests that would remind the treaty partner of their promise to care for the other.[115]

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[114] They stated: "Enquiries at the Crown Land Department shew that no increase in the annuity is yet warranted by the sums realized from the surrendered lands."
[115] Stage One Reasons, at para. 305.

[167] The trial judge cited Mr. Chartrand's evidence that "the Anishinaabe were 'modest' and 'diplomatic' when making requests under the Treaties."[116] That the Anishinaabe, in 1873, asked only for $4, and that non-Indigenous actors responded to those requests, cannot demonstrate that the Anishinaabe were not ever entitled to more.

[168] Simon Dawson, a Member of Parliament, wrote to the Governor-General's Secretary in 1873 that "the lands ceded have become sufficiently productive to warrant the increased payment of at least $4; if not, of such further sum (over and above the $4) as Her Majesty may be graciously pleased to order, as provided for in the above cited clause of the treaty."

[169] Letters from E.B. Borron, a Member of Parliament, in 1874 and 1875, urged Ministers in the Department of the Interior to pay the "full amount of annuity stipulated for" in the Treaties, at $4. It is unclear how he reached this interpretation. Justice Minister Edward Blake responded with his opinion on July 7, 1875, based on "the papers laid before the undersigned, as well as oral information of the Minister of the Interior" (to whom Borron had written).[117] D. Laird, Minister of the Interior, then advised, on July 12, 1875, that he "concurs in the views expressed in the annexed report of the Honorable the Minister of Justice" and referred to

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[116] Stage One Reasons, at para. 315.
[117] Ontario conceded that Blake's opinion arose from him looking at the documents and at the wording of the Treaties.

Blake's opinion that the Anishinaabe were "entitled, under the Treaty of 1850, to the maximum amount of annuity thereby stipulated, namely $4 per head." The resulting federal OIC, which increased the annuities "to the maximum amount of annuity thereby stipulated, namely, $4.00 per head", was expressly based on both Blake's opinion and Laird's report. These writers appear to take their interpretations either directly from the Treaty text, or from one another, not relying on information about the intentions or interests of the Crown when the Treaty was formed.

[170] Eight years after his first letter, Dawson wrote again. In his letter to Col. C. Stuart, dated October 7, 1881, he referred to the "full amount" of the available annuity, and to the payment of arrears on the $4 amount as providing "the full benefit of the stipulation throughout the whole period". He did so based on his own interpretation of the text and other interpretations he had read. He began his letter with the words: "By this Treaty … it was stipulated as follows", before quoting the augmentation clause. He then continued:

> The language is clear and on reference to the official correspondence, it will be seen that it is nowhere denied, but on the contrary, admitted on all hands, that from the time the payment of four dollars per head could have been made from the revenue of the ceded territory, without loss to the Government, the Indians were clearly entitled to have their annuities augmented to that amount.

Dawson did not base his interpretation, as reflected in either his 1873 or 1881 letters, on any evidence, beyond the Treaty text, as to the interests or intentions of the Crown at the time of Treaty formation.

[171] Next, on January 9, 1884, Charles Skene, an Indian Agent, recounted his discussion with Chief Solomon James and other Chiefs. He told them that "$4 was the utmost sum to be given as annuity", and their response "was that it is not so". He then "referred to the written copy of the Treaty sent to me by the Department". Again, it appears likely that his interpretation of the Treaties came from reading the text. This evidence is equivocal, in any event, since the First Nations representatives denied the cap.

[172] Ontario argues that the interpretations expressed by these writers are relevant because, in order to find the Crown intention to have been contrary to these interpretations, "one would have to accept (in the absence of evidence) that this interpretation was intended by the Crown at the time of ratification, but then almost immediately forgotten by the bureaucracy charged with implementing the Treaties."

[173] On the contrary, there is no evidence to show, and no reason to believe, that in the 23 years between the promise being made and the Anishinaabe complaints that sparked discussion and action, knowledge relevant to the Crown's intentions and interests was communicated, discussed, or passed among bureaucrats.

[174] Instead, the evidence suggests that the Treaties were set aside and largely forgotten for two decades. Only in 1873, when they were faced with complaints, did the responsible bureaucrats read the augmentation clause and reach their own understanding of the text. The resulting documents are therefore of very little probative value in determining what the Crown's intentions were in 1850.

[175] Ontario points to the 1893 affidavit of Elder John Mashekyash, of Batchewana First Nation, who was present at the Treaty negotiations. The trial judge assessed that evidence and concluded that "it would be risky to give much weight" to it given the frailties of memory and Mashekyash's presence only in the Huron negotiations.[118] She added that his was not evidence of "any widespread understanding of the Huron Chiefs at the time the Robinson Huron Treaty was signed." This assessment was well within the trial judge's remit.

[176] Finally, Ontario placed particular emphasis on documents relating to the financial dispute between Canada, Ontario and Quebec regarding responsibility for the Crown's annuity obligations. The decisions of the arbitrators in that dispute were reviewed by the Supreme Court of Canada and the Judicial Committee of the Privy Council.[119] The trial judge did not refer to this group of documents, and for good reason. They provide little, if any, assistance in understanding the Crown's

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[118] Stage One Reasons, at paras. 307-13.
[119] *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, aff'd *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario*, [1897] A.C. 199 (J.C.P.C.).

intentions or interests at the time of Treaty formation. The documents exhibit the frailties of being neither proximate nor connected to Treaty formation. The context in which they were written calls for particular caution in relying on them.

[177] Vancise J.A. cautioned, in *Lac La Ronge*, against reading subsequent conduct "not directly related to the interpretation of the Treaty", including "compromise" decisions, as a "demonstration of the intention of the parties at the time the treaty was negotiated and signed."[120] Records that were not aimed at interpreting the augmentation clause must be read with a sensitivity to the context of the documents and the objectives the writer sought to achieve.

[178] The main issue in dispute in the arbitration was which of Canada, Ontario or Quebec bore responsibility for paying the Robinson Treaty annuities. The parties to the arbitration referred to $4 as the "full" or "maximum" amount of the annuity, and Justice Burbidge, one of the arbitrators, found that "[a]ny increase beyond that would have been a matter of grace."[121] Neither party raised the possibility that the $4 stipulation did not cap the annuities. While there might have been "careful scrutiny" of the augmentation clause in the arbitration, that scrutiny was, on the part of the paying parties, aimed at advancing each party's case against the others

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[120] *Lac La Ronge*, at para. 106.
[121] *Award on Indian Robinson Treaties, Huron and Superior*, February 14, 1895 (J.A. Boyd, Sir L.N. Casault, and G.W. Burbidge), as reproduced in the notes preceding the Supreme Court of Canada's judgment on the appeal of the arbitrators' award: *Province of Ontario*, at p. 456.

and, on the part of the arbitrators, limited to considering the arguments of the parties. They were not focused on Anishinaabe entitlements.

[179] There was a lively debate during the arbitration as to whether the $4 per person limit was based on the Anishinaabe population at the time the Treaties were signed or on the population at the time the annuity was paid. Mr. Clark, counsel for Ontario at the arbitration, argued that "it is apparent on the face of the Treaty that the maximum liability of the Province under that covenant in any event is 1422 [population at the time of Treaty formation], multiplied by 4", all of which would be paid to the Chiefs, who then "divided it as they chose".[122]

[180] Mr. Clark's understanding, which differs from the one Ontario now claims to be self-evident, was earlier expressed by William Spragge in 1873. Spragge's report, drafted in response to petitions from the Anishinaabe, referred to $4 as the "maximum amount per head named in the treaties". Ontario argues that Spragge, having been a Crown official since 1847, was aware of the circumstances of the Treaty negotiations. However, in a letter preceding his report, he gave his opinion that the annuities were only to be augmented based on the First Nations' population when the Treaties were signed.[123] His adoption of this interpretation, which no party to these appeals currently endorses, significantly undermines the

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[122] Transcripts from the Unsettled Accounts Arbitration, at pp. 365-66.

[123] Spragge stated, "the Robinson Treaties … do not contemplate that in the event of the annuities being augmented, the numbers to receive them shall exceed those at which the various bands were estimated when the treaties were executed."

value of his report as an aid in interpreting the Treaties. It also suggests that Spragge had no special knowledge of the Treaty negotiations.

[181] It is also worth noting that, to the opposite effect, some Crown actors expressed, albeit cautiously, the view that more might be owed to the Anishinaabe. Dawson, in his 1881 letter, wrote that the sum of the arrears on the $4 annuity, “although considerable, is not all the Indians may fairly claim or are justly entitled to”, before referring to the graciousness part of the augmentation clause. He then referred to other bands who receive a higher annuity and also “carpenters’ tools, twine for nets, farming implements and cattle.”

[182] On June 17, 1893, E.L. Newcombe, a Deputy Minister, wrote to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, in reference to the augmentation clause. Newcombe stated, after quoting from the augmentation clause:

> The portion of the above excerpt to which I wish to have particular attention called is that which describes the additional annuity, over and above one pound per caput which may be paid as “such further sum as Her Majesty may be pleased to order.” The Department has for some years past paid the Indians under these treaties $4 per capita, the mount necessary to enable it to do so having been voted annually by Parliament, but it is considered that, owing to the immense revenue derived from the sales of land and timber within the territory ceded by the Indians under the above treaties to the Crown, the amount of annuity might fairly be increased to such further sum as Her Majesty may be pleased to order.

[183] In response, Vankoughnet stated that “the point to which you refer will not be lost sight of” but stated also that “it is very questionable whether the provision in these treaties to which you refer can be made the basis of any legal claim against the Province of Canada.”

[184] While these documents do not support the trial judge’s interpretation, they do undermine Ontario’s argument that the post-Treaty evidence demonstrates one unequivocal understanding of the augmentation clause among Crown officials.

(iii) Conclusion on the Trial Judge’s Treatment of the Evidence Concerning Crown Intention

[185] The trial judge did not err in her treatment of the evidence of the Crown’s intentions upon entering the Robinson Treaties or in determining the common intentions of the Treaty parties.

[186] To be helpful, post-treaty evidence must be capable of shedding light on the intention or interests of one or more of the parties at the time the treaty was signed. The extent to which a document does so will depend not only on its contents, but on its temporal proximity to treaty formation, its connection to treaty negotiations, and the context in which it was created. Taking these factors into account, the post-Treaty evidence upon which Ontario relies provides little assistance and the trial judge did not err in not relying on it.

[187] The documents proximate to Treaty formation on which Ontario relies are consistent with the trial judge’s interpretation of the augmentation clause. The post-

Treaty evidence, on which Ontario largely focused its submissions, is incapable of establishing a contrary Crown intention. The trial judge did not make a palpable and overriding error in her treatment of this evidence.

(b) The Trial Judge Did Not Err in Her Determinations on the Existence and Extent of Crown Discretion in the Augmentation Clause

[188] Ontario's second basic argument on the trial judge's interpretation of the augmentation clause is that she erred in finding that the Crown's discretion under the augmentation clause was not unfettered.

[189] To recall the context, Ontario's position is that the $4 per person amount specified in the Treaties is a "hard cap" that fixes both the annuity paid to entitled individuals and the total amount of the annuity payable. Ontario submits that the Crown has unfettered discretion as to when and whether it will increase the per person annuity, and therefore the total annuity paid, beyond the $4 per person cap.

[190] At trial, both Ontario and Canada submitted that the law gave them "unfettered discretion concerning how they will meet their treaty obligations."[124] Canada has not appealed the judgments below. On appeal, Canada agrees with the trial judge's finding that the Crown is obliged, under the Treaties, to increase the annuities beyond $4 per person. Canada now submits that the Crown retains discretion in fulfilling this obligation but that this discretion is not unfettered.

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[124] Stage One Reasons, at para. 562.

[191] We begin by setting out the governing principles concerning the existence and scope of governmental discretion. We next summarize the trial judge's decision concerning Crown discretion and then apply the governing principles to Ontario's arguments.

(i) The Governing Principles Concerning Discretion

[192] In the seminal *Baker* decision, L'Heureux-Dubé J. noted: "The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."[125] It is now trite law that "there is no such thing as absolute and untrammelled 'discretion'".[126] Where discretion is granted by statute, that discretion, said L'Heureux-Dubé J., "must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[127] These boundaries set a reasonable "margin of manoeuvre" for a decision-maker exercising discretion.[128]

[193] These principles apply with necessary modifications to the exercise of Crown discretion related to treaties with First Nations. The most significant constraints on the Crown in the context of this case are the Treaty promises made

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[125] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 52
[126] *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, *per* Rand J.
[127] *Baker*, at para. 56.
[128] *Baker*, at para. 53.

by the Crown, s. 35 of the *Constitution Act*, *1982*, including its reconciliatory imperative, and the honour of the Crown.

(ii) The Trial Judge's Treatment of Crown Discretion

[194] The trial judge found that the promise in the augmentation clause to increase the annuity is not discretionary but mandatory; the $4 cap is only a cap on annual payments to individuals and does not limit the total annuity payable under the Treaties; and the Crown has discretion in the implementation of the Treaty promise, including when and how it provides information to the Anishinaabe to assess the reasonableness of the Crown's calculations of net Crown revenues[129] and whether to raise the $4 cap on the annuity payable to individuals.[130] She stated: "The discretion is not unfettered and is subject to [judicial] review", and noted that Crown discretion in the implementation process "must be exercised honourably and with a view to fulfilling the Treaties' promise."[131]

(iii) Ontario's Arguments

[195] Ontario makes four arguments in support of its position that the power to increase annuities is unfettered: the first is based on the text of the graciousness clause and its location in the augmentation clause; the second is that the decision to increase the annuities is not justiciable; the third is that the trial judge erred in

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[129] Stage One Reasons, at paras. 527, 532 and 569.
[130] Stage One Reasons, at para. 454.
[131] Stage One Reasons, at para. 4.

her evidentiary finding on the role of discretion in determining the common intention of the Treaty parties; and the fourth relates to the honour of the Crown. We address the first three in turn and the honour of the Crown under the second issue, which follows immediately.

(i) The Textual Argument

[196] Ontario argues that the phrasing of the graciousness clause in the augmentation clause is a particularly potent conferral of unfettered discretion on the Crown. The graciousness clause provides: “or such further sum as Her Majesty may be graciously pleased to order”. This language evokes the royal prerogative. Ontario argues that the language of the graciousness clause modifies the entire augmentation clause, making any increase to the annuity beyond its current level completely discretionary.[132]

[197] We disagree for textual reasons and for reasons of principle.

[198] The trial judge’s interpretation of the augmentation clause is consistent with and is supported by the text of the augmentation clause. The structure of the augmentation clause makes it clear that the graciousness clause applies only to the per person annuity, not to the collective annuity. It does not modify the entire augmentation clause. To see this, it is helpful to depict the structure of the

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[132] This was also Canada’s position before the trial judge, as she noted in her reasons, at para. 382.

augmentation clause in its constituent parts, with some explanatory notes and emphasis added.

[199] The collective annuity promise comes first:

> [F]or the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each year …
>
> …
>
> Her Majesty and the Government of this Province, hereby promises and agrees to make, or cause to be made, the payments as before mentioned….

[200] The main text of the augmentation clause states:

> Her Majesty, Who desires to deal liberally and justly with all Her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time,

[201] Then comes the first proviso, which specifies the amount paid to individuals and contains the graciousness clause:

> 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;

[202] Then comes the second proviso followed by the diminution clause:

> and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of

> their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof; and should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

[203] Structurally, the textual breakdown shows plainly that the graciousness clause does not apply to the entire augmentation clause but only to the first proviso, which sets the annuity for individuals.

[204] Textually, in terms of the language, Crown compliance with the augmentation clause is mandatory because the clause expressly states that "should" the ceded territory produce sufficient revenue to enable increasing the annuity "without incurring loss", "then and in that case the same shall be augmented from time to time". Up to that point in the text of the augmentation clause, the only antecedent to which "the same" could relate is the collective annuity already mentioned, being "the further perpetual annuity of six hundred pounds of like money". In our view, because the graciousness clause is part of the first proviso, it cannot dominate the augmentation clause and reduce its mandatory wording ("shall be augmented") into a gratuitous exercise of the Crown's unfettered discretion ("such further sum as Her Majesty may be graciously pleased to order"), as Ontario argues. The graciousness clause applies only to the per person annuity in the first proviso ("the amount paid to each individual"), which is capped in the text at $4.

[205] As a matter of principle, there is, in any event, no such thing as an unfettered discretion, as we have already established.

(ii) Justiciability

[206] To set the context for this issue, we first set out Ontario's position, next the governing principles on justiciability, and then apply the principles to Ontario's argument.

Ontario's Position on Justiciability

[207] Ontario invokes the doctrine of justiciability, in part, to reinforce its claim that Crown discretion under the augmentation clause is unfettered. Ontario attacks the trial judge's finding that the augmentation clause requires the Crown to pay a "fair share" of net Crown resource-related revenues on the basis that "[n]othing in the historical record suggests that this abstract concept was discussed during the Treaty negotiations, much less agreed upon." Accordingly, Ontario argues: "The absence of common intention on what constitutes a 'fair share' also implies that should the parties fail to reach agreement on this concept, the courts will have to create a definition in a legal vacuum." Ontario asserts: "What is 'fair' in the abstract, considered apart from legal principles or common intention, is not a justiciable question; it is a moral or policy question on which many different views and perspectives are possible." The question does not have "a sufficient legal component to be justiciable."

[208] Ontario's argument concludes dramatically:

> In defining what is a "fair share" under the judgments below, the courts would be making policy decisions with respect to limited Crown finances, thereby entering a field that Canadian courts have appropriately viewed as being outside the proper function of the judiciary. In the result, a Crown discretion to increase annuities has been replaced in the judgments below by a judicial discretion in relation to Crown finances that is not grounded in common intention or legal principles.

The Governing Principles Concerning Justiciability

[209] The doctrine of justiciability imposes limits on judicial review of executive action. It is based on the sense that there are public policy issues that are beyond the jurisdiction of the courts. Stratas J.A. noted:

> In rare cases … exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers.[133]

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[133] *Hupacasath First Nation v. Canada*, 2015 FCA 4, 379 D.L.R. (4th) 737, at para. 66. In *Hupacasath*, Stratas J.A. found that the application for judicial review was justiciable because, although the challenge was to the decision to sign an international treaty, the case turned on whether the appellant had certain legal rights. In *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166, at paras. 58-63, Stratas J.A. addressed justiciability and concluded that a class action seeking to quash a federal program to compensate victims of Thalidomide on the basis that the documentary proof requirements were unreasonable was justiciable. In *Hupacasath* and *Wenham*, Stratas J.A. followed *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

Examples of such rare cases would include the deployment of military assets, entering into foreign treaties, and addressing homelessness.

[210] The issue of addressing homelessness was raised in *Tanudjaja*, where the court found that there was "no sufficient legal component to engage the decision-making capacity of the courts", and that "[i]ssues of broad economic policy and priorities are unsuited to judicial review."[134] The application in that case asked the court "to embark on a course more resembling a public inquiry into the adequacy of housing policy."[135] The court noted, "the issue is one of institutional competence [and] whether there is a sufficient legal component to anchor the analysis" and concluded that the application was not justiciable.[136]

The Principles Concerning Justiciability Applied

[211] In our view the doctrine of justiciability has no application to this case, for three reasons. First, here the court is not reviewing executive action in the abstract. The court's task is to interpret the augmentation clause in the Treaties in the context in which they were negotiated. The interpretation and enforcement of treaty obligations is core judicial business.[137]

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[134] *Tanudjaja, v. Canada (Attorney General)*, 2014 ONCA 852, 123 O.R. (3d) 161, at paras. 27, 33, leave to appeal refused, [2015] S.C.C.A. No. 39.
[135] *Tanudjaja*, at para. 33.
[136] *Tanudjaja*, at para. 35.
[137] See *Hupacasath First Nation*, at para. 70.

[212] Second, Ontario's justiciability argument does not turn on the language of the augmentation clause but on the trial judge's adoption of the expression "fair share". However, Ontario's justiciability argument cannot be based on the result of the trial judge's interpretation. Either a question is justiciable or it is not. If it is justiciable, then the court's answer might be wrong, but the result cannot logically convert the question from one that is justiciable into one that is not.

[213] Ontario's argument must be treated as an assertion that the trial judge erred in adopting the term "fair share", not that the interpretation is not justiciable. As we will explain below, we agree that it was unhelpful for the trial judge to adopt the concept of "fair share", but her doing so cannot form the basis of a justiciability argument.

[214] Third, and relatedly, there is a sense in which Ontario is making an argument based on the possibly catastrophic impact of a large judgment on the fiscal state of the Province, thereby reducing its capacity to deal effectively with its other responsibilities. We draw this inference from the language of Ontario's factum: "the courts would be making policy decisions with respect to limited Crown finances, thereby entering a field that Canadian courts have appropriately viewed as being outside the proper function of the judiciary." But this is not what the court is tasked to do nor what it will do. In the end there might be a financial judgment that Ontario will have to pay, like any party that is in breach of an agreement. The court is simply requiring the Crown to comply with the Treaties. Accordingly, Ontario is making an

argument based solely on consequences, which is not a true justiciability argument.

[215] For these reasons, we do not consider justiciability to be a viable basis on which to find that the augmentation clause gave the Crown unfettered discretion over whether and when to increase the annuities.

(iii) The Argument on the Evidence as to the Nature of the Crown's Discretion

[216] The trial judge found that the promise in the augmentation clause to increase the annuity is mandatory, not discretionary, but that the Crown has a measure of discretion in the implementation of the Treaty promises. Ontario attacks the evidentiary basis for her finding that the promise to increase the annuity is not discretionary.

[217] In the course of her reasoning, the trial judge found there to be no historical record that Robinson explained the notion of discretion to the Anishinaabe. She stated:

> The Robinson Treaties use formal English and legal terminology. I am not at all convinced that the presence of interpreters could or should have given Robinson confidence that the Chiefs understood the concepts of discretion, royal prerogative, or Her Majesty's graciousness, if such concepts had been embedded into

> the Treaties. And, therefore, such concepts could not have informed the common intention of the parties.[138]

[218] Ontario bases its challenge on the last sentence: "such concepts could not have informed the common intention of the parties." Ontario asserts that the trial judge's finding that discretion was not understood by the Chiefs is inconsistent with her plain finding that the augmentation clause gave the Crown discretion over increases to the $4 cap on distribution to individuals and discretion in implementation. Read literally, that sentence ("such concepts could not have informed the common intention of the parties") would mean that no element of the Treaties could engage the Crown's discretion because Crown discretion did not form part of the common intention of the Treaty parties.

[219] Seeking to avoid the risk that such a reading would pose to its argument that the Crown has plenary discretion under the Treaties, Ontario essentially makes a two-step argument. The first step is that the trial judge was palpably wrong and Robinson successfully conveyed the concept of Crown discretion at the Treaty Council. The second step is that Crown discretion, the meaning of which Robinson correctly conveyed and which then formed part of the common intention of the parties, was unfettered. We agree with the first step, but Ontario's argument falters at the second.

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[138] Stage One Reasons, at para. 447 (emphasis added).

[220] Relevant to the first step, Ontario submits that the concept of discretion in a leader is not inherently difficult to explain, that there were interpreters and advisers at Treaty Council who were not Crown actors, and that the evidence from Elder Rita Corbiere, a contemporary witness, contradicts the trial judge's assertion that the Anishinaabe would not have understood the concept of discretion. We agree that Robinson is likely to have conveyed, and the Anishinaabe are likely to have understood, the concept of discretion.

[221] However, this is not a palpable and overriding error that undermines the trial judge's interpretation. Instead, in our view, the correct analysis is simple: the trial judge simply misspoke. What she meant to say was not, "such concepts could not have informed the common intention of the parties" but instead, "such concepts of unfettered discretion could not have informed the common intention of the parties." Most obviously, in light of her numerous references to ongoing Crown discretion, the trial judge did not intend to exclude all Crown discretion, just unfettered discretion.

[222] This reading of the trial judge's reasons is supported by the record. In its written closing submissions on the motions, under the heading "Common Intention", Ontario argued that Robinson would not have understood the augmentation clause as creating an obligation to increase annuities beyond an

amount equal to $4 per person under any circumstances.[139] Because Robinson was motivated to accurately communicate the meaning of the Treaties at Treaty Council, he took steps through skilled interpreters to explain the Treaties so as to avoid any misunderstanding. Ontario argued that he was successful in doing so. Ontario pointed to Robinson's statement, in his Treaty Report, that he "had no difficulty in making [the Anishinaabe] comprehend" the augmentation clause. Ontario argued that Robinson was better placed than anyone alive today to assess whether he had successfully communicated the meaning of the augmentation clause.

[223] The trial judge asked: "What can we take from Robinson's many references in his diary and Official Report that the Chiefs were satisfied after the Treaties were read out, interpreted and explained to them?"[140] Contextually, we read this section of the trial judge's reasons as her response to Ontario's arguments that Robinson's supposed understanding of the augmentation clause – that the Crown's discretion to augment was unfettered – should be assumed to have been communicated successfully to the Anishinaabe.

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[139] See Ontario's Written Closing Submissions in Stage One Trial, Exhibit MM, pp. 206-10. We have rejected this argument on Robinson's understanding of the augmentation clause at paras. 140-43 of these reasons.
[140] Stage One Reasons, at para. 438.

[224] The trial judge noted Ontario's submission that "the Anishinaabe had the benefit of multiple interpreters who were skilled cross-cultural translators."[141] According to one expert, the interpreters at the Treaty Council "were a genuine part of the multicultural world of the upper Great Lakes region." The trial judge accepted that the interpreters explained the "shall not exceed £1" provision in the augmentation clause and that there is no record of any complaints.[142] She added: "There is no record of Robinson himself explaining the 'cap', the notion of discretion, or royal prerogative."[143]

[225] The trial judge then described the difficulties of interpreting legal terms to lay people and the large cultural gap between the Treaty parties, before making the comments, quoted earlier, in which Ontario claims she erred.

[226] Contextually, however, in making these comments, the trial judge is best understood to be noting that the fact that the augmentation clause was interpreted or explained to the Anishinaabe does not mean they would have understood discretion in the augmentation clause as operating in the manner Ontario now claims, that is, as an unfettered Crown discretion, "not subject to any defined set of factors", over increases beyond $4 per person.[144]

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[141] Stage One Reasons, at para. 439.
[142] Stage One Reasons, at para. 442.
[143] Stage One Reasons, at para. 442.
[144] Ontario's Written Closing Submissions in Stage One Trial, Exhibit MM, at para. 369.

[227] The trial judge cited Elder Corbiere's testimony "that the Anishinaabe lived with notions of what they expected of their leaders: to be generous, to live in a good way, to do right by the people."[145] Elder Corbiere's testimony strongly suggested that the Anishinaabe would not have understood sole or unfettered discretion in a leader, which is the form of discretion that Ontario argues was embedded in the augmentation clause and successfully communicated to the Anishinaabe. This concept, of a leader choosing to act arbitrarily without regard for the needs, requests, or expectations of others, could not have been communicated to the Anishinaabe because it is not consistent with Anishinaabe conceptions of leadership or their expectations of the Crown. It is therefore unlikely to have been what the Anishinaabe understood from an interpretation and explanation of the augmentation clause.

[228] The trial judge was entitled to rely on this evidence and to draw from it the inference that the Anishinaabe could not have understood the concept of a leader exercising discretion arbitrarily because it would have been incomprehensible to the Anishinaabe that a leader, including the Queen, would assert unfettered discretion, and be empowered to act in a manner unbound by the principles described by Elder Corbiere.[146] The trial judge did not accept that the Anishinaabe

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[145] Stage One Reasons, at para. 446.
[146] This kind of discretion is equally incomprehensible in Canadian law, as explained at paras. 192-93 of these reasons.

would have understood the augmentation clause as permitting the Crown to refuse to increase the annuity after it reached the equivalent of $4 per person, no matter the revenues produced by the land.

[229] The trial judge did not err in assessing the Anishinaabe understanding of Crown discretion. Her findings on common intention and her interpretation of the augmentation clause to the effect that Crown discretion was not unfettered were not based on Elder Corbiere's statements alone, but on a careful examination of the historical and cultural context in which the Treaties were negotiated and signed. This was completely within the trial judge's remit and we do not discern an error.

[230] The trial judge did not err in her analysis of the form and content of the Crown's discretion, or the First Nation's understanding of the scope of that discretion, contrary to Ontario's argument.

C. ISSUE TWO: DID THE TRIAL JUDGE ERR IN FINDING THAT THE DOCTRINE OF THE HONOUR OF THE CROWN OBLIGES THE CROWN TO INCREASE THE ANNUITIES AS PART OF ITS DUTY TO DILIGENTLY IMPLEMENT THE TREATIES?

[231] We begin with the governing principles, next set out the trial judge's reasons, the positions of Ontario and Canada, and then our analysis. The context is set by Ontario's position that, in the circumstances, the honour of the Crown is procedural only and does not give rise to fiduciary duties to the Treaty First Nations.

(1) The Governing Principles Concerning the Honour of the Crown

[232] The honour of the Crown has been recognized as a legal principle applying to treaties since at least 1895,[147] but its roots are far deeper.[148] It is historically linked to the *Royal Proclamation of 1763* (the "Royal Proclamation")[149] and engaged by s. 35 of the *Constitution Act, 1982.*[150] In *Haida Nation*, McLachlin C.J. explained:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"….[151]

[233] We repeat McLachlin C.J.'s strong statement: "The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."[152] The honour of the Crown is "always at stake" in the Crown's

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[147] *Marshall*, at para. 50.
[148] Thomas Isaac, in *Aboriginal Law*, 5th ed. (Thomson Reuters: Toronto, 2016), at p. 341, discusses two cases, dating back to 1608 and 1613, where the "King's honour" was applied to disputes outside the Aboriginal law context: *St. Saviour in Southwark (Churchwardens case)* (1613), 77 E.R. 1025 (Eng. K.B.); and *Rutland's (Earl) Case* (1608), 77 E.R. 555 (Eng. K.B.).
[149] *Manitoba Metis*, at para. 66, *per* Abella J.; *Little Salmon*, at para. 42; and *Mikisew Cree* (2018), at para. 21.
[150] *Haida Nation*, at para. 32; *Manitoba Metis*, at paras. 58-59, *per* Abella J.
[151] *Haida Nation*, at para. 17 (citations omitted).
[152] *Haida Nation*, at para. 45.

dealings with Aboriginal people.[153] According to McLachlin C.J., this statement "is not a mere incantation, but rather a core precept that finds its application in concrete practices."[154]

[234] The honour of the Crown "infuses" the process of treaty interpretation,[155] and is "an important anchor".[156] Further: "The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."[157] The honour of the Crown gives rise to justiciable duties.[158] While not a cause of action in itself, [159] the honour of the Crown can also be the subject of a declaration.[160]

[235] Brian Slattery argues that in *Haida Nation* and *Taku River*, "we witness the emergence of a new constitutional paradigm governing Aboriginal rights" built around the doctrine of the honour of the Crown.[161] In his book, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada*, Jamie D. Dickson makes an extended argument that since *Haida Nation*, the doctrine of the honour of the Crown has begun to displace fiduciary duty as the

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[153] *Marshall*, at paras. 49, 51, *per* Binnie J. This statement is repeated often. The Supreme Court of Canada used the phrase most recently in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at para. 22.
[154] *Haida Nation*, at para. 16; and see *Manitoba Metis*, at paras. 73-74.
[155] *Haida Nation*, at para. 19.
[156] *Little Salmon*, at para. 42.
[157] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24.
[158] *Manitoba Metis*, at para. 73.
[159] *Manitoba Metis*, at para. 73.
[160] *Manitoba Metis*, at para. 143; *Mikisew Cree* (2018), at para. 47.
[161] Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 S.C.L.R. (2d) 433, at p. 436.

principal means by which the court assesses Crown actions under treaties. He states:

> [T]he fundamental conceptualisation of Crown obligations in Aboriginal contexts was entirely reset upon (a) explicitly, the core principle that the Crown is legally mandated to always act honourably in its dealings with Aboriginal peoples, and (b) implicitly, the notion that the regulation of the mischief of Crown dishonour involving Aboriginal peoples is the predominant, if not the exclusive, function of Aboriginal law.[162]

[236] The caselaw bears out Dickson's prediction, flowing from *Haida Nation*, that in giving content to sparsely defined treaty promises courts will utilize the doctrine of the honour of the Crown, not fiduciary duty. He notes:

> As the doctrinal anchor of Aboriginal law — as it was described by Justice Binnie in *Little Salmon/Carmacks* — the honour of the Crown principle describes the core mandate of this area of law — that the Crown is to act honourably in its dealings with Aboriginal peoples — and operates to give rise to specific and enforceable obligations, the breach of which by the Crown violates the anchor principle.[163]

[237] In *Mikisew Cree* (2018), Karakatsanis J. noted:

> This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it

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[162] Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing Limited, 2015), at p. 10. Abella J. cited Dickson, in *Mikisew Cree* (2018), at para. 71, for the proposition that "*Haida Nation* established a new legal framework in which to understand the government's obligations towards Indigenous peoples, organized around the principle of the honour of the Crown."

[163] Dickson, at pp. 20-21.

> makes to Aboriginal peoples…. Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be permitted….[164]

[238] In *Haida Nation*, McLachlin C.J. pointed out that: "The honour of the Crown gives rise to different duties in different circumstances."[165] In *Manitoba Metis*, McLachlin C.J. and Karakatsanis J. note that "[w]hat constitutes honourable conduct will vary with the circumstances", and that "the duty that flows from the honour of the Crown varies with the situation in which it is engaged."[166] The incidents of the honour of the Crown that may apply include "a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest".[167] It is instructive that in *Manitoba Metis* the court found that the honour of the Crown did not give rise to a fiduciary duty[168] even though the honour of the Crown was breached.[169]

[239] As an example of the more nuanced approach, McLachlin C.J. noted in *Haida Nation* that:

> [W]hile the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct

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[164] *Mikisew Cree* (2018), at para. 28 (citations omitted).
[165] *Haida Nation*, at para. 18.
[166] *Manitoba Metis*, at para. 74.
[167] *Manitoba Metis*, at para. 73(1).
[168] *Manitoba Metis*, at para. 64.
[169] *Manitoba Metis*, at para. 133.

> from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests.[170]

[240] The most common cases in which the court has imposed fiduciary duties on the Crown as an incident of its honour are those where the Crown controls the disposition of reserve property, including the taking up of reserve lands or lands subject to a treaty. Examples include *Guerin*, *Grassy Narrows*, and *Southwind*.[171] There are also cases where the court did not rely on fiduciary duty in which the complaint was that the Crown had not given full effect to a treaty, including *Marshall*, or had not complied with the duty to consult.[172]

[241] The honour of the Crown demands the purposive interpretation of treaties by the courts and by the Crown.[173] The Crown must act "diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests"[174] and "diligently pursue implementation" of treaty promises[175] in order to achieve their intended purposes.[176] This duty of diligent implementation is "narrow and circumscribed".[177] Like the duty to consult, it is distinct from fiduciary duties. To fulfil the duty of diligent implementation, "Crown servants must seek to

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[170] *Haida Nation*, at para. 54. See also *Mikisew Cree* (2005), at para. 51.
[171] *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447; and *Southwind v. Canada*, 2021 SCC 28, 459 D.L.R. (4th) 1.
[172] On the duty to consult, see *Haida Nation*, at para. 54, and *Mikisew Cree* (2005), at para. 51.
[173] *Manitoba Metis*, at para. 76
[174] *Manitoba Metis*, at para. 78.
[175] *Manitoba Metis*, at para. 97, and see para. 75.
[176] *Manitoba Metis*, at para. 73(4); *Mikisew Cree* (2018), at para. 28.
[177] *Manitoba Metis*, at para. 81.

perform the obligation in a way that pursues the purpose behind the promise."[178] Implementation need not be perfect, but "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise."[179]

[242] These are the duties that arise from the honour of the Crown in relation to the promises made in the Robinson Treaties. The question then becomes whether the concept of fiduciary duty has any work to do that is not done by the honour of the Crown and its duty of diligent implementation. We address this question below.

(2) The Trial Judge's Reasons

[243] The trial judge stated:

> The honour of the Crown requires that the Crown fulfil their treaty promises with honour, diligence, and integrity. The duty of honour also includes a duty to interpret and implement the Treaties purposively and in a liberal or generous manner. The Defendants accept this characterization of their duties.[180]

[244] She added immediately: "As I have found, there is also an ad hoc fiduciary duty on the part of the Crown."[181] The trial judge often linked the honour of the Crown and fiduciary duties in her reasons without making any distinction between

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[178] *Manitoba Metis*, at para. 80.
[179] *Manitoba Metis*, at para. 82.
[180] Stage One Reasons, at para. 538.
[181] Stage One Reasons, at para. 538.

the two.[182] The issue was squarely raised in argument[183] but she sidestepped it, taking the view that it was not necessary to decide which of the honour of the Crown or fiduciary duty "has primacy over the other."[184] Her concern appears to be to leave open the possibility of equitable damages.[185]

[245] Finally, the trial judge noted: "Whether the Crown has consistently fulfilled its duties to purposively and diligently interpret and implement the Treaties or whether the Crown has breached its duties are not Stage One issues."[186] But she overcame this diffidence, making several strong statements:

> Since 1850 the Crown has acted with unfettered discretion in their interpretation and implementation of the Treaties, in a way that has seriously undermined their duty of honour. This left the Treaties' promise completely forgotten by the Crown.[187]
>
> It seems to me that the real problem is not so much that the financial circumstances changed in the 168 years since the Treaties were signed; the real problem is that the augmentation promise was ignored for that entire period.[188]
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> [N]or should the Crown benefit from their neglect of the Treaties' provisions for over 150 years and thereby escape their obligation of honourable implementation of the Treaties' terms. At the implementation stage, the Crown is obliged, by virtue of the doctrine of the honour

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[182] Stage One Reasons, at paras. 3, 355, 369, 374 and 499.
[183] Stage One Reasons, at paras. 500-2.
[184] Stage One Reasons, at para. 505, citing *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, 485 Sask. R. 162, leave to appeal refused, [2017] S.C.C.A. No. 95.
[185] Stage One Reasons, at para. 504.
[186] Stage One Reasons, at para. 393.
[187] Stage One Reasons, at para. 495.
[188] Stage One Reasons, at para. 587.

> of the Crown, to purposively interpret and implement the Treaties' terms.[189]

(3) The Position of Ontario on the Honour of the Crown

[246] Ontario makes two arguments concerning the honour of the Crown. The first is linked to its primary argument that the Crown has unfettered discretion to augment the annuities or to decline to do so. Consistent with that position, Ontario asserts that in exercising its discretion under the aegis of the honour of the Crown, the Crown has only procedural duties, which Ontario sets out in four propositions:

- the Crown must engage in the exercise of the discretion upon request by a Treaty First Nation, and from time to time in any event;
- the Crown should engage honourably with the Treaty First Nations in the exercise of the discretion, meaning that the process the Crown chooses to follow must uphold the honour of the Crown, and can be challenged on the basis that it failed to do so;
- the Crown must engage with Treaty First Nations in relation to the analysis of net Crown resource-based revenues, including providing sufficient information to allow them to independently assess the analysis performed by the Crown; and
- an honourable process includes providing Treaty First Nations with an explanation of any decision reached, though this would not require formal reasons.

[247] Ontario's second argument is that the honour of the Crown does not require the imposition of fiduciary duties on the Crown respecting these Treaties and that the trial judge erred in imposing them.

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[189] Stage One Reasons, at para. 589.

(4) The Position of Canada on the Honour of the Crown

[248] Canada did not appeal the judgment and agrees that the Crown has Treaty obligations "to increase the promised annuity payments from time to time if Crown resource-based revenues from the Treaties' territories permit." Canada submits that the Crown "retains discretion with respect to the implementation and fulfilment of those obligations; but its discretion is not unfettered" and is subject to judicial review. The constraints include the terms of the Treaties, the duty of purposive treaty interpretation, the honour of the Crown, and the reconciliatory imperative of s. 35 of the *Constitution Act, 1982*. Canada did not address the relationship between the honour of the Crown and fiduciary duties.

(5) The Principles Concerning the Honour of the Crown Applied

[249] The trial judge stated that the honour of the Crown requires the Crown to fulfil the Treaty promises with honour, diligence, and integrity, including the duty to interpret and implement the Treaties purposively and in a liberal or generous manner.[190] This is consistent with the authorities.

[250] The trial judge correctly found that "the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant."[191] She specified that: "The economic circumstances will

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[190] Stage One Reasons, at para. 538.
[191] Stage One Reasons, at para. 3.

trigger an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss."[192] This is the core Treaty promise that must now be diligently implemented by virtue of the honour of the Crown.

[251] Consequently, we would not accept Ontario's argument that, in this case, the honour of the Crown can be reduced to a series of procedural requirements. Where the honour of the Crown is involved, "fairness to the Indians is a governing consideration."[193] As Thomas Isaac notes, "[t]he notion of fairness in interpretation seemed to indicate, even at a relatively early stage, that the honour of the Crown was meant to ensure just outcomes, rather than solely procedural fairness."[194]

[252] We agree with Ontario that the honour of the Crown does impose procedural requirements at least equal to those Ontario proposes. We would not go further in specifying these procedural requirements. They are properly the subject of rulings to be made in Stage Three of these proceedings.

[253] However, these procedural requirements are not all that the honour of the Crown requires. The honour of the Crown, together with s. 35, requires that the Crown diligently implement the Treaty promise. This is the standard against which

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[192] Stage One Reasons, at para. 3.
[193] *R. v. Agawa* (1988), 53 D.L.R. (4th) 101 (Ont. C.A.), at p. 120, leave to appeal refused, [1988] S.C.C.A. No. 501.
[194] Isaac, at p. 344.

the Crown's incidental discretionary decisions in the implementation process are to be assessed. All of those decisions are subject to judicial review. The relevant question, on review, will be: "Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes" of the Treaty promise?[195]

[254] We turn to the issue the trial judge declined to resolve, which she expressed as which of honour of the Crown or fiduciary duty "has primacy over the other."[196] With respect, the honour of the Crown and fiduciary duty are not in competition. The honour of the Crown can give rise to fiduciary duties in circumstances where such duties are necessary and appropriate.

[255] The trial judge found the imposition of a fiduciary duty necessary, in part, to ensure the availability of equitable remedies. She noted that, in addition to the obligations imposed by the honour of the Crown, "a finding of a fiduciary duty may impose additional duties on the Crown, as well as open up an array of equitable remedies."[197] These are remedies that, the trial judge suggested, "at this time are not available under the principle of the honour of the Crown."[198] She found that the

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[195] *Manitoba Metis*, at para. 83.
[196] Stage One Reasons, at para. 505.
[197] Stage One Reasons, at para. 499.
[198] Stage One Reasons, at para. 504.

question of fiduciary duties could not "be ignored because a different model may be developed at some future point."[199]

[256] In the particular circumstances, does the concept of fiduciary duty have any work to do that is not already being done by honour of the Crown? In *Peter Ballantyne Cree Nation*, the Court of Appeal for Saskatchewan endorsed Dickson's view, set out above, that "the generalized fiduciary obligation (in form, a principle that calls for honourable conduct) has been largely replaced by the honour of the Crown principle which effectively mandates the same thing."[200] We agree.

[257] The "different model" to which the trial judge refers appears to be the honour of the Crown and the duty of diligent implementation. While the duty of diligent implementation has received only recent and isolated application as a basis for remedies in the treaty context,[201] it "is not a novel addition to the law" and is "recognized in many authorities".[202] Where the duty is breached, a court may order remedies aimed at ensuring that the Crown fulfills its treaty promises.

[258] We agree with Hourigan J.A. that fiduciary duty has no work to do in this case that cannot be done by honour of the Crown alone. The development of the

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[199] Stage One Reasons, at para. 505.
[200] *Peter Ballantyne Cree Nation*, at para. 83, citing Dickson, at p. 91.
[201] See e.g., *Watson v. Canada*, 2020 FC 129 (in which only declaratory relief was granted); *Yahey. v. British Columbia*, 2021 BCSC 1287; and *Manitoba Metis*, which concerned constitutional obligations contained in the *Manitoba Act*, *1870*, S.C. 1870, c. 3, rather than a treaty promise.
[202] *Manitoba Metis*, at para. 81.

doctrine counsels against imposing fiduciary duties where they are not required, and they are not required in this case.

D. ISSUE THREE: DID THE TRIAL JUDGE ERR IN FINDING THERE WAS NO IMPLIED TERM FOR THE INDEXATION OF THE ANNUITIES?

[259] Ontario submits that the trial judge erred in refusing to accept that the annuities paid pursuant to the Robinson Treaties should be indexed to mitigate the impact of inflation. Ontario argues that, although the Treaties do not contain any legally enforceable obligation to increase the annuities beyond a contractual $4 per person "cap", applying the common-law test for implication of contractual terms, so as to add a proviso indexing that cap, would restore the purchasing power intended by the Treaty partners and would be consistent with the honour of the Crown. Canada takes the position that the trial judge was correct in declining to imply such a term. The Huron and Superior Plaintiffs see no need to imply indexing if the Treaties oblige the Crown to increase the annuity from time to time, when the revenues generated by the ceded lands permit the Crown to do so without incurring a loss.

(1) The Trial Decision on Indexation

[260] As noted, the Treaties provide that the annuity "… 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" (emphasis added).

[261] At trial, Ontario pleaded that “one pound Provincial currency”, equivalent to $4, should be indexed to mitigate inflation but, as discussed, took the position that this sum was a “cap” and that it has no obligation other than to consider augmenting the individual annuity over this indexed amount. The precise inflation-adjusted value of the cap would be left for the trial judge to determine at Stage Three of these proceedings. On appeal, Ontario acknowledges that an inflation-adjusted cap would be relevant both to Ontario and Canada’s continuing obligations under the Treaties and to any calculation of damages.

[262] Both the Huron and Superior Plaintiffs agreed that “one pound Provincial currency” should be indexed, but only if their principal argument – that the Treaties oblige the Crown to increase a collective annuity in step with increases to territorial revenue – were to fail. Canada took the position that, given inflation was unknown in 1850, the parties would not have turned their minds to the question of indexation and, thus, implying a term would be inappropriate.

[263] The trial judge was not persuaded that the parties would have agreed to an indexation clause, had the then-unknown concept of persistent inflation and erosion of purchasing power been explained to them at the time of the Treaties.[203] This was just one of many unforeseen changes affecting the Treaty partners over

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[203] Stage One Reasons, at para. 594.

the following 170 years.[204] She observed that the Treaties contained both an augmentation clause and a diminution clause, intended by the parties to deal with changing circumstances.[205] The Robinson Treaties were unique in providing for an augmentation of the annuities which, she found, were linked to increases in the territorial revenue and which would thereby adjust the future value of the annuities.[206] She accordingly refused to imply a Treaty term for indexation of the annuities but noted that "[i]n treaties without an augmentation provision, different considerations could quite possibly result in different responses to this claim."[207]

(2) Analysis

[264] There is no doubt that courts may imply terms into treaties on the basis of the presumed intentions of the parties, where necessary to give effect to treaty promises or where doing so meets the "officious bystander test". In *Marshall*, the accused – a Mi'kmaq man – was charged with offences under federal fishery regulations. He asserted a treaty right to fish. The treaty contained a Mi'kmaq promise not to trade any commodities except with the managers of certain trading posts, known as truckhouses, or persons appointed by the Crown. The treaty did not contain any reference to a continued right to fish.

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[204] Stage One Reasons, at para. 586.
[205] Stage One Reasons, at para. 592.
[206] Stage One Reasons, at para. 596.
[207] Stage One Reasons, at para. 597.

[265] Binnie J. observed:

> Here, if the ubiquitous officious bystander had said, "This talk about truckhouses is all very well, but if the Mi'kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course".[208]

[266] And further:

> This was not a commercial contract. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. In my view, with respect, the interpretation adopted by the courts below left the Mi'kmaq with an empty shell of a treaty promise.[209]

[267] The court concluded the treaty at issue, in restricting the trade of fish, implied a continued right to fish in a manner sufficient to produce a moderate livelihood. As Binnie J. put it, "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship".[210]

[268] In the commercial context, courts will consider whether an implied term is "necessary to give business efficacy" to the agreement.[211] As noted in *Energy Fundamentals Group Inc.*:

> Implication of a contractual term does not require a finding that a party actually thought about a term or

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[208] *Marshall*, at para. 43.
[209] *Marshall*, at para. 52.
[210] *Marshall*, at para. 4.
[211] *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514, 388 D.L.R. (4th) 672, at para. 34, quoting *Attorney General of Belize & Ors v. Belize Telecom Ltd & Anor*, [2009] UKPC 10, [2009] 2 All E.R. 1127, at para. 22.

> expressly agreed to it. Often terms are implied to fill gaps to which the parties did not turn their minds….
>
> On the other hand, a court will not imply a term that contradicts the express language of the contract or is unreasonable….[212]

Courts will generally not imply a term where the agreement's language addresses the particular contingency addressed by the proposed implied term.

[269] In this case, the trial judge was correct to reject the proposal to imply an indexing term in the face of the parties' choice, in the Treaties, to link increases in the annuities to the revenues generated by the ceded lands. There is no basis to supplant the augmentation clause with a judicially created indexing term which, over 170 years, could produce widely different results, particularly given the various possible formulae for indexation.

[270] Here, the Treaty beneficiaries are not left with "an empty shell of a treaty promise" in the absence of the proposed implied term.[213] As we explain elsewhere, the Huron and Superior Plaintiffs retain a meaningful and enforceable Treaty right, subject to substantive judicial review, that accommodates the risk of inflation. The honour and integrity of the Crown demand that it uphold *this* promise, not the implied promise Ontario advances in its stead.

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[212] *Energy Fundamentals Group Inc.*, at paras. 35-36.
[213] *Marshall*, at para. 52.

E. ISSUE FOUR: DID THE TRIAL JUDGE ERR IN HER APPROACH TO REMEDIES?

[271] We begin with several observations to set the remedial context facing the trial judge. First, the trial judge cited the patent deficiencies and omissions in these historical Treaties. Even though they were meant to establish relationships in perpetuity, the Treaties are "lean on details."[214] The trial judge noted that:

> [T]he Treaties do not prescribe a protocol or a guide for the mechanics of implementing this promise *(i.e. the frequency, method, or factors to be considered, the corresponding duties that arise, or the scope or limits of review)*. Therefore, while it is not controversial that the duties flowing from the honour of the Crown bind the Crown (irrespective of the nature of the promise), the specific duties that arise in this case are undefined on the face of the Treaties.[215]

[272] The trial judge observed that because the Treaties are perpetual, they "are not frozen at the date of signature."[216] But the lack of any effort to implement the augmentation clause in the Robinson Treaties, apart from the increase to the annuities in 1875, has resulted in a lack of guidance for future implementation:

> The annuities were last increased in 1875. Therefore, regrettably, there is no set protocol, mechanism, or precedent for the process of considering increases to the annuities. Hence, the court and the parties must return to the shared goals, expectations, and understandings of the parties in 1850 and, based on those shared goals, expectations, and understandings, devise processes and

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[214] Stage One Reasons, at para. 399.
[215] Stage One Reasons, at para. 349 (emphasis in the original).
[216] Stage One Reasons, at para. 324(9).

> procedures for the implementation of the Treaties' promise in the modern era.[217]

[273] Binnie J. commented in *Little Salmon*:

> The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome.[218]

[274] Second, the trial judge expressed dismay at the positions taken in this litigation by Ontario and Canada,[219] implicitly echoing McLachlin C.J.'s comment in *Taku River* that "[t]he Province's submissions present an impoverished vision of the honour of the Crown and all that it implies."[220] The trial judge noted that "both Ontario and Canada reject the proposition that they have duties of disclosure or consultation in the implementation process."[221] This hard position, she said, "flies in the face" of Supreme Court authority on the honour of the Crown, leading her to note that: "The duty of honour must find its application in concrete practices and in legally enforceable duties."[222] Those duties include both a duty to consult and a duty to disclose at least "sufficient information to allow the parties to calculate net Crown resource revenues."[223]

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[217] Stage One Reasons, at para. 536.
[218] *Little Salmon*, at para. 12.
[219] Stage One Reasons, at paras. 492-94.
[220] *Taku River*, at para. 24.
[221] Stage One Reasons, at para. 563.
[222] Stage One Reasons, at para. 567.
[223] Stage One Reasons, at paras. 570, 571, and see para. 572, in which the trial judge notes that a better definition of the contents of the duty to consult must be left to another stage in the litigation.

[275] Third, these observations about the recalcitrance of both Ontario and Canada[224] led the trial judge to doubt the prospect of successful negotiations:

> However, when negotiation fails to achieve a resolution or if the Crown refuses to negotiate, the Treaties' beneficiaries are entitled to ask for judicial intervention. And if the Treaties' beneficiaries issue a claim after 168 years of no action on the part of the Crown, the court cannot simply accept the Crown's acknowledgment of their duty of honour and permit the Crown to carry on without further direction.[225]

[276] The trial judge went on to craft the judgments under appeal with no confidence that a simple declaration without more judicial direction would trigger good faith negotiations. On the record before her, this was not an unreasonable assessment.

(1) Ontario's Arguments

[277] Ontario makes three arguments on remedies. First, the trial judge erred in excluding the costs of infrastructure and institutions from the calculation of net Crown resource-based revenues. Second, her "fair share" formulation is not supported on the evidence. Third, as framed, the remedy in the judgments is not justiciable. We found earlier that the justiciability argument has no merit. We

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[224] Canada somewhat moderated its recalcitrance during the hearing before the trial judge: see Stage One Reasons, at para. 490.

[225] Stage One Reasons, at para. 492 (footnote omitted), and see paras. 378, 391, 481 and 491-97. The trial judge was alive to the advantages of negotiation. The Supreme Court has often sounded its preference for negotiation over litigation, motivated by negotiation's promise of reconciliation, which is the "grand purpose" of s. 35 of the *Constitution Act, 1982*, most recently in *R. v. Desautel*, 2021 SCC 17, 456 D.L.R. (4th) 1, at para. 87, *per* Rowe J. But there must be a will.

address the remaining two issues in turn after setting out the relevant language of the judgments. We conclude with some observations on Stage Three in light of the matters addressed in this section of the reasons.

(2) The Language of the Judgments

[278] The context for all three issues is set by the terms of the formal judgments from the Stage One proceedings. For convenience, in our analysis, we will use the text of the judgment from the Huron action, which is materially the same as the text of the judgment from the Superior action. Our analysis applies equally to both judgments.

[279] The trial judge found that the Treaties require the payment of a "fair share" of net Crown resource-based revenues to the First Nations. Paragraph 1(a) of the operative part of the judgment from the Huron action provides:

> Pursuant to the Robinson Huron Treaty of 1850, the Crown is obligated to increase, and the First Nation Treaty Parties have a collective treaty right to have increased, from time to time, the promised annuity payment of £600 (or $2,400) if net Crown resource-based revenues from the Treaty territory permit the Crown to do so without incurring loss, with the amount of annuity payable in any period to correspond to a fair share of such net revenues for that period[.] [Emphasis added.]

[280] The trial judge added, at para. 1(d) of the judgment: "The Crown must diligently implement the augmentation promise, so as to achieve the Treaty

purpose of reflecting in the annuities a fair share of the value of the resources, including the land and water in the territory" (emphasis added).

[281] The trial judge included guidance on the definition of "net Crown resource-based revenues" in paras. 3(b) and (c) of the judgment:

> (b) For the purpose of determining the amount of net Crown resource-based revenues in a particular period:
>
> > i. relevant revenues to be considered are Crown resource-based revenues arising directly or in a closely related way to the use, sale, or licensing of land (which could include the waters) in the Treaty territory, including mineral and lumbering revenues and other analogous revenues as received by the Crown both historically and in the future, but not including personal, corporate or property tax revenues,
> >
> > ii. relevant expenses to be considered are Crown expenses related to collecting, regulating, and supporting relevant revenues, but do not include the costs of infrastructure and institutions that are built with Crown tax revenues,
>
> with these definitions to be applied as general principles that are subject to clarification and further direction by the Court in a future stage of this proceeding; and
>
> (c) Failing agreement amongst the parties, the principles to be applied for purposes of determining amounts that are fairly and reasonably equal to a fair share of net Crown resource-based revenues are subject to further direction by the Court in a future stage of this proceeding.

(3) The Definition of Net Crown Resource-Based Revenues

[282] Ontario argues that the trial judge erred in excluding the costs of infrastructure and institutions built with Crown tax revenues from the calculation of net Crown resource-based revenues. To be fair to the trial judge, she embarked on this exercise at the behest of the Huron and Superior Plaintiffs[226] and against the opposition of Ontario and Canada, who urged her to "proceed cautiously", arguing that the questions of what constitutes a revenue and an expense were better dealt with in Stage Three.[227] The trial judge's ambivalence about deciding the issue is signalled by her comment that: "I agree, to some extent, with both positions."[228] However, the trial judge accepted the Huron and Superior Plaintiffs' argument that there was sufficient evidence before the court to "articulate general principles".[229]

[283] The trial judge accepted the arguments of Ontario and Canada that tax revenues should not be considered in calculating net Crown resource-based revenues[230] and on that basis excluded the costs of "the infrastructure and institutions that are built with Crown tax revenues."[231] But her uncertainty is revealed in this statement:

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[226] Stage One Reasons, at para. 540.
[227] Stage One Reasons, at para. 541.
[228] Stage One Reasons, at para. 541.
[229] Stage One Reasons, at para. 541.
[230] Stage One Reasons, at para. 547.
[231] Stage One Reasons, at para. 549.

> With respect to further principles guiding the definition of relevant revenues and expenses, I suggest that more or better evidence at Stage Three of this litigation may be of further assistance. The above general principles should be considered as a starting point only.[232]

[284] The trial judge encouraged the parties to "come to an agreement on specific revenue and expense categories".[233] The same hedging for uncertainty is found in paras. 3(b) and (c) of the judgment quoted earlier.

[285] Ontario argues that the hedging language "appears to leave open the possibility that some tax revenues may be relevant, creating the potential for inconsistency." Ontario appears to fear a form of tracing as the basis for establishing relevant revenues and expenses and notes that the ruling "failed to take into account uncontested evidence that by far the majority of provincial revenues and expenses flow through Ontario's consolidated revenue fund." Ontario expects that "there likely will be no 'infrastructure and institutions' that have been built exclusively with tax revenues" (emphasis in the original), and argues that if "applied categorically, this 'general principle' may exclude expenses that should be included, at least in part."

[286] The trial judge's desire to give some guidance was well-intentioned, but, in our view, the counsel of caution should have prevailed. A prescriptive paragraph in a judgment should not be framed as only a first foray into a complex and difficult

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[232] Stage One Reasons, at para. 553.
[233] Stage One Reasons, at para. 554.

issue already scheduled to be heard. We would, as an exercise of prudence, excise the words, “but not including personal, corporate or property tax revenues,” from para. 3(b)(i) of the judgments, and the words, “but do not include the costs of infrastructure and institutions that are built with Crown tax revenues” from para. 3(b)(ii) of the judgments.

(4) The “Fair Share” Formulation

[287] Ontario argues that the trial judge erred in interpreting the Treaties as promising the payment of annuities corresponding to a “fair share” without defining “fair share” or articulating related principles. Ontario acknowledges that “[a]ll parties to the Robinson Treaties likely intended the annuities agreed upon to be ‘fair’ in context”, but argues that the concept of “fair share” was not discussed or agreed upon in Treaty negotiations and that there is no basis to infer any common intention that the promise be for a “fair share”.

[288] The judgments provide that the Treaties require the payment of annuities corresponding to a “fair share of the value of the resources, including the land and water in the territory”. We would deconstruct the judgments into two possible promises for analytical purposes. The first is that the augmentation clause was a promise to share in the value of the land. The second is that a “fair share” was promised.

[289] The first form of promise – to share in the value of the land - is supported on the evidence and was woven through the trial judge's interpretation of the augmentation clause. The same cannot be said for the second form of the promise – the elusive promise of fair share. We address each in turn.

(a) The Promise to Share

[290] At the most obvious level, the concept of sharing was built into the augmentation clause. Any future increase in the annuities will be funded out of net Crown revenues – revenues from the ceded lands in excess of costs. In that simple sense, the revenues would literally be shared.

[291] But the concept of sharing is more fundamental. It was integral to the interpretation of the augmentation clause that the trial judge adopted, to quote it again for convenience:

> A third interpretation, which includes the second interpretation, is that the Treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met.[234]

[292] The trial judge found that "[a] plan to share the wealth on an 'if and when' basis through an augmentation clause was always central to the understanding, the aspiration, and the intent of both the Anishinaabe and the Crown."[235]

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[234] Stage One Reasons, at para. 461 (emphasis added).
[235] Stage One Reasons, at para. 466.

[293] From the Anishinaabe perspective, the principles that the trial judge found "fundamental to the Anishinaabe's understanding of relationships",[236] particularly the principle of reciprocity, suggest that the Treaties would have been viewed as an agreement to share in the value of the territory. But the word "value" is notoriously vague, as a review of the evidence shows.

[294] In her careful recounting of the evidence on this issue, the trial judge described the Anishinaabe's "established tradition of sharing their territory with others, provided that the use or occupation was authorized."[237] She described the "ubiquitous" practice of gift giving among the Anishinaabe, which was considered "an act of moral imperative, rather than an economic necessity."[238] Within Anishinaabe society, "hunters shared their bounty knowing that in turn, another hunter would reciprocate and share his when needed."[239] Gift giving occurred "in accordance with the principle of reciprocity, which holds that items of value are given with the expectation that the gift will be returned."[240]

[295] The practice of gift giving became part of alliances between Euro-Canadians and the Anishinaabe:

> Prospective allies demonstrated their ability to take care of each other through the mutual exchange of gifts. Reciprocal gift giving was representative of the alliance

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[236] Stage One Reasons, at para. 423.
[237] Stage One Reasons, at para. 32.
[238] Stage One Reasons, at para. 48.
[239] Stage One Reasons, at para. 48.
[240] Stage One Reasons, at para. 49.

> that included the possibility of shared spaces and resources, embodying the principle of mutual interdependence. An alliance included the mutual promise of responsibility for each other.[241]

[296] Sharing was inherent in the Anishinaabe practice of gift giving and in the principle of reciprocity. The trial judge found that, upon ceding their land to the Crown, "[t]he Anishinaabe Chiefs and leaders had every reason to expect that their 'gift' attracted a reciprocal 'gift', commensurate with the value of what they had provided."[242]

[297] The trial judge also grounded her finding that the augmentation clause promised some form of sharing in specific expressions by Anishinaabe leaders, such as the specific request for a "share" in a petition from Chief Shingwaukonse to Governor General Lord Cathcart, dated June 10, 1846. The trial judge found that this petition, in which Chief Shingwaukonse protested mining activities, "proposes to share the benefits derived from the territory."[243] Chief Shingwaukonse wrote:

> I see Men with large hammers coming to break open my treasures to make themselves rich & <u>I want to stay and watch them and get my share.</u> Great Father – The Indians elsewhere get annuity for lands sold if ours are not fit in most places for cultivation they contain what is perhaps more valuable & I should desire for sake of my people to derive benefit from them… I should much wish to Great Father to see you & take your hand and ask you

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[241] Stage One Reasons, at para. 50.
[242] Stage One Reasons, at para. 420.
[243] Stage One Reasons, at para. 126.

> to tell me of these things, and also open to you my mind for tho' I can write yet I could speak it better to you… I want always to live and plant at Garden River and as my people are poor to derive a share of what is found on my Lands. [Emphasis added.]

[298] The trial judge found that Chief Shingwaukonse "eloquently argued for a share of the wealth for over four years" and did not abandon this idea during treaty negotiations.[244] On another occasion, Chief Shingwaukonse expressed the desire for "pay for every pound of mineral that has been taken off of our lands, as well as for that which may hereafter be carried away."[245] The trial judge also quoted Chief Peau de Chat's words: "A great deal of our mineral has been taken away. I must have something for it. I reflect upon it, as well as upon that which still remains."[246]

[299] These "demands from the Anishinaabe for a share of the proceeds of [the mining] activity" were a significant part of the context that the trial judge took into account in interpreting the augmentation clause.[247] She found that the concept of sharing could be traced from the Chiefs' expressions and petitions to the recommendation in the Vidal-Anderson Report that provision be made, "if necessary, for an increase of payment upon further discovery and development of any new sources of wealth."[248]

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[244] Stage One Reasons, at para. 246.
[245] Stage One Reasons, at para. 131.
[246] Stage One Reasons, at para. 134.
[247] Stage One Reasons, at para. 330.
[248] Stage One Reasons, at para. 467, and see para. 161.

[300] The word “value” is used in different ways in the evidence and by the trial judge in her reasons. The trial judge described Anderson’s visit in 1848. She stated: “Chief Peau de Chat also sought information on the value of the mineral wealth. He stated that he wanted a fair evaluation of his land’s worth and arrears for the loss of minerals”.[249] This suggests a monetary conception of value. That conception is also invoked in the Vidal-Anderson Commissioners’ belief “that the Lake Superior Anishinaabe had been led ‘to form extravagant notions of the value of their lands’”.[250] Both this conception of value, and the fact that it was not familiar to the Anishinaabe, were also suggested by Chief Shingwaukonse’s comments to the Commissioners, regarding his lawyer: “[W]e have appointed Macdonell to arrange our affairs… I know nothing of the value of the land, - we thought of our ignorance and employed Macdonell.”[251]

[301] It is clear that a monetary conception of “value” was being employed and that the “value” in question related to revenue produced from activities in the territory (both revenue from mining locations and proceeds from sale of lots).[252]

[302] The trial judge asked: “What did the Commissioners Mean by ‘Value of the Land’?” This question arose from the fact that “no prior treaty linked compensation

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[249] Stage One Reasons, at para. 134.
[250] Stage One Reasons, at para. 146.
[251] Stage One Reasons, at para. 150.
[252] Stage One Reasons, at para. 161.

to value."[253] The trial judge pointed out that there was "no market for any Indian land" after the Royal Proclamation of 1763; only the Crown could buy such land. The trial judge stated: "Consequently, the Government controlled, or arbitrarily set, the entire market for Anishinaabe land 'sales'. There was no way for Anishinaabe leaders to know 'the value' of the land, if value was measured as a function of future revenue."[254]

[303] The trial judge stated:

> The Commissioners' repeated statements on this issue of "ignorance of value" leads to three possible inferences concerning the Commissioners' assumptions: first, that "value", however it was defined, was going to be an important factor to consider to reach a mutually acceptable agreement on annuity amount; second, that the Anishinaabe would be in a compromised position without knowledge of the value of the land or the wealth that the territory could produce; and third, that the Commissioners believed the Crown was in a superior position to predict the "value of the land" and that this superior position in negotiating imposed certain duties on the Crown.[255]

[304] The trial judge accepted that it was the monetary concept that the Anishinaabe sought to have included and that the Commissioners proposed inserting into the Treaties:

> The Commissioners proposed a compensation model that took into consideration "the actual value" of the

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[253] Stage One Reasons, at para. 167.
[254] Stage One Reasons, at para. 167.
[255] Stage One Reasons, at para. 171.

> territory. In a recommendation that reverberates today, the Commissioners made a novel proposal for the new treaty to make "terms in accordance with present information of its resources" while adding a provision for an increase to the annuities "upon further discovery and development of any new sources of wealth" (emphasis added). This recommendation was based on the knowledge the Commissioners acquired during their extensive consultations with the Anishinaabe, as well as their understanding of the challenges facing the Colonial Government at the time.[256]

[305] She added: "Since at least 1846, Chief Shingwaukonse spoke of tying the mineral wealth or monies collected in connection to the mining activity to compensation."[257]

[306] From this evidence, the trial judge concluded that the Treaties created a revenue sharing model:

> For the Crown, the idea of sharing revenues was novel, but reflected their goal to obtain access to the land and resources, limit their liability, and deal honourably with the Anishinaabe.
>
> A treaty that linked the future revenue of the territory to the annuities payable to the Anishinaabe answered the uncertainties and risks present. A revenue sharing model was consistent with the perspective that the Anishinaabe Chiefs held about their relationships with the newcomers and the land. It was also consistent with the Anishinaabe's duties of responsibility as leaders toward their people. In addition, the sharing model invited renewal as circumstances changed. Most importantly, a

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[256] Stage One Reasons, at para. 174.
[257] Stage One Reasons, at para. 176.

> sharing model was consistent with the principle of reciprocity.[258]

[307] This analysis and the trial judge's finding that the Treaties created a revenue sharing model are well supported and were not effectively challenged by Ontario. The trial judge did not err in characterizing the Treaties in this way.

(b) The Concept of "Fair Share"

[308] We turn now to the second promise identified by the trial judge as part of her interpretation of the augmentation clause, the promise of a "fair share". The judgments set out what the trial judge considered to be the consequences of her interpretation of the augmentation clause, which is constructed around the concept of a fair share.

[309] To recapitulate, para. 1(a) of the operative language of the formal judgments provides that: "the amount of annuity payable in any period [will] correspond to a fair share of such net revenues for that period" (emphasis added). Paragraph 1(d) of the judgments add that the Treaty purpose is to reflect in the annuities "a fair share of the value of the resources, including the land and water in the territory" (emphasis added). Paragraph 1(e) addresses the graciousness clause and obliges the Crown to consult with the Treaty parties "to determine what portion, if any, of the increased annuity amount is to be distributed by the Crown to the individual

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[258] Stage One Reasons, at paras. 469-70.

Treaty rights holders in addition to the $4 per person per year they are already being paid". Finally, para. 3(c) leaves things somewhat more open: "the principles to be applied for purposes of determining amounts that are fairly and reasonably equal to a fair share of net Crown resource-based revenues are subject to further direction by the Court in the future stage of this proceeding" (emphasis added).

[310] In terms of the trial judge's reasons for decision, the expression "fair share" first emerged in her summary of the position of the Huron Plaintiffs, who argued for "renewing the treaty relationship and moving to a fair sharing agreement of the land and its resources."[259] The trial judge next referred to the "fair share of the net revenues" as an implementation issue in dispute.[260] In argument, both the Huron Plaintiffs and the Superior Plaintiffs suggested that a fair share would be 100 percent of net Crown revenues.[261] The trial judge rejected this proposition stating, "[s]haring, by definition, does not include taking 100% of the net benefits from the Crown."[262] She addressed and rejected the Huron Plaintiffs' and Superior Plaintiffs' claims to all of the revenues.[263] Finally, the trial judge noted that it was not yet possible to specify what a fair share would be:

> It is not possible to articulate the principles for a fair share in a vacuum. There was very little evidence before the

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[259] Stage One Reasons, at para. 362.
[260] Stage One Reasons, at para. 535.
[261] Stage One Reasons, at para. 556. The Huron Plaintiffs argued on the motions and before this court that Crown revenues represent only a fraction of the wealth generated by the territory.
[262] Stage One Reasons, at para. 560.
[263] Stage One Reasons, at paras. 555-61.

> court on post-Treaty economic activity in the territories. In a later stage of these proceedings it will be up to the parties to demonstrate what division of revenues is supportable on the evidence.[264]

(c) Ontario's Position

[311] As noted, Ontario argues that the trial judge erred in interpreting the Treaties as promising the payment of annuities corresponding to a "fair share" without defining "fair share" or articulating related principles.

(d) Analysis

[312] We agree with Ontario that the trial judge's interpretation of the Treaties fell short on the "fair share" issue. As we will explain, the trial judge's interpretation of the Treaties as giving the Anishinaabe a "fair share" of the value of the territory went beyond a generous construction of the Treaties.

(i) The "Fair Share" Error

[313] The expression "fair share" is not an actual interpretation of the augmentation clause. The "promise to share the revenues from the territory" gains nothing substantive from the addition of the words, "fair share". The concept of a "fair share" is neither drawn from the evidence nor is it especially useful in understanding the Crown's obligations under the Treaties. The expression is a

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[264] Stage One Reasons, at para. 559.

rhetorical gloss that adds nothing substantive but has the potential to work mischief.

[314] The trial judge's interpretation of the Treaty promises has two elements. The first is that "the Treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met."[265] The second relates to the graciousness clause and obliges the Crown to consult with the Treaty parties to determine how much of any increase was to be paid directly to the individual Treaty rights holders.[266]

[315] We recognize that at one level, no one can quarrel with the idea of a "fair share". We instill the virtue of sharing in our children. As the trial judge noted, sharing is what the Treaties are built on. No reasonable person would oppose an arrangement that was "fair". Ontario acknowledges that "[a]ll parties to the Robinson Treaties likely intended the annuities agreed upon to be 'fair' in context." So, on this reading, "fair share" seems quite innocent. But that would downplay the effectiveness of a rhetorical figure of speech. It was introduced by the Huron and Superior Plaintiffs' counsel for that reason.[267]

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[265] Stage One Reasons, at para. 461.
[266] Stage One Reasons, at para. 397. See also Huron Action Stage One Partial Judgment, at para. 1(e); Superior Action Stage One Partial Judgment, at para. 1(e).
[267] Familiar figures of speech are used in legal rhetoric to prompt the intuitive adoption of a favourable schema because they are often unthinkingly accepted. This is a form of "narrative priming": see

[316] The trial judge's judgment that the Treaties promise a "fair share" of net Crown revenues is not supported by evidence. This phrase does not appear in any of the historical records. It seems to have originated with counsel. The Huron Plaintiffs, in their Amended Statement of Claim, seek "[j]udgment … that the Crown is to forthwith provide payment of a fair share of the net profit, said share to be the subject of a negotiated agreement between the Crown and the Plaintiffs."[268] They state:

> The Robinson Huron Treaty Territory has been considerably taken-up since the signing of the Treaty in 1850. The Robinson Huron Treaty Anishinabek were not meaningfully consulted by the Crown with regard to the taking-up of those lands. Nor were they accommodated, as provided in the Treaty, by way of being paid a fair share of resource revenues as promised by Robinson in 1850.[269]

[317] The expression "fair share" was repeated many times by counsel for both the Huron and Superior Plaintiffs, in oral and written submissions. The "fair share" concept was advanced as part of Robinson's understanding of the augmentation clause ("Mr. Robinson himself must have believed that the augmentation clause was capable of providing the Anishinaabe with a fair share of the proceeds of the

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Linda L. Berger & Kathryn M. Stanchi, *Legal Persuasion: A Rhetorical Approach to the Science* (London and New York: Routledge, 2018) at pp. 84, 109.

[268] Appeal Book, Tab 4.a.1, para. 1(l).

[269] Appeal Book, Tab 4.a.1, para. 123 (emphasis added).

land");[270] as the desire of Chief Shingwaukonse ("He wants his fair share")[271] and other Anishinaabe leaders ("[W]e have the Fort William Chief and principal man concerned that they want their fair share");[272] as the core purpose of the augmentation clause ("[W]e say that that is an approach that's entirely consistent with the purpose of the augmentation clause, which is to provide the Anishinaabe with a fair share of the revenues");[273] and – in its absence – as the basis of later complaints ("They're complaining they're not getting their fair share").[274]

[318] At one point, the trial judge asked counsel about the origin of the phrase, "fair share". At first, counsel agreed that this phrase originated in the Vidal-Anderson report. Counsel then corrected himself and said, instead, that it came from Chief Shingwaukonse's 1846 petition, stating, "He says, I want my fair share."[275] But this too was an error by counsel. There is no evidence on the record that Chief Shingwaukonse ever used the phrase "fair share". He said that he

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[270] Opening Submissions of the Huron Plaintiffs, Joseph Arvay, September 25, 2017, Transcript, Vol. 1, at p. 23.
[271] Opening Submissions of the Superior Plaintiffs, Harley Schachter, September 26, 2017, Transcript, Vol. 2, at p. 141.
[272] Opening Submissions of the Superior Plaintiffs, Harley Schachter, September 26, 2017, Transcript, Vol. 2, at p. 142.
[273] Closing Submissions of the Huron Plaintiffs, Joseph Arvay, June 4, 2018, Transcript, Vol. 68, at p. 10,048.
[274] Closing Submissions of the Superior Plaintiffs, Harley Schachter, June 7, 2018, Transcript, Vol. 71, at p. 10,524.
[275] Closing Submissions of the Superior Plaintiffs, Harley Schachter, June 6, 2018, Transcript, Vol. 70, at pp. 10,307-8.

wanted to “get my share”, and that he desired “as my people are poor to derive a share of what is found on my Lands.”[276]

(ii) The Impact of Adopting “Fair Share”

[319] Introducing the concept of “fair share” into the judgments is not without consequences. It might seem obvious that the share owed to the Anishinaabe ought to be a fair one. However, as can be seen from the trial judge’s attempt to determine what constitutes a fair share, the concept tends to focus the mind on the amount or percentage of revenue that ought to be redirected to the Treaty First Nations, rather than on the state of affairs that this promise to share sought to, and ought to, achieve. The Anishinaabe were not focused on subsistence in the Treaty negotiations but on sharing the wealth.[277] They sought the ability to live as they had so long as possible but also sought to benefit from the rise in living standards that would accompany development, especially if that development impaired their traditional way of life. They were not aiming at mere subsistence.

(iii) What Kind of Sharing is Required by the Treaty Promise?

[320] The trial judge’s task in Stage Three is to determine what kind of sharing the augmentation clause requires and what increase is necessary in the annuities to fulfil the Treaty promise.

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[276] Address of Chief Shingwaukonse to Lord Cathcart, June 10, 1846, Exhibit 01-0437.
[277] Stage One Reasons, at para. 593.

[321] In describing the Anishinaabe principle of responsibility, the trial judge stated:

> The Anishinaabe Chiefs and leaders came to the Treaty Council with a responsibility to ensure that their people could enjoy continued dependence on the land for their sustenance, their medicines, and their spiritual well-being, and, equally, that they could continue to be responsible for that land.[278]

[322] Based on the trial judge's reasoning, the common intention of the parties was to share in such a way that would provide for both communities. This would suggest that the "share" promised is to be determined not only based on the extent of Crown revenues but also with reference to the relative wealth and needs of the different communities. Obviously, the Anishinaabe would not have expected their communities to suffer a range of deprivations, including substandard housing and boil water advisories, while non-Indigenous communities thrived. Nor was it likely, based on the Anishinaabe principles discussed by the trial judge, that the Anishinaabe would have wished to enjoy great personal wealth while their fellow Canadians suffered deprivation.

[323] The trial judge noted:

> [T]he court and the parties must return to the shared goals, expectations, and understandings of the parties in 1850 and, based on those shared goals, expectations, and understandings, devise processes and procedures

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[278] Stage One Reasons, at para. 417.

> for the implementation of the Treaties' promise in the modern era.[279]

The parties in negotiations, or the trial judge in Stage Three, must determine the form, level, and aim of the sharing that the augmentation clause requires. The parties and the court should be led, in doing so, by the Treaty parties' "shared goals, expectations, and understandings" in 1850, including the Anishinaabe principles of respect, responsibility, reciprocity, and renewal, identified by the trial judge, and the Crown's commitment to being both liberal and just.

[324] The remaining task of interpretation, and the basis of implementation, lies in determining what the sharing relationship envisioned by the Anishinaabe and the Crown in 1850 would look like today and how that relationship can be brought about. This is the task of reconciliation.

[325] The trial judge observed that "questions regarding implementation remain subject to dispute".[280] The precise form of sharing required by the Robinson Treaties remains to be determined. Because of our concerns about the possible misuse of the concept of "fair share" as a figure of speech, we would amend the formal judgment to delete it, as set out in Appendix "A".

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[279] Stage One Reasons, at para. 536.
[280] Stage One Reasons, at para. 350.

(5) Observations on Stage Three

[326] We make two observations. First, the staging of this case has introduced some uncertainties into the process. There is a functional trifurcation but the stages have become somewhat confused. Broadly conceived, Stage One was dedicated to the interpretation of the Treaties, the identification of the Treaty promises, and the determination of the duties of the Crown, while Stage Two related to the Crown's defences, and Stage Three to the Huron and Superior Plaintiffs' remedies. However, as matters progressed, some elements of interpretation seem to have been reserved for Stage Three. The trial judge also seems to have reserved a decision on whether the Crown breached the Treaties for Stage Three.[281] In some ways, Stage Three has become a basket for unresolved issues carried forward from Stages One and Two.

[327] The second observation is that the implementation of the Treaty promises in Stage Three presents unusual complexities that will be difficult to manage. It would be far better for the parties to negotiate, rather than litigate, the remaining issues.

[328] Negotiations also allow the court to step back from "[c]lose judicial management" that "may undermine the meaningful dialogue and long-term

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[281] Stage One Reasons, at para. 393, but see her strong words quoted at para. 243 of these reasons.

relationship that these treaties are designed to foster."[282] Although written about a modern treaty, these words would apply equally to a negotiated agreement on how the promises in the Robinson Treaties are to be implemented.

[329] The careful language of modern treaties, having been negotiated by competent, sophisticated and adequately resourced parties, has the advantage of creating precision, continuity, transparency and predictability,[283] and is due judicial deference.[284] In our view, this would also be true of negotiated agreements for the implementation of historical treaties.

[330] Neither the trial judge nor this court has any information as to whether and to what extent the parties have engaged in negotiations.[285] But there appear to have been three barriers to successful negotiations. The first is the position taken by Ontario and Canada before the trial judge that the Crown has unfettered discretion as to whether, when, how, and in what amount the annuities might be increased. This court's decision clarifies the Crown's obligations. There is something to negotiate about.

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[282] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 60.
[283] *Little Salmon*, at para. 12.
[284] *Nacho Nyak Dun*, at para. 36.
[285] Stage One Reasons, at fn. 279.

[331] The second barrier to negotiation was the trial judge's insertion of the concept of "fair share" into the interpretation of the augmentation clause, which we addressed earlier. This court's decision eliminates this barrier.

[332] The final barrier is the ongoing struggle between Ontario and Canada over which government will pay the annuities and, if both are obliged to contribute, in what proportion. The panel requested that the parties consider having the trial judge hear and determine the allocation issues on an expedited basis, before the Stage Three hearing. Ontario and Canada were opposed to doing so. In the absence of their consent, this court has no jurisdiction under the *Rules of Civil Procedure* to require that the allocation issue be dealt with separately and in priority.[286]

[333] We urge both Crown parties to reconsider their stance on expediting the allocation issue in order to facilitate the negotiation of an agreement on the implementation of the Robinson Treaties. In our view, the best way to accomplish the task of reconciliation is through negotiation. Compared to continued litigation, with its attendant close judicial management, a modern agreement on the implementation of the Robinson Treaties, negotiated by the Treaty parties, is more

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[286] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 6.1.01. Rule 6.1.01 states that: "With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages." This rule "precludes making [a bifurcation] order without the consent of the parties": *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788, 454 D.L.R. (4th) 496, at para. 38.

likely to produce a strong, renewed Treaty relationship.[287] True reconciliation will not be achieved in the courtroom.[288]

F. ISSUE FIVE: DID THE TRIAL JUDGE ERR IN HER COSTS AWARD FOR THE STAGE ONE PROCEEDINGS?

[334] Ontario also appeals from the costs awards in favour of the Superior and Huron Plaintiffs for the Stage One proceedings. The trial judge awarded costs and disbursements to the Superior Plaintiffs of $5,148,894.45 and $9,412,447.50 to the Huron Plaintiffs, with Ontario and Canada each to pay one half of those amounts.

[335] Canada does not appeal from the costs awards.

[336] Ontario argues that the trial judge erred in awarding 85 percent of actual legal fees after concluding that partial indemnity costs were appropriate. Ontario submits that partial indemnity costs cannot exceed 67 percent of fees paid. It submits that the trial judge erred in principle by giving no weight or insufficient weight to Ontario's reasonable expectations in awarding disproportionately high costs to the Superior and Huron Plaintiffs, and argues that she erred by failing to scrutinize the costs they claimed in a substantive and meaningful way.

[337] For the Superior Plaintiffs, Ontario asks that the costs be fixed at the rate of 67 percent of the fees found by the trial judge to be recoverable, that the manner

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[287] *Nacho Nyak Dun*, at para. 60.
[288] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24.

in which the trial judge dealt with costs awarded for an earlier motion be varied, and that these plaintiffs recover their disbursements as awarded by the trial judge. The Superior Plaintiffs claimed $5,151,448.21 in fees. The difference between an award of 85 and 67 percent of claimed fees is $927,267.88, of which $463,630.34 would be paid by Ontario. Inclusive of disbursements, Ontario says the total award ought to be $4,166,381.06.

[338] For the Huron Plaintiffs, Ontario submits that the hours claimed are excessive, asks that they be reduced by 50 percent, and requests that costs be fixed at 67 percent of that amount plus the disbursements allowed by the trial judge. The Huron Plaintiffs claimed $8,383,930.00 in fees. The difference between an award of 85 percent of claimed fees and 67 percent of the proposed reduced-hours fees is $4,317,723.95, of which $2,158,861.98 would be paid by Ontario. Inclusive of disbursements, Ontario says the total award ought to be $5,094,724.55.

(1) The Trial Decision on Costs

[339] The trial judge found that the Huron Plaintiffs and the Superior Plaintiffs were entitled to costs on a partial indemnity basis fixed at 85 percent of their fees and 100 percent of their disbursements.[289]

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[289] Stage One Costs Reasons, at para. 43.

[340] Before the trial judge, Ontario and Canada agreed that it was appropriate to award the Huron Plaintiffs and the Superior Plaintiffs their costs for Stage One and the summary trial, including pleadings and case management. Ontario and Canada also agreed that they each should be liable for half of the costs award. They disagreed, however, with the Huron Plaintiffs and the Superior Plaintiffs on the quantum of costs, in addition to other issues that are not pursued on appeal.

[341] The trial judge first found that the Huron Plaintiffs and the Superior Plaintiffs were entitled to costs at a higher-than-typical rate of 85 percent based on the factors set out in r. 57.01 of the *Rules of Civil Procedure*, including:

1. **Amount Claimed** – The amount claimed in the litigation is substantial;[290]
2. **Complexity of the Proceedings** – The litigation is on the high end of complexity (i.e., the interpretation of two historic Treaties will re-shape the Crown-Indigenous relationship for a vast area of northern Ontario), the procedural history of the litigation is complex and evolving, and certain legal and strategic decisions by Ontario and Canada prolonged or complicated the proceedings;[291]
3. **Importance of the Issues** – The issues raised in the case are of central importance to the entire Anishinabek Nation and central to the broad

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[290] Stage One Costs Reasons, at para. 16.
[291] Stage One Costs Reasons, at paras. 17-22.

national public interest in reconciliation with Indigenous peoples of the upper Great Lakes Territories;[292]

4. **Principle of Indemnity** – All parties retained teams of highly specialized and experienced counsel and should be fairly compensated for the increased costs associated with specialized and experienced counsel;[293] and

5. **Context of Indigenous Legal Issues** – The fiduciary relationship forms an important consideration for the award of costs in this matter and, in these circumstances, the small, remote and historically economically marginalized First Nations plaintiffs should not have to assume 40 percent of the costs in this litigation.[294]

(2) Analysis

[342] Stage One of these proceedings was of the utmost importance to the Treaty partners. The trial of this part continued over 78 days. The parties filed twenty expert reports and nineteen witnesses gave oral evidence. The trial time was the tip of the iceberg in comparison to the years of preparation.

[343] Leave to appeal costs is not granted lightly. As this court observed in *Barresi*:

> The test for leave to appeal costs is high: there must be "strong grounds upon which the appellate court could find

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[292] Stage One Costs Reasons, at para. 23.
[293] Stage One Costs Reasons, at para. 24.
[294] Stage One Costs Reasons, at para. 25.

> that the judge erred in exercising his [or her] discretion": *McNaughton Automotive Limited v. Co-Operators General Insurance Company* (2008), 95 O.R. (3d) 365 (C.A.), at para. 24, citing *Brad-Jay Investments Ltd. v. Szijjarto*, 218 O.A.C. 315 (2006) (C.A.), at para. 21. A costs award should be set aside on appeal "only if the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.[295]

[344] Costs awards are "quintessentially discretionary."[296] They are accorded a very high degree of deference.[297]

[345] In *Frazer*, this court observed:

> A trial judge has extremely broad discretion in the awarding of costs, which is entitled to a very high degree of deference and [is] not to be taken lightly by reviewing courts. A reviewing court can only review a trial judge's award of costs where he or she has considered irrelevant factors, failed to consider relevant factors or reached an unreasonable conclusion. And finally, a reviewing court will not interfere with a trial judge's disposition on costs on the grounds that the members of the appellate court would have exercised their discretion differently: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 39.[298]

[346] As this court noted in *Bondy-Rafael*:

> [P]artial indemnity fees are not defined in terms of an exact percentage of full indemnity fees under the *Rules*

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[295] *Barresi v. Jones Lang Lasalle Real Estate Services Inc.*, 2019 ONCA 884, 58 C.P.C. (8th) 318, at para. 14.
[296] *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 126.
[297] See *Walker v. Ritchie*, 2006 SCC 45, [2006] 2 S.C.R. 428, at para. 17; *Frazer v. Haukioja,* 2010 ONCA 249, 101 O.R. (3d) 528, at para. 75.
[298] *Frazer,* at para. 75.

> *of Civil Procedure*. While representing a portion of full indemnity costs, that portion has never been defined with mathematical precision but generally amounts to a figure in the range of more than 50 percent but less than 100 percent. This is as it should be given the myriad factors that the court must consider in the exercise of its discretion in fixing costs.[299]

[347] Similarly, this court has repeatedly noted that the extent of the reduction associated with partial indemnity costs is a matter within the trial judge's discretion.[300] As observed in *Wasserman, Arsenault Ltd.*:

> The degree of indemnification intended by an award of partial indemnity has never been precisely defined. Indeed, a mechanical application of the same percentage discount in every case where costs are awarded on a partial indemnity scale would not be appropriate. In fixing costs, courts must exercise their discretion, with due consideration of the factors set out in rule 57.01(1), in order to achieve a just result in each case.[301]

[348] The trial judge did not err in principle by taking into account the burden it would place on the Huron and Superior Plaintiffs were they to recover only two thirds of their legal fees. This is in the context of admitted neglect by the Crown of its Treaty promises for many decades, and the extreme difficulty of bringing proceedings like these for recognition of Treaty rights by people who have been marginalized by that neglect.

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[299] *Bondy-Rafael v. Potrebic*, 2019 ONCA 1026, 441 D.L.R. (4th) 658, at para. 57.
[300] See e.g., *Whitfield v. Whitfield*, 2016 ONCA 720, 133 O.R. (3d) 753, at para. 29.
[301] *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (C.A.), at para. 5.

[349] In *Okanagan Indian Band*, the Supreme Court noted with approval the Court of Appeal for British Columbia's reasoning that "constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs."[302]

[350] Nor can it be said that the trial judge erred in the manner in which she treated the costs paid by Canada on an earlier motion, for which Ontario now seeks some credit. Ontario's materials do not permit this court to independently calculate what amount any credit should be. If Ontario's submissions are correct, the Superior Plaintiffs say that Ontario would be entitled to a further credit of $31,845.40. However, this court is unable to conclude that there was an error in principle or that the trial judge was clearly wrong in the manner in which she dealt with the costs paid by Canada. She did deduct the former costs paid from the costs awarded.

[351] Leave to appeal from the costs award in favour of the Superior Plaintiffs is refused.

[352] Ontario argued at trial that the hours claimed by the Huron Plaintiffs were excessive. Ontario's cost outline noted 11,956 hours of legal work for both

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[302] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paras. 16, 47, aff'g 2001 BCCA 647, 95 B.C.L.R. (3d) 273.

actions.[303] The Superior Plaintiffs started their action in 2001 and proceeded through discovery. Their costs summary claimed 7,644 hours of legal work. The Huron Plaintiffs started their action in 2014, relied in part on the discovery in the other action, and yet claimed for 28,211 hours of legal work which the trial judge allowed in full.

[353] The trial judge dealt with the controversy regarding the hours spent briefly:

> Canada accepts the reported hours, hourly rates and disbursements as reasonable, subject to an assurance that the fees and disbursements claimed for Stage One do not include any time or expenses either already advanced. This assurance was provided.
>
> Ontario challenges the number of hours, size of the team and travel disbursements of the Huron claim based upon comparison to their own hours and costs. I am satisfied the Huron claim survives these challenges.[304]

[354] Given the position on appeal, the hourly rates and the travel disbursements are no longer in issue, but Ontario says the hours claimed and the size of the Huron Plaintiffs' legal team – including 22 lawyers – was excessive.

[355] The trial judge did not address the substantial difference between the hours claimed as between the Huron and the Superior Plaintiffs. The material before her did not permit her to come to a conclusion as to the amount of time reasonably

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[303] The Superior Plaintiffs say that Ontario understates the time it actually spent. Ontario did not dispute this assertion during oral arguments, but the record does not permit this court to review Ontario's calculation.

[304] Stage One Costs Reasons, at paras. 6-7.

required by the Huron Plaintiffs to deal with all aspects of the action. Was there over-lawyering or unnecessary duplication of legal work? There may be logical explanations for the substantially greater amount of legal time claimed or there may not. For example, the Huron Plaintiffs claimed more than 6,000 hours of law clerk, paralegal and student work. In contrast, Ontario's archival research was performed by an independent contractor, Public History, whose time was reflected in a disbursement rather than billable hours. It may also be that the Superior Plaintiffs were able to rely on some of the work done by the Huron Plaintiffs.

[356] After coming to a conclusion as to the time reasonably spent on this matter the trial judge would then be required to "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable."[305]

[357] As noted in *Murano*, this overall sense of what is reasonable "cannot be a properly informed one before the parts are critically examined."[306]

[358] Leave to appeal from the costs award in favour of the Huron Plaintiffs is granted. The disbursements allowed by the trial judge are upheld. The fees allowed are set aside and remitted to the trial judge for reconsideration in light of these reasons. This assessment will have to proceed with caution, given that these

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[305] *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24, citing *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.
[306] *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at para. 100.

proceedings are continuing, and privileged matters must be protected from disclosure.

[359] It will be up to the trial judge to devise a procedure to deal with the manner in which evidence as to the reasonableness of the time spent is presented to her.

G. DISPOSITION

[360] For these reasons, as summarized in the seven propositions set out above,[307] we would grant the Stage One appeals in part, direct that the Stage One judgments be amended as set out in Appendix "A" to these reasons, and remit the matter of the Huron Plaintiffs' costs for the Stage One proceedings to the trial judge for reconsideration in accordance with these reasons. We would dismiss the Stage Two appeal. We would award costs of the appeals in the manner set out in the joint reasons.

P. Lauwers J.A.

G. Pardu J.A.

[307] Our reasons, at para. 100.

Strathy C.J.O. and Brown J.A.:

A. INTRODUCTION

[361] We concur with the reasons of Lauwers and Pardu JJ.A. on the issues of costs and indexing. We also agree with the reasons of Hourigan J.A. on the issues of fiduciary duty, Crown immunity and limitation defences.

[362] We issue these reasons to explain: (1) why the standard of review set out in *Marshall* applies when reviewing the trial judge's interpretation of the Robinson Treaties;[308] (2) why, applying that standard, we conclude the trial judge committed reversible error in her interpretation of the Robinson Treaties; (3) how the honour of the Crown informs the Crown's obligation to implement the Treaties; and (4) the appropriate remedy is in this case.

[363] To set the stage for our analysis, we begin by reviewing the trial judge's interpretation of the Treaties, the principles governing treaty interpretation, and the standard of appellate review in treaty interpretation cases. We then explain how the trial judge erred in her interpretation of the Treaties, including by failing to consider both the plain meaning of the Treaties' texts and the only interpretation of the Treaties that reconciled the parties' intention in a manner consistent with the historical record. We then explain why, notwithstanding these errors, we agree with

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[308] *R. v. Marshall*, [1999] 3 S.C.R. 456.

the trial judge and the majority of this court that, after 150 years of inaction, the Crown can be compelled to exercise its discretion about whether to increase the annuities to address an injustice that brings dishonour to the Crown. Finally, we outline the judgment we would grant in light of our conclusions.

B. THE TRIAL JUDGE'S INTERPRETATION OF THE TREATIES

[364] At paras. 70-80 of this court's joint reasons, we summarized the trial judge's interpretation of the Treaties. Briefly stated, the trial judge interpreted the Treaties as imposing a "mandatory and reviewable obligation" on the Crown "to increase the Treaties' annuities when the economic circumstances warrant."[309] She held that the principle of the honour of the Crown and the doctrine of fiduciary duty imposed on the Crown "the obligation to diligently implement the Treaties' promise" to reflect the value of the territories in the annuities.[310] The court's formal judgments provided that the Crown is required to increase the annuities without limit, "so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the resources, including the land and water, in the territory".[311]

[365] The majority of our colleagues conclude that the trial judge's interpretation of the Treaties was reasonable and free from legal error, though they do conclude she erred in her approach to remedies. As we do not share that same opinion on

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[309] Stage One Reasons, at para. 3.
[310] Stage One Reasons, at para. 3.
[311] Huron Action Stage One Partial Judgment, at para. 1(d); Superior Action Stage One Partial Judgment, at para. 1(d).

the treaty interpretation issue, we will review the trial judge's reasons in more detail in order to explain our disagreement.

[366] Prior to engaging in the interpretative exercise, the trial judge described the context of Anishinaabe political and social life, both before and after their contact with Europeans.[312] She identified some of the important milestones on the road to the Robinson Treaties, from the *Royal Proclamation of 1763* (the "Royal Proclamation") and the Council at Niagara in 1764 to the Vidal-Anderson Commission and the "Mica Bay Incident" in 1849.[313] She also described the events leading up to the Treaty Council in September 1850 and the activities and negotiations at the Council itself.[314] Referring to *Marshall*, she noted that this history was "necessary for the interpretation of the Robinson Treaties in their full historical, cultural, linguistic, and political context".[315] In so doing, the trial judge appropriately set the stage for the consideration of the Treaties in the context of the broader historical relationship between the Crown and First Nations in Canada and the specific relationship between the Crown and the Anishinaabe of the upper Great Lakes.

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[312] Stage One Reasons, at paras. 15-61.
[313] Stage One Reasons, at paras. 62-207.
[314] Stage One Reasons, at paras. 208-37.
[315] Stage One Reasons, at para. 14, citing *Marshall*, at para. 11.

[367] The trial judge also examined the post-Treaty record, which Ontario argued was instructive concerning the parties' understanding of the Treaties' promise.[316] She ultimately found that the record was "vague, inconsistent, and conflicting" and "of limited assistance to the exercise of searching for the parties' common intention."[317]

[368] The trial judge then turned to the principles of treaty interpretation, which she summarized from *Marshall*.[318] These are set out below and are not in dispute. She described what she called a "two-step approach" to treaty interpretation proposed by McLachlin J. (as she then was) in *Marshall*.[319] McLachlin J. identified the first step as examining "the words of the treaty text and not[ing] any patent ambiguities and misunderstandings arising from linguistic and cultural differences."[320] This would "lead to one or more possible interpretations and will identify the framework for a historical contextual inquiry to enable the court to ascertain a final interpretation."[321]

[369] The trial judge described the "second step" of the *Marshall* approach as "a consideration of the possible meanings of the text against the treaty's historical and cultural context. These various meanings may arise from the text or the

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[316] Stage One Reasons, at paras. 281-320.
[317] Stage One Reasons, at para. 318.
[318] Stage One Reasons, at para. 324, citing *Marshall*, at para. 78.
[319] Stage One Reasons, at para. 327.
[320] Stage One Reasons, at para. 328, citing *Marshall*, at para. 82.
[321] Stage One Reasons at para. 328.

contextual analysis."[322] She pointed out that contextual evidence assists the court in ascertaining the full extent of the agreement of the parties.[323]

[370] Finally, the judge identified what she called the "third step": examining the historical context to determine which interpretation comes closest to reflecting the parties' common intention.[324] Citing *Marshall*, she described this as choosing "from among the various possible interpretations of the common intention the one which best reconciles the parties' interests."[325]

[371] The trial judge found that the purpose of the augmentation clause was to bridge the gap between the expectations of the parties by promising future annuities that would reflect the value of the territory.[326]

[372] She noted that the parties did not agree about two features of the augmentation clause.[327] The first and primary dispute, she said, was whether the augmentation clause included a mandatory promise to increase the annuity payments above £1 ($4) per person, in step with the revenues received from the Treaty territories, or whether that decision was discretionary.[328] The second point of contention was whether, as the Huron and Superior Plaintiffs alleged, the

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[322] Stage One Reasons, at para. 329 (footnote omitted), citing *Marshall*, at para. 83..
[323] Stage One Reasons, at para. 330.
[324] Stage One Reasons, at para. 331.
[325] Stage One Reasons, at para. 331, quoting *Marshall*, at para. 83.
[326] Stage One Reasons, at para. 338.
[327] Stage One Reasons, at paras. 343, 347.
[328] Stage One Reasons, at para. 343.

"perpetual annuity" of £500 or £600 to be paid to the Chiefs and their Tribes was a "collective amount", from which a "distributive amount", limited to a maximum of £1 per person, was to be paid to individuals.[329]

[373] After setting out the positions of the parties on these and other issues, the trial judge turned to the interpretation of the augmentation clause.[330] She described this exercise as finding the common intention that best reconciled the parties' interests.[331]

[374] She set out her conclusion at the outset of her analysis, namely that the parties did not intend to cap the annuity and that the reference to £1 in the augmentation clause was a "limit only on the annuity amount that may be distributed to individuals, and this distributive amount is a portion of the collective lump sum annuity payable to the Chiefs and their Tribes."[332]

[375] The trial judge began her analysis with "step one" of the *Marshall* framework, which she described as determining the "[p]resence of [a]ny [p]atent [a]mbiguities or [m]isunderstandings".[333] She found that the "first and most confounding ambiguity is whether the parties intended that the promise of a perpetual annuity would be a collective, as opposed to an individual, entitlement."[334] This, she said,

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[329] Stage One Reasons, at paras. 345-46.
[330] Stage One Reasons, at paras. 352-91.
[331] Stage One Reasons, at paras. 351, 395-97.
[332] Stage One Reasons, at para. 397.
[333] Stage One Reasons, at Part X.A.
[334] Stage One Reasons, at para. 400.

was “key to understanding the parties’ intentions with respect to the existence of a ‘cap’.”[335] She noted that there was no reference to a per capita payment in the “consideration clause”, which stated:

> [T]hat for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes….[336]

[376] She observed that there was a provision in the augmentation clause to increase the annuity, which was triggered if a condition was met:

> [I]n case the territory hereby ceded by the parties … shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time....[337]

[377] She also concluded that the “sub-clause” that followed set out a further condition on the increase:

> [P]rovided 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....[338]

[378] The trial judge stated that from her reading of this clause, the text caused a “real risk of misunderstanding or different understandings”: namely, whether the

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[335] Stage One Reasons, at para. 400.
[336] Stage One Reasons, at para. 401.
[337] Stage One Reasons, at para. 402.
[338] Stage One Reasons, at para. 403.

entire lump sum annuity was to be capped by an amount paid to each individual, or whether it was to be increased without limit, while any individual distributions from the lump sum would be subject to a cap.[339] The Huron Plaintiffs and the Superior Plaintiffs argued that the "cap" was either inapplicable or applied only to individual distributions, whereas Canada and Ontario argued that the £1 ($4) was a "cap" or limit on the obligation to increase the collective annuity and that any increases beyond that level were discretionary, in "Her Majesty's graciousness".[340]

[379] After reviewing the historical and cultural context, including the different perspectives of the Treaty partners, the historical record and the records of the Treaty Council, the challenges of interpretation, transcription and drafting of the treaty documents, the post-Treaty record and the principle of the honour of the Crown, the trial judge returned to the interpretation of the augmentation clause and the common intention that best reconciled the intentions of the parties.[341]

[380] She found that "[o]n the words of the text alone", there were three possible interpretations of the augmentation clause:

1. the Crown's promise was capped at $4 per person, and once the annuity was increased to that amount, the Crown had no further liability;

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[339] Stage One Reasons, at para. 406.
[340] Stage One Reasons, at paras. 406-8.
[341] Stage One Reasons, at paras. 411-58.

2. the Crown was obliged to make orders ("as Her Majesty may be graciously pleased to order") for further payments above $4 per person when the economic circumstances permitted the Crown to do so without incurring loss; or
3. the Treaties were a collective promise to share the revenue from the territory with the collective – to increase the lump sum annuity so long as the economic condition was met, and the reference to £1 ($4) was a limit only on the amount that could be distributed to individuals.[342]

[381] The trial judge found that, having regard to treaty interpretation principles, the honour of the Crown and the context in which the Treaties were made, "only the third interpretation comes close to reflecting the parties' common intention."[343]

[382] She found that the parties did not intend to cap increases to the annuities at $4 per person and that:

> The best possible interpretation of the parties' common intention, the one that best reconciles their interests, is that the Crown promised to increase the collective annuities, without limit, in circumstances where the territory produces an amount as would enable the Government to do so without incurring loss.[344]

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[342] Stage One Reasons, at paras. 459-61.
[343] Stage One Reasons, at para. 462.
[344] Stage One Reasons, at para. 463 (emphasis added).

[383] The common intention, the trial judge said, was that the reference to £1 in the augmentation clause was "a limit only on the amount that may be distributed to individuals, and this distributive amount is a portion of the collective lump sum annuity payable to the Chiefs and their Tribes."[345] She found that the "first interpretation", which put a £1 per person cap on the annuities, "does not reflect either the common intention nor reconcile the parties' interests; it suggests that the Treaties were a one-time transaction. As the historical and cultural context demonstrates, this was not the case; the parties were and continue to be in an ongoing relationship."[346]

[384] The trial judge found that the "third interpretation" satisfied the goals of the parties, by sharing the wealth on an "if and when" basis.[347] This reflected the Anishinaabe tradition of sharing with others.[348] While the sharing of revenues was "novel" for the Crown, it permitted access to the land and resources, limited Crown liability, and reflected their goal to deal honourably with the Anishinaabe.[349]

[385] The trial judge identified a "fourth interpretation" proposed by the Huron and Superior Plaintiffs, which she said the parties did not fully develop.[350] The fourth interpretation characterized the £1 amount as a "placeholder" for a temporary or

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[345] Stage One Reasons, at para. 464.
[346] Stage One Reasons, at para. 465.
[347] Stage One Reasons, at para. 466.
[348] Stage One Reasons, at para. 467.
[349] Stage One Reasons, at para. 469.
[350] Stage One Reasons, at paras. 455-56.

permanent cap on the collective entitlement; it was not the true extent of the consideration the parties' agreed on.[351] The trial judge did not explore that interpretation any further.

[386] As we will explain, we conclude that the trial judge's interpretation of the Treaties was the product of extricable errors of law in the application of the principles of treaty interpretation. We find that the fourth interpretation, which the trial judge did not explore in any meaningful way, provides the only reasonable interpretation consistent with the common intention of both parties. While that interpretation contemplates an ongoing relationship between the Crown and the Anishinaabe, and a potential sharing of the wealth of the Treaty lands, it did not provide for a mandatory and unlimited "fair share" as expressed in the court's judgments. Instead, the sharing was intended to take place through the exercise of Her Majesty's graciousness.

[387] Before turning to the interpretation of the Treaties, we will briefly summarize the core principles of treaty interpretation.

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[351] Stage One Reasons, at para. 455.

C. PRINCIPLES OF TREATY INTERPRETATION

[388] The principles applicable to treaty interpretation are not in dispute. Those principles were expressed in *Marshall* and were summarized by the trial judge as follows:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation;
2. treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories;
3. the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;
4. in searching for the common intention of the parties, the integrity and honour of the Crown is presumed;
5. in determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;
6. the words of the treaty must be given the sense which they would naturally have held for the parties at the time;
7. a technical or contractual interpretation of treaty wording should be avoided;

8. while construing the language generously, the court cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic; and
9. treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in the modern context.[352]

D. STANDARD OF REVIEW

(1) Position of the Parties

[389] The parties disagree about the standard of review applicable to the trial judge’s interpretation of the Treaties.

[390] Ontario submits that the interpretation of treaties ultimately is a legal issue, reviewable on a standard of correctness, even when informed by findings of fact that will be reviewable on a deferential standard.

[391] The Huron and Superior Plaintiffs and two of the interveners, Assembly of First Nations and Biigtigong Nishnaabeg First Nation, argue that treaty interpretation involves a question of mixed fact and law, analogous to the process

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[352] Stage One Reasons, at para. 324, citing *Marshall*, at para. 78.

of contract interpretation that attracts the deferential standard of review adopted in *Sattva*.[353]

[392] Canada takes no position on the issue.

(2) Analysis

(a) The *Marshall* Standard of Review

[393] The Supreme Court's decision in *Marshall* remains the seminal case on the applicable standard of review for treaty interpretation.

[394] *Marshall*'s standard of review analysis drew on the court's earlier decision in *Van der Peet*, where the issue was whether the claimant enjoyed an Aboriginal right to exchange fish for money or for other goods.[354] Just as the two-step common intention process for interpreting a treaty provision involves considerable fact-finding about the historical and cultural context in which the treaty was made, so too the "integral to a distinctive culture" test used to assess a claim to an Aboriginal right involves a factual inquiry into the practices, customs, and traditions of Aboriginal cultures.[355]

[395] In *Van der Peet*, the Supreme Court recognized that appellate review would engage a consideration of the evidence presented at trial, as well as the findings

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[353] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50.
[354] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[355] *Van der Peet*, at paras. 46, 55.

of fact made by the trial judge, and that considerable deference was owed to a trial judge's findings of fact.[356] Nevertheless, the Supreme Court held that a trial judge's determination of the scope of Aboriginal rights, based on the facts as found, involves a question of law to which deference is not owed, stating:

> In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis — his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them — is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however — the findings of fact from which that legal inference was drawn — do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.[357]

[396] In *Marshall*, the Supreme Court applied the *Van der Peet* standard of review to the interpretation of a provision in an Aboriginal treaty. At issue in that case was whether a right existed under a 1760 Treaty of Peace and Friendship that enabled the Mi'kmaq claimant to fish for trade. Writing for the majority, Binnie J. noted that "[t]he only contentious issues arose on the historical record and with respect to the

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[356] *Van der Peet*, at paras. 80, 81.
[357] *Van der Peet*, at para. 82 (emphasis added).

conclusions and inferences drawn by [the trial judge] from the documents, as explained by the expert witnesses."[358] Binnie J. concluded that "[t]he permissible scope of appellate review in these circumstances was outlined by Lamer C.J. in *R. v. Van der Peet* … at para. 82", which is reproduced in the paragraph above.[359]

[397] Binnie J. found that the trial judge erred in interpreting the "truckhouse" provision of the 1760 Treaty of Peace and Friendship by failing to give adequate weight to the concerns and perspective of the Mi'kmaq people and by giving excessive weight to the concerns and perspective of the British, resulting in an overly deferential attitude to the text of the treaty.[360]

(b) The Implications of *Sattva*

[398] Notwithstanding that the Supreme Court has not departed from *Marshall*'s standard of review, the Huron and Superior Plaintiffs and some interveners submit that the *Marshall* standard must now give way to the more deferential standard applicable to contract interpretation set out in *Sattva* by reason of the fact-heavy

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[358] *Marshall*, at para. 18.
[359] *Marshall*, at para. 18.
[360] *Marshall*, at paras. 19, 20. Although McLachlin J., writing in dissent, did not expressly address the issue of the standard of appellate review, in several places her reasons evince the application of a correctness standard: "The wording of the trade clause, taken in its linguistic, cultural and historical context, permits no other conclusion" (at para. 96); "I conclude that the trial judge did not err — indeed was manifestly correct — in his interpretation of the historical record and the limited nature of the treaty right that this suggests" (at para. 104); and "the trial judge made no error of legal principle. I see no basis upon which this Court can interfere" (at para. 114).

inquiry into the parties' common intention involved in the two-step treaty interpretation process.

[399] In *Sattva*, the Supreme Court discarded the historical approach of classifying the interpretation of a contract as a question of law for purposes of appellate review in favour of more deferential treatment as a question of mixed fact and law, under which appellate intervention is confined to demonstrated palpable and overriding errors.[361] *Sattva's* deferential standard of review is subject to two exceptions:

(i) Deference does not apply where it is possible to identify an extricable question of law from within a question of mixed fact and law, in which case the correctness standard applies to that extricable question.[362] In the context of contractual interpretation, extricable questions of law include the application of an incorrect principle, the failure to consider a required element of a legal test, and the failure to consider a relevant factor.[363] In the context of treaty interpretation, extricable questions of law include an incorrect application of the numerous treaty interpretation principles enumerated in *Marshall*, at para. 78; and

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[361] *Sattva*, at para. 50. See also *Corner Brook (City) v. Bailey*, 2021 SCC 29, 460 D.L.R. (4th) 169, at para. 20.
[362] *Sattva*, at para. 53.
[363] *Sattva*, at para. 53; *Corner Brook*, at para. 44.

(ii) The other exception is that identified by the Supreme Court in *Ledcor*.[364] There, the court treated as a question of law the interpretation of a standard form contract, where the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process.[365]

[400] The Huron and Superior Plaintiffs urge this court to follow the reasons on the standard of review of the dissenting judge in the Court of Appeal for British Columbia's decision in *West Moberly*.[366] That case involved the interpretation of a treaty's description of the boundary of a particular tract of land. The dissenting judge's approach deviates from *Marshall* and would apply a deferential standard of review to legal inferences or conclusions drawn from findings of historical fact:

> In my view, the principles outlined in *Sattva* provide guidance in the approach to be taken to the standard of review with respect to treaty interpretation. Contract and treaty interpretation involve analogous (though not identical) considerations. Like contract interpretation, treaty interpretation involves the application of legal principles of interpretation to the text of the written treaty, considered in light of the factual matrix. For historical treaties, that matrix includes the historical and cultural context of the time. Thus, the standard of review that applies to treaty interpretation is overriding and palpable

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[364] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23.
[365] *Ledcor*, at para. 24.
[366] *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232, leave to appeal refused, [2020] S.C.C.A. No. 252.

> error unless the error alleged involves an extricable question of law.[367]

[401] The dissenting judge's approach did not find favour with the majority in *West Moberly*, who applied a standard of review echoing that set out in *Marshall*, stating:

> It is common ground that no deference is owed to judicial conclusions stemming from legal error. A correctness standard of review applies to a finding of the trial judge that "can be traced to an error in his or her characterization of the legal standard": *Housen* at para. 33. Similarly, no deference is owed to the legal conclusions a trial judge makes by applying the law to a historical record: *Caron v. Alberta*, 2015 SCC 56 at para. 61.
>
> However, a traceable legal error must, of course, be identifiable to merit appellate interference on this correctness standard….[368]

[402] It is difficult to reconcile the dissent in *West Moberly* with a decision the Supreme Court released just over a year after *Sattva*, the decision in *Caron*.[369] *Caron* did not involve issues of Aboriginal rights or treaty rights; it considered the issue of whether a post-Confederation constitutional document, the 1870 *Rupert's*

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[367] *West Moberly*, at para. 130.
[368] *West Moberly*, at paras. 363-64 (emphasis added).
[369] *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511. The dissent's approach in *West Moberly* also runs counter to the view expressed by this court in a treaty interpretation case, *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158, 114 O.R. (3d) 401, at para. 158, aff'd *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447. Although not finding it necessary to engage in a detailed consideration of the applicable standard of review, this court stated that as the trial judge's findings of fact were mingled with her assessment of the effect of legislation and principles of treaty interpretation, "there may be an argument that some or all of her findings attract a less deferential standard": at para. 158.

Land and North-Western Territory Order (U.K.) (the "*1870 Order*"), created a right to legislative bilingualism in the province of Alberta.

[403] In the course of its interpretation of the *1870 Order*, the majority of the court found guidance in its jurisprudence on Aboriginal rights and treaties and affirmed the continued application of the standard of review analysis in *Van der Peet* and *Marshall*, stating:

> While we take no issue with the factual findings of the provincial court judge regarding the negotiations between the delegates and Canada, we disagree with his legal conclusion that the negotiations resulted in a pact with Canada to establish legislative bilingualism in all of the annexed territories (para. 354). In this respect, there is a helpful distinction drawn in Aboriginal rights jurisprudence between a trial judge's findings of fact on historical matters, which are entitled to deference, and the legal inferences or conclusions that a trial judge draws from such facts, which are not. As Lamer C.J. explained in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, "[the trial judge's] determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them . . . is a determination of a question of law which, as such, mandates no deference from this Court" (para. 82; see also *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 18; and *R. v. Sappier*, 2004 NBCA 56, 273 N.B.R. (2d) 93, at para. 76). In our view, the same distinction applies with respect to the historical factual findings of the provincial court judge in this case, and the legal inferences he draws on the basis of these facts.[370]

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[370] *Caron*, at para. 61 (emphasis added).

[404] *Caron* confirms that, notwithstanding *Sattva's* modification of the standard of review for contract interpretation, the *Marshall* standard of review remains in place, including the principle that legal inferences or conclusions regarding the meaning of a historical treaty provision drawn by a trial judge from historical facts are not entitled to deference on appellate review.[371]

(c) Policy Considerations

[405] In our view, two policy considerations also support the application of the *Marshall* standard of review in this case.

[406] First, the Huron and Superior Plaintiffs' efforts to functionally analogize treaty interpretation with contract interpretation ignores the distinctive nature of Aboriginal treaties under Canadian law. Our jurisprudence regards a treaty between Canada and a First Nation as a unique, *sui generis* agreement, which attracts special principles of interpretation, and possesses a unique nature in that the honour of the Crown is engaged through its relationship with Aboriginal people.[372] As put by the late Peter W. Hogg, an Aboriginal treaty "is not a contract,

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[371] The American approach to standard of review of "Indian" treaty interpretation is similar: the interpretation of an Indian treaty is a question of law reviewed on a *de novo* standard, while a trial judge's findings of historical fact, including the treaty negotiators' intentions, are reviewed for "clear error": see e.g., *United States v. State of Washington*, 157 F.3d 630 (9th Cir. 1998), at p. 642, cert. denied 119 S.Ct. 1376 (1999); *Richard v. United States*, 677 F.3d 1141 (Fed. Cir. 2012), at pp. 1144-45.

[372] *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Marshall*, at para. 78; and *R. v. Desautel*, 2021 SCC 17, 456 D.L.R. (4th) 1, at para. 25.

and is not subject to the rules of contract law. It is an agreement between the Crown and an aboriginal nation."[373]

[407] The uniqueness of Aboriginal treaties stems, in part, from their public, political nature in establishing and shaping the on-going relationship between political communities. Professor Dwight Newman has eschewed analogizing Aboriginal treaties to contracts preferring, instead, to describe them as covenants, a concept he thinks better captures their broader public, political role as foundational documents that establish the bases of relations between Aboriginal peoples and the larger Canadian community. Professor Newman writes:

> A covenantal conceptualization of treaties would essentially see them as agreements between political communities expressing the terms of the ongoing evolution of relationships between those communities. To see them as such does not mean ignoring their express terms. Nonetheless, a covenant, in this sense, differs from a contract in several key ways. It concerns the establishment of the terms of a long-term relationship rather than a deal over more specifically defined matters. It has a broad, typically non-commercial orientation rather than a narrow, typically commercial purpose. It recognizes the intrinsic value of the other party rather than having a fundamentally instrumentalist orientation.[374]

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[373] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2019), at § 28.6,

[374] Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54 S.C.L.R. (2d) 475, at p. 486.

[408] Second, as this court observed in *Keewatin*, treaties are solemn agreements that are intended to last indefinitely.[375] Indeed, the annual annuities in both Robinson Treaties are described as "perpetual" in nature.

[409] In *Ledcor*, the precedential value of the interpretation of a provision in a standard form contract informed, in part, the court's adoption of a correctness standard of review. So, too, precedent is more likely to be controlling in the interpretation of a treaty than in an ordinary contract, especially for the Robinson Treaties that call for revisiting the amount of the annuities "from time to time". While a specific treaty may only affect a defined group of First Nations, by their nature treaties concern not only persons who lived in the past and are living in the present, but also future generations to come of both Aboriginal and non-Aboriginal persons.

[410] The perpetual, multi-generational nature of treaty provisions makes the interpretation of their provisions of "interest to judges and lawyers in the future", as put by *Ledcor*.[376] Consequently, the degree of generality or precedential value of treaty interpretation or, put negatively, the lack of its "utter particularity", moves the question of treaty interpretation across the line from a question of mixed fact and law to one of law and calls for a consistency of interpretation that is the objective of a standard of correctness.[377]

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[375] *Keewatin*, at para. 137.
[376] *Ledcor*, at paras. 39, 42 and 43.
[377] *Ledcor*, at paras. 39, 41 and 42.

(3) Conclusion

[411] For these reasons, when reviewing the trial judge's interpretation of the Robinson Treaties, we shall apply the standard of review set out in *Marshall*.

E. ANALYSIS OF THE TRIAL JUDGE'S INTERPRETATION OF THE TREATIES

[412] The primary issue at the trial was the interpretation of the Robinson Treaties. The trial judge called it "[t]he focus of this hearing and the primary dispute".[378] The same is true of this appeal. Mr. Schachter, counsel for the Superior Plaintiffs, called treaty interpretation the "main event". We agree with that characterization.

[413] To provide context for the following analysis, we note here our respectful point of departure from our colleagues' reasons. We conclude that the trial judge erred in finding that the Robinson-Huron and Robinson-Superior Treaty annuities were a "collective entitlement" containing within them a separate "distributive amount" payable to individuals. That is, the trial judge erred when she expressly found that the collective entitlement was greater than the sum of the individual amounts that were to be distributed to members of the Robinson-Huron and Robinson-Superior Treaty First Nations.

[414] This bifurcation of the annuities led to the trial judge's conclusion that the £1 per person "cap" applied only to the individual distributive amount and that there

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[378] Stage One Reasons, at para. 340.

was no cap on the collective entitlement, which was to be augmented, as expressed in her judgments, to reflect in the annuities a fair share of the value of the resources, including the land and water in the Treaties' territory.

[415] In our respectful view, this conclusion was the product of errors of law in the interpretation of the Treaties. The only reasonable interpretation is that there was only one annuity under each Treaty, which was to be (and in fact was historically) distributed in its entirety to the members of the First Nations. That annuity was subject to an aggregate "cap" of £1 per person, but, in our view, this was a "soft cap" and was subject to further increases through the exercise of Her Majesty's graciousness.

[416] The errors of law were as follows:

1. failing to consider the plain meaning of the Treaties' text;
2. finding ambiguity where there was none;
3. going beyond a generous interpretation of the Treaties by exceeding what was possible on their language; and
4. failing to consider the only reasonable interpretation that reconciled the common intention of both parties.

[417] In this section, we will examine each of these errors and will explain how they led the trial judge to an unreasonable interpretation of the Treaties. We will identify a more reasonable interpretation, which was identified by the trial judge

herself, but which she failed to explore. We refer to this interpretation as the “fourth interpretation”.

[418] In the next section, we will explain why the fourth interpretation is consistent with the parties’ common intention and more faithful to the historical record than the interpretation advanced by the trial judge. As we will explain, the fourth interpretation is grounded in the words of the Treaties, and gives meaning to “Her Majesty’s graciousness”. It gives the Crown discretion as to when and how it will give effect to the Treaties’ promises. But that discretion must be exercised. It cannot be ignored. The Crown’s failure to exercise its discretion for 150 years is a failure to diligently implement the Treaty promise. This failure runs contrary to the principle of the honour of the Crown and s. 35 of the *Constitution Act, 1982*. In its role as guardian of the Constitution, this court must ensure the fulfillment of the Crown’s long-neglected promise to the beneficiaries of the Robinson Treaties.[379]

(1) First Error: Failing to Consider the Plain Meaning of the Treaties’ Texts

[419] In our view, the trial judge erred in law in the application of the principles of treaty interpretation because she never gave the language of the Robinson Treaties a fair opportunity to speak. This was not a case in which some terms of the Treaties were found in or modified by oral promises extrinsic to the Treaty

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[379] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 153

documents. Moreover, Robinson was at pains to ensure that the Treaties were orally interpreted from English to Anishinaabemowin before they were signed. The words of the Treaties are therefore a central component of the interpretation exercise in this case.

[420] As Binnie J. observed in *Marshall*: "The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms."[380] To the same effect, Cory J. stated in *Badger*:

> Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.[381]

[421] The need to begin the analysis with the "facial meaning" of the treaty language was also highlighted by McLachlin J. (dissenting, but not on this point) in *Marshall*:

> The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the

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[380] *Marshall*, at para. 5.
[381] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 76 (emphasis added).

> clause.… The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.[382]

[422] With this approach in mind, we return to the pertinent language of the Treaties, set out in the joint reasons, which we repeat for convenience:

> **The Consideration Clause (Robinson-Huron Treaty):**
>
> [F]or and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose…. [Emphasis added.]
>
> **The Augmentation Clause (Robinson-Huron Treaty):**
>
> 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 should the Territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, 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; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-

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[382] *Marshall*, at para. 82 (emphasis added).

> two, to entitle them to claim the full benefit thereof; and should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers. [Emphasis added.]

[423] The trial judge interpreted these provisions to mean that the Treaties promised a "collective" annuity, which had within it an "individual" or "distributive" component. As noted earlier, her formal judgments stipulated that the Crown was required to increase the annuity, without limit, "so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the value of the resources, including the land and water in the territory".[383] The judgments added that the Crown was required to consult with the Treaty parties "to determine what portion, if any, of the increased annuity amount is to be distributed by the Crown to the individual Treaty rights holders in addition to the $4 per person per year they are already being paid".[384]

[424] While the trial judge purported to follow the two-step approach in *Marshall*, she never explicitly examined the augmentation clause to ascertain its facial meaning. Nor did she identify any patent ambiguities or misunderstandings that might have arisen from linguistic or cultural differences.

[425] We make the following preliminary observations about the Treaty language:

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[383] Huron Action Stage One Partial Judgment, at para. 1(d); Superior Action Stage One Partial Judgment, at para. 1(d).
[384] Huron Action Stage One Partial Judgment, at para. 1(e); Superior Action Stage One Partial Judgment, at para. 1(e).

- the consideration paid by the Crown in exchange for the surrender of the Treaty territories had two components – an immediate payment of £2000 and a perpetual "annuity" of £500 under the Robinson-Superior Treaty and £600 under the Robinson-Huron Treaty – the amounts were different because the population of the Huron territories was greater;
- the annuity was to be delivered to the Chiefs and their Tribes at a "convenient season of each summer";
- the Crown promised to augment the annuity from time to time, if the land proved sufficiently profitable to enable the government to do so without incurring loss;
- it was a condition of the augmentation ("provided that…") the amount paid to each individual could not exceed £1 in any one year or "such further sum as Her Majesty may be graciously pleased to order"; and
- there was a second condition that the annuity would be "diminished" proportionately if the number of beneficiaries fell below two-thirds of the population at the time of the Treaties.

[426] It is noteworthy that the financial terms of the annuity were consistent with Robinson's instructions: an initial lump-sum payment of £2,000 for each of the Huron and Superior parties (within the total £5,000 limited provided in the Order In Council ("OIC")) and annuities in the total amount of £1,100 which were consistent

with the income from the balance of the notional £25,000 fund made available to Robinson under the April 16, 1850 OIC.

[427] The plain meaning of the augmentation clause is that the annuity was a perpetual one in the stated amount, payable to the Chiefs and their Tribes. It would be increased if economic conditions warranted. The maximum increase would be "capped" at £1 ($4) per person or such further sum as "Her Majesty may be graciously pleased to order". The capped amount would be paid to all Treaty beneficiaries, even if the population grew, as in fact occurred. The annuity would be proportionately reduced if the Anishinaabe population fell below two-thirds of the stated amount.

[428] On a fair and facial reading, the augmentation clause did not create an annuity payable to the "Chiefs and their Tribes" as a "collective" and an unspecified "individual" component payable to each Treaty beneficiary. The reference to "individual" was not for the purpose of creating a separate payment to individuals. It was simply the means of setting a cap on the amount of future increases to the annuity, recognizing that the population might grow and that the total amount of the annuity would be required to grow with it, thereby increasing the Crown's overall obligation. After the cap was reached, further increases in the annuity could be made through the exercise of "Her Majesty's graciousness".

[429] The trial judge came close to appreciating this when she correctly described the words “provided that the amount paid to each individual shall not exceed the sum of one pound Provincial Currency in any one year” as a “condition” of the increase of the annuity.[385] In our view, that is exactly what it was – a condition that was intended to limit the amount by which the annuity could be increased. It was mirrored by a condition requiring a reduction of the amount of the annuity if the population fell. Both conditions (“provided” and “provided further”) applied to the total amount of the annuity – one condition required the annuity to be increased and the other required its reduction.

[430] Instead of giving the condition its obvious meaning, however, the trial judge treated it as creating a separate payment to individuals. This distorted its meaning and wholly ignored the second condition of the increase, that the annuity would be reduced if the population fell below a certain percentage of its number at the time of the Treaties.

[431] One consequence of this distortion of the Treaties’ language is that the trial judge failed to give any effect to the “Her Majesty’s graciousness” provision of the augmentation clause. That provision was not just flowery language – it made it clear that the £1 per individual “cap” on the annuity was a “soft cap”. The intent, as conveyed by the Treaties’ language, was that increases above £1 per person could

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[385] Stage One Reasons, at para. 403.

be made in the Crown's discretion and would be based on the revenues of the Treaty territories. In the context of the treaty negotiations, the invocation of "Her Majesty's graciousness" would have played a key role in bridging the gap between Robinson's limited spending power and the demands of the Huron leaders for a $10 (£4½) annuity, which was the norm for treaties in Upper Canada.

[432] In dismissing the import of "Her Majesty's graciousness", the trial judge stated that the Anishinaabe could not have understood this provision even if it had been translated, and that it could not have informed their common intention. This was based on a misapprehension of the evidence and was inconsistent with the trial judge's other findings.

[433] The trial judge said that the witness, Elder Corbiere, who translated the Treaties' from English to Anishinaabemowin and then back to English, testified that there was no way to translate "as Her Majesty may be graciously pleased to order".[386] In fact, Elder Corbiere testified that she translated the phrase to mean "and even more will be given to the Anishinaabek if the Gischpin Gchi-Gimaa Kwe ['Big Chief Lady'] has a good heart and has a mind to do so." Elder Corbiere testified that while she could not translate "graciously", the Anishinaabe expected leaders to be generous. The translation that she provided, "if [the Queen] has a

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[386] Stage One Reasons, at para. 446.

good heart and has a mind to do so", reasonably conveys the meaning of "as Her Majesty may be graciously pleased to order".

[434] Moreover, a few paragraphs later in her reasons, in the context of considering the fourth interpretation advanced by the Huron and Superior Plaintiffs, the trial judge observed that it was possible that once the general principles of the Treaties were agreed on, the Anishinaabe, especially those represented by Chief Peau de Chat, were content to permit the Crown to set the amount of the annuity payments, understanding that Her Majesty's graciousness would be exercised honourably to ensure that the annuities reflected the value of land, to the extent that the Crown would not incur a loss.[387] However, in spite of the fact that this interpretation gave meaning to "Her Majesty's graciousness", the trial judge gave no consideration to it in her ultimate analysis of which interpretation best reconciled the parties' common intention.

[435] As we will explain below, the plain meaning of the augmentation clause reconciles the common intention of the parties and is consistent with both the pre-Treaty and post-Treaty record.

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[387] Stage One Reasons, at para. 456.

(2) Second Error: Finding Ambiguity Where There Was None

[436] Whether a judge is interpreting a contract, a statute or a treaty, the principles of interpretation seek to reconcile two or more reasonable interpretations available on the language of the document. As this court observed in *Chilton*, a case involving an insurance policy, "[t]he ambiguity principle … resolves conflicts between two reasonable but differing interpretations…. The court should not strain to create ambiguity where none exists."[388]

[437] The trial judge's finding of ambiguity is the product of a strained and illogical reading of the Treaties. Her error can be readily traced to para. 405 of her reasons, where she posited that the reference to "individual" in the phrase, "provided that the amount paid to each individual" in the augmentation clause was a "missing link", because there was no other reference in the Treaties to payments to individuals. She explained that:

> Because the initial words of the consideration clause ["paid and delivered to the said Chiefs and their Tribes at a convenient season of each year"] create a perpetual annuity in the form of a lump sum paid to the Chiefs and their Tribes, there is an obvious missing link to the last sub-clause where there is reference to individual payments. There is no other reference in the text of the Treaties that mentions payments to individuals.[389]

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[388] *Chilton v. Co-Operators* (1997), 143 D.L.R. (4th) 647 (Ont. C.A.), at p. 654.
[389] Stage One Reasons, at para. 405.

[438] The trial judge said that this created a “real risk of misunderstanding or different understandings.” She called this “the first and most confounding ambiguity”, although she did not identify any other ambiguity in the language of the augmentation clause.

[439] After finding a “missing link”, the trial judge used the reference to £1 per individual to find that the annuity contained both a “collective” payment and an individual “distributive” payment. In our view, there was a good reason why the Treaties contained no other reference to individuals. As with other treaties, the Robinson Treaties’ annuity was expressed as a lump sum, but it was to be distributed to the individual members of the Treaty First Nations, either in cash or in goods. As we have observed, this is precisely what occurred in the case of the Robinson Treaties for 170 years. The reference to individuals was solely for the purpose of creating a “cap” on the collective annuity – that is, a cap of £1 per person multiplied by the number of Treaty beneficiaries at any given time. Having regard to the province’s desperate financial circumstances, it would have made no sense for Robinson to promise the Anishinaabe an unlimited collective annuity, while at the same time limiting individual payments.

[440] Instead of examining the words of the Treaties to seek a reasonable and unambiguous interpretation, the trial judge created ambiguity and ultimately adopted an interpretation that was unreasonable.

[441] In support of her conclusion that the reference to £1 per person was not intended as a "cap" on the annuity, the trial judge noted that increases and caps had no precedent in earlier treaties.[390] She continued:

> In any event, it is more likely that Robinson, under some pressure from some Chiefs at the Council to ear mark some funds for individual distribution and in compliance with the Colborne Policy that limited his ability to make cash payments to individuals, set a low cap on the individual distributive amount (the £1 or $4 cap.) Her Majesty was left with the discretion to increase this cap should future circumstances permit.[391]

[442] The difficulty with this speculation is that there is no evidence that Robinson was under pressure at the Treaty Council to earmark funds for individual distribution. This speculation also presupposes that there was a recognition at the Treaty Council that the annuity was intended to be a "collective" amount from which individual "distributive" shares were to be carved out. There is no evidence of any such discussion.

[443] In their report, Vidal and Anderson had observed that "money payments are highly prejudicial to the interests of the Indians". As noted earlier, they had recommended that, apart from the first payment when the treaty was signed, subsequent payments should be made in clothing, provisions, goods, and implements and that provision should also be made for schools. Robinson did not

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[390] Stage One Reasons, at para. 454.
[391] Stage One Reasons, at para. 454.

follow this recommendation. As the trial judge noted, the Colborne Policy required that annuities be accessed through a requisition approval system that was still in place in 1850.[392] Robinson could easily have required that the Treaty annuities be distributed in goods in compliance with the Colborne Policy if he wished to do so. Not only did he not do so, as we have noted, the annuity was paid in cash to individual members of the Robinson-Superior Treaty First Nations from the very outset and to members of the Robinson-Huron Treaty First Nations from 1855 onwards.

[444] In summary, instead of seeking the plain or "facial" meaning of the Treaties, the trial judge sought ambiguity. Her finding of ambiguity led to speculation concerning the reference to "individuals", which was at the root of her finding that the Treaties had both a collective component and an individual one, with only the former being subject to augmentation.

(3) Third Error: Going Beyond What Was Possible on the Language of the Treaties

[445] It is a well-settled principle of treaty interpretation that a generous construction of treaty language does not permit the court to re-write the treaty.[393]

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[392] Stage One Reasons, at para. 108.
[393] *Badger*, at para. 76; *Keewatin*, at para. 151; and *Marshall*, at para. 14. See also *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 908; *Sioui*, at p. 1069.

[446] The trial judge's interpretation of the Treaties as giving the Anishinaabe a "fair share" of the value of the Treaty territory went beyond a generous construction of the Treaties and gave effect to modern concepts of fairness and generosity that are not found on either a fair reading of the Treaties or in a balanced assessment of the common intention of the parties.

[447] One such modern concept of fairness is articulated by Professor Michael Coyle, who advocates for a "fair sharing" of the economic benefits that flow from the development of treaty lands, given the "special, even sacred, bond between the first peoples of Canada and the Crown."[394] After all, as Professor Coyle writes, this special bond "enabled the creation and settlement of this country".[395] Coyle and others argue that courts and governments should re-adjust their conceptions of treaties, and "re-imagine" the treaty relationship.

[448] In our view, it is unnecessary to re-imagine the Robinson Treaties. What is necessary is to hold the Crown to the promises it has neglected for more than 150 years. That can be done through an interpretation that is grounded in the words of the Treaties and best reflects the parties' common intention at the time the Treaties

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[394] Michael Coyle, "As Long as the Sun Shines: Recognizing that Treaties were Intended to Last", in John Borrows and Michael Coyle, eds., *The Right Relationship: Re-imagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 39, at p. 41.
[395] Coyle, at p. 41.

were signed – not by reading more into the words of the Treaties than the Treaties' partners could reasonably have contemplated.

[449] The Robinson Treaties, which hold a unique place in the historical treaties, expressly contemplated that the Treaty relationship would be a continuing one, which would be periodically renewed and refreshed, having regard to the needs of the Anishinaabe and the means of the Crown.

[450] As we will explain, the fourth interpretation, coupled with the honour of the Crown, provides a basis for the augmentation of the annuities in a manner that renews the Treaty relationship and promotes reconciliation. This calls for periodic reconsideration of the Treaties' annuities in consultation with the Treaties' beneficiaries.

(4) Fourth Error: Failing to Consider the Only Interpretation that Reconciled Both Parties' Intentions

[451] In *Marshall*, Binnie J. referred to the "bottom line" of treaty interpretation as the court's obligation to choose from among the various possible interpretations of the common intentions, at the time the treaty was made, the one that best reconciles the First Nations' interests and those of the Crown.[396]

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[396] *Marshall*, at para. 14.

[452] As we noted earlier, the trial judge observed that "[o]n the words of the text alone", there were three possible interpretations of the augmentation clause.[397] They can be summarized as follows:

- an annuity capped at £1 per person;
- an obligation to make further orders above £1 per person, based on the "Her Majesty's graciousness" clause, when economic circumstances permitted; or
- a "collective promise to share the revenues from the territory with the collective", whenever it was possible to do so without loss, with the £1 "cap" being a limit only on the amount payable to individuals.[398]

[453] In our view, none of these interpretations were available on a fair reading of the Treaties' language.

[454] The first interpretation is unreasonable because a "hard cap" gives no effect to the "Her Majesty's graciousness" clause, which imports a discretion to increase the annuity above $4 per person. The second interpretation is equally unreasonable because it suggests the Crown was under an obligation to increase the annuity if circumstances permitted, based on Her Majesty's graciousness. The existence of an obligation is inconsistent with Crown discretion. For the reasons

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[397] Stage One Reasons, at para. 459.
[398] Stage One Reasons, at paras. 459-61.

we have identified above, the third interpretation is a strained and illogical interpretation of the Treaties and exceeds what is possible on their language.

[455] In our respectful view, the fourth interpretation, which the trial judge identified but never pursued, is supported by the evidence on common intention to a much greater extent than any of the three interpretations identified by the trial judge.

[456] The trial judge noted that the Huron and Superior Plaintiffs had put forth an alternative interpretation of the £1 amount in the Treaties:

> The Plaintiffs submit that, alternatively, if the reference to a £1 amount is interpreted as a temporary or permanent cap on the whole of the collective entitlement, the most plausible explanation why Robinson chose a £1 amount was that Robinson was using the £1 amount as a "placeholder", as per other treaties made previously in Upper Canada. In other words, the £1 amount was not the true extent of the consideration, but simply a placeholder amount.
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> The parties did not fully develop this argument; however, as an alternative characterization of the £1 amount, it has a certain logic. Once the general principles of the Treaty were agreed, the First Nation parties, especially those represented by Chief Peau de Chat, were content to permit the Crown to set [the] amount of the annuity payments, understanding that Her Majesty's graciousness would be exercised honourably to ensure that the annuities reflected the value of land, to the extent that the Crown would not incur a loss.[399]

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[399] Stage One Reasons, at paras. 455-56 (emphasis added).

[457] The trial judge did not fully consider this interpretation, apparently because the parties did not develop it, but she clearly thought there was a "certain logic" to it. Leaving aside the "placeholder" characterization, which was speculative, this interpretation is consistent with the £1 amount being a "soft cap". It also gives real meaning to "Her Majesty's graciousness" in the context of the augmentation clause.

[458] As we will explain in the next section, the fourth interpretation not only best reconciles the parties' common intention, it is also most consistent with the historical record.

F. RECONCILING THE PARTIES' INTENTIONS IN A MANNER CONSISTENT WITH THE HISTORICAL RECORD

[459] The fourth interpretation reconciles the intentions of both parties at the time the Treaties were signed. The Crown realized its pressing objective of opening up the territories for mineral development and did so at a cost that its beleaguered Treasury could bear. The "soft cap" (a characterization we would employ rather than "placeholder") limited the Crown's immediate exposure to a modest annuity, but gave it the discretion to augment the annuity in excess of £1 per person in the future, if the territories proved profitable. From Robinson's perspective, as the trial judge noted when considering the fourth interpretation, this would satisfy the expectations of the Anishinaabe, while "at the same time, limit the Crown's financial exposure and not impose an unreasonable administrative burden" on the

Crown.[400] The “administrative burden” referred to the need for a strict accounting of the revenues from the territories.

[460] On the Anishinaabe side, many of the Chiefs at the Treaty Council were prepared to follow Chief Peau de Chat’s lead and trust in the “Great Mother” to act fairly toward her “children”. The dissenting Huron Chiefs, Shingwaukonse and Nebenaigoching, only signed their Treaty when it became apparent that the Superior Chiefs had accepted Robinson’s proposal and the other Huron Chiefs were prepared to follow their lead. Faced with the prospect of no cash payment and no annuity if they did not accept Robinson’s offer, the promise of future increases in the annuity up to £1 if the land proved profitable and additional increases in Her Majesty’s graciousness, helped bridge the gap between the Chiefs’ demands and the amount of the initial annuity.

[461] While it is clear that Chiefs Shingwaukonse and Nebenaigoching would have preferred a more generous annuity, it is also clear that they ultimately accepted what they were offered, relying on the Crown to augment the annuity in a liberal and just manner, as the Treaties promised. The Anishinaabe’s reliance on the Queen’s generosity is consistent with the uncontroverted evidence that the Anishinaabe understood the “Great Mother” as a generous leader, who would

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[400] Stage One Reasons, at para. 457.

provide for her “children’s” needs and would share in the bounty of their land, rather than keep it to herself.

[462] Robinson would have appreciated that relationship of trust and knew that the reference to Her Majesty’s intention to deal “liberally and justly” with her subjects would reflect Anishinaabe perceptions of a good leader. In the words of the trial judge, again referring to the fourth interpretation, the Anishinaabe, especially those represented by Chief Peau de Chat, understood that “Her Majesty’s graciousness would be exercised honourably to ensure that the annuities reflected the value of the land, to the extent that the Crown would not incur a loss.”[401]

[463] The fourth interpretation also satisfies the trial judge’s concern that both the Crown and the Anishinaabe expected to be in an ongoing relationship, characterized by reciprocity, renewal and respect. The Anishinaabe may not have understood the legal niceties of the Royal Prerogative or the honour of the Crown but they knew, from their long relationship with the Crown, their shared language of kinship and the customs associated with treaty-making, that the Robinson Treaties were intended to renew their longstanding relationship with the Crown. The Crown’s express Treaty assurance of its desire to treat the Anishinaabe liberally and justly, the promise of future augmentation of the annuity if the land

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[401] Stage One Reasons, at para. 456.

proved profitable and the invocation of Her Majesty's graciousness, can only be seen, in this context, as an assurance to the Anishinaabe that the Treaty relationship with the Crown would not only endure, but would be periodically renewed.

[464] While the concept of future revenue sharing, subject to a soft "cap", was not to be found in Robinson's instructions, he did keep within the financial authority he had been given as regards the cash payments and the amount of the annuities. He plainly regarded a modest increase of the annuity to £1, an amount less than one half of the annuities paid in the fertile lands to the south, "if and when" the net revenues were sufficient, as something that was so reasonable that he felt confident it would be accepted by the Executive Committee of which he was a member. The "Her Majesty's graciousness" clause provided the Crown with discretion to increase the annuities if it could do so without loss and assured the Anishinaabe that a "liberal and just" Sovereign would share the wealth of the land with them if and when it was possible to do so.

[465] The fourth interpretation is also consistent with the evidence on the parties' common intention to include an annuity in the Treaties. Both the Vidal-Anderson Report and Robinson's instructions, set out in the April 16, 1850 OIC, contemplated payment of an annuity. The Anishinaabe were familiar with the use of annuities in southern treaties. Some Anishinaabe leaders based their demands on the $10 per person annuity that had been paid in exchange for the cession of

arable lands in the south of Upper Canada. The subject was discussed both before the treaty negotiations and at the Treaty Council, where both Chiefs Shingwaukonse and Nebenaigoching spoke about annuities and compared Robinson's offer to the annuities that were being paid elsewhere in Upper Canada ($10) and in the United States (significantly more). Chief Peau de Chat originally sought an even higher annuity, asking for $30 per person.

[466] There is nothing in the record of the Treaty Council to indicate that the Anishinaabe were seeking compensation in any form other than a traditional annuity or that Robinson was under pressure to earmark funds for individual distribution. It is true that the Treaty records are incomplete because the record of the speeches made by the Anishinaabe Chiefs have been lost. Nevertheless, Robinson's detailed treaty diary did not mention either demands for a "share" of the wealth of the territories or an individual "distributive" share. The Treaty Council demands of Chiefs Shingwaukonse and Nebenaigoching focused on the amount of the annuities traditionally paid in the south of Upper Canada or in the United States.

[467] The trial judge suggested that an entry in Robinson's treaty diary concerning a meeting with Governor General Lord Elgin in Sault Ste. Marie on August 30 and 31, prior to the Treaty Council, was evidence that the Governor General had

approved the trial judge's "fair share" interpretation of the Treaties.[402] Robinson recorded that he met with the Governor General and informed him of his "intentions as to the treaty", of which the Governor General approved. There is no reference in Robinson's treaty diary or in any other document he prepared as to exactly what his "intentions" were. The trial judge stated, however, "[i]t is reasonable to conclude that if Robinson was contemplating treaty terms outside the past practice of the Government, and possibly committing a share of future proceeds from the territory, that he discussed this idea and sought the approval from the Governor General himself."[403]

[468] The trial judge concluded:

> Robinson would have discussed this novel idea for the augmentation clause with Lord Elgin, and Lord Elgin gave him the authorization he needed to proceed. This is consistent with what is known about the way Robinson acted. He secured Lord Elgin's approval to proceed on that basis.
>
> Finally, there is nothing in the historical record following the Treaties to suggest that either the Governor General or the Executive Council were unhappy with the augmentation clause. Robinson must have been confident that he had secured approval to make a treaty on the basis of an augmentation provision with Lord Elgin. Hence, he said in his report: "I trust his Excellency will approve of my having concluded the treaty...".[404]

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[402] Stage One Reasons, at paras. 252-64.
[403] Stage One Reasons, at para. 252.
[404] Stage One Reasons, at paras. 263-64.

[469] In our respectful view, the inference the trial judge drew – that Robinson obtained approval from the Governor General for the third "fair share" interpretation – was simply not available to her. The words of the diary speak for themselves: Robinson told Lord Elgin of his intentions and Lord Elgin approved them. The idea that the Governor General approved the "novel idea" (the trial judge's concept of a fair share with an uncapped annuity) is a matter of pure speculation.[405] It is equally likely that Robinson informed the Governor General of his intention to provide a modest annuity with a "soft cap" of £1, with future increases occurring if and when the funds were available and subject to Her Majesty's graciousness.

[470] The fact that there was nothing in the historical record to suggest that Lord Elgin and the Executive Council were unhappy with the augmentation clause is equally consistent with the fourth interpretation of the Treaties.

[471] Although it is impossible to resolve exactly what conversations took place between Robinson and Lord Elgin, it should be remembered that the government of the day was "broke", as the trial judge put it.[406] In these circumstances, it seems highly unlikely that Robinson would have proposed, and Lord Elgin would have approved, a treaty that committed the government to an unlimited, mandatory and perpetual "sharing" of future revenues. It seems even more unlikely that, had

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[405] See Stage One Reasons, at para. 263.
[406] Stage One Reasons, at para. 219.

Robinson received those instructions from the Queen's representative, he would not have mentioned them in his diary, in his report to the Executive Committee, or in his subsequent communications.

[472] If Robinson had been intent on changing what the trial judge referred to as the "known patterns of treaty making" and adopting a "novel" approach that would give the Anishinaabe a "fair share" of the future revenues of the territory, it also seems strange that he would have buried the language in the middle of terms dealing with the augmentation of the annuity, to be revealed through a "missing link", which was only discovered some 170 years later.[407]

[473] More telling, had it been his intention to change the long-standing pattern of treaty-making by giving the Anishinaabe a "fair share" of the value of the territories he would certainly have made reference to that decision at the Treaty Council, in his treaty diary, in his Report to the Executive Council or in his subsequent correspondence on the issue, some of which responded to criticisms of the Treaties. Indeed, it is telling that there is nothing in the post-Treaty record, on either side, that demonstrates an understanding that the Robinson Treaties were intended to be a departure from the traditional course of treaty-making, other than to provide for an increase in the annuity if the land proved profitable.

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[407] See Stage One Reasons, at paras. 405, 434, 469 and 535.

[474] In that regard, we return briefly to the post-Treaty record.

[475] The trial judge found the post-Treaty record of limited assistance in the interpretative exercise.[408] What is striking about that record, however, and what the trial judge failed to consider, is the absence of any evidence to support the notion that the Treaties were intended to provide the Anishinaabe with a "fair share" of the wealth of the Treaty territories, as the trial judge found.

[476] While there were complaints of various kinds after 1850 by and on behalf of the Anishinaabe, no one ever suggested that the Crown's obligation was unlimited or that the Treaties compelled the payment of a "fair share". While the Robinson Treaties have been noted to be innovative in the use of an augmentation clause, none of the historians cited in the record has suggested that the Treaties were intended to give the First Nations a "fair share" of the revenues from the territories.[409]

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[408] Stage One Reasons, at para. 318.

[409] See Robert J. Surtees, "Indian Land Surrenders in Ontario 1763-1867" (Ottawa: Indian and Northern Affairs Canada, 1983); Robert J. Surtees, *Indian Land Cessions in Ontario, 1763-1862: The Evolution of System* (PhD Thesis, Carleton University, 1979) [unpublished]; Robert J. Surtees, "Indian Land Cessions in Upper Canada, 1815-1830" in Ian A. L. Getty & Antoine S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 65; Robert J. Surtees, *Treaty Research Report: The Robinson Treaties (1850)* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986); Robert J. Surtees, "Canadian Indian Treaties" in Wilcomb E. Washburn, ed., *History of Indian-White Relations* (Washington, D.C.: Smithsonian Institution, 1988) 202; and Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations of which they are Based, and other Information Relating Thereto* (Toronto: Belfords Clarke, 1880).

[477] Indeed, as early as November 1850 Captain George Ironside, the Superintendent of Indian Affairs at Manitowaning, wrote to his superior, Colonel R. Bruce, the Superintendent General of Indian Affairs, noting that Chief Shingwaukonse was said to be “very much dissatisfied indeed with the late Treaty” and had been “led by designing persons” to believe that the Anishinaabe had been “shamefully deceived”, particularly with regards to the amount of the annuity. The letter said that Chief Shingwaukonse was taking a deputation to England, to make their complaint to the authorities there.

[478] Colonel Bruce transmitted this communication to Robinson, who replied:

> The clause I introduced to increase the amount under certain reasonable circumstances should [and] I have no doubt will satisfy the Indians generally — and convince Her Majesty’s [Government] that they have no just cause of complaint… It may well be for [Captain] Ironside to explain to such of the Indians as he meets with at any time that part of the Treaty, which secures to them a larger annuity should the territory surrendered enable the [Government] to [increase] it without loss.

[479] There is no suggestion in Robinson’s response that there were two components of the annuity, one an individual payment and the other a payment to the collective. Nor is there any suggestion that the Treaties offered an unlimited “fair share” of the revenues from the Treaty territories, something that Robinson would surely have said in defence of the Treaties he drafted.

[480] Particularly telling, as well, is Robinson’s response to a subsequent complaint made by two Lake Huron Chiefs, who had sent a petition to the Governor

General, complaining that they had understood that the annuity to be received by each band was to be in proportion to the quantity of land it had been allocated by the Robinson-Huron Treaty.

[481] Colonel Bruce forwarded the communication to Robinson, noting in his letter:

> My impression gathered from your report [sic] the treaty itself and the numerical lists transmitted as a guide for the distribution of the annuities distinctly was that all the Indians belonging to the Tribes interested were to share in it alike, and as I understand the payments you made on the spot, were governed by that principle.
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> The following extract from the Treaty seems to show conclusively that the distribution was to be per capita and not as suggested by the Petitioners [:] "And in that case the same (the Annuity) shall be augmented from time to time provided that the [amount] paid to each individual shall not exceed the sum of one pound currency in any one year." [Emphasis added.]

[482] Robinson replied:

> I can only say that the Treaty made by me with the Indians last year was based on the same conditions as all preceding ones I believe. These conditions even fully explained in Council [and] are also clearly expressed in the Treaty…. Nothing was said by the Chiefs [illegible] of the nature mentioned in the extract you sent me and all seemed satisfied both at the signing of the Treaty and payment of the money with the terms on which I concluded the surrender by them to Her Majesty. [Emphasis added.]

[483] Once again, had Robinson believed that the Treaty included a "collective" annuity that could be greater than the sum of the individual "per capita" annuities,

he would not have described it as being “based on the same conditions as all preceding ones”. He would also, surely, have brought this feature to the attention of Colonel Bruce.

[484] Having received Robinson’s response, Colonel Bruce, on behalf of the Governor General, responded to Captain Ironside as follows:

> With reference to the distribution of the Annuity he sees no reason to suppose that a different rate was to be pursued in this from other cases. Indeed the Treaty clearly recognizes in all Indians entitled to participate in the annuity the right to share equally. These views are entertained by Mr. [Robinson?] to whom I have referred for information on the subject and were has he states fully explained in Council of the Chiefs before the Treaty was signed. [Emphasis added.]

[485] In 1858, the Pennefather Commission was constituted by the government to investigate “the best means of securing future progress and civilization of the Indian Tribes in Canada” and “the best mode of … managing the Indian Property as to secure its full benefit to the Indians, without impeding the settlement of the country.” The Pennefather Commission’s observations concerning the Robinson Treaties included the following:

> [W]e do not hesitate to express our decided regret, that Treaty shackled by such Stipulations, whereby a vast extent of Country has been wrung from the Indians for such a comparatively nominal sum, should have received the sanction of the Government.

[486] These observations, made less than a decade after the Treaties were signed, are inconsistent with the concept of an unlimited annuity or a fair sharing

of the revenues of the Treaty territories, something that would have been a novel departure from traditional treaty-making.

[487] While the historical record contains complaints about the amount of the annuity, there is nothing in the record to indicate that either the Crown or the Anishinaabe believed that the annuity had both a collective component and an individual component.

G. CONCLUSION ON TREATY INTERPRETATION

[488] The trial judge made extricable errors of law in her interpretation of the Treaties. The trial judge's interpretation was neither supported by the language of the Treaties themselves, nor by the pre-Treaty or post-Treaty evidence. There was a reasonable "fourth interpretation" of the augmentation clause, which the trial judge failed to consider. The fourth interpretation is the only one that is grounded in the unambiguous words of the Treaties and is supported by the evidence on the parties' common intention at the time the Treaties were signed. Even the Huron and Superior Plaintiffs' counsel suggested that the fourth interpretation was reasonable, as long as "Her Majesty's graciousness" was not interpreted as a reference to unfettered discretion.

[489] This raises the question – does the Crown have an obligation to augment the annuity under the fourth interpretation?

[490] For over 170 years, the Robinson Treaties have been interpreted and implemented as requiring a payment capped at $4. Counsel for the Superior Plaintiffs advised us that, to this day, the members of the Robinson-Huron and Robinson-Superior Treaty First Nations receive a $4 cheque or two “toonies” distributed personally each year.

[491] Both Ontario and Canada agree that the annuities should be increased. Ontario says that the annuities should be indexed for inflation. Canada says that it should be accomplished through the augmentation clause. They cannot agree on who bears the responsibility for the increases, an issue to be resolved, if necessary, in Stage Three of these proceedings.

[492] Below, we will explain why we agree with the trial judge, and the majority, that after 150 years of inaction, the Crown can be compelled to exercise its discretion to address an injustice that brings dishonour to the Crown.

H. THE HONOUR OF THE CROWN

(1) The Principles of the Honour of the Crown

[493] There is no dispute concerning the legal principles arising from the honour of the Crown. Nor was there any dispute at trial or in this court that the honour of the Crown binds the Crown in its dealings with the beneficiaries of the Robinson Treaties. The real issues are the duties flowing from the honour of the Crown, the

impact of those duties on the Treaty promises, and the remedies available for breach of those duties.

[494] The principles arising from the honour of the Crown have been expressed and developed in a number of decisions of the Supreme Court, notably *Mikisew Cree* (2018),[410] *Badger*, *Marshall*, *Manitoba Metis*, and *Haida Nation*.[411] Those cases establish the following general propositions:

- "[t]he honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from 'the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people' and goes back to the Royal Proclamation of 1763";[412]
- the honour of the Crown "recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples";[413]

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[410] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 ("*Mikisew Cree* (2018)").
[411] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R 511.
[412] *Mikisew Cree* (2018), at para. 21; *Haida Nation*, at para. 32; and *Manitoba Metis*, at para. 66.
[413] *Mikisew Cree* (2018), at para. 21; *Manitoba Metis*, at para. 67; and Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 S.C.L.R. (2d) 433, at p. 436.

- the "underlying purpose" of the honour of the Crown is to facilitate the reconciliation of Aboriginal peoples' pre-existing sovereignty and the Crown's assertion of sovereignty;[414]
- one way that the honour of the Crown reconciles the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty rights of Aboriginal people is by "promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes…. This endeavour of reconciliation is a first principle of Aboriginal law";[415]
- "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples…. As it emerges from the Crown's assertion of sovereignty, it binds the Crown *qua* sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct";[416]
- the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances."[417] Because of the close relationship between the honour of the Crown and s. 35 of the

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[414] *Mikisew Cree* (2018), at para. 22; *Manitoba Metis*, at paras. 66-67.
[415] *Mikisew Cree* (2018), at para. 22; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24.
[416] *Mikisew Cree* (2018), at para. 23 (citations omitted).
[417] *Haida Nation*, at paras. 16, 18.

Constitution Act, 1982, the honour of the Crown has been described as a "constitutional principle", enshrined in s. 35(1);[418] and

- the duties that flow from the honour of the Crown vary "with the situation in which it is engaged."[419] The obligations that are imposed by the honour of the Crown and what constitutes honourable dealing "depends heavily" on the circumstances.[420]

[495] The honour of the Crown is not a cause of action itself.[421] Instead, the honour of the Crown gives rise to a variety of actionable duties. As explained in *Manitoba Metis*, the honour of the Crown "speaks to *how* obligations that attract it must be fulfilled."[422]

[496] The Supreme Court has recognized duties that flow from the honour of the Crown in a variety of circumstances. For example, in *Marshall*, the honour of the Crown was used to give meaning and substance to promises made by the Crown, in the absence of a complete written text. In *Manitoba Metis*, the court found that a persistent pattern of errors and indifference had frustrated a solemn Crown promise – the Crown was ultimately required to take a broad and purposive approach to the interpretation of its legislative promise to the Metis and to act

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[418] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42; *Taku River*, at para. 24.
[419] *Manitoba Metis*, at para. 74.
[420] *Mikisew Cree* (2018), at para. 24.
[421] *Manitoba Metis*, at para. 73
[422] *Manitoba Metis*, at para. 73 (emphasis in original).

diligently to fulfill it. In *Haida Nation*, the honour of the Crown drove a duty to consult and reasonable accommodations of Aboriginal interests, pending a land title claim.

[497] As demonstrated by the above authorities, duties that flow from the honour of the Crown are contextual and impose a "heavy obligation" on the Crown.[423] When the Crown is implementing a constitutional obligation to Aboriginal people, the honour of the Crown requires it to: (1) take a broad and purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it.[424]

(2) The Crown's Obligation to Honourably and Diligently Implement the Robinson Treaties

[498] The Robinson Treaties affirmed the Crown's desire to deal "liberally and justly" with Her Majesty's subjects and promised to augment the annuity to £1 per person if the lands proved fruitful. It held out the promise of further augmentation, should Her Majesty be graciously pleased to so order. As the Superior Plaintiffs put it, the Crown made a promise to "act graciously".

[499] At a minimum, the Treaty promises, together with the honour of the Crown and principles of reconciliation, require the Crown to turn its mind from time to time

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[423] *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, 485 Sask. R. 162, at para. 41, leave to appeal refused, [2017] S.C.C.A. No. 95.
[424] *Manitoba Metis*, at para. 75.

to consider an increase in the amount of the annuity in excess of £1. The Crown has plainly failed to do so for 150 years since the one and only increase in 1875.

[500] This case goes well beyond the circumstances of *Marshall*, *Haida Nation* and *Manitoba Metis*. Even though both Canada and Ontario acknowledge that the annuity should be augmented in one manner or another, no steps have been taken to do so. There is no evidence that after 1875 the Crown ever turned its mind to a further increase in the annuity. The Crown's refusal to exercise its discretion to augment the annuities, even while recognizing that their purchasing power has been gutted by persistent inflation, is a clear failure to diligently implement the Robinson Treaties' promise.

[501] As noted earlier, it has been suggested that historical treaties need to be renegotiated, to reflect a modern understanding of the treaty relationship, with a view to renewal and reconciliation. As Professor Coyle puts it:

> The inescapable context of every historical land treaty in what is now Canada is that both treaty partners needed an arrangement under which the future of their peoples could be secured in the face of inevitable changes to come. And, in every case, what the parties sought was a consensual arrangement for coexistence, one based on reciprocal commitments and understandings. Accepting these premises means a third principle must inevitably form part of the normative order created by the historical land treaties. That is, in entering into a relationship expected to endure indefinitely, the historical treaty partners would be prepared, in the face of significant changes in circumstances over time, to negotiate, in good faith, a new consensus as to how their treaty

> understandings should be renewed to address both sides' contemporary needs and interests in relation to the treaty lands.[425]

[502] In entering into the Robinson Treaties the Crown expressly undertook to revisit its promises and to refresh the annuities, where possible, "to address both sides' contemporary needs and interests in relation to the treaty lands."

[503] The trial judge rejected Ontario's submission that the honour of the Crown gave the Crown unfettered discretion about whether to increase the annuities. She found that in light of the Crown's neglect of the Treaty promise for over a century and a half, the court had the authority and the obligation "to impose specific and general duties on the Crown."[426]

[504] We respectfully agree with this conclusion.

I. DISPOSITION

[505] For these reasons, we would grant judgment in the following terms:

- declaring that the Crown is under an obligation to turn its mind from time to time to determine whether the £1 ($4) per person soft "cap" on the Treaty annuities can be augmented, having regard to the net Crown resource-based revenues from the Treaty territories and without incurring loss (the "augmentation promise");

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[425] Coyle, at p. 61 (emphasis and footnote omitted).
[426] Stage One Reasons, at para. 497.

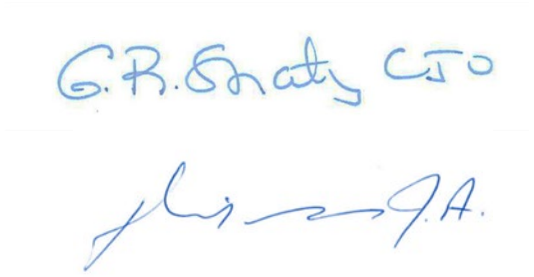
- declaring that the augmentation promise is a Treaty right, recognized and affirmed by s. 35 of the *Constitution Act, 1982*;
- declaring that the Crown is required to diligently implement the augmentation promise and is required to periodically engage in a process, in consultation with the First Nation Treaty parties, to determine the amount of such augmentation; and
- declaring that, in fulfilling these obligations, the Crown is subject to the duties flowing from the honour of the Crown.

[506] We would direct the trial judge to invite further submissions from the parties, before undertaking Stage Three, concerning the implementation of the augmentation promise, including:

- the frequency with which the Crown is required to turn its mind to the augmentation promise;
- the considerations to be taken into account in determining whether the Crown can increase the annuities without incurring loss, including the extent to which the Crown is entitled to take into account its other obligations and expenditures, both within and outside the Treaty territories;
- the calculation of the amounts, if any, by which the Crown should have increased the annuities from time to time; and

- the damages resulting from the Crown's breach of the augmentation promise.

[507] We would remit the matter of the Huron Plaintiffs' costs for the Stage One proceedings to the trial judge for reconsideration in accordance with the reasons of Lauwers and Pardu JJ.A. We would dismiss the Stage Two appeal for the reasons of Hourigan J.A. and award costs of the appeals in the manner set out in the joint reasons.



Hourigan J.A.:

A. INTRODUCTION

[508] I concur with the reasons of Lauwers and Pardu JJ.A. on the issues of costs, indexing, the honour of the Crown, Crown discretion and remedies. While I also agree with their conclusion on the trial judge's interpretation of the Robinson Treaties, like Pardu J.A., I do so on the basis that her interpretation was free from palpable and overriding error and contained no extricable legal errors.

[509] In addition, I issue these reasons to address: (1) whether the appropriate standard of review when considering an appeal about the interpretation of a historical Aboriginal treaty is palpable and overriding error or correctness; (2) whether the trial judge erred in finding that Canada and Ontario owe the Huron and Superior Plaintiffs a fiduciary duty regarding the implementation of the augmentation clauses in the Robinson Treaties; (3) whether Ontario can assert a defence of Crown immunity with respect to the Huron and Superior Plaintiffs' breach of fiduciary duty claims; and (4) whether the claims for breach of Treaty are prescribed by the former *Limitations Act* (the "1990 *Limitations Act*").[427]

[510] Regarding the appropriate standard of review in treaty interpretation cases, the appellate jurisprudence in Canada has created two distinct lines of authority.

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[427] *Limitations Act*, R.S.O. 1990, c. L.15 (the "1990 *Limitations Act*").

On one side, there is case law that regards treaty interpretation as akin to contractual analysis, and that uses a standard of palpable and overriding error to review lower courts' decisions. This approach finds support in the seminal decision of *Sattva*.[428] There, the Supreme Court found that matters of contractual interpretation generally raise questions of mixed fact and law because the principles of contractual interpretation must be "applied to the words of the written contract, considered in light of the factual matrix."[429] Since contract and treaty interpretation involve analogous (though not identical) considerations, subsequent cases have reasoned that appellate courts should adopt a less stringent standard of review, i.e., a standard of palpable and overriding error, when interpreting historical Aboriginal treaties.

[511] On the other hand, there is a line of appellate authority (primarily pre-*Sattva*) holding that treaties are of a different qualitative nature than contracts. These cases suggest that because of the importance of treaty cases and their constitutional implications, appellate courts should review lower court decisions on a standard of correctness.

[512] There is merit in both positions. Aboriginal treaties are important. They represent a "solemn exchange of promises" between the Crown and Indigenous

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[428] *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.
[429] *Sattva*, at para. 50.

peoples. In many parts of Canada, they "formed the basis for peace and the expansion of European settlement."[430] They also continue to provide a framework for an ongoing relationship between the Crown, Indigenous peoples, and Canadian society at large. To that end, unlike the decisions routinely made by courts in contract cases, treaty interpretation requires judges to think about how the treaties at issue will define legal obligations for generations to come. However, the courts also must be mindful of the circumstances that surrounded the formation of Aboriginal treaties. Historical Aboriginal treaties were drafted and signed in drastically different circumstances than the modern Aboriginal treaties we see today. As a result, to adequately understand the relevant context and properly interpret the parties' intentions, the factual matrix becomes exceedingly important in historical Aboriginal treaty cases.

[513] To determine the appropriate standard of review, it is thus important to analyze the central role that historical context plays in determining both the factual and legal issues underlying treaty interpretation. Further, it is essential to carefully consider the interpretative process undertaken by trial judges in historical Aboriginal treaty cases. When the role of historical context and the nature of the interpretive process are considered, it becomes evident that only a standard of

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[430] *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24.

review of palpable and overriding error provides the appropriate level of deference to trial courts.

[514] Regarding fiduciary duty, the trial judge found that the Crown owes an *ad hoc* fiduciary duty, but not a *sui generis* fiduciary duty, to the Treaty beneficiaries in the implementation of the augmentation clauses.

[515] In my view, the trial judge erred in law in finding the existence of an *ad hoc* fiduciary duty in the circumstances. Two parts of her analysis render her decision unsustainable. First, the trial judge significantly expanded the scope of the *ad hoc* fiduciary duty between the release of her reasons and the settling of the judgments in these cases. It was transformed from a narrow and procedural duty into a broad-based and substantive obligation on the Crown to implement the augmentation clauses. Second, the trial judge made a legal error by concluding that the Crown agreed to act solely in the best interests of the Treaty beneficiaries when upholding the Treaty augmentation clauses. This was not legally possible because it would put the Crown, which is also responsible for Canadian society as a whole, in an inevitable conflict of interest.

[516] I would not interfere with the trial judge's finding regarding the *sui generis* fiduciary duty as I see no error in her analysis, and the ruling was consistent with binding precedent. Further, courts must be cautious in expanding the scope of the

sui generis fiduciary duty where the actions of the Crown are more in the nature of a public law duty rather than a private law duty.

[517] Ontario also asserts Crown immunity with respect to the claims for breach of fiduciary duty. It does not rely on Crown immunity in defence of any other aspect of the Huron and Superior Plaintiffs' claims. Given my conclusion that there is no fiduciary duty owed in the circumstances of this case, it is unnecessary to decide whether Crown immunity is available, and I decline to do so.

[518] Regarding the 1990 *Limitations Act*, the Crown appeals the decision of the trial judge, which found that the provisions of the legislation are unavailable with respect to the breach of Treaty claims. Ontario argues that the pre-2002 Treaty claims are statute-barred because one of the following limitation periods apply: (1) the claims are actions for contract without specialty, subject to a six-year limitation period under s. 45(1)(g); (2) the claims are actions upon a specialty, subject to a twenty-year limitation period under s. 45(1)(b); or (3) the claims are actions of account, subject to a six-year limitation period under s. 46.

[519] The Crown's submissions regarding the 1990 *Limitations Act* are without merit. Limitation periods are supposed to provide certainty to litigants regarding their legal rights and liabilities. There is nothing in the 1990 *Limitations Act* that explicitly references treaty claims. Had the legislature intended to target treaty claims, it would have been a straightforward task to do so, either through an explicit

reference or the inclusion of a basket clause that caught all other causes of action not explicitly mentioned in the statute.

[520] In any event, I do not accept the thrust of the Crown's submission that treaties are synonymous with contracts. While treaties and contracts may share certain common features, the weight of the authority from the Supreme Court is that they are very different legal instruments. Similarly, a specialty contract shares little or no commonality with a treaty. Finally, as contemplated in the 1990 *Limitations Act*, an action of account is wholly inapplicable to the Robinson Treaties.

B. ANALYSIS

(1) Standard of Review

(a) Historical Aboriginal Treaties

[521] Treaties between Aboriginal people and the Crown are generally divided into "historical treaties", negotiated prior to 1921, and "modern treaties", negotiated after 1973.[431] The written terms of historical Aboriginal treaties, which surrendered large tracts of land to the Crown, are understood to be significantly less favourable to Indigenous parties than those contained in modern treaties.[432] The Robinson

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[431] Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties" in John Borrows & Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 105 ("Jai (2017)"), at p. 105.
[432] Jai (2017), at p. 107.

Treaties, signed in 1850, are historical in nature. At the outset of my analysis, it is therefore essential to outline the differences between modern Aboriginal treaties and historical Aboriginal treaties in order to ascertain the standard of review applicable to these cases.

[522] Historical Aboriginal treaties were negotiated "at the demographic low point for Indigenous peoples, which coincided with the relative lack of Indigenous economic, military, and legal power."[433] In order to ensure that land and resources were not taken without their permission, and to protect their communities from European-borne diseases and starvation, Aboriginal people entered treaty-making processes with reduced bargaining power.[434]

[523] Historical Aboriginal treaties were often negotiated quickly,[435] with little or no legal representation for the Indigenous signatories.[436] They were intended to record the agreement reached orally between the parties, but were relatively brief documents "with lofty terms of high generality" that did not always include the full extent of the Crown's promises to Indigenous signatories.[437] Further, the differences in language, culture, and worldview led to divergent understandings of

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[433] Jai (2017), at p. 107.
[434] Jai (2017), at pp. 112, 122-23.
[435] Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26:1 Queen's L.J. 143, at p. 188.
[436] Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2009) 26:1 Nat'l J. Const. L. 25 ("Jai (2009)"), at p. 27.
[437] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12. See also *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52.

what the parties agreed to in each treaty.[438] The written text of historical Aboriginal treaties may thus not reflect the true intent or understanding of Indigenous signatories.[439] As a result, cases like the ones before this court raise questions about whether the written text represents the entirety of the Crown's obligations.

[524] By contrast, modern Aboriginal treaties were negotiated in a period of improved Indigenous bargaining power.[440] Modern Aboriginal treaties are long and complex documents that have been carefully drafted and reviewed by all parties' legal counsel over several years. They are usually ratified by a majority of community members after substantial consultation and engagement. Unlike the historical Aboriginal treaties, they also contain amending provisions that recognize the need for continued dialogue between the parties. The consequences of such an inclusive and iterative process are that once a modern Aboriginal treaty is concluded, the parties are more likely to have a similar understanding of what has been agreed to, and the written text of the document more accurately captures the key terms of their agreement.[441]

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[438] Jai (2009), at p. 27. See also *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 108.
[439] Jai (2017), at p. 107. For a discussion of historical treaties and whether they reflect the "real deal", a fair deal, or no deal at all, see Nancy Kleer & Judith Rae, "Divided We Fall: Tsilquot'in and the Historic Treaties" (11 July 2014), online (blog): *Olthuis Kleer Townshend LLP*: <https://www.oktlaw.com/divided-fall-tsilhqotin-historic-treaties/>.
[440] Jai (2017), at p. 130.
[441] Jai (2017), at pp. 134-36.

[525] The interpretation of modern Aboriginal treaties can still give rise to disagreement. However, the context in which they are negotiated, and the comprehensiveness of the document produced, mean that the circumstances a court must consider to identify the parties' common intention and to determine an appropriate interpretation is vastly different than historical Aboriginal treaties. In *Beckman*, Binnie J. explained that:

> [T]he distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork.[442]

[526] Consequently, modern Aboriginal treaties warrant greater deference to their text than historical Aboriginal treaties.[443]

[527] Historical Aboriginal treaties should "be interpreted in light of the contexts in which they were signed, and that interpretation must be both liberal and dynamic so as to avoid the freezing of rights, while any ambiguity is to be resolved in favour of the Aboriginal signatories."[444] This requires courts to go beyond the facial meaning of the text and to examine any evidence of how the parties understood

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[442] *Beckman*, at para. 54 (citation omitted).
[443] *First Nation of Nacho Nyuk Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 36.
[444] *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 108.

the terms at the time the treaty was signed. Courts must undertake an extensive analysis of the record and witness testimony in order to make factual findings that will provide a foundation for them to apply the principles of treaty interpretation and arrive at a conclusion best reconciling the interests and intentions of both parties.

[528] As I will elaborate below, it is precisely the scope of the fact-finding exercise underpinning the interpretation of historical Aboriginal treaties that requires appellate courts, upon review, to afford deference to lower courts and apply a standard of palpable and overriding error.

(b) The Case for a Correctness Standard

[529] Ontario relies on *Van der Peet*,[445] *Marshall*,[446] and *Caron*[447] to assert that the standard of review applicable to the interpretation of historical Aboriginal treaties is correctness. According to Ontario, the interpretation of treaties is a legal issue, even when informed by findings of fact.

[530] In *Van der Peet*, the appellant was charged with the offence of selling fish that she had caught under the authority of an Indian food fish license. The appellant defended the charges on the basis that she had exercised an existing Aboriginal

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[445] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[446] *R. v. Marshall*, [1999] 3 S.C.R. 456.
[447] *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511.

right to sell fish, and as a result, the relevant section of British Columbia's fishery regulations[448] violated s. 35(1) of the *Constitution Act, 1982*.

[531] Lamer C.J. stated that no deference is owed to legal inferences or conclusions drawn from the trial judge's findings of fact. The relevant paragraph reads as follows:

> In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis — his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them — is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however — the findings of fact from which that legal inference was drawn — do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.[449]

[532] The Supreme Court ultimately showed deference to the trial judge's findings of fact but applied a standard of correctness to his subsequent analysis of the

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[448] See *British Columbia Fishery (General) Regulations*, SOR/84-248, s. 27(5).
[449] *Van der Peet*, at para. 82 (emphasis added).

scope of the appellant's Aboriginal rights. A correctness standard was similarly imposed in several other historical Aboriginal treaty cases before *Sattva*.[450]

[533] Ontario rejects the argument that this jurisprudence's precedential value has been called into question due to the Supreme Court's decision in *Sattva*. It submits that treaties are not comparable to everyday commercial contracts, and that treaty relationships between the Crown and Aboriginal peoples create public law and are of importance to individuals and communities beyond a particular case. That argument seems to find support in a recent article by Professor Janna Promislow:

> Serving the ends of justice in the treaty interpretation context, however, is more complex than the interpretation of contracts, due to the historical nature of the agreements and the constitutional character of the moments of agreement – and because the foundational values behind protecting historic treaty rights are arguably less understood and more contentious than the values behind protecting freedom of contract.[451]

[534] In any event, Ontario submits that the Supreme Court has not created a single standard of review applicable to all contracts. For example, in *Ledcor*, the court held that when faced with standard form contracts affecting a wide range of

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[450] See e.g., *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 64 B.C.L.R. (3d) 206, at para. 85; *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, 213 Sask. R. 1, at para. 148, leave to appeal refused, [2001] S.C.C.A. No. 647.

[451] Janna Promislow, "Treaties in History and Law" (2014) 47:3 U.B.C.L. Rev. 1085, at p. 1172 (footnote omitted).

parties, *Sattva* does not apply, and the case should be reviewed on a standard of correctness.[452]

[535] Ontario also argues that in *Caron*, which was released post-*Sattva*, the Supreme Court affirmed its earlier jurisprudence on the applicability of the correctness standard of review in treaty interpretation cases. The Supreme Court noted:

> While we take no issue with the factual findings of the provincial court judge regarding the negotiations between the delegates and Canada, we disagree with his legal conclusion that the negotiations resulted in a pact with Canada to establish legislative bilingualism in all of the annexed territories (para. 354). In this respect, there is a helpful distinction drawn in Aboriginal rights jurisprudence between a trial judge's findings of fact on historical matters, which are entitled to deference, and the legal inferences or conclusions that a trial judge draws from such facts, which are not. As Lamer C.J. explained in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, "[the trial judge's] determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them … is a determination of a question of law which, as such, mandates no deference from this Court" (para. 82; see also *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 18; and *R. v. Sappier*, 2004 NBCA 56, 273 N.B.R. (2d) 93, at para. 76). In our view, the same distinction applies with respect to the historical factual findings of the provincial court judge in this case, and the legal inferences he draws on the basis of these facts.[453]

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[452] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23
[453] *Caron*, at para. 61 (emphasis added).

[536] In another recent post-*Sattva* case, *Fort McKay First Nation*, the Court of Appeal of Alberta took an unequivocal stance on the standard of review applicable to treaty interpretation. The court subscribed to the view that all matters of treaty interpretation are subject to a standard of correctness.[454]

[537] In summary, Ontario submits that treaty interpretation cases, both before and after *Sattva*, call for a correctness standard of review. It relies on the importance of treaties and the broad impact of decisions interpreting treaties as justifying this more stringent standard of review.

(c) The Case for a Deferential Standard

[538] The Huron Plaintiffs argue that historical Aboriginal treaty interpretation is a matter of mixed fact and law, and reviewable on the standard of palpable and overriding error. In support of this submission, they draw an analogy to contracts. In the pre-*Sattva* jurisprudence, there is authority for the proposition that Aboriginal treaties should be treated as analogous to contracts. For example, in *Badger*, Cory J. noted that "[t]reaties are analogous to contracts, albeit of a very solemn and special, public nature."[455]

[539] *Sattva* represented a sea change in the approach to the standard of review in contractual interpretation cases. In that case, Rothstein J. recognized that the

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[454] *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2019 ABCA 14, at para. 39.
[455] *Badger*, at para. 76.

traditional view in England and Canada had been that the standard of review on an appeal from a lower court decision involving the interpretation of a contract was correctness. However, he noted that the law of contractual interpretation in Canadian courts had developed to the point where it was recognized that the meaning of contractual terms is often derived from contextual factors – also known as the "factual matrix" – that must inform the analysis.

[540] Further, Rothstein J. observed that the exercise of applying the principles of contractual interpretation to the facts and words of an agreement is closer to a question of mixed fact and law than a question of law. He emphasized that determining the parties' objective intentions to a contract is a "fact-specific goal", informed, in part, by a consideration of "the surrounding circumstances known to the parties at the time of formation of the contract."[456]

[541] Another critical policy rationale for the imposition of a more deferential standard of review relied on by Rothstein J. was that in most cases, the interpretation of a contract would have no impact beyond the interests of the parties to the particular dispute. On this point, he reasoned as follows:

> [O]ne central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law,

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[456] *Sattva*, at paras. 47, 49.

> rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal….
>
> Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings…. These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.[457]

[542] It is important to note that Rothstein J. recognized that it might be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law. He cited examples, including the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.[458] However, he warned that courts should be cautious in identifying legal errors in disputes over contractual interpretation. He stated that "the circumstances in which a question of law can be extricated from the interpretation process will be rare."[459]

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[457] *Sattva*, at paras. 51-52 (citation omitted).
[458] *Sattva*, at para. 53.
[459] *Sattva*, at para. 55.

[543] The Huron Plaintiffs submit that while historical Aboriginal treaties are not contracts, their interpretation requires the courts to look at the historical context and the parties' intentions in a manner at least as inherently fact specific as contractual interpretation.

[544] Like the Huron Plaintiffs, the Superior Plaintiffs submit that the rationale for the deferential standard of review in *Sattva* applies with equal force to the interpretation of historical Aboriginal treaties. The Superior Plaintiffs, however, go a step further than the Huron Plaintiffs and assert that the interpretation of the Robinson Treaties will have no precedential value because they are the only ones in Canada to contain augmentation clauses. Given what they believe to be the limited precedential value of this case, the Superior Plaintiffs argue that the trial judge's interpretation should attract significant deference on appeal unless there is an extricable error of law.

[545] The Superior Plaintiffs draw an analogy between the interpretation of the Robinson Treaties and the interpretation of the Indian Residential School Settlement Agreement in *Fontaine (SCC)*.[460] In *Fontaine (SCC)*, the court's decision would have had a broad impact affecting thousands of people but was not subjected to a higher standard of review. The Superior Plaintiffs similarly argue

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[460] *Fontaine v. Canada (Attorney General)*, 2017 SCC 47, [2017] 2 S.C.R. 205 ("*Fontaine (SCC)*"), aff'g 2016 ONCA 241, 130 O.R. (3d) 1 ("*Fontaine (ONCA)*").

that although the interpretation of the Robinson Treaties will have significant implications for many people, the fundamental issue for the courts to address is the common intention of the Treaties' signatories, and thus, the question is one of mixed fact and law.

[546] Both the Huron and Superior Plaintiffs cite *West Moberly*, a recent case from the Court of Appeal for British Columbia that examined the standard of review in historical Aboriginal treaty cases.[461] This appeal concerned the interpretation of a "metes and bounds" clause in Treaty 8 that described a tract of land.

[547] The plaintiffs in *West Moberly* applied for a declaration that the tract's western boundary referred to the height of land along the continental divide between the Arctic and Pacific watersheds. The province counterclaimed. It sought a declaration that the disputed phrase referred to the line of the watershed within the Rocky Mountains as those mountains were understood to be situated in 1899 at the time of the treaty signing. The trial judge granted the declaration requested by the plaintiffs. The province appealed the order on the grounds that: (1) declaratory relief was unavailable in the circumstances; and (2) the trial judge erred in his interpretation of the relevant provision.

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[461] *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232, leave to appeal refused, [2020] S.C.C.A. No. 252.

[548] In dismissing the appeal, the majority, whose decision was authored by Bauman C.J.B.C., briefly considered the issue of the standard of review. The majority noted:

> It is common ground that no deference is owed to judicial conclusions stemming from legal error. A correctness standard of review applies to a finding of the trial judge that "can be traced to an error in his or her characterization of the legal standard": *Housen*, at para. 33. Similarly, no deference is owed to the legal conclusions a trial judge makes by applying the law to a historical record: *Caron v. Alberta*, 2015 SCC 56 at para. 61.[462]

[549] In dissenting reasons, Smith J.A. undertook a more detailed analysis of the issue and concluded:

> In my view, the principles outlined in *Sattva* provide guidance in the approach to be taken to the standard of review with respect to treaty interpretation. Contract and treaty interpretation involve analogous (though not identical) considerations. Like contract interpretation, treaty interpretation involves the application of legal principles of interpretation to the text of the written treaty, considered in light of the factual matrix. For historical treaties, that matrix includes the historical and cultural context of the time. Thus, the standard of review that applies to treaty interpretation is overriding and palpable error unless the error alleged involves an extricable question of law.[463]

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[462] *West Moberly*, at para. 363.
[463] *West Moberly*, at para. 130.

[550] The Huron and Superior Plaintiffs rely on Smith J.A.'s comments in support of their position that the standard of review is palpable and overriding error.

[551] In summary, the Huron and Superior Plaintiffs submit that the factual matrix plays an essential role in the interpretative exercise of non-standard form contracts and historical Aboriginal treaties. Therefore, for the same reasons articulated by the Supreme Court in *Sattva*, they argue that the trial judge's decision should be subject to a more deferential standard of review.

(d) A New Approach

[552] As I stated at the outset of these reasons, I am of the view that a new approach should be taken on the issue of standard of review as it relates to the interpretation of historical Aboriginal treaties. I will first consider Ontario's submissions in favour of a correctness standard of review before I explain what the new approach should be.

(i) Ontario's Arguments Are not Persuasive

[553] Ontario's plea that a higher standard of review should be imposed because of the Treaties' significance is not persuasive. That is not the way standard of review analysis is supposed to operate. Courts do not have differing standards dependent on the quantum of damages at stake or the number of people impacted by the decision. A breach of contract judgment in a dispute between two parties is not entitled to less deference than a similar decision in a class proceeding that

impacts thousands of class members. As Strathy C.J.O. stated in *Fontaine (ONCA)*:

> The question is not whether the decision will impact many people, but whether it will have precedential value, in the sense that it provides guidance to adjudicators or resolves an issue that could arise in future litigation. The fact that the outcome of the interpretation of the agreement will affect many – indeed many thousands – of claimants, is not, of itself, a reason to elevate the standard of review to correctness.[464]

[554] Deference is also applied to the fact-finding of judges in a myriad of circumstances that result in very serious consequences. For example, in criminal cases, factual findings critical in determining the guilt or innocence of an accused, or the appropriate sentence, are afforded significant deference on appeal. It is therefore an unconvincing argument to state that the standard of review should be higher for treaty interpretation cases because the consequences flowing from the decisions are more significant.

[555] The jurisprudence is clear, however, that whether a decision has precedential value will be a significant factor in determining the appropriate standard of review. The purpose of the distinction between questions of mixed fact and law and questions of law is, as a matter of judicial economy, to limit an appellate court's power to interfere with the fact-finder's interpretation of a contract,

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[464] *Fontaine (ONCA)*, at para. 95.

given that in most cases, the interpretation will have no impact beyond the interests of the parties to the particular dispute.[465]

[556] Wagner J. (as he then was) described the distinction between cases with and without precedential value this way in *Ledcor*:

> Contractual interpretation is often the "pure application" of contractual interpretation principles to a unique set of circumstances. In such cases, the interpretation is not "of much interest to judges and lawyers in the future" because of its "utter particularity". These questions of contractual interpretation are appropriately classified as questions of mixed fact and law, as the Court explained in *Sattva*.
>
> However, the interpretation of a standard form contract could very well be of "interest to judges and lawyers in the future". In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a "pure question of law", i.e., "questions about what the correct legal test is": *Sattva*, at para. 49; *Southam*, at para. 35. Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions.[466]

[557] It is essential to recognize that what the Supreme Court discussed in *Ledcor* was standard form insurance contracts, which contained identical or nearly identical contractual language as used in many other insurance policies. In the cases at bar, the interpretation of the agreements has minimal precedential value.

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[465] *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 21, leave to appeal refused, [2016] S.C.C.A. No. 39.
[466] *Ledcor*, at paras. 42-43.

As counsel for the Superior Plaintiffs point out, there are no other similar augmentation treaties extant in Canada.

[558] I am also not persuaded that there should be a distinction, as suggested in *Van der Peet*, *Marshall*, and *Caron*, between findings of historical facts (reviewed on a deferential standard) and the application of those findings to draw appropriate legal inferences (reviewed on a correctness standard). In a case where the primary goal of the analysis is to ascertain the signatories' intentions for executing a treaty, the determination of the historical facts and the legal consequences of those findings are usually two sides of the same coin. Once the trial judge has determined the parties' intention, there is very little work remaining; the legal consequences flow directly from the fact-finding. It is artificial to suggest that there is a two-step process and that different review standards should apply to each step.

[559] Further, in my view, *Van der Peet*, *Marshall*, and *Caron* do not stand for the proposition that historical Aboriginal treaties are to be reviewed on a correctness standard. It must be noted that both *Van der Peet* and *Marshall* were decided prior to *Housen*, the leading case on the standards of appellate review.[467] In that case, the court differentiated between errors of law that are subject to a correctness standard, and errors of fact or mixed fact and law that are subject to a palpable

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[467] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

and overriding error standard. *Van der Peet* and *Marshall* are examples of cases decided on extricable legal errors – the former case involved the establishment and application of the test for Aboriginal rights, whereas in the latter case, the Supreme Court was required to give effect to a treaty interpretation principle that the trial judge had ignored. Finally, *Caron* was not a case about Aboriginal or treaty rights.

[560] For these reasons, I would reject Ontario's arguments for a standard of correctness.

(ii) Appellate Review of Historical Aboriginal Treaty Interpretation

[561] The question that remains is whether historical Aboriginal treaties should be subject to a lower standard of review by reason of their similarity to contracts and should be fit under the umbrella of the *Sattva* line of authority.

[562] I recognize that there is jurisprudence where appellate courts have suggested that Aboriginal treaties are akin to contracts. However, as Michael Coyle points out:

> [T]he doctrines of contract law did not evolve in the context of arrangements intended to endure for generations and were not formulated to resolve the kinds of disputes that are likely to arise in such a long-term relationship. Conceiving of treaties mainly through the principles of domestic contract law would fail to account for either the web of relational expectations that infused the treaty-making process or the necessarily unforeseeable and evolving circumstances through which the parties intended to maintain their treaty

> relationship. Perhaps most importantly, to adopt an approach based solely on Canada's domestic law of contracts would overlook the fundamental character of treaties, namely that they are the product of an encounter between two separate legal orders, Indigenous and non-Indigenous. Since at least 1985, with the Supreme Court of Canada's *Simon* decision, Canadian law has acknowledged that treaties between the Crown and First Nations are unique legal arrangements to be governed by a set of legal principles adapted to their unique nature.[468]

[563] I would thus approach the issue in a slightly different manner. In my view, the reasons why the analysis of historical Aboriginal treaties should be subject to a lower standard of review are twofold: (1) the critical nature of historical context in the exercise; and (2) the process that trial courts engage in when undertaking a historical Aboriginal treaty analysis.

(i) The Historical Context

[564] The historical context relevant to treaty interpretation includes not only the political, economic, and social circumstances that the Crown and the Indigenous parties had faced in or around the time of the document's signing. The historical context also refers to how Indigenous communities would have conceptualized their relationships to one another, the land, and European society, and how the Crown would have viewed the same. The parties' beliefs, legal orders, and desires

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[468] Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last" in John Borrows & Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 39, at pp. 46-47 (footnotes omitted).

for the future would have provided the framework with which they each approached and entered into a given treaty. It must consequently be stressed that this historical context is integral to the exercise of Aboriginal treaty interpretation, which is fundamentally about the determination of the parties' rights as was intended by the original signatories at the time of the document's signing.

[565] As Julie Jai notes, historical Aboriginal treaties were meant to create a relationship between two culturally distinct groups so that they could peacefully co-exist. However, there were gaps in language, worldview, and other factors that produced divergent understandings of what was agreed upon between the parties. In addition, the Aboriginal signatories often did not have legal representation and did not appreciate the fact that they were giving up their rights for perpetuity.[469] The exercise of seeking common intent in treaty interpretation would be "superfluous and misleading if the courts did not concern themselves with the manner in which each party's apparent assent was obtained."[470] In other words, when courts examine historical Aboriginal treaties that were negotiated quickly, with power imbalances, and often in a language foreign to Aboriginal peoples, the task of treaty interpretation cannot be accomplished without a detailed understanding of the broader historical context.

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[469] Jai (2009), at p. 27.
[470] Michael Coyle, "Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties" (2008) 32:2 Man. L.J. 34, at p. 59.

[566] I would also observe that our courts interpret these historical treaties in the 21st century, where we recognize reconciliation as an animating element of ongoing Aboriginal-Crown relationships. To that end, the Crown must perform its treaty obligations in a manner that "pursues the purpose behind the promise."[471] It must also ensure that its dealings do not render the treaty an improvident arrangement for the Aboriginal signatories. This substantive legal accountability is not possible if the courts are restricted to an interpretation based on the "lean and often vague vocabulary of historic treaty promises."[472] Reconciliation requires the courts to view each historical treaty in the context of the facts that come from the vast and unique array of evidentiary sources presented by the parties.

(ii) The Process of Trial Courts in Interpreting Historical Aboriginal Treaties

[567] Regarding the process followed by trial judges, the Huron and Superior Plaintiffs' analogy to the factual matrix in contract cases is not entirely apt. In a historical Aboriginal treaty case, the examination of the surrounding factual circumstances analysis goes well beyond what is typical in a contract case. Usually, a court tasked with interpreting a contract starts with the words of the agreement, and where there is ambiguity as to their meaning, applies the evidence adduced at trial to give the necessary context to the words chosen by the parties.

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[471] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 80.
[472] *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, at para. 18.

This generally involves *viva voce* evidence from one or more of the participants in the contract negotiation. Often, the trial judge is also called upon to review the contracting parties' communications. An analysis of a contract's factual matrix, while important, is thus not a particularly complex or novel exercise. It is consistent with the fact-finding function that trial courts engage in every day across the country. To put it colloquially, it is the bread and butter of trial courts.

[568] Contrast this typical process with the far more extensive exercise a trial court engages in when interpreting a historical Aboriginal treaty. Courts recognize that the text of historical Aboriginal treaties "often reflect the views and biases of the powerful" and that to understand the "truth", they must go "well beyond the words of a single agreement".[473] A finding of ambiguity in the treaty language is not necessary to have regard to extrinsic evidence.[474] The extrinsic evidence helps the courts see how the parties understood the terms of the treaty, and such an appreciation is "of assistance in giving content to the term or terms."[475] Consequently, in a historical Aboriginal treaty case, the surrounding circumstances of the treaty are as important as the document's text. The significance of the factual matrix is heightened, and a court must undertake an extensive review of the historical circumstances to interpret the treaty properly.

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[473] Kate Gunn, "Agreeing to Share: Treaty 3, History & the Courts" (2018) 51:1 U.B.C.L. Rev. 75, at p. 92.
[474] *Marshall*, at para. 11.
[475] *Marshall*, at para. 11, quoting *R. v. Taylor and Williams* (1981), 66 C.C.C. (2d) 227 (Ont. C.A.), at p. 236, leave to appeal refused, [1981] S.C.C.A. No. 377.

[569] The cases at bar serve as good examples of the nature of that process. There was, of course, no direct evidence from any party who was present during the negotiation and execution of the Robinson Treaties. The trial judge accepted evidence from 11 experts and heard from various Elders and Chiefs. She reviewed approximately 30,000 pages of historical documents, including the Treaties themselves, reports, maps and diaries, and a similarly lengthy volume of secondary source material. To properly understand the parties' intentions, she had to put the Robinson Treaties in their historical context. This meant reviewing the evolving nature of the relationship between Aboriginal peoples and Europeans over several decades. It also included a review of the conduct of the parties after the execution of the Treaties. The trial took 67 sitting days and was followed by closing submissions, which lasted another 11 days.

[570] In a case centred on the interpretation of a historical Aboriginal treaty, the trial judge is called upon to conduct a process akin to a judicial inquiry. It is an extensive analysis where the judge is acting both as judicial officer and historian. Like the historian, the trial judge must sort through, piece together, and try to make sense of a diverse array of source material that usually illuminates the incomplete, tenuous, and questionable nature of the parties' agreement. In order to resolve the parties' dispute in their judicial role, however, they must go a step further and make factual inferences to fill the inevitable gaps in the record. Experts present evidence to help the trial judge in drawing those inferences, and the trial judge must evaluate

the weight to give those opinions against the record of source documents. There are hard historical facts that may be revealed in this process, but generally inferences and opinions outnumber those facts.

[571] Where the court is engaged in drawing conclusions from competing interpretations of the historical record, it cannot be credibly argued that there is only one correct interpretation. This is because:

> [T]reaties have a social life and generate a multiplicity of meanings, interpretations, expectations and hopes. Treaties have a social life insofar as they carry relational qualities, capacities and potentialities that concern and engage humans, institutions and the land. This is a social life that brings Indigenous and non-Indigenous regimes of value and historicity into coexistence and, therefore, into dialogue.
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> …
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> Once signed, treaties become key actors in the relationship between governments, industries, Indigenous people and the land; they play a major role in the formation, transformation and deployment of these relationships. Once ratified, treaties are the starting point of a relationship, not an end in themselves. Their future and deployment are fraught with potentialities, uncertainties and indeterminacy.[476]

[572] Ultimately, the study of history is not mathematics. It is all about context, perspective, and judgment. To use the words of the American writer, Thomas Flanagan, to properly understand a historical event, a historian must take that

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[476] Sylvie Poirier & Clinton N. Westman, "Living Together with the Land: Reaching and Honouring Treaties with Indigenous Peoples" (2020) 62 Anthropologica 236, at p. 241 (citations omitted).

event and “turn it in one’s fingers until all the lights had played upon its surfaces.”[477] A trial judge in a historical Aboriginal treaty case must do the same. They are required to consider the intention of the signatory parties from all perspectives and in light of the historical context.

[573] A trial judge must work diligently to sift through the historical record and come to a conclusion that is sensible and in accord with the evidence. Where a trial judge undertakes that task with diligence, carefully considers the competing viewpoints, and weighs the evidence to reach an available conclusion without making a palpable and overriding error or an extricable legal error, an appellate court oversteps its proper role if it interferes and asserts its own conclusion. As McLachlin J. (as she then was; dissenting, but not on this point) stated in *Marshall*, the “goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed”.[478] In my view, it is not open to an appellate court to step in after the trial and declare that theirs is the only valid interpretation of the historical record.

[574] Thus, the rationale for deference is much better established in a historical Aboriginal treaty case than in an ordinary contract case. This is especially true in

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[477] Thomas Flanagan, *The Tenants of Time* (New York: Dutton, 1988), at p. 85.
[478] *Marshall*, at para. 73(3).

light of the fact that a trial judge's determination of the parties' common intention often settles the legal issues. For example, in the cases at bar, the key determination to be made by the trial judge was the parties' intention in inserting the augmentation clauses into the Robinson Treaties. Once she answered that question, very little legal analysis was required. It is therefore unhelpful to suggest that there are distinct stages to a trial judge's analysis, each of which could be subject to different standards of review.

[575] I also note that there must be some value placed in the trial process itself. Based on the Supreme Court's comments in *Housen*, we presume trial judges to be as competent as appellate judges in resolving disputes justly.[479] We further accept that trial judges are in a privileged position vis-à-vis their appellate counterparts to engage with the record, watch and listen to the parties, and make findings of fact, and that with repeated experience of carrying out this process, there comes expertise.[480] In the context of historical treaty interpretation, where reconciliation is the animating principle, the trial judge's expertise and process should be especially respected.

[576] Here, for example, the trial judge took extensive efforts to involve and hear from the Indigenous Treaty partners. She conducted the proceedings in various

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[479] *Housen*, at para. 11.
[480] *Housen*, at para. 13, citing *Anderson v. Bessemer (City)*, 470 U.S. 564 (1985), at pp. 574-75.

Indigenous communities, immersed herself in the teachings of these communities' many knowledge keepers, and permitted Anishinaabe ceremony to come into the courtroom and the court process, through witnesses, counsel, and members of the First Nations. For this court to intervene not only undervalues the trial judge's comprehensive process, but suggests that the involvement of the Treaty partners, particularly the Indigenous signatories, did not make the trial judge better situated to decide the case. That cannot be the intention of a treaty interpretation exercise meant to promote reconciliation.

[577] In summary, I would find that the standard of review applicable to the trial judge's analysis of the Robinson Treaties is palpable and overriding error. Extricable errors of law should be reviewed on a correctness standard.

(e) Application of Legal Principles

[578] In the present cases, the trial judge carefully considered the historical evidence and made extensive references to it in her judgment. Her interpretation of the Treaties was available to her, as it was well rooted in the evidence. It is free from palpable and overriding error or extricable legal error.

[579] Ontario's complaints that the trial judge ignored relevant evidence are not borne out by an examination of the record. In reality, these arguments are directed to the degree of emphasis that the trial judge placed on various parts of the record. The weight given by a trial judge to individual pieces of evidence is a choice that

is well within a trial judge's discretion and is not properly the subject of appellate correction.

[580] Based on the foregoing, I would find no basis for this court to interfere with the trial judge's interpretation of the Robinson Treaties.

(2) Fiduciary Duty

(a) Overview

[581] There are two distinct types of fiduciary duty that may arise in the cases at bar. They were described by Wagner J. (as he then was), in *Williams Lake* as follows:

> A fiduciary obligation may arise from the relationship between the Crown and Indigenous peoples in two ways. First, it may arise from the Crown's discretionary control over a specific or cognizable Aboriginal interest: *Manitoba Metis Federation*, at paras. 49 and 51; *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18; T.R., at para. 180-81. Because this obligation is specific to the relationship between the Crown and Indigenous peoples, it has been characterized as a "*sui generis*" fiduciary obligation: *Wewaykum*, at para. 78; *Guerin*, at p. 385; *Sparrow*, at p. 1108. Second, a fiduciary obligation may arise where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary: *Manitoba Metis Federation*, at para. 50; *Alberta v. Elder*

Advocates of Alberta Society, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36; T.R., at paras. 182 and 217.[481]

[582] The trial judge found that the Crown owes an *ad hoc* fiduciary duty, but not a *sui generis* fiduciary duty, to the Treaty beneficiaries regarding the augmentation clauses.[482] As I will explain in this section of my reasons, in reaching her conclusion regarding the *ad hoc* fiduciary duty, the trial judge made two significant legal errors in her analysis, which render her finding unsustainable.

[583] First, there is an unresolvable discrepancy between the nature of the fiduciary duty identified in the trial judge's reasons and the one found in her judgments. Somehow, the scope of the duty expanded significantly in the process of settling the judgments. In the reasons, the content of the fiduciary is limited to procedural obligations in implementing the augmentation clauses. However, in the judgments, the fiduciary duty applies to the entire process of the Crown making payments under these clauses.

[584] Second, the trial judge failed to apply the test for *ad hoc* fiduciary duties properly. She erred in law in concluding that the Crown agreed to act solely in the best interests of the Treaty beneficiaries concerning the Treaty augmentation

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[481] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 44.
[482] Stage One Reasons, at paras. 512, 533.

clauses. This was not possible because it would put the Crown in an inevitable conflict of interest.

[585] I see no error in the trial judge's conclusion that there is no *sui generis* fiduciary duty in the circumstances. I will explain why courts should be cautious in expanding the scope of the *sui generis* fiduciary duty where the actions of the Crown are more in the nature of a public rather than a private duty.

(b) *Ad Hoc* Fiduciary Duty

(i) Nature of the Duty

[586] An *ad hoc* fiduciary duty arises where there is: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries; (2) a defined class of beneficiaries vulnerable to the fiduciary's control; and (3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[483]

[587] The trial judge found that the Crown assumed an *ad hoc* fiduciary duty under the Treaties.[484] In coming to this decision, she held that all three elements of the test for an *ad hoc* fiduciary duty were met. First, the Crown undertook to act exclusively in the best interests of the Treaty beneficiaries. The trial judge found

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[483] See *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36; *Manitoba Metis*, at para. 50; and *Williams Lake*, at para. 162, *per* Brown J. (dissenting, but not on this point).
[484] Stage One Reasons, at para. 533.

that there was no competing interest or duty for the Crown to engage in a process to determine if economic circumstances warranted an increase in the annuities.[485] Second, the Treaty beneficiaries constituted a defined class of persons vulnerable to the Crown's control.[486] Third, the beneficiaries stood to be adversely affected because of the discretionary control of the Crown over the annuity increase.[487]

[588] In my view, the trial judge made an error of law in holding that the Crown undertook to act exclusively in the best interests of the Treaty beneficiaries. At trial, Ontario and Canada submitted that they could not owe an *ad hoc* fiduciary duty to the Treaty beneficiaries in paying monies under the augmentation clauses because they cannot act with exclusive or utmost loyalty to them. They argued that it would put them in a conflict of interest if, in paying out monies under the augmentation clauses, they had to place the interests of the Treaty beneficiaries over the interests of all other members of society.

[589] The trial judge appeared to recognize the implications of a broad-based fiduciary duty finding. She attempted to resolve that potential conflict of interest by narrowing the scope of the fiduciary duty she was imposing. That duty would not relate to the results of the Treaty augmentation process (i.e., the actual setting and paying of compensation). Instead, it would be procedural and only apply to the

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[485] Stage One Reasons, at paras. 524-26.
[486] Stage One Reasons, at para. 514.
[487] Stage One Reasons, at paras. 520-23.

process to determine whether the compensation should be paid. This was most clearly stated in para. 525:

> The Crown argument that an ad hoc fiduciary duty analysis fails because the Crown cannot act with exclusive or utmost loyalty to the Anishinaabe because it "wears many hats" is based on a faulty premise. The Crown focused on the land as the interest at stake; however, the interest at stake is embedded in the augmentation clause. It is a promise to engage in the process of implementing the conditional augmentation promise. The legal interest subject to the duty is not in an absolute right to increases and is not in relation to the administration of the land. Rather, the legal interest created by the augmentation clause is to engage in the process to determine whether increases are payable. The right to have the Crown engage in the process came into effect upon the signing of the Treaties and continues to exist today.[488]

[590] Throughout her reasons, the trial judge was at pains to emphasize that the *ad hoc* fiduciary duty was process-based and not results-based:

- "Specifically, I find that the Crown undertook 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."[489]
- "The Crown reminded th[e] court that a finding of ad hoc fiduciary duty on the part of the Crown would be rare. However, the circumstances

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[488] Stage One Reasons, at para. 525.
[489] Stage One Reasons, at para. 519.

in this case, being a duty to engage in a process to meet a treaty promise, may constitute one of those rare cases. The Crown has no other conflicting demands when it comes to engaging in the process."[490]

- "The best interests define the standard of conduct of the fiduciary; they do not define the outcome. It is the standard of conduct that defines, in general terms, the duties of the fiduciary. As the court said in *Williams Lake*, the Crown will fulfil its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result."[491]
- "For example, the Crown has discretion on when and how it provides sufficient information to allow the Anishinaabe, or a court on review, to assess the Crown's calculations of net Crown revenues. The discretion is subject to the duties of a fiduciary and, therefore, is not unfettered and must be carried out within the parameters of the duty of honour and the duties of loyalty and utmost good faith."[492]
- "I am satisfied that an ad hoc fiduciary duty arises in the context of the Robinson Treaties and attaches to the Treaties' promise to engage

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[490] Stage One Reasons, at para. 526 (footnote omitted).
[491] Stage One Reasons, at para. 530 (footnote omitted).
[492] Stage One Reasons, at para. 532.

> with the process to determine if the Crown can increase the annuities without incurring loss (based on a calculation of relevant revenues and expenses to determine net Crown revenues).”[493]

[591] The point the trial judge was making was that the Crown was not put in an untenable position because it was not required to favour the Treaty beneficiaries over the interests of other residents of Ontario, as there was no competing duty regarding procedural matters. By limiting the scope of the duty, she tried to avoid placing the Crown in an inherent conflict of interest.

[592] Notwithstanding the foregoing, the trial judge greatly expanded the scope of the Crown’s fiduciary duty in settling the judgments for these cases. Gone was the notion of a limited procedural-based fiduciary duty, and in its place was a broad, substantive fiduciary duty on the Crown to implement the augmentation clauses.

[593] The judgment in the Superior Plaintiffs’ action reads, in part, as follows:

> [1] THIS COURT ADJUDGES AND DECLARES THAT, considered apart from the pleaded defences based on statutes of limitation, *res judicata* and *laches,* including acquiescence, and without making a determination as to the respective responsibilities and liabilities of Canada and Ontario:
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> > a) Pursuant to the Robinson Superior Treaty of 1850, the Crown is obligated to increase, and the First Nation Treaty Parties have a collective treaty right to have increased, from time to time, the

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[493] Stage One Reasons, at para. 533.

> promised annuity payment of £500 (or $2,000) if net Crown resource-based revenues from the Treaty territory permit the Crown to do so without incurring loss, with the amount of annuity payable in any period to correspond to a fair share of such net revenues for that period;
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> b) To fulfill its obligation in (a) above, the Crown:
>
> > i. is required to periodically engage in a process, in consultation with the First Nation Treaty parties, to determine the amount of net Crown resource-based revenues; and
> >
> > ii. if there are sufficient Crown resource-based revenues, to permit the Crown to pay an increased annuity amount without incurring loss, is required to pay any such increase;
>
> c) In fulfilling these obligations and requirements of the augmentation promise, the Crown is subject to the duties flowing from the honour of the Crown and the fiduciary duty which the Crown owes to the First Nation Treaty parties[.] [Emphasis added.]

[594] Identical language is used in the judgment for the action brought by the Huron Plaintiffs.

[595] Clearly, the text of the judgments is not restricted to process. The trial judge is ordering that the Crown has an obligation to pay an increased annuity amount where it can do so without incurring a loss. In fulfilling that obligation, the Crown is subject to a fiduciary duty. The notion of a limited, procedural-based fiduciary duty, as articulated in the reasons, is therefore not consistent with the judgments rendered by the trial judge.

[596] It is well settled in the jurisprudence that an appeal is from the order or judgment rendered in the court below and not the reasons that are given in support thereof.[494] Thus, we must take the judgments that the trial judge signed as reflecting her finding on the scope of the Crown's fiduciary duty. As I will discuss in the next section of my reasons, however, regardless of whether the Crown's fiduciary duty is broad-based and substantive or narrow and procedural, the trial judge erred in law in finding an *ad hoc* fiduciary duty.

(ii) Error in Imposing an *Ad Hoc* Fiduciary Duty

(i) Substantive Fiduciary Duty

[597] Concerning the broad-based and substantive fiduciary duty, Ontario submits that it is impossible for a government to act with the utmost good faith to only one group in society when making policy decisions. It argues that because the Crown "wears many hats", it must balance the interests of all members of society and cannot benefit one group over the others. Binnie J. articulated the "many hats" argument in *Wewaykum*:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.). As the Campbell

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[494] *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

> River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians.[495]

[598] Similarly, in a recent article, Bryan Birtles argues in favour of a sovereign-to-sovereign approach to treaty agreements because a "fiduciary relationship means a fiduciary must put its beneficiary's interests ahead of anyone else's. But such a situation is impossible to maintain between the Crown and a single segment of society: the Crown has competing interests, including its own, that structurally preclude it from putting Indigenous interests first."[496]

[599] The trend in the jurisprudence is to move away from imposing fiduciary duties on governments in implementing their policy obligations. As the Supreme Court stated in *Elder Advocates*, the "Crown's broad responsibility to act in the

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[495] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96 (emphasis omitted).
[496] Bryan Birtles, "Another Inappropriate F Word: Fiduciary Doctrine and the Crown-Indigenous Relationship in Canada" (2020) 9:1 American Indian L.J. 1, at p. 6 (footnotes omitted).

public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare".[497]

[600] The cases at bar serve as good examples of the difficulty with trying to shoehorn in a fiduciary duty that does not fit the circumstances. Leonard I. Rotman writes that a fundamental problem with the law of fiduciary duties is that courts do not have a proper understanding of why the concept exists, what it was meant to accomplish, and the purpose it was intended to facilitate.[498] This leads to situations where the concept is improperly applied. As Rotman states, this "unsophisticated and often-improper understanding of the fiduciary concept not only results in the misapplication of its principles, but also allows for the purposeful misuse of its principles to generate particular results."[499]

[601] It is important to remember that where an *ad hoc* duty is found,

> [f]iduciaries are obliged to abnegate all self-interest, as well as those of third parties, and focus solely on the best interests of their beneficiaries. This requires that fiduciaries not benefit themselves or third parties, whether financially or otherwise, from their positions as fiduciaries….[500]

[602] A finding of a fiduciary duty greatly expands the scope of available remedies. The availability of those remedies must not drive the analysis of whether such a

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[497] *Elder Advocates*, at para. 44.
[498] Leonard I. Rotman, "Understanding Fiduciary Duties and Relationship Fiduciary" (2017) 62:4 McGill L.J. 975, at p. 978.
[499] Rotman, at pp. 981-82.
[500] Rotman, at p. 984.

duty is extant. However, I highlight below the extent of the potential damages to demonstrate that if the trial judge's finding regarding a broad *ad hoc* fiduciary duty were permitted to stand, the result would be inconsistent with her central finding that there should be a sharing of revenue between the Crown and the Treaty beneficiaries.

[603] Pursuant to their rights under the *ad hoc* fiduciary duty, the beneficiaries would be well within their rights to insist on total compensation of all net resources and take the position that the Crown has no right to benefit in any manner from the development of the lands subject to the Treaties. The Crown would be obliged to strictly account for and pay out all monies received, over and above the associated expenses. There would be no sharing in the circumstances; the Crown's only obligation would be to the Treaty beneficiaries.

[604] In addition to the preceding, the beneficiaries' right to compensation could arguably exceed net revenues. As a fiduciary fulfilling its standard of care of the utmost good faith, the Crown is obliged not to benefit itself or third parties at the expense of their beneficiaries' interests. Strict rules against conflicts of interest enforce the prohibitions against self-dealing and preferring the interests of others. In enforcing these rules, the courts will not inquire into why the breach occurred and will brook no arguments regarding why it was justified in the circumstances.

Instead, as Rotman states, "[b]reaching a fiduciary duty is not a question of degree: it is a binary definition—either a breach has occurred or it has not."[501]

[605] The equitable remedies that flow from such a breach include constructive trusts, equitable compensation, and disgorgements of profits. Moreover, the presumption of most advantageous use will be employed in calculating lost opportunities by a beneficiary wrongfully deprived of property.[502]

[606] The beneficiaries in these cases could argue that they are entitled to the revenue generated and what revenue could have been generated by the lands covered by the Treaties. For example, an argument might be advanced that the Crown set mining rates at too low a level in order to attract investment, create good-paying jobs, and generate tax revenue. Arguably such policies prefer the interests of the Crown or those of third parties over the interests of the Treaty beneficiaries. The Crown would have the onus of establishing why its policies did not amount to a breach of its fiduciary duty. In that regard, its arguments about its public policy motivations in setting its mining royalties would be of no moment.

[607] Based on the foregoing, it is clear that the trial judge's finding of a broad-based substantive fiduciary duty cannot stand for two reasons. First, the imposition of such a duty places the Crown in a conflict of interest. It forces the Crown to

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[501] Rotman, at p. 1013 (footnote omitted).
[502] Rotman, at p. 992.

prefer the interests of one group over all others in making policy decisions regarding the development of a large swath of the province. The trial judge erred in finding that the Crown agreed to what is essentially a legal impossibility. Second, the trial judge has provided no reasons to support her finding that such a duty is owed. On the contrary, her reasons support the opposite conclusion that the duty is limited to procedural matters only.

(ii) Procedural Fiduciary Duty

[608] Even if the fiduciary duty was limited to procedural matters, Ontario denies that it could carry out the procedural obligations contemplated by the trial judge's reasons with utmost loyalty to the Treaty beneficiaries. It argues that it has control over information that it cannot be forced to produce. Ontario cites cabinet confidences on the setting of royalties and land management policies, third-party confidential business information, and solicitor-client and litigation privileged documents as examples. For these and other documents, the Crown has a competing duty to keep the information confidential. In other words, even a limited procedural-based fiduciary duty would place the Crown in a conflict of interest. I accept that submission.

[609] In addition, there is no evidence in the record that supports a finding that the Crown undertook to act exclusively in the best interests of the Treaty beneficiaries with respect to procedural matters stemming from the augmentation clauses.

Accordingly, to the extent that the trial judge can be found to have only imposed a procedural-based fiduciary duty, I would order that it also be set aside.

(c) *Sui Generis* Fiduciary Duty

(i) Legal Principles

[610] The jurisprudence has developed a unique fiduciary duty that may arise in certain circumstances in dealings between Aboriginal peoples and the Crown. A *sui generis* fiduciary duty was first recognized in *Guerin*.[503] It was developed in response to the political trust doctrine, which held that governments could owe trust-like obligations to specific people or groups, but that those obligations were not enforceable in the courts.[504]

[611] *Guerin* involved a situation where the Musqueam Nation made a claim against the federal government in relation to the surrender of a portion of their reserve to a golf club. The focus of the court's analysis was on the fact that the Musqueam Nation had Aboriginal title over the land in issue. Dickson J. (as he then was) explained that the *sui generis* fiduciary duty arises from the unique relationship between the Crown and Aboriginal peoples regarding lands subject to Aboriginal title:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain

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[503] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[504] See *Tito v. Waddell (No. 2),* [1977] 3 All E.R. 129 (Ch.).

> interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. In order to explore the character of this obligation, however, it is first necessary to consider the basis of aboriginal title and the nature of the interest in land which it represents.[505]

[612] Dickson J. distinguished the political trust jurisprudence on the basis that in those cases, the party "claiming to be [a] beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim". In contrast, in *Guerin*, the interest in the lands was based on "a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."[506]

[613] Post-*Guerin*, there followed a series of cases alleging breaches of fiduciary duty in circumstances ranging from claims for moving expenses to the provision of

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[505] *Guerin*, at p. 376.
[506] *Guerin*, at p. 379.

social services. In *Wewaykum,* Binnie J. placed limits on the applicability of the *sui generis* fiduciary duty. He commented as follows:

> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35 (1) of the *Constitution Act, 1982*.[507]

[614] Binnie J. went on to refine the nature of the *sui generis* fiduciary duty as follows:

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty"….[508]

[615] The jurisprudence has developed a two-part test for determining whether a *sui generis* fiduciary duty arises in the circumstances of a given case. For such a

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[507] *Wewaykum*, at para. 81.
[508] *Wewaykum*, at para. 85.

duty to apply there must exist both: (1) a specific or cognizable Aboriginal interest; and (2) a Crown undertaking of discretionary control over that interest.[509]

[616] It is essential to recognize that the nature of this fiduciary duty is distinct from an *ad hoc* fiduciary duty in that it permits a balancing of competing interests. Brown J. (dissenting) described it this way in *Williams Lake*:

> This form of fiduciary duty imposes a less stringent standard than the duty of utmost loyalty incident to an *ad hoc* fiduciary duty. It requires Canada to act — in relation to the specific Aboriginal interest — with loyalty and in good faith, making full disclosure appropriate to the subject matter and with ordinary diligence: *Wewaykum*, at paras. 81 and 97. It allows for the necessity of balancing conflicting interests: *Wewaykum*, at para. 96.[510]

[617] Therefore, unlike the situation with an *ad hoc* fiduciary duty, discussed above, it is open to a *sui generis* fiduciary to act in more than one interest. This is a fiduciary duty that breaks with the traditional tenets of the doctrine as developed by the courts of equity. It arose from case-specific circumstances where Canadian courts found it necessary to impose a higher duty on the Crown in order to protect Aboriginal interests, but where the courts also recognized that the Crown requires some degree of flexibility to undertake its duty to the broader public.

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[509] *Wewaykum*, at paras. 79-83; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18; and *Manitoba Metis*, at para. 51.
[510] *Williams Lake*, at para. 165.

(ii) Application of Principles

[618] The trial judge found that no *sui generis* fiduciary duty was established on the facts of these cases, reasoning:

> The first element of the *sui generis* approach requires the Plaintiffs to establish that they have a specific or cognizable Aboriginal interest: the interest must be a distinctly Aboriginal, communal interest in land that is integral to the nature of the distinctive community and their relationship to the land. The Anishinaabe interest in the territories that became the subject of the Robinson Treaties was historically occupied and communally held prior to contact and is, therefore, capable of constituting a specific or cognizable Aboriginal interest in land in the pre-Treaty context. There is no controversy on this point.
>
> The Defendants contend, however, that the surrender that was made as part of the Treaties extinguished the Anishinaabe's specific or cognizable Aboriginal interest in the lands, and, therefore, the pre-existing interest is not capable of grounding a *sui generis* fiduciary duty.
>
> I do not have to decide whether the Anishinaabe's cognizable interest in the land survives the signing of the Robinson Treaties. This question can be left for another day because I find that the second element of the *sui generis* analysis is not met. That is, there was no Crown undertaking of discretionary control over the Anishinaabe's interest in land, however that interest might be characterized.
>
> Specifically, I find that neither the Treaties' text nor the context in which the Treaties' promise was made support the contention that the augmentation clause included the notion or concept that the Crown would administer the land on behalf of the Treaties' beneficiaries. In the absence of an undertaking in respect of the cognizable

> interest in the land, I find that a *sui generis* fiduciary duty does not arise from the Robinson Treaties' promise.[511]

[619] The Huron Plaintiffs argue that the trial judge erred in not finding a *sui generis* fiduciary duty, submitting that the two elements of the duty are satisfied. First, the augmentation promise is a specific and cognizable interest that is "distinctly Aboriginal" and in the nature of a private law duty. Second, the circumstances under which the enhanced annuities are to be paid (i.e., where Crown revenues from the land allow for it) constitute a Crown undertaking of discretionary control over the interest.

[620] The Superior Plaintiffs take the position that the trial judge erred in stating that a *sui generis* fiduciary duty only arises with respect to interests in land. They submit that *sui generis* fiduciary duties can arise in respect of all Aboriginal and treaty rights recognized under s. 35 of the *Constitution Act*, *1982*, such as Aboriginal rights to fish and treaty rights to hunt, fish, and trap. In this case, Ontario conceded that the Treaty beneficiaries have a "right to augmentation of Treaty annuities". The Superior Plaintiffs argue that since there is a collective entitlement covered under s. 35, which is subject to Crown discretionary control, a *sui generis* fiduciary duty arises.

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[511] Stage One Reasons, at paras. 509-12.

[621] I would not give effect to the arguments advanced by the Huron and Superior Plaintiffs for the following reasons.

[622] The Huron and Superior Plaintiffs take the position that the trial judge erred in restricting *sui generis* fiduciary duties to interests in land. They submit that the Supreme Court has not ruled that an interest in land is required to qualify as a cognizable interest. In other words, the Huron and Superior Plaintiffs' position is that the duty has been expanded from the circumstances of *Guerin* and is sufficiently flexible to apply in different contexts as required to ensure equitable results.

[623] I pause to note that the trial judge did not decide this issue on the basis of a cognizable Aboriginal interest. Nonetheless, the Huron and Superior Plaintiffs raise important issues about the scope of the *sui generis* fiduciary duty and where it may be properly applied. Those issues are worthy of consideration by this court.

[624] When counsel for the Huron and Superior Plaintiffs were asked in oral argument if the *sui generis* fiduciary duty had ever been applied in the context of a treaty, they were unable to point the panel to any applicable case law. Conversely, the Crown pointed out that the Supreme Court had repeatedly restricted cognizable Aboriginal interests to pre-existing interests and not interests founded by treaty, legislation, or executive action.[512] I agree with the Crown's

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[512] See *Guerin*, at p. 379; *Manitoba Metis*, at para. 58; and *Williams Lake*, at paras. 52-54.

submission. Based on the jurisprudence, the Huron and Superior Plaintiffs' interests as found in the Robinson Treaties would not qualify as a cognizable Aboriginal interest.

[625] The Huron and Superior Plaintiffs submit that the lack of precedent does not necessarily preclude the application of a *sui generis* fiduciary duty. Assuming without deciding that treaty rights can qualify as a cognizable Aboriginal interest, the question is whether it is advisable in the circumstances of these cases to find such a duty. I would answer that question in the negative for two reasons.

[626] First, courts must be careful in identifying a cognizable interest, as was emphasized by Wagner J. in *Williams Lake*:

> The specific or cognizable Aboriginal interest at stake must be identified with care. The fiduciary's obligation is owed in relation to that interest, and its content will depend on "the nature and importance of the interest sought to be protected": *Manitoba Metis Federation*, at para. 49; *Wewaykum*, at para. 86. If there is no Aboriginal interest sufficiently independent of the Crown's executive and legislative functions to give rise to "responsibility 'in the nature of a private law duty'", then no fiduciary duties arise — only public law duties: see *Wewaykum*, at paras. 74 and 85; *Guerin*, at p. 385; see also D. W. Elliott, "Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown" (2003), 29 *Queen's L.J.* 1.[513]

[627] In the instant cases, there is an element of private law duty in the Treaties. These were resource agreements entered into specifically with the signatory

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[513] *Williams Lake*, at para. 52.

bands. However, that element is overwhelmed by the public law aspects of the relationship created by the Robinson Treaties. The Treaties engage the Crown's responsibility for managing a large section of the northern portion of the province. The Crown's responsibilities include not only the setting of mining rates and taxes, but also the building of infrastructure and community development. This is factually far removed from the situation in *Guerin*, which created the *sui generis* fiduciary duty based on the Crown policy of acting as an intermediary in the sale and lease of Aboriginal lands. I am of the view that the Aboriginal interests in the cases at bar are not sufficiently independent of the Crown's executive and legislative functions to ground a cognizable Aboriginal interest.

[628] Second, I also agree with the trial judge's finding that there was no evidence of a Crown undertaking of discretionary control over any cognizable interest. Thus, neither of the requisite elements of a *sui generis* fiduciary duty were met in the cases at bar.

(3) Crown Immunity

[629] At trial, Ontario argued that the Huron and Superior Plaintiffs' claims for breach of fiduciary duty were barred by s. 28 of the *Proceedings Against the Crown Act* ("*PACA*").[514] Pursuant to s. 28, the Crown is immune against claims for acts or omissions prior to the date that the *PACA* came into force (September 1, 1963),

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[514] *Proceedings Against the Crown Act, 1962-63*, S.O. 1962-63, c. 109 ("*PACA*").

except for claims that meet the exception in s. 29(1). That subsection permits a party to commence an action that could have been enforced by a petition of right prior to September 1, 1963. Ontario submitted that the Huron and Superior Plaintiffs' claims could not be captured by the exception in s. 29(1) because, prior to the enactment of the *PACA*, Crown immunity covered all equitable wrongs, not simply torts.

[630] The trial judge rejected Ontario's argument by drawing a distinction between tort claims and claims for equitable relief. She reasoned that, even before the *PACA* was enacted, claims for equitable relief could be brought against the Crown on a petition of right.[515]

[631] On appeal, Ontario makes a series of arguments in support of its submission that the trial judge erred in her consideration of the Crown immunity issue. However, Ontario only asserts Crown immunity with respect to the Huron and Superior Plaintiffs' breach of fiduciary duty claims. Given my finding that the Crown does not owe a fiduciary duty to the Huron and Superior Plaintiffs regarding the augmentation clauses, it is unnecessary for me to consider these arguments.

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[515] Stage Two Reasons, at paras. 79-87.

(4) Limitations Defence

(a) Overview

[632] Ontario's position is that the Huron and Superior Plaintiffs' claims for breach of Treaty are subject to either a twenty-year limitation period (as actions upon a specialty) or a six-year limitation period (as actions of account or actions for contract without specialty) under the 1990 *Limitations Act*.

[633] The 1990 *Limitations Act* applies by virtue of ss. 2(1)(e), 2(1)(f) and 2(2) of the *Limitations Act*, *2002* (the "2002 *Limitations Act*").[516] These sections provide that proceedings based on Aboriginal and treaty rights recognized by s. 35 of the *Constitution Act*, *1982*, or equitable claims brought by Aboriginal people are "governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed." Consequently, the parties agree that if any limitations legislation applies to these cases, it is the 1990 *Limitations Act*.

[634] The trial judge rejected the Crown's submission, reasoning that an Aboriginal treaty is not a contract for limitations purposes, but rather a unique agreement between the Crown and Indigenous peoples intended to be a part of Canada's constitutional fabric.[517] She also held that the Robinson Treaties could not be considered specialties because specialties are a specific type of contract.[518]

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[516] *Limitations Act*, *2002*, S.O. 2002, c. 24, Sch. B. (the "2002 *Limitations Act*").
[517] Stage Two Reasons, at paras. 149-51.
[518] Stage Two Reasons, at para. 153.

Further, even if the Treaties could be characterized as contracts, they could not be interpreted as specialties, which derive their meaning from their form.[519] By contrast, Aboriginal treaties represent a vast body of promises between the parties that go beyond the document's words and must be understood in their full historical and cultural context.[520] Finally, the trial judge rejected Ontario's alternative argument that the Huron and Superior Plaintiffs' Treaty claims were actions of account as contemplated by the 1990 *Limitations Act*. The trial judge agreed with the Huron and Superior Plaintiffs that they were seeking equitable compensation from the Crown, which is unlike a common law accounting.[521]

[635] Although unnecessary, given her conclusion on the application of the 1990 *Limitations Act*, the trial judge went on to discuss the liberal statutory interpretation principles in favour of Indigenous peoples that are mandated by *Nowegijick*.[522] She acknowledged that those principles only apply to legislation that expressly deals with Indigenous people, not to statutes of general application. However, the trial judge observed that statutes of general application might attract such special rules of interpretation in certain circumstances. She reasoned that allowing a technical defence based on a strict and narrow interpretation of the *PACA* and the 1990 *Limitations Act* would effectively terminate the Huron and Superior Plaintiffs' Treaty

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[519] Stage Two Reasons, at para. 173.
[520] Stage Two Reasons, at para. 168.
[521] Stage Two Reasons, at paras. 179-80.
[522] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

rights. Consequently, the trial judge concluded that both the *PACA* and the 1990 *Limitations Act* could attract the *Nowegijick* principles of interpretation.

[636] The trial judge also noted that the *Nowegijick* principles are connected to the honour of the Crown. Given that the *PACA* and the 1990 *Limitations Act* have a significant impact on the enforcement of the Crown's Treaty promises to the Huron and Superior Plaintiffs, the trial judge concluded that these statutes could be interpreted according to the duties flowing from the honour of the Crown.

[637] Ultimately, the trial judge found that she would have applied the *Nowegijick* principles and the honour of the Crown when interpreting Ontario's statutory defences of Crown immunity and limitations, had it been necessary to do so. However, she did not undertake this analysis since she held that the Crown did not have immunity from the Huron and Superior Plaintiffs' breach of fiduciary duty claims, and the Huron and Superior Plaintiffs were not statute-barred from bringing their breach of Treaty claims.

[638] Ontario submits that the trial judge erred in her interpretation of the 1990 *Limitations Act*. Below, I will review the terms of that legislation, utilizing the modern approach to statutory interpretation to examine Ontario's arguments. In so

doing, I will use a standard of correctness, as the issue concerns purely legal questions of statutory interpretation.[523]

[639] I note that I will not consider the trial judge's comments regarding the *Nowegijick* principles and the honour of the Crown to interpret the 1990 *Limitations Act*. The comments were *obiter*, and I do not need to consider them to dispose of this ground of appeal.

(b) Modern Approach to Statutory Interpretation

[640] The modern approach to statutory interpretation was recently summarized by Côté J. in *Pointes Protection Association*:

> Indeed, this Court has reiterated on numerous occasions that the modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).[524]

[641] The key point of the modern approach is that statutory interpretation cannot be founded on the wording of the legislation alone. The court must consider the

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[523] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 23; and *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 30.
[524] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1, at para. 6.

purpose of the disputed provision(s) and all of the relevant context, including the public policy objectives underlying the legislation.

[642] Ultimately, the court must adopt an interpretation that is appropriate in the circumstances. As Ruth Sullivan notes:

> An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.[525]

(c) Applying the Modern Approach to the 1990 *Limitations Act*

(i) No Reference to Aboriginal Treaties

[643] Ontario relies on ss. 45(1)(b), 45(1)(g), and 46 of the 1990 *Limitations Act*, which read as follows:

> 45. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
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> …
>
> (b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;
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> …
>
> within twenty years after the cause of action arose,

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[525] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada Inc., 2014), at § 2.9.

…

> (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,
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> within six years after the cause of action arose,
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> …
>
> 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. [Emphasis added.]

[644] The crux of Ontario's argument is that when the legislature referred to a specialty, a simple contract or action of account in the 1990 *Limitations Act*, it meant to include Aboriginal treaty claims. Ontario provides no authority to support its submission that the 1990 *Limitations Act* should be interpreted in this manner. I also pause to note that Ontario's attempt to construe Aboriginal treaties as a form of contract is the antithesis of the position it takes on the Stage One appeal with respect to the nature of treaties for the purposes of determining the appropriate standard of review.

[645] The primary difficulty I have with Ontario's submission is that one would have thought that if the legislature intended to impose a limitation period for

Aboriginal treaty claims, it would have said just that in the 1990 *Limitations Act*. In this regard, the context surrounding ss. 45(1)(b), 45(1)(g) and 46 is important. A review of the 1990 *Limitations Act* reveals that the legislature listed numerous causes of action and designated specific limitation periods for each one. However, the legislature did not include Aboriginal treaty claims in the statute or identify an applicable limitation period. For something as unique as Aboriginal treaty claims, it seems inconceivable that the legislature intended to impose a limitation period but left litigants to choose which of the limitation periods for a specialty, a simple contract, or an accounting applied.

[646] Further, in the 2002 *Limitations Act* the legislature specifically dealt with Aboriginal treaty claims. This suggests two things: (1) the legislature understood that Aboriginal treaty claims are distinct and cannot fall under the umbrella of specialties, contracts, or actions of account; and (2) when the legislature intended to deal with Aboriginal treaty claims, it did so explicitly.

[647] The words of ss. 45(1)(b), 45(1)(g), and 46 appear to be clear on their face. The legislature chose to use legal terms like “specialty”, “simple contract” and “account” to delineate causes of action that will have limitation periods. The legislature is presumed to know both statutory and common law, and when it uses

such terms, it is assumed to have used them in their correct legal sense.[526] The ordinary meaning of the terms should therefore be given effect unless there is a reason to reject them.

(ii) The Meaning of "Contracts", "Specialties" and "Accounting"

[648] It is well established in the jurisprudence that a court must consider the entire context of a statute before settling on what appears, at first blush, to be the plain meaning of a legislative provision.[527]

[649] Here, Ontario argues that despite the legislature's failure to use the term, "treaty" in the 1990 *Limitations Act*, this court should interpret ss. 45(1)(b) and 45(1)(g) in conjunction with common law jurisprudence that characterizes Aboriginal treaties as contracts or specialties. Ontario similarly asserts that based on a contextual reading of s. 46, the type of claims asserted by the Huron and Superior Plaintiffs qualifies as an accounting. If Ontario's propositions are accurate, they would impact the meaning attributed to the terms, "contract", "specialty", and "accounting", in the respective provisions, and influence the interpretation of the 1990 *Limitations Act*. However, as I will discuss below, I do

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[526] *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 238, *per* L'Heureux-Dubé J. (concurring); *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; and Sullivan, at §§ 4.23 (fn. 4), 8.9.
[527] *R. v. McColman*, 2021 ONCA 382, 156 O.R. (3d) 253, at para. 115. See also *Solar Power Network Inc. v. ClearFlow Energy Finance Corp.*, 2018 ONCA 727, 426 D.L.R. (4th) 308, at para. 75, leave to appeal refused, [2018] S.C.C.A. No. 487; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, 437 D.L.R. (4th) 567, at para. 96, *per* Côté and Brown JJ. (dissenting).

not believe that Ontario's submissions accurately reflect the current state of the law.

(i) Contracts

[650] Ontario concedes that Aboriginal treaties are more than simple contracts but submits that they are contracts within the meaning of the 1990 *Limitations Act*. In support of this argument, Ontario points to several cases that have held Aboriginal treaties are contract-like. I agree that courts in Ontario and elsewhere in Canada have observed that treaties are analogous or tantamount to contracts.[528]

[651] Notwithstanding the foregoing, the trial judge was correct in rejecting this argument. She relied on a series of cases from the Supreme Court and a statement from the late Professor Peter W. Hogg that make clear that, although Aboriginal treaties and contracts may have features in common, they are distinct concepts in law. She reasoned as follows:

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

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[528] See *Pawis v. Canada*, [1980] 2 F.C. 18, at para. 9(i); *Badger*, at para. 76; and *Fletcher v. Ontario*, 2016 ONSC 5874, at para. 118.

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

Badger:

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

Sundown:

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

Marshall:

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

Finally, constitutional scholar, Peter W. Hogg, writes:

> An Indian treaty has been described as unique or “sui generis”. It is not a treaty at

> international law and is not subject to the rules of international law. It is not a contract, and is not subject to the rules of contract…[529]

[652] Thus, the weight of the jurisprudence is to the effect that, while Aboriginal treaties are comparable to contracts and may share similar features, they are different legal instruments. Treaties share with contracts the mutual exchange of consideration and obligations. Yet, the nature of the obligations that flow from these agreements are much different from a contract. Aboriginal treaties include concepts that are foreign to the law of contract, including the honour of the Crown and the protections contained in s. 35 of the *Constitution Act*, *1982*, both of which create unique substantive legal obligations towards Indigenous peoples. The trial judge did not err in finding that Aboriginal treaties cannot be considered contracts within the meaning of the 1990 *Limitations Act*.

(ii) Specialty

[653] Ontario submits that the trial judge wrongly concluded that actions for breach of an Aboriginal treaty could not be actions upon a specialty within the meaning of s. 45(1)(b) of the 1990 *Limitations Act*. It argues that a specialty is a disposition of property made in a particular form: the document must contain a promise, obligation, or covenant which is signed, sealed, and delivered with the intention to bind the parties in their act and deed. According to Ontario, while a specialty is an

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[529] Stage Two Reasons, at paras. 127-28 (footnotes omitted).

obligation under seal securing a debt, the debt need not exist when the specialty is made and sealed; it may be a future debt.

[654] Ontario asserts that the question of whether the Robinson Treaties secure a debt, and the extent of any amount owing thereunder, should have been deferred to Stage Three as a genuine issue requiring a trial. Its position is that the Robinson Treaties were made and were intended to be made under seal. To the extent that the Huron and Superior Plaintiffs contest the Treaties' seal, Ontario claims that such arguments involve questions of fact requiring the benefit of evidence to be adduced at the Stage Three hearing.

[655] These submissions do not persuade me. The trial judge observed that the record was unclear on whether the Treaties were sealed but concluded that it was unnecessary for her to determine the issue. She assumed that the Treaties were sealed, and focused her analysis on the fundamental differences between a specialty and a treaty:

> However, even if one were to assume that the Treaties were sealed and that the presence of seals somehow transformed these Treaties into specialties, this characterization would conflict with the findings on Stage One that the Treaties must be understood in their full historical and cultural context. In contrast, the meaning of specialties comes from the form of the document itself.
>
> In *Friedmann*, the Supreme Court briefly outlined the history of the practice of sealing documents, stating:
>
> > The seal rendered the terms of the underlying transaction indisputable, and

> thus rendered additional evidence unnecessary… A contract under seal derived, and still derives, its validity from the form of the document itself. [Citations omitted.]
>
> Such a document is, by definition, in stark contrast to the findings on Stage One, with respect to the vast historical, cultural, and Anishinaabe legal perspective that underlies the meaning of the Treaty documents.
>
> The Treaties must be interpreted according to treaty interpretation principles settled in the jurisprudence, which is fully outlined in Stage One of this proceeding.
>
> On the other hand, the form controls the substance in a specialty. But relying only on the form of the written document is anathema to the task of treaty interpretation. The finding in Stage One was that the treaty represented a vast body of understanding of the parties in their dealings with one another beyond the mere words of the document.…[530]

[656] I agree with and adopt the trial judge's analysis. In considering Ontario's submission that a treaty is a form of specialty, the correct place to start is a review of the nature of an Aboriginal treaty and a specialty. As noted above, even in cases where the text of an Aboriginal treaty does not include an ambiguity, courts must have regard to the context surrounding its negotiation and execution to understand its meaning. The opposite is true with a specialty. It is a unique form of legal document that permits the parties and the court to look strictly at what is within its four corners to ascertain its meaning. The whole point of creating a specialty

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[530] Stage Two Reasons, at paras. 164-68 (footnotes omitted).

agreement is to avoid the type of analysis that is required in Aboriginal treaty interpretation.

[657] The fundamental differences between these types of agreements leads me to conclude that the trial judge was correct in finding that the Robinson Treaties are not specialties. It is therefore unnecessary for me to consider the trial judge's additional finding that the Robinson Treaties do not secure a debt.

(iii) Accounting

[658] Ontario submits that the trial judge erroneously held that the Huron and Superior Plaintiffs' actions could not be viewed as actions for an accounting within the meaning of s. 46 of the 1990 *Limitations Act*. She reasoned that the actions were seeking equitable compensation, not a common law accounting, and thus the claims did not fall within the ambit of s. 46.[531] According to Ontario, this was an error because an action for an accounting is incidental to an action brought in contract, or any other relationship where there is an equitable or legal duty to account.

[659] I would not give effect to this ground of appeal. In my view, it can be dismissed summarily. As Dan Zacks notes in his authoritative blog on limitation periods, an analysis pursuant to the 1990 *Limitations Act* "always began by

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[531] Stage Two Reasons, at paras. 178-79.

'classifying the action' – [i.e.,] determining which form of action included the cause of action being advanced."[532]

[660] The form of action for an "action of account" was described by the Ontario Law Reform Commission in its *Report on the Limitation of Actions* as follows:

> The actions of account expressly referred to in section 46 probably are only those which would have been brought at common law and do not include equitable actions of account. Section 46 was originally enacted to remove the exception of merchants' accounts contained in section 3 of *The Limitations Act, 1623*. Section 3 provided, *inter alia*, that all common law actions of account, except merchants' accounts, must be brought within six years after the cause of action arose. When section 46 first became law, it clearly only referred to merchants' accounts. Owing to minor changes in punctuation and wording, the section now is ungrammatical and appears on the surface to apply to all actions of account, although it is unlikely that the changes were intended to produce the latter result.[533]

[661] Section 46 of the 1990 *Limitations Act*, which was intended to be limited to merchants' accounts, has no application to the instant cases. Therefore, I would reject this ground of appeal.

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[532] Dan Zacks, "Ontario: There has never been a limitation period for a breach of treaty claim" (16 July 2020), online (blog): *Under the Limit: Developments in Canadian Limitations Jurisprudence*: <http://limitations.ca/?p=1134>.
[533] Ontario Law Reform Commission, *Report on the Limitation of Actions* (Toronto: Department of Attorney General, 1969), at p. 18.

(d) Summary

[662] The legislature chose not to reference Aboriginal treaties in the 1990 *Limitations Act*, although it did so in the 2002 *Limitations Act*. This is strongly suggestive of an intention not to impose a limitation period for claims based on a breach of an Aboriginal treaty. Ontario's arguments that the legislature intended to cover Aboriginal treaty claims under the terms "contract", "specialty", or "action of account" are unpersuasive. As discussed above, these claims are distinct in law from one based on a breach of an Aboriginal treaty. Accordingly, I would dismiss this ground of appeal.

C. DISPOSITION

[663] For the preceding reasons, I would dismiss Ontario's appeal of the trial judge's interpretation of the Robinson Treaties. Regarding fiduciary duty, I would set aside the trial judge's finding that the Crown owes the Huron and Superior Plaintiffs' a fiduciary duty, and accordingly I do not consider Ontario's claim of Crown immunity. Finally, I would dismiss Ontario's appeal of the trial judge's decision on its defence under the 1990 *Limitations Act*.

[664] In summary, I would grant the appeal from the Stage One proceedings in part, amend the judgments as set out in Appendix "A" to these reasons, and remit the matter of the Huron Plaintiffs' costs for the Stage One proceedings to the trial judge for reconsideration in accordance with the reasons of Lauwers and Pardu

JJ.A. I would dismiss the appeal from the Stage Two proceedings. I would award costs of the appeals in the manner set out in the joint reasons.

Released: November 5, 2021 

APPENDIX A: AMENDED STAGE ONE JUDGMENTS

RESTOULE JUDGMENT (Huron Action)

(PARTIAL JUDGMENT - STAGE ONE - RELEASED JUNE 17, 2019)

THROUGH NOTICES OF MOTION for summary judgment brought in the within action the plaintiffs sought the following declaratory relief, and costs:

1. The plaintiffs move for a declaration that, considered apart from the pleaded defences based upon statutes of limitation*, res judicata*, *laches* and acquiescence, since 1850 the Crown has been and remains legally obligated under the Robinson Huron Treaty of 1850 to increase the annuity under the Treaty from time to time if the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss, and that the size of the increase of the annuity is not limited to an amount based on one pound per person.

2. The plaintiffs acknowledge that in addressing this motion, the parties were permitted to address and seek determination of particular issues, including:

a) the meaning and legal effect of the phrase “such further sum as Her Majesty may be graciously pleased to order” in the written text of the Treaty;

b) whether the revenues that are to be taken into account in determining whether “the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss” are restricted to Crown revenues from the territory;

c) whether gross or net revenues are to be taken into account in determining whether “the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss”;

d) what principle or principles govern the determination of the amount of the increased annuities;

e) whether the provision that “the amount paid to each individual shall not exceed the sum of one pound provincial currency ($4) in any one year, or such further sum as Her Majesty may be graciously pleased to order” should be indexed for inflation;

ON BEING ADVISED by counsel for the parties near the outset of the summary trial that there was no dispute regarding issues 2 (b) and 2 (c) noted above, and that in relation to those issues the parties were in agreement that the revenues that are to be taken into account in determining whether "the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss" are net Crown revenues from the territory;

AND ON BEING REQUESTED BY THE PARTIES to make determinations on issues 1, 2 (a), (d) and (e) above, as set out in the plaintiffs' notices of motion, but without engaging in a line-by-line identification of relevant revenues and expenses in the public accounts of Canada or Ontario;

AND ON BEING REQUESTED BY THE PLAINTIFFS to make determinations under Issue 2 (d) above with respect to what types of Crown revenues and expenses are relevant for the purposes of Augmentation Clause, and on hearing submissions from counsel for the Attorney General for Canada ("Canada") that such determinations should be deferred to the contemplated Stage 3 of this litigation, and from counsel for Her Majesty the Queen in right of Ontario and the Attorney General for Ontario, that the Court should make findings with respect to the intentions of the Treaty parties in 1850 regarding relevant revenues and expenses, but without reaching definitive determinations regarding relevant revenues and expenses on the limited evidence before the Court regarding modern public finances;

AND ON READING the pleadings, the text of the Treaty, the numbered exhibits entered, the affidavits, expert reports and historical documents, filed, and on hearing the oral testimony of the witnesses, and on reading and hearing the submissions of counsel for the parties, and for reasons released on December 21, 2018 (2018 ONSC 7701):

[1] THIS COURT ADJUDGES AND DECLARES THAT, considered apart from the pleaded defences based on statutes of limitation, *res judicata* and *laches*, including acquiescence, and without making a determination as to the respective responsibilities and liabilities of Canada and Ontario:

> a) Pursuant to the Robinson Huron Treaty of 1850, the Crown is obligated to increase, and the First Nation Treaty Parties have a collective treaty right to have increased, from time to time, the promised annuity payment of £600 (or $2,400) if net Crown resource-based revenues from the Treaty territory permit the Crown to do so without incurring loss~~, with the amount of annuity payable in any period to correspond to a fair share of such net revenues for that period~~;

b) To fulfill its obligation in (a) above, the Crown:

i. is required to periodically engage in a process, in consultation with the First Nation Treaty parties, to determine the amount of net Crown resource-based revenues; and

ii. if there are sufficient Crown resource-based revenues, to permit the Crown to pay an increased annuity amount without incurring loss, is required to pay any such increase;

c) In fulfilling these obligations and requirements of the augmentation promise, the Crown is subject to the duties flowing from the honour of the Crown~~ and the fiduciary duty which the Crown owes to the First Nation Treaty parties~~;

d) The Crown must diligently implement the augmentation promise~~, so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the value of the resources, including the land and water in the territory~~;

e) The Crown shall, in a manner consistent with the honour of the Crown, consult with the First Nation Treaty parties to determine what portion, if any, of the increased annuity amount is to be distributed by the Crown to the individual Treaty rights holders in addition to the $4 per person per year they are already being paid;

f) The augmentation promise is a Treaty right recognized and affirmed by s. 35 of the *Constitution Act*, 1982.

[2] THIS COURT ADJUDGES AND DECLARES THAT the principles governing the Treaty parties' implementation of the annuity provisions are to accord with this Court's determinations that:

a) the Robinson Huron Treaty was negotiated by the Treaty parties around the Anishinaabe Council Fire at Bawaating (Sault Ste Marie) as a renewal of the ongoing relationship between the Anishinaabeg and the Crown grounded in the Covenant Chain alliance, and as a basis for continuing a mutually respectful and beneficial relationship going into the future; and

b) the Treaty reflects the parties' common intention that their agreement was to allow both the Anishinaabeg and the Crown to realize the future opportunities and potential of the Treaty territory in a manner consistent with the Anishinaabe principles of respect, responsibility, reciprocity and renewal

and the intention of the Crown to act honourably, with justice or fairness, and with liberality or benevolence.

[3] THIS COURT FURTHER ADJUDGES AND DECLARES THAT:

a) The process adopted for purposes of determining the amount of net Crown resource- based revenues in a particular period must afford sufficient Crown disclosure of information to enable the First Nation Treaty parties and the Court, if necessary, to determine the amount of such net revenues;

b) For purposes of determining the amount of net Crown resource-based revenues in a particular period:

> i. relevant revenues to be considered are Crown resource-based revenues arising directly or in a closely related way to the use, sale, or licensing of land (which could include the waters) in the Treaty territory, including mineral and lumbering revenues and other analogous revenues as received by the Crown both historically and in the future~~, but not including personal, corporate or property tax revenues~~,
>
> ii. relevant expenses to be considered are Crown expenses related to collecting, regulating, and supporting relevant revenues~~, but do not include the costs of infrastructure and institutions that are built with Crown tax revenues~~,

with these definitions to be applied as general principles that are subject to clarification and further direction by the Court in a future stage of this proceeding; and

c) Failing agreement amongst the parties, the principles to be applied for purposes of determining amounts [added text - to be disbursed pursuant to the augmentation promise from] ~~that are fairly and reasonably equal to a fair share of~~ net Crown resource-based revenues are subject to further direction by the Court in a future stage of this proceeding.

d) Where in the exercise of their duties to implement the augmentation promise the Crown exercises discretion, the discretion must be exercised honourably, such discretion is not unfettered and is subject to review by the Courts.

[4] THIS COURT FURTHER ORDERS AND ADJUDGES THAT the plaintiffs' alternative claim, supported by Ontario, that the Court should imply a Treaty term to provide for indexing of the promised annuity payment of £600 (or $2,400), as augmented to an amount based on £1 (or $4) per person, in order to protect the First Nation Treaty parties against erosion of the purchasing power of annuities due to inflation be, and is hereby, dismissed.

~~[5] AND THIS COURT FURTHER ORDERS AND ADJUDGES that the plaintiffs are hereby awarded their costs of this action to date, on the partial indemnity scale, without reserving to them any right to seek a higher level of indemnity at another time, and that pursuant to an agreement made between them, Canada and Ontario are each responsible to pay 50 per cent of such costs, and:~~

> ~~a) that subject to paragraph 4(b) below, the plaintiffs' costs of this action to date, including this motion, are hereby fixed in the total amount of $9,412,447.50; and~~
>
> ~~b) that the plaintiffs may make further submissions to the Court with respect to the sum of $303,775.00 they have claimed as further disbursements incurred by the Robinson Huron Trust. Should the plaintiffs make such further submissions, the defendants will be entitled to respond.~~

[6] THIS JUDGMENT BEARS INTEREST at the rate of three per cent (3%) per year commencing on December 21, 2018.

CHIEF AND COUNCIL OF RED ROCK FIRST NATION (Superior Action)

(PARTIAL JUDGMENT - STAGE ONE - RELEASED JUNE 17, 2019)

THROUGH NOTICES OF MOTION for summary judgment brought in the within action the plaintiffs sought the following declaratory relief, and costs:

1. The plaintiffs move for a declaration that, considered apart from the pleaded defences based upon statutes of limitation, *res judicata*, *laches* and acquiescence, since 1850 the Crown has been and remains legally obligated under the Robinson Superior Treaty of 1850 to increase the annuity under the Treaty from time to time if the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss, and that the size of the increase of the annuity is not limited to an amount based on one pound per person.

2. The plaintiffs acknowledge that in addressing this motion, the parties were permitted to address and seek determination of particular issues, including:

a) the meaning and legal effect of the phrase “such further sum as Her Majesty may be graciously pleased to order” in the written text of the Treaty;

b) whether the revenues that are to be taken into account in determining whether “the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss” are restricted to Crown revenues from the territory;

c) whether gross or net revenues are to be taken into account in determining whether “the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss”;

d) what principle or principles govern the determination of the amount of the increased annuities;

e) whether the provision that “the amount paid to each individual shall not exceed the sum of one pound provincial currency ($4) in any one

year, or such further sum as Her Majesty may be graciously pleased to order" should be indexed for inflation;

ON BEING ADVISED by counsel for the parties near the outset of the summary trial that there was no dispute regarding issues 2 (b) and 2 (c) noted above, and that in relation to those issues the parties were in agreement that the revenues that are to be taken into account in determining whether "the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss" are net Crown revenues from the territory;

AND ON BEING REQUESTED BY THE PARTIES to make determinations on issues 1, 2 (a), (d) and (e) above, as set out in the plaintiffs' notices of motion, but without engaging in a line-by- line identification of relevant revenues and expenses in the public accounts of Canada or Ontario;

AND ON BEING REQUESTED BY THE PLAINTIFFS to make determinations under Issue 2 (d) above with respect to what types of Crown revenues and expenses are relevant for the purposes of Augmentation Clause, and on hearing submissions from counsel for the Attorney General for Canada ("Canada") that such determinations should be deferred to the contemplated Stage 3 of this litigation, and from counsel for Her Majesty the Queen in right of Ontario and the Attorney General for Ontario, that the Court should make findings with respect to the intentions of the Treaty parties in 1850 regarding relevant revenues and expenses, but without reaching definitive determinations regarding relevant revenues and expenses on the limited evidence before the Court regarding modern public finances;

AND ON READING the pleadings, the text of the Treaty, the numbered exhibits entered, the affidavits, expert reports and historical documents, filed, and on hearing the oral testimony of the witnesses, and on reading and hearing the submissions of counsel for the parties, and for reasons released on December 21, 2018 (2018 ONSC 7701):

[1] THIS COURT ADJUDGES AND DECLARES THAT, considered apart from the pleaded defences based on statutes of limitation, *res judicata* and *laches*, including acquiescence, and without making a determination as to the respective responsibilities and liabilities of Canada and Ontario:

a) Pursuant to the Robinson Superior Treaty of 1850, the Crown is obligated to increase, and the First Nation Treaty Parties have a collective treaty right to have increased, from time to time, the promised annuity payment of £500 (or $2,000) if net Crown resource-based revenues from the Treaty territory

permit the Crown to do so without incurring loss~~, with the amount of annuity payable in any period to correspond to a fair share of such net revenues for that period~~;

b) To fulfill its obligation in (a) above, the Crown:

i. is required to periodically engage in a process, in consultation with the First Nation Treaty parties, to determine the amount of net Crown resource-based revenues; and

ii. if there are sufficient Crown resource-based revenues, to permit the Crown to pay an increased annuity amount without incurring loss, is required to pay any such increase;

c) In fulfilling these obligations and requirements of the augmentation promise, the Crown is subject to the duties flowing from the honour of the Crown~~ and the fiduciary duty which the Crown owes to the First Nation Treaty parties~~;

d) The Crown must diligently implement the augmentation promise~~, so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the value of the resources, including the land and water, in the territory~~;

e) The Crown shall, in a manner consistent with the honour of the Crown, consult with the First Nation Treaty parties to determine what portion, if any, of the increased annuity amount is to be distributed by the Crown to the individual Treaty rights holders in addition to the $4 per person per year they are already being paid;

f) The augmentation promise is a Treaty right recognized and affirmed by s. 35 of the *Constitution Act*, 1982.

[2] THIS COURT ADJUDGES AND DECLARES THAT the principles governing the Treaty parties' implementation of the annuity provisions are to accord with this Court's determinations that:

a) the Robinson Superior Treaty was negotiated by the Treaty parties around the Anishinaabe Council Fire at Bawaating (Sault Ste Marie) as a renewal of the ongoing relationship between the Anishinaabeg and the Crown grounded in the Covenant Chain alliance, and as a basis for continuing a mutually respectful and beneficial relationship going into the future; and

b) the Treaty reflects the parties' common intention that their agreement was to allow both the Anishinaabeg and the Crown to realize the future opportunities and potential of the Treaty territory in a manner consistent with the Anishinaabe principles of respect, responsibility, reciprocity and renewal and the intention of the Crown to act honourably, with justice or fairness, and with liberality or benevolence.

[3] THIS COURT FURTHER ADJUDGES AND DECLARES THAT:

a) The process adopted for purposes of determining the amount of net Crown resource- based revenues in a particular period must afford sufficient Crown disclosure of information to enable the First Nation Treaty parties and the Court, if necessary, to determine the amount of such net revenues;

b) For purposes of determining the amount of net Crown resource-based revenues in a particular period:

> i. relevant revenues to be considered are Crown resource-based revenues arising directly or in a closely related way to the use, sale, or licensing of land (which could include the waters) in the Treaty territory, including mineral and lumbering revenues and other analogous revenues as received by the Crown both historically and in the future~~, but not including personal, corporate or property tax revenues~~,
>
> ii. relevant expenses to be considered are Crown expenses related to collecting, regulating, and supporting relevant revenues~~, but do not include the costs of infrastructure and institutions that are built with Crown tax revenues~~,

with these definitions to be applied as general principles that are subject to clarification and further direction by the Court in a future stage of this proceeding; and

c) Failing agreement amongst the parties, the principles to be applied for purposes of determining amounts [added text - to be disbursed pursuant to the augmentation promise from] ~~that are fairly and reasonably equal to a fair share of~~ net Crown resource-based revenues are subject to further direction by the Court in a future stage of this proceeding.

d) Where in the exercise of their duties to implement the augmentation promise the Crown exercises discretion, the discretion must be exercised

honourably, such discretion is not unfettered and is subject to review by the Courts.

[4] THIS COURT FURTHER ORDERS AND ADJUDGES THAT the plaintiffs' alternative claim, supported by Ontario, that the Court should imply a Treaty term to provide for indexing of the promised annuity payment of £500 (or $2,000), as augmented to an amount based on £1 (or $4) per person, in order to protect the First Nation Treaty parties against erosion of the purchasing power of annuities due to inflation be, and is hereby, dismissed.

[5] AND THIS COURT FURTHER ORDERS AND ADJUDGES that the plaintiffs are hereby awarded their costs of this action to date, on the partial indemnity scale, without reserving to them any right to seek a higher level of indemnity at another time, and that pursuant to an agreement between them, Canada and Ontario are each responsible to pay 50 per cent of such costs, with the plaintiffs' costs of this action to date, including this motion, being hereby fixed in the total amount of $5,148,894.45.

[6] THIS JUDGMENT BEARS INTEREST at the rate of three per cent (3%) per year commencing on December 21, 2018.