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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850

Plaintiffs (Moving Parties)

- and -

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

Defendants (Responding Parties)

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties

FACTUM OF THE PLAINTIFFS

Stage Two: Crown Immunity, Statutory Limitations and Crown Liability

AUGUST 16, 2019

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PART I – OVERVIEW

1. This motion involves three issues. The first two involve disposal of Ontario's technical defences involving Crown immunity and statutory limitations based on statutory interpretation.[1] Ontario asserts that it is immune from claims based on facts existing as of the date of the coming into force of the *Proceedings Against the Crown Act*, 1962-63[2] ("PACA") unless those claims are of a nature that they could be brought by petition of right, and that some or all of the Plaintiffs' claims are not of that nature. The Plaintiffs' claim is that Ontario failed to discharge its obligations under the Robinson Huron Treaty (the "Treaty") and that this constitutes breach of treaty, breach of fiduciary duty and breach of the honour of the Crown. These are claims about the Crown fulfilling its legal obligations under a solemn treaty and they could be brought by a petition of right, but for the enactment of the PACA. As a result, there is no Crown immunity from these claims.

2. Second, Ontario says the Plaintiffs' claims are, in whole or part, statute barred. The Plaintiffs say that there is no limitation period applicable, as a matter of statutory interpretation, to the Plaintiffs' claims. The legislation relied on by Ontario does not impose any limitation period for claims based on the causes of action at play or the remedies the Plaintiffs seek. While some limitations legislation in other provinces include a "basket clause" that captures all claims not specifically mentioned, the legislation relied on by Ontario does not. Ontario and Canada have both abandoned their arguments regarding laches. Thus, there are no limitations defences barring the Plaintiffs' claims in whole or in part.

3. The third issue involves the question of whether the Plaintiffs must prove which of the two Crowns is liable to them for the failure to pay annuities arising from the Treaty that was entered into when the Province of Canada, was still in existence. The Plaintiffs

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[1] Other issues raised by Ontario's limitations defence, including the constitutionality of the statutes and issues of discoverability, have been left to be determined in a further stage of these proceedings if the statutory limitation provisions relied upon by Ontario are found to apply.

[2] *Proceedings Against the Crown Act*, SO 1962-63, c 109, (PACA was subsequently amended. The most recent amendments came into force on May 22, 2019. The *Act* is currently entitled *Crown Liability and Proceedings Act*, SO 2019, c 7, Sched. 17, which replaces the former *Proceedings Against the Crown Act*, RSO 1990, c P 27).

rely on the arguments made by the Red Rock/Whitesand plaintiffs in their factum to say that the liability for compensation for the failure to increase the treaty annuities is joint and several, and therefore enforceable against either Crown. In the alternative, the Plaintiffs argue that whether or not the liability is joint and several, the honour of the Crown and Canada's duty of diligent and purposive treaty implementation requires Canada to pay to the Plaintiffs the full compensation owing to them for the failure to increase the annuities as required under the Treaty, and to seek payment from Ontario for any part of that compensation which Ontario may ultimately be held liable for.

4. Finally, the Plaintiffs say that the issues on this motion are suitable for determination on a summary judgment motion. The Defendants have agreed that the first two issues are suitable to being dealt with in this way. The Plaintiffs say that the third question is also amenable to being addressed in this way because it deals with an extricable issue, and because proceeding by means of a summary judgment motion will significantly promote access to justice, and is the most proportionate, timely and cost effective approach. Proceeding with this issue will not require this Court to come to any findings of fact or law that will prejudice the ability of the Defendants to argue the remaining issues outstanding in this proceeding, and there is no risk of duplicative or inconsistent findings.

PART II – LAW & ARGUMENT

A. Issue #1: PACA does not provide immunity from the Plaintiffs' claims

5. On January 28, 2015, the Honourable Elizabeth Dowdeswell, the Lieutenant Governor of Ontario, issued a Royal Fiat to the Plaintiffs that provides (emphasis in original):

> **IN THE MATTER** of Court File No. C-3512-14 commenced in the Superior Court of Justice in the City of Sudbury (the "Action"), between Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty (collectively, the "Plaintiffs"), and the Attorney General of Canada, Her Majesty the Queen in right of Ontario, and the Attorney General of Ontario (as defendants);

AND WHEREAS the Action asserts claims based on events that occurred prior to the coming into force of the *Proceedings Against the Crown Act;*

AND WHEREAS the Plaintiffs have submitted a request by correspondence dated September 18, 2014, that a royal fiat be issued with respect to the Action, deeming such claims that can only properly be asserted as against Her Majesty the Queen in right of Ontario by way of petition of right, to have been asserted in that manner;

NOW THEREFORE:

LET RIGHT BE DONE in the Action as if it had been commenced as against Her Majesty the Queen in right of Ontario by way of petition of right, without prejudice to the right of the Crown to argue that some or all of the claims asserted in the Action are nevertheless subject to Crown immunity, and to raise any other defence, point of pleading or jurisdictional issue, or take any other position.

6. At paragraph 73 of its amended statement of defence, Ontario sets out its Crown immunity defence as follows:

> The claims asserted in this proceeding arise from facts existing prior to the coming into force of the *Proceedings Against the Crown Act, 1962-63*, (S.O. 1962-63, c. 109). They may be pursued as against Her Majesty the Queen in right of Ontario by way of petition of right, pursuant to a royal fiat issued for this proceeding in January 2015. Ontario has not, however, waived Crown immunity with respect to claims of a nature that cannot be asserted by way of petition of right. In particular:
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> > (a) This proceeding seeks the payment of money by the Crown pursuant to the Crown's discretion, and is not in respect of any legal obligation or property of the Plaintiffs in the hands of the Crown. Accordingly, a petition of right does not lie in respect of this proceeding; and
> >
> > (b) A petition of right also does not lie for claims based on allegations of breach of fiduciary duty; Ontario remains immune from such claims.

7. With respect to (a), the Plaintiffs say that this assertion cannot stand in the face of the decision in Stage One of this proceeding. It is now clear that there is a legal obligation to increase the annuities when the circumstances warrant. As a result, this is not a claim about a discretionary payment. Specifically, the decision of Stage One in this proceeding

held that, "the promise contained in the augmentation clause is mandatory".[3] As the payment of money is in respect of a mandatory legal obligation, a petition of right lies in respect of this proceeding.

8. Ontario does not seem to argue that it is immune from a claim for breach of treaty, or breach of duty based on the honour of the Crown. Rather, paragraph 73(b) of Ontario's Amended Statement of Defence asserts immunity insofar as the claims are grounded in breach of fiduciary duty, on the basis of an assertion that such claims cannot be pursued through a petition of right. However, case law in Ontario clearly establishes that claims for breach of fiduciary duty are not excluded from the petition of right regime. The Crown's fiduciary obligations under the Treaty preceded the enactment of Crown proceedings legislation, and there is no reason why they cannot be enforced by means of a petition of right. It is clear that the exception contained in s. 29(1) applies to actions respecting events that occurred prior to 1963 if those proceedings could be brought by petition of right, but for the PACA.

i. The History and Evolution of Crown Immunity

9. At common law, the Crown could not be sued. This changed with the introduction of the petition of right, as Morris and Brongers explain:

> The petition of right developed as the mechanism to allow legal claims against the Crown to be adjudicated. A subject could petition the Crown for permission to have his or her claim adjudicated in the ordinary courts. The Sovereign would consider the petition and, if so inclined, would issue a fiat stating "Let Right Be Done". The petition would then be referred to the Court, which could then grant relief against the Crown. The remedy developed with respect to clams concerning property and came to extend to claims in contract…
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> The petition of right did not extend to claims in Tort... The crown was effectively immune from liability in tort. While Crown servants could be sued

[3] *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 529 [*Restoule*] (emphasis added).

> where they had committed a tort in the course of their duties, the Crown could not be held vicariously liable and Crown assets could not be reached.[4]

10. As Professors Hogg and Monahan note, the existence of Crown immunity did not mean that the King was regarded as above the law. Rather, the maxim that "the King can do no wrong" originally meant that the King was not privileged to commit illegal acts.[5]

11. In 1950, the Canadian Commissioners for Uniformity prepared a uniform model Act to expand the liability of the Crown to claims in tort.[6] The *Crown Liability Act*, SC 1952-1953, c 30 expanded the liability of the federal Crown to claims in tort. The Federal legislation still exists today. However, it was renamed the *Crown Liability and Proceedings Act*, (RSC, 1985, c C-50) in 1992. The name was changed to reflect the fact that the Act now deals with Crown proceedings generally, wherever they may be brought and whether in tort, in contract or otherwise. The substantive provisions governing Crown liability in matters such as costs, interest, limitation periods and payment of judgements are now found in Part II of the *Crown Liability and Proceedings Act*.

12. All provinces, except Quebec and British Columbia, adopted the model Act of 1950 to a significant degree. However, there are differences in the legislation from jurisdiction to jurisdiction and care must be taking in reading and applying the jurisprudence.

ii. The Relevant PACA Provisions

13. Section 3 of PACA provides:

> A claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the Crown in

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[4] Michael H. Morris and Jan Brongers, *The 2019 Annotated Crown Liability and Proceedings Act* (Toronto: Carswell, 2019) at page 1 [citations omitted].

[5] Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed, (Scarborough: Carswell, 2000) at 1-11, [Hogg & Monahan]. These rules persisted for centuries, but their rationale derives from the feudal principles that the lord could not be sued in his own courts and that the King could do no wrong.

[6] Hogg & Monahan, *ibid* at 15.

> accordance with this Act without the grant of a fiat by the Lieutenant Governor.

14. Pursuant to this provision, any claim that could have been pursued by petition of right no longer requires a fiat. However, s. 28 and 29(1) of PACA provide:[7]

> 28. No proceedings shall be brought against the Crown under this Act in respect of any act or omission, transaction, matter or thing occurring or existing before the first day of September, 1963.
>
> 29 (1). A claim against the Crown existing on the first day of September, 1963 that, if this Act had not been passed, might have been enforced by petition of right may be proceeded with by petition of right subject to the grant of a fiat by the Lieutenant Governor as if this Act had not been passed.

15. In *S.M. v Ontario,* Simmons J.A. held that, "[a]lthough s. 3 of the 1963 Act authorized proceedings against the Crown by way of action for claims that formerly had to proceed by way of petition of right, ss. 27 and 28 of the 1963 Act [now ss. 28 and 29] preserved Crown immunity from action and the petition of right regime with respect to claims that existed on September 1, 1963."[8]

16. Because PACA preserves the petition of right regime with respect to claims existing prior to September 1, 1963, the Plaintiffs were required to obtain a fiat, which they have done. Ontario's argument seems to be, however, that the fiduciary duty claim is not a "claim against the Crown […] that, if [PACA] had not been passed, might have been enforced by petition of right."[9] This assertion is inconsistent with the interpretation of PACA consistently adopted in the Ontario cases.

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[7] The relevant provisions of PACA were included in the consolidations of 1970, 1980 and 1990 except that sections 28 and 29 of the 1962-63 Act were omitted from the consolidating statutes of 1980 and 1990. Despite this, these sections have been held to remain in force, see: *S.M. v. Ontario,* 2003 CanLII 22812 (ON CA), [*S.M. v* Ontario].

[8] *S.M. v Ontario*, *ibid* at para 2.

[9] PACA, s. 29(1).

iii. *Slark (Litigation guardian of) v Ontario* is determinative against Ontario's position

17. The application of PACA to claims for breach of fiduciary duty existing before PACA came into force was fully considered by Cullity J. in *Slark.*[10] At issue in *Slark* was whether, by virtue of PACA's s. 29(1) exemption, a class action could be brought based on a claim for breach of fiduciary duty asserted against the Crown by individuals who had suffered abuse aa residential facility for persons with developmental disabilities. Some of the acts and events complained of pre-dated the passage of PACA.

18. Justice Cullity held that the fact that a claim for breach of fiduciary duty against the Crown might not have been recognized and enforced by the Courts prior to 1963 was not determinative of the issue of whether the claim for breach of fiduciary duty could be maintained. In this regard, he adopted a different approach than had been adopted by the British Columbia Court of Appeal in the *Richards* case, which had held that claims for breach of fiduciary duty could not be enforced by petitions of right.[11]

19. Justice Cullity conducted a detailed review of the history of Crown immunity and the development of the petition of right regime. He noted:

> In Clode, *The Law and Practice of Petitions of Right* (1887) - to which counsel for the Crown referred - it was accepted that equitable relief by way of a petition of right could be obtained in the Court of Chancery in support of a common law right. The learned author was, however, critical of nineteenth-century cases in which this procedure had been permitted in respect of claims in equity, but recognized that a practice of allowing this had developed. Holdsworth refers to this practice without expressing similar doubts (above, at pages 31 - 32) and in Holmested's *Ontario Judicature Act*, 1915, (at page 1395) it was indicated that, despite earlier uncertainty, the procedure was in practice available in this jurisdiction to enforce equitable rights.
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> In Holmested & Langton, *Ontario Judicature Act* (5th edition, 1940) cases in which petitions of right were available were summarised quite narrowly without distinguishing between common law and equitable rights. The

[10] *Dolmage v. Ontario*, 2010 ONSC 1726, [also referred to as *Slark (Litigation guardian of) v Ontario* or "*Slark*"].

[11] *Richard v. British Columbia*, 2009 BCCA 185 (CanLII), [*Richard*].

> learned authors accepted the possibility that the court might declare that a plaintiff was entitled to restitution - or compensation in lieu of it - for goods or money that had found its way into the hands of the Crown.
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> Any doubt whether declaratory relief could be granted in respect of equitable rights against the Crown was removed by the landmark decision in *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), on which Mr Baert relied. In Dyson it was held that declaratory relief against the Attorney-General - as representing the Crown - could be granted in an exercise of the inherent equitable jurisdiction of the court without recourse to the petition of right procedure and the necessity of a fiat.[12]

20. Justice Cullity held that prior to the enactment of PACA, the law continued to evolve, and that in some circumstances declarations were given that a plaintiff was entitled to damages, compensation or restitution from the Crown.[13] Most importantly, he held that s. 29 did not require a plaintiff to prove that a remedy was available prior to the enactment of PACA for it to fall within s. 29. He stated:

> It is, I believe, important that…the exception in section 29 (1) is not conditioned expressly on the pre-September 1963 availability of a declaration for breach of fiduciary duty. It is conditioned on a person having a claim against the Crown that (a) existed on September 1, 1963; and (b) might have been enforced by petition of right if PACA had not been passed.
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> […]
>
> I see no reason why the second condition – that looks to the availability of a petition of right if PACA had ot been enacted – should require the court to go back in time and speculate about whether a court sitting in August, 1963 would, or would not, have granted a petition of right for such a clam in respect of what was then an unknown cause of action. Rather, I believe it is perfectly consistent with the words of section 29(1), more realistic, and more consistent with the evolution of Crown liability as described by Holdsworth- as well developments in the law governing fiduciary duties

[12] *Slark*, *supra* at para 109-111.

[13] *Slark*, *supra* at para 115.

since 1963 – to ask what the position would be now if the Act had not been passed. [14]

21. Justice Cullity noted that the Crown has no immunity from damage for breaches of fiduciary duty that occurred after 1963, and that this was not the result of anything in PACA, stating:

> If it is now the law that claims for damages against the Crown for breaches of fiduciary duty can be made, it must follow that declaratory relief is also available in respect of such breaches. These developments in the law are inconsistent with the maxim that the king can do no wrong, and are not based on any authorization in PACA. In order to accept the submissions of the Crown, I would have to assume that the developments would not have occurred if the Act had not been passed. Such an assumption would be "regressive" in the sense in which Cory J. used the word and I do not believe I would be justified in making it. I find it inconceivable that the petition of right procedure and the *Dyson* procedure would not have been adapted to accommodate judicial recognition of the new fiduciary duties of the Crown. Such a development would be far less momentous than the rejection of Crown immunity for direct liability in tort that has otherwise deprived the rule that the Crown can do no wrong of any continuing influence.[15]

22. Justice Cullity thus held that the claim for a declaration that the defendant had breached its fiduciary duty and a declaration that the defendant was liable for damages for breach of fiduciary duty, "fall within the exception to the general prohibition in section 28 of PACA, are not outside the jurisdiction of the court, and are not subject to the Crown immunity within the meaning of the proviso in the fiat."[16] That caveat is identical to the one included in the fiat issued in this case. Justice Cullity also held that there was no bar with respect to a declaratory relief of entitlement to damages.

23. In denying the leave to appeal the decision in *Slark*, Herman J. endorsed Cullity J.'s analysis of PACA, stating:

> The motion judge concluded that, by virtue of s. 29(1), the question to be asked was whether the claim for a declaration in respect of a breach of

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[14] *Slark*, *supra* at paras 119 & 121.

[15] *Slark*, *supra* at para 124.

[16] *Slark*, *supra* at para 93.

> fiduciary duty would have been permitted if *PACA* had not been enacted. Furthermore… the question is not whether the claim would have been allowed by a court prior to the enactment of *PACA*, but what the position would now be if *PACA* had not been passed.
>
> In the opinion of the motion judge, there is no reason to treat the law as frozen on August 31, 2003. The parties agree that prior to September 1, 1963 (when *PACA* came into force), a court would not have recognized a claim against the Crown for breach of fiduciary duty. The parties also agree that the law since then has evolved and such a claim would be recognized today. Indeed, the Crown does not dispute that the Plaintiffs' claim for breach of fiduciary duty post-September 1, 1963 can proceed.
>
> Given the wording of s. 29(1) of *PACA* and the various authorities referred to by the motion judge, it is my opinion that there is no reason to doubt the correctness of the motion judge's approach or his decision, that is, that the question to be asked is whether a court today would recognize such a claim and that the answer to that question is yes.[17]

24. In *Seed v Ontario*, Ontario raised the same arguments that had been rejected in *Slark*. Justice Horkins held:

> The defendant argues that there is no fiduciary duty cause of action prior to 1963. This position was argued and rejected in *Slark*. In *Slark* the defendant argued that the Ontario court should follow the approach in *Richard v British Columbia*, 2009 BCCA 185 (CanLII), [2009] B.C.J. No. 854 (C.A.) ("*Richard*") where the court concluded that there could be no claim for damages for breach of fiduciary duty for events that occurred prior to their *Crown Proceedings Act*, S.B.C. 1974, c. 24, s. 17. *Richard* was distinguished in *Slark* and not followed. The defendant does not rely on *Richard* on the motion before this court. It simply argues that the court in *Slark* was wrong and I should decline to follow it. In my view, the result in *Slark* was correct. The issue was thoroughly considered by Cullity J. and Herman J.[18]

25. The approach set out in *Slark* has subsequently been adopted in Nova Scotia. In *C v Nova Scotia*, where the Court ruled the plaintiffs' claim for breach of fiduciary duty

[17] *Dolmage v. Ontario* 2010 ONSC 6131 *(Slark CA)* at paras 8-10.

[18] *Seed v. Ontario*, 2012 ONSC 2681 (CanLII) at para 100.

was an equitable claim, and that the ancient petition of right process permitted such claims against the Crown. Specifically, Campbell J. held:

> Mr. D.B.C.'s claim is based on an allegation of a breach of fiduciary duty. That is an equitable claim. The ancient petition of right process permitted such claims against the Crown. Subsection 3(3) of the *Proceedings Against the Crown Act* provides that what could be done before 1951 with consent of the Crown, can now be done without consent. That means that the petition of right that was available and is still available but with no requirement for Crown consent. Section 25(1) abolished other proceedings against the Crown. That means that the old procedures are gone but the substantive rights remain.[19]

26. On appeal, the Nova Scotia Supreme Court noted that the Province acknowledged, "that, in England, the petition of right process permitted an equitable claim against the Crown, with consent."[20]

iv. The Claim for Breach of Fiduciary Duty Falls within s. 29(1)

27. Justice Cullity determined that the exception in section 29 (1) applies to a claim against the Crown that (a) existed on September 1, 1963; and (b) might have been enforced by petition of right if PACA had not been passed. The Plaintiffs submit that the Crown's breach of fiduciary duty with regard to the Robinson Treaties meet both criteria and as such may continue as a petition of right.

28. First, Cullity J. discussed what an "existing" claim is for the purposes of s. 29(1):

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[19] *C. v. Nova Scotia (Attorney General)*, 2015 NSSC 199, at para 83. See also: Campbell J.'s ruling at para. 17 where he states, "It is hardly surprising that claims for breach of fiduciary duty were not addressed in the1951 legislation. The concept of fiduciary duty itself was not new in the early 1950's but it was based at that time largely on agency law. That involved closed categories of relationships to which fiduciary obligations would attach. That changed substantially in the 1980's. In *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6 at para. 73 Justice LaForest said that the "fiduciary principle" in Canadian law really commenced with *Guerin v. Canada* 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, continuing with *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] S.C.J. No. 49 and *LAC Minerals Ltd. v. International Corona Resources Ltd,* 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574. It has grown to become a remedy to enforce government obligations to defined vulnerable groups. As Cullity J. remarked in *Slark*, *supra*. at para. 117, "I continued to be unimpressed by the artificiality of asking how equitable claims that were effectively unknown to the law before the decision in Guerin would have been treated had they been considered by a court before 1st September, 1963."

[20] *Nova Scotia (Attorney General) v. Carv*ery, 2016 NSCA 21 at para 29.

> In S.M. (at para 47) it was held that the word "claim" in section 29 (1) does not refer to a cause of action. It is to be read in conjunction with section 28 and refers to a "sub-category of act(s) or omission(s), transaction(s), matter(s) or thing(s) occurring or existing before the first day of September, 1963". In para 43 it was said that "the existence of a claim is tied to the event creating the claim". It follows that the claims against the Crown in respect of such matters are claims "existing" on September 1, 1963 within the meaning of section 29(1).[21]

29. Applying the same rationale as set out by Cullity J. in *Slark*, the failure of the Crown to revisit or increase annuities pursuant to the augmentation clause would fall within Cullity J.'s contemplation of "claim": a sub-category of act(s) or omission(s), transaction(s), matter(s) or thing(s) occurring or existing before the first day of September, 1963.

30. The Plaintiffs' claims are such that they could be enforced by way of petition of right if PACA had not been passed. The importance of the Crown fulfilling the solemn obligations set out in treaties is fundamental to maintaining the honour of the Crown. While the fiduciary claims against the Crown in cases such *Slark* were unknown in 1963, the fiduciary relationship between the Crown and indigenous peoples dates back to the *Royal Proclamation* in 1763. Even if it were unknown in 1963, however, it is well-recognized now. Under *Slark*, this is sufficient for it to be pursued through the petition of right regime.

v. The Conclusion in *Richard v. British Columbia* Does Not Apply in Ontario

31. In the *Richard* case, Saunders J.A. of the British Columbia Court of Appeal posed the question to be answered as follows: was a claim in equity for damages for equitable wrongs one that was known to the courts of equity prior to August 1, 1974, that is, the date of the British Columbia statute, *Crown Proceedings Act*, S.B.C. 1974, c. 24.[22] The Court concluded that such a claim would not have been recognized by a court

[21] *Slark*, *supra* at para 120.

[22] *Richard*, *supra* at para 62.

prior to August, 1974 and that therefore there could be no claim for damages for a breach of fiduciary duty with respect to events that occurred prior to that date.

32. In *Slark*, Cullity J. distinguished the *Richard* case on the basis that the British Columbia statute is different than the Ontario statute. Firstly, there is no statutory provision in British Columbia that mirrors s. 29(1) of the Ontario PACA. As Cullity J. noted, s. 29(1) focuses on the enforceability of the claim as if the Act had not been passed, not on whether the claim would have been allowed if it had been brought prior to the Act.

33. As Cullity J. further noted, the British Columbia statute deals with, "all those liabilities to which it would be liable if it were a person" (s. 2(c)), not just torts as is the case under PACA. Thus, unlike the situation in British Columbia, there is no statutory basis in Ontario for permitting claims against the Crown for breach of fiduciary duty in Ontario either before or after September 1, 1963.

34. On application for leave to appeal *Slark*, T.P. Herman J. reviewed Cullity J.'s reasoning and ruled:

> [T]he different provisions in the two statutes are central to the different results in the two cases. "Conflicting cases" must represent a difference in principle, not merely a difference in result (*Holt v. Anderson*, [2005] O.J. No. 4494 (Div. Ct.)). There is no difference in principle where the different results stem from the interpretation of different statutes. As such, the *Richard* case cannot be said to be a decision that conflicts with the motion judge's decision in this case.[23]

35. The Plaintiffs submit that Cullity J. is correct in his conclusion that the *Richard* case does not conflict with the *Slark* decision and that his decision is good law in Ontario, particularly in light of T.P. Herman J.'s decision to not grant the defendants leave to appeal.

36. Justice Cullity acknowledged the following in the *Slark* decision:

> The old maxim ["the king can do no wrong"] reflected medieval concepts of the monarch as sovereign that were out of place in the 20th century and are even more so today. The gradual erosion of the maxim's influence …was - at the very least - vastly accelerated by the enactment of PACA. If, apart

[23] *Slark CA supra*, at para 15

> from the issue in this case, any vestiges remained, they were effectively abolished by the more recent judicial repudiation of the "regressive" distinction between the direct and vicarious tortious liability of the Crown that appeared to be embedded in the statute. It appears to me to be no less regressive to give the maxim new life by limiting access to justice for newly established causes of action against the state.
>
> In addition to the considerations just mentioned, I continue to be unimpressed by the artificiality of asking how equitable claims that were effectively unknown to the law before the decision in *Guerin* would have been treated if they had been considered by a court before 1st September, 1963. Ultimately, however, the issue is one of statutory interpretation.
>
> For this purpose, I believe I must accept that, on the authority of S.M., claims against the Crown for breach of fiduciary duty are claims "under" PACA, and therefore that it is necessary - pursuant to section 29(1) - to ask whether the claims for declarations in respect of breaches of fiduciary duty would have been permitted if PACA had not been enacted. I do not, however, believe that it is necessary for this purpose to treat the evolution of the law governing petitions of right as frozen at the end of August 1963, and to ignore developments in the equitable jurisdiction of the court since that time. It is, of course, not unknown for statutes to be applied to events or things that could not possibly have been within the contemplation of their drafters: see *Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.), at 265; Bennion, *Statutory Interpretation*, (2nd edition, 1992) at page 617.[24]

37. Moreover, the application by the defendants in the *Slark* case for leave to appeal the certification of the action by the plaintiff as a class proceeding was denied.[25] Justice Herman foresaw future challenges to the *Slark* decision and made a decision to strengthen its conclusions by taking the rare step of setting out the reasons for his decision to deny the appeal.

38. The Plaintiffs also note that there is a good argument that the right to bring an action against the Crown for breach of fiduciary duty exists independent of PACA, such that the prohibition in s. 28 has no application. This is supported by the Federal Court's

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[24] *Slark*, *supra* at paras 116-118.

[25] *Slark CA,supra*.

recent decision in *Sides v Canada*.[26] We acknowledge that *Sides* needs to be reconciled with *Slark* and *S.M. v Ontario*. However, it is important to note that *Sides* involves claims for breach of treaty and fiduciary duty flowing from wrongful Crown conduct occurring over a century ago. Thus, it engages special interpretive and constitutional principles not considered in the other cases.

vi. Conclusion on Crown Immunity

39. The assertion of Crown immunity to protect the Crown from its failure to fulfill its treaty obligations, and the fiduciary duties that attach to those obligations, would be the kind of "regressive" approach the courts have rejected. None of the Plaintiffs' claims are barred by PACA. To the extent that they relate to facts existing as of September 1 1963, they are being properly pursued under the fiat granted by Ontario. In any event, the Plaintiffs are entitled to the declarations they seek pursuant to the *Dyson* procedure.

B. Issue #2: Ontario's Limitations Legislation Does Not Apply to Limit the Claims

40. As noted above, the Plaintiffs' claims are grounded in breach of fiduciary duty, breach of treaty and breach of duty based on the honour of the Crown. Ontario has plead at least 13 different statutes dating back to 1623 in support of its position that the Plaintiffs' claims in this case are statute barred.[27] However, not one of these purport to impose a limitation period with respect to any of the causes of action relied on by the Plaintiffs, and none of them apply to bar the availability of damages or declarations as remedies for the Crown's breaches.

41. In specific circumstances, claims involving Aboriginal or treaty rights could be subject to limitation periods set out in statute – as a matter of statutory interpretation.[28]

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[26] *Sides v. Canada*, 2019 FC 789 (CanLII), [*Sides*].

[27] Ontario's Amended Statement of Defence at paras 75-78.

[28] The case law on limitations in Aboriginal and treaty rights context indicates that where there is a catch-all provision in the statutory scheme that limitations may apply. However, the trend in the jurisprudence has moved towards acknowledging that, "many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this." See: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 (CanLII) at para 141, [*Manitoba Metis Federation*]. See also: *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CanLII 50

However, this can only be the case where the statute explicitly limits such claims or the remedies that are sought, or where the statute contains a catch-all provision which applies a limitation period to all types of claims not named in the statute, or an ultimate limitation period that applies to all claims. The legislation relied on by Ontario does none of these things.

42. It is Ontario's burden to demonstrate that the legislation it relies on applies to the Plaintiffs' claims, and it is not clear from Ontario's Amended Statement of Defence what provisions are being relied on for what purpose. As a result, while the Plaintiffs will try to anticipate Ontario's arguments here, they reserve all of their rights to reply to any issues raised by Ontario in its response.

i. There is no Limitation Period Applicable to Claims for Breach of Fiduciary Duty

43. In *Chippewas of Sarnia Band*, the Ontario Court of Appeal upheld the decision of Campbell J. who reviewed a score of different limitations statutes dating back to 1623 (including some of the statutes cited by Ontario in this case) to determine whether they applied to breach of fiduciary duty and ruled that none applied to the Chippewas' claims.[29] In its reasons, the unanimous panel of five appellate judges stated that, "no limitation period bars the Chippewas' claim against the Crown for breach of fiduciary duty, a cause of action for which there is no statutory limitation period in Ontario." [30] Not only did this ruling apply to the *Limitations Act, 1990*, which Ontario relies on here, but it applied to all of the 18 different statutes dating back to the year 1623 that were argued by the parties in that case.[31]

(SCC); *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, 2002 SCC 79 (CanLII); *Canada (Attorney General) v. Lameman*, [2008] 1 SCR 372, 2008 SCC 14 (CanLII).

[29] *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CanLII *16991* (ON CA) at para 24,[*Chippewas of Sarnia Band*, ONCA]; *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 at paras 433-606 (ON SC), 88 A.C.W.S. (3d) 728. (Notably, Campbell J. also dealt with the constitutionality of these statutes with respect to Aboriginal title and Treaty rights and found them inapplicable. However, as stated in the Plaintiffs' Notice of Motion, the constitutionality of the statutes relied upon by Ontario is not an issue at this stage and will only be raised if this Court first determines that the statutes apply to the Plaintiffs' claims in this case.).

[30] *Chippewas of Sarnia Band*, ONCA, *ibid* at para 220.

[31] *Chippewas of Sarnia Band*, ONCA, *ibid* at para 220.

ii. There is No Limitation Period Applicable to Claims for Breach of Treaty

44. The Legislative Assembly of Ontario has never passed legislation, past or present, which applies limitation periods to claims brought by First Nations against the Crown for breach of treaty. Considered apart from any constitutional questions of whether Ontario would be *ultra vires* in passing such legislation, there is nothing in the statutes relied upon by Ontario which suggests that its legislative body ever intended to limit the Plaintiffs' ability to bring an action to be fully compensated for breach of treaty and breach of fiduciary duty by Crown.

45. Ontario seeks to avoid this fact by recharacterizing the claim for breach of treaty as "an action upon a speciality." Ontario relies upon s. 45(1)(b) of the *Limitations Act*, RSO 1990, which states:

> **45.**(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> > (b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894

46. There is no precedent that the Plaintiffs are aware of for characterizing a breach of treaty claim as an "action upon a speciality."

47. A speciality is akin to a bond, and is essentially a contract securing a debt, which the parties intend to make under seal. [32] Sealed contracts are subject to special rules, including that their validity depends entirely on their form.[33] In *Friedmann Equity* the Supreme Court of Canada held that, (emphasis added):

> At common law, a sealed instrument, such as a deed or a specialty, must be signed, sealed and delivered. The mere inclusion of these three words is not sufficient, and some indication of a seal is required: see, e.g., *872899 Ontario Inc. v. Iacovoni* (1998), 1998 CanLII 7129 (ON CA), 163 D.L.R. (4th) 263 (Ont. C.A.). To create a sealed instrument, the application of the seal

[32] *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 SCR 842, 2000 SCC 34, [*Friedmann Equity*]; *872889 Ontario Inc. v. Iacovoni*, 1998 CanLII 7129 (ON CA); *The Mortgage Insurance Company of Canada v. Grant Estate,* 2009 ONCA 655.

[33] *Friedmann Equity*, *ibid* at para 48.

must be a conscious and deliberate act. At common law, then, the relevant question is whether the party intended to create an instrument under seal.[34]

48. The Court went on to say that the intention "to create a sealed instrument must be evident from the construction of the instrument itself and the circumstances surrounding its creation before the rule will be applied."[35]

49. While a "specialty" has special rules, they do not apply to treaties, which have their own "special rules" of interpretation. As the Supreme Court of Canada has held numerous times, treaties are "far more" than a contract; "they are a solemn exchange of promises made by the Crown and various First Nations" and as such "constitute a unique type of agreement" which "attract special rules of interpretation."[36] Treaties are interpreted and applied utilizing entirely different principles than contracts including those under seal which might create a "specialty".[37] Applying these non-contentious interpretation principles in Stage One this Court held that, "[f]or the Anishinaabe, the Treaties were not a contract and were not transactional" and as such the Treaty was not "a one-time transaction" but rather that "the parties were and continue to be in an ongoing relationship."[38]

50. While it is true that Commissioner W.B. Robinson in drafting the Treaty included the three words, "Signed, Sealed and delivered at Sault Ste Marie", inspection of the original only indicates that the Treaty was signed by Robinson and presumably signed by the Chiefs indicate by the "X" made next to their respective names. There is no

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[34] *Friedmann Equity*, *ibid* at para 36 (emphasis added).

[35] *Friedmann Equity*, *ibid* at para 39 (emphasis added).

[36] *R. v. Sundown*, [1999] 1 SCR 393, 1999 CanLII 673 (SCC) at para 24; *R. v. Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC), at para 78.

[37] Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNB LJ 11-50 at 11, Professor Rotman explains that, "the Canadian judiciary recognized that treaties between representatives of the Crown and Aboriginal nations ought not to be governed by the ordinary principles of interpretation that are applicable to other agreements, such as private contracts or international treaties. Greater emphasis began to be placed on methods of construing treaties that would give a more accurate portrayal of the compacts between the Crown and Aboriginal peoples so that the promises made therein would be recognized and enforced by the courts. The interpretive canons were intended to accomplish this task."

[38] *Restoule*, *supra* at paras 423 & 465.

indication that a seal was ever consciously and deliberately affixed, and if any ever existed, it has been lost to time.

51. When the circumstances of the creation of the Treaty are considered, it is clear that the Treaty promise from Her Majesty the Queen is of a form and nature that is fundamentally different than a "specialty." The formalities which were carefully followed by the parties to the Treaty were not those developed by the British common law for the creation of a specialty. Rather, they were the customs and ceremonies of Treaty making under Anishinaabek law and the practices and protocols of Great Lakes diplomacy in the 18th and 19th centuries. The Crown, and W.B. Robinson in particular at the time, were well-versed in this form of intersocietal law and treaty-making.

52. The legal instrument which resulted from this specialized and sacred process is a *sui generis* legal agreement solemnly made and entered concurrently under, and consistently with, both Anishinaabek and British-Canadian legal orders, which today has constitutional force as part of the supreme law of the land. In light of all of this, there is no basis for equating treaties with a "speciality" for the purposes of limitations legislation. To do so violates the principles of treaty interpretation and the very honour of the Crown to suggest that any part of the Crown's treaty promise should be diminished by mischaracterizing it as a "specialty" for the sole purpose of providing Ontario a basis for its limitations defence.

iii. PACA Does Not Prevent the Plaintiffs' Claims from Proceeding

53. Ontario asserts that s. 28 of PACA prohibits the claim from proceeding. But, as set out above, the Plaintiffs have obtained a fiat, and may proceed under the exception in s. 29(1).

iv. The *Public Authorities Protection Act* ("PAPA") has no Application

54. Ontario's pleads that the Plaintiffs' claim, "is for and in respect of acts done in performance or pursuance or execution of an alleged statutory or other public office, duty or authority, or in respect of alleged neglects or defaults in the execution of such

office, duty or authority".[39] In this, they rely on s.7(1) of PAPA that was repealed with the enactment of the current *Limitations Act, 2002*, and which imposed a very short six-month limitation period, designed to protect officials exercising statutory duties.

55. In *Berardinelli*, the SCC held that the identically worded predecessor of s. 7(1) of PAPA should be given strict interpretation, stating:

> Section 11, being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated. There is little doubt about the presence of ambiguity and uncertainty of meaning in the section.[40]

56. Taking a strict interpretation has led courts to restrict the application of PAPA to public authorities like police and bailiffs who exercise coercive authority and therefore may be exceptionally vulnerable to lawsuits. In *Black v. Sault College of Applied Arts & Technology*, Pardu J. explained why some public authorities were subject to the *Charter*, but not the PAPA:

> In my view, cases which determine whether community colleges are "government" for the purposes of the Canadian Charter of Rights and Freedoms are of little assistance in interpreting the Public Authorities Protection Act. The principals governing interpretation of the Charter are entirely different from the restrictive approach required by a limitations statute. […] It might reasonably be concluded that the legislature feared that those who were called upon to exert coercive authority upon others might be exceptionally vulnerable to lawsuits, and required the protection of a very short limitation period. The same principles might affect agencies given a statutory monopoly to provide public utilities, or educate the young, where school attendance is mandatory to the age of 16 years. On the other hand, where one could readily chose a private parking lot, or one operated by a parking authority, or a private campground as opposed to one operated by a conservation authority, there seemed little principled reason to accord one the protection of the extraordinarily short limitation period, and not the other.

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[39] Ontario's Amended Statement of Defence at para 77. (Citing: *An Act to Protect Justices of the Peace and Other Officers from Vexatious Actions*, C.S.U.C., c. 126, ss. 1, 9 and 20; and the *Public Authorities Protection Act*, RSO 1990, c P 38, s. 7 (1) and its predecessors.)

[40] *Berardinelli v. Ontario Housing Corp*, [1979] 1 SCR 275 at 280, 1978 CanLII 42 (SCC).

> Similarly, for the most part, public hospitals do not exercise coercive authority over patients, and as found by Krever J. in Schnurr, supra, are not public authorities.[41]

57. Further to this, PAPA has been found to be inapplicable to s. 24 *Charter* remedies, with the Court preferring the doctrine of laches:

> In M. (K.) v. M. (H.), 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6 at pp. 29-30, 96 D.L.R. (4th) 289, La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that Plaintiffs do not sleep on their rights. Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.
>
> Put in this Charter context, I see no valid comparison between procedural rules of court and statutory limitation periods. I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises. Having found that immunity is not available under the Proceedings Against the Crown Act from a claim for Charter remedy, it therefore follows that in my opinion s. 11 of the Public Authorities Protection Act should be read as not applying to relief claimed under s. 24(1) of the Charter.[42]

58. As noted, the court in *Prete* engages with the policy rationales underlying statutory limitations. More will be said about this below. With respect to the applicability of PAPA, the Plaintiffs submit that their claims are not of the kind contemplated by that statute. There is nothing to suggest that statutory actors who have the benefit of PAPA would be involved in any process relating to the annuities. Moreover, the claims at issue are not about the manner in which a statutory duty has been carried out. While the intertwined issues of respective Crown liabilities, responsibilities and breaches as between Canada and Ontario remain to be determined at a later stage, the Plaintiffs'

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[41] *Black v. Sault College of Applied Arts & Technology*, 1999 CanLII 14769 (ON SC),

[42] *Prete v. Ontario (Attorney-General)*, 1993 CanLII 3386 (ON CA), [emphasis added].

claims cannot be reduced to a claim that one, or several Crown agents at one, or many points in the past 169 years since the Treaty promise was made, failed to perform their part of the Crown's obligation. Nor are they claims about neglect or default in the execution of a public office.

59. The Plaintiffs' claims are about whether the Crown has fulfilled its treaty and fiduciary obligations to the Anishinaabek. These claims should attract similar principles to those applied in the *Charter* context. Such principles would not give Ontario the benefit of an extraordinarily short limitation period over the Crown's solemn dealings with the Anishinaabek and the performance of its Treaty obligations.

v. The Plaintiffs claim is not "an action of account"

60. Ontario's pleads that the Plaintiffs' claim, "is in part an action of account or for allegedly not accounting".[43] The Plaintiffs' claim seeks damages for breach of fiduciary duty and breach of treaty based on the Crown's failure to increase the annuity as required under the Treaty. Section 46 of the *Limitations Act*, 1990 does not bar that remedy with respect to any period of time since the Treaty was signed. The Treaty itself requires the disclosure of information relating to net Crown revenues, and the Plaintiffs have sought an "accounting" of those revenues in order to permit the calculation of compensation for the failure to take place. This does not transform their claims for breach of Treaty and breach of fiduciary duty into an "action of account."

vi. Policy rationale of limitations statutes in Aboriginal and Treaty rights context

61. In *Manitoba Metis Federation*, the SCC held that the honour of the Crown "imposes a heavy obligation" and that "Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group

[43] Ontario's Amended Statement of Defence at para 78. (Citing: and relies upon: An Act to Protect Justices of the Peace and Other Officers from Vexatious Actions, C.S.U.C., c. 126, ss. 1, 9 and 20; and the Public Authorities Protection Act, R.S.O. 1990, c. P.38, s. 7 (1) and its predecessors.)

must not be left 'with an empty shell of a treaty promise'."[44] The Court went on to explain:

> Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the Plaintiffs: *Novak v. Bond*, 1999 CanLII 685 (SCC), [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:
>
> > The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification. ("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)
>
> Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "*Wewaykum*: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004), *U.B.C. L. Rev.* 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.[45]

62. Further to this, the Truth and Reconciliation Commission's Calls to Action state at #26:

> We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they

[44] Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 SCR 623, 2013 SCC 14 at paras 68 and 80, [*Manitoba Metis Federation*].

[45] *Manitoba Metis Federation*, *ibid* at para 141.

conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.[46]

63. In response to both the SCC's jurisprudence and the TRC's Calls to Action, the Attorney General of Canada has recently issued its Directive on Civil Litigation Involving Indigenous Peoples Directives which states:

> **Litigation Guideline #14: Limitations and equitable defences should be pleaded only where there is a principled basis and evidence to support the defence.**
>
> *Extinguishment, surrender, abandonment*
>
> The Principles discourage certain long-standing federal positions, including relying on defences such as extinguishment, surrender, and abandonment.
>
> Generally, these defences should be pleaded, only where there is a principled basis and evidence to support the defence. Such defences must not be pleaded simply in the hope that through discoveries or investigation some basis for the defence may be found.
>
> When determining whether such circumstances exist, counsel must consider whether the defence would be consistent with the honour of the Crown. Reconciliation is generally inhibited by pleading these defences.
>
> When considering pleading these defences, counsel must seek approval from the Assistant Deputy Attorney General.
>
> *Limitations and laches*
>
> In cases where litigation is long delayed, equitable defences such as laches and acquiescence are preferable to limitation defences. However, these defences should also be pleaded only where there is a principled basis and evidence to support the defence and where the Assistant Deputy Attorney General's approval has been obtained. [Footnote 22: This Guideline goes beyond the TRC's Call to Action #26, which discourages reliance on limitation defences specifically in legal actions regarding historical abuse

[46] Truth and Reconciliation Commission of Canada, "Call to Action #26" in *Calls to Action*, (Ottawa: TRC, 2015).

> brought by Indigenous peoples. Counsel should also be aware of the research and perspectives underpinning this Call to Action.][47]

64. While the AG of Canada's Directive does not apply to the arguments that Ontario may make, it should be noted that Ontario has brought nearly identical arguments before in *Fletcher v Ontario*.[48] Submissions do not appear to have been made on the issue of limitations, however, Lederer J. still went on to hold as follows:

> [158] Without submissions, I am unable to make any substantive comment as to the strength, viability or validity of any argument that some aspects of the claims being made are limited by the application of any limitation periods that may be said to apply. I repeat, however, that the actions of the Crown are to be governed by the honour of the Crown:
>
> > The honour of the Crown 'is not a mere incantation, but rather a core precept that finds its application in concrete practices'...
>
> [159] The honour of the Crown governs treaty-making and implementation. The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to First Nations people.
>
> [160] The ultimate purpose of the honour of the Crown is reconciliation, that is, the reconciliation of pre-existing First Nation societies with the assertion of Crown sovereignty:
>
> > The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982,* which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

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[47] Minister of Justice and Attorney General of Canada Principles respecting the Government of Canada's relationship with Indigenous peoples (Government of Canada, 2018).

[48] *Fletcher v Ontario*, 2016 ONSC 5874 (CanLII) at para 113.

> [161] Reconciliation has a broad ambition. In its *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, the Commission defined reconciliation, in part, as:
>
> > …[A]n ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change.
>
> [162] If this is the goal, why would we limit the available remedies to an award of money where additional land, other concessions or grants may assist in accomplishing the desired result?[49]

65. Although not a ruling, it seems clear that Lederer J.'s question here is a rhetorical one which echoes the policy statements and concerns of the Court in *Manitoba Metis Federation*, the TRC and the AG of Canada's Directive. While those policy concerns do not determine whether the statutes as drafted apply, they do inform the conversation around the policy rationale underlying these statutes and reinforce the need to interpret provisions, which can limit the ability of courts to adequately address claims of historical injustice involving Aboriginal and treaty rights, in a manner that is respectful of the unique nature of these claims. It should not be lightly assumed that provisions meant to limit access to the courts in respect of different kinds of claims apply in the context of constitutionally protected treaty rights.

vii. Conclusion on Limitations

66. While Aboriginal and treaty rights may, subject to constitutional challenge, be limited by limitations statutes in some circumstances, they are not limited here. Claims involving these rights were explicitly excluded from the *Limitations Act*, *2002,* and thus governed by the previous *Limitations Act*, *1990* which contained no "basket clause," no ultimate limitation period and no provisions which explicitly addressed these rights. Any concern about older claims are left to be dealt with by the doctrine of laches, which both Defendants have decided not to assert here.

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[49] *Fletcher v Ontario*, *ibid* at paras 158-161.

C. Issue #3: The Honour of the Crown requires an order that Canada pay to the Plaintiffs the amounts owing as a result of past failures to increase the annuity, regardless of which Crown is ultimately liable to fund those increases

67. The Plaintiffs rely on the submissions of the Red Rock Whitesand plaintiffs regarding the joint and several liability of the two Crown defendants for the compensation payable as a result of the failure to increase the annuities as required under the Treaty, including their submissions regarding why that is an appropriate matter for summary judgment.

68. In addition, the Plaintiffs argue, in the alterative, that in the particular circumstances of this case, the honour of the Crown and Canada's duty of diligent treaty implementation requires Canada to pay to the Plaintiffs the amounts owing as a result of past failures to increase the annuity, regardless of which Crown is ultimately held liable to fund those increases. In other words, Canada is required to act as the "paymaster" of the annuities.

69. The honour of the Crown is a constitutional principle.[50] It is not a "mere incantation, but rather a core precept that finds its application in concrete practices."[51] What concrete practices are required is dependent on the context. In *Haida*, the Supreme Court of Canada held that the honour of the Crown gives rise to different duties in different circumstances.[52] In that case, the Court addressed the requirements imposed on the Crown when aboriginal rights were asserted but as yet unproven.

70. In this case, on the other hand, the context is that the Treaty right has been proven through litigation but is awaiting implementation. In the decision on Stage One, this Court held the Treaty required the Crown to increase the annuity payable to the Plaintiffs 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. The Court held that

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[50] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 [*Mikisew Cree*, 2018] at paras 24 & 42; *Restoule*, *supra* at paras 478-81.

[51] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [*Haida Nation*].

[52] *Haida Nation, ibid* at para 18.

this requires the Crown to periodically engage in a process to determine the amount of net Crown resource-based revenues; and to pay an increase to the annuity if it is warranted. This obligation has been extant for 160 years. It is still a matter of dispute however, who is responsible for fulfilling these obligations.

71. It is significant that the reason for uncertainty about who is liable has nothing to do with the Plaintiffs, but is a result of the fact that after the Treaty was entered into, the Province of Canada ceased to exist and the federal and provincial Crowns were created. There is no dispute that between the two of them, the federal and provincial Crowns bear all of the liability and are required to perform all of the obligations formerly assumed by the Province of Canada.

72. There is also no dispute that the honour of the Crown requires treaty terms to be diligently and purposively implemented.[53] The Crown must act honourably in the negotiation, interpretation and implementation of treaties because "the honour of the Crown infuses every treaty and the performance of every treaty obligation."[54] As this Court found in Stage One, the Defendants in this case accept that they must "implement the Treaties purposively and in a liberal or generous manner" and must "fulfil their treaty promises with honour, diligence, and integrity." [55]

73. The Plaintiffs say that obligation is not suspended when a matter is being litigated in a complex claim such as this where the litigation itself spans several years. Once an obligation is clarified by the Courts it must be fulfilled, unless the parties agree otherwise or the Court's order is stayed. The honour of the Crown requires the Court to assume that the Crown intends to fulfill its promises.[56] At a minimum, there can be no sharp dealings.[57]

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[53] *Manitoba Metis Federation*, *supra* at paras 75-80; *Restoule* at paras 339 & 538.

[54] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 57, [*Mikisew Cree*, 2005]; *Restoule*, *supra* at para 481,

[55] *Restoule*, *supra* at para 538.

[56] *Mikisew Cree*, 2018, *supra* at para 28.

[57] *Mikisew Cree*, 2018, *supra* at para 28; *Haida Nation*, *supra* at para 19.

But the honour of the Crown requires more than that. It requires the Crown to endeavor to ensure its obligations are fulfilled, and fulfilled in a timely way.[58]

74. In the Amended Statement of Defense and Counterclaim filed by Canada and the Amended Statement of Defense filed by Ontario, there is no assertion that either of the Crowns have, since at least 1900, engaged in any process to determine the net revenues from the territory or to increase the annuities. In the decision on Stage One, this Court held "[s]ince 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."[59]

75. On a going forward basis, it may be the case that the two Crowns are responsible for different aspects of implementing the annuity augmentation promise, including obligations relating to, for example, disclosure of information. But in this litigation, the Plaintiffs seek compensation for the failure to pay them augmented annuities in the past.

76. In their respective pleadings, the two Crown Defendants raise numerous arguments relating to how the constitution assigns liability between them for the increase in annuities that the Court has now held is required by the Treaties. What is demanded by the duty of honourable dealing, and what specific obligations are imposed on the Crown, "depends heavily on the circumstances."[60] A relevant circumstance in this case is a consideration of the positions the defendants have taken in their pleadings in this litigation.

77. In its Amended Statement of Defence and Counterclaim, Canada admits at paragraph 53 that at Confederation in 1867, Canada assumed responsibility for the administration of the annuities payable under the Treaty. In its pleading, Canada also acknowledged that it has authority to and indeed has increased the annuities it pays to the Plaintiffs in circumstances where it is unknown whether Canada or Ontario will

[58] *Manitoba Metis Federation*, *supra* at para 79.

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

[60] *Mikisew Cree*, 2018, *supra* at para 24.

ultimately be held to be liable for funding such increases. In other words, Canada does not dispute its role as paymaster for the treaty annuities generally.

78. At paragraph 66, Canada argues that liability for any increased annuity lies exclusively with Ontario because pursuant to s. 109 Ontario has administration and control over the surrendered territory, possesses the beneficial interest in the territory, and has collected and retained the benefit of any resource revenues generated from the surrendered territory. Similarly, at paragraph 79 of the Crossclaim, Canada asserts that Ontario is required to "fund" any increase in the annuity payable because of resource revenues. At paragraph 81, Canada sets out an alternative plea that it if Canada is liable to pay the increased annuities under s. 111 of the Constitution Act, 1867 that amount is fully recoverable form Ontario under s. 112. It also pleads in the further alternative that Ontario is liable because of a finding by the arbitrators appointed under s. 142 or the common law. At paragraph 83 Canada concludes:

> Canada therefore states that there is no constitutional or other basis in law or equity that would allow this Court to hold the federal Crown responsible to fund the liabilities alleged by the Plaintiffs. (Emphasis added)

79. At no point does Canada plead that it does not or will not continue to be responsible for administering the annuities, including making the payment of increased annuities to the Plaintiffs. Canada accepts its role as paymaster. The only matter at issue, in Canada's view, is the ultimate funding of those annuities.

80. Ontario's Statement of Defence asserts that the payment of increased annuities is a s. 111 pre-confederation liability that Canada is wholly responsible to the Plaintiffs for. Ontario argues that it is not required to repay Canada under s. 112 of the Constitution Act, 1867.

81. The Defendants both seem to agree that if this Court finds that the amount required for increased annuities constitutes a pre-confederation debt of the Province of Canada, only Canada will liable to the Plaintiffs. This again is consistent with Canada's role as paymaster. Canada and Ontario disagree, however, on whether Canada would then have a right to collect some or all of the amount from Ontario. The Plaintiffs have no interest in the resolution of that dispute.

82. If Canada persuades the Court that obligation to pay increased annuities is not a pre-Confederation liability, then the Court will have to determine which of the two Crowns is responsible for funding the annuity increases. But it appears that even in that case, Canada accepts it will be required to administer and therefore pay the increased annuities to the Plaintiffs. Again, where the funding will ultimately come from for those payments is a question the Plaintiffs have no interest in.

83. Another relevant circumstance is the scope and complexity of this litigation, which involves multiple Plaintiffs and Defendants. Quantifying the appropriate compensation to be paid to the Plaintiffs for the failure to pay the increased annuities will involve an examination of the net Crown revenues and the determination of what is fair share to be paid to the Anishinaabek. However, it does not require a determination regarding the respective liability of the Crowns. The Defendants have indicated that the question of who is liable for payment of the increased annuities will require each of them to call expert evidence. They have raised numerous complex legal issues that will need to be resolved, including the effect of the Privy Council decision and the various arbitration awards, whether any of the issues between the two Crowns are res judicata or barred by issue estoppel, and whether the Canada has released Ontario from any obligation it may have had. The Plaintiffs have no interest in the resolution of these questions, as they are all internal to the respective Crowns.

84. In these circumstances, the Plaintiffs submit that the honour of the Crown requires that once the Court reaches a determination about the quantum owing to the Plaintiffs, Canada assumes responsibility for ensuring that amount is paid to the Plaintiffs, while Canada and Ontario continue to litigate respective Crown liability if necessary.

85. If the increased annuity payments are ultimately found to be a s. 111 pre-confederation debt, this is what the law will require in any event. If the court finds that the liability is not a pre-confederation debt, and that some or all of the ultimate liability lies with Ontario, Canada will not be prejudiced because it will be able to recover from Ontario. The Plaintiffs have already waited a century and half for their increased annuities. They should not be further prejudiced by additional delay and expense occasioned by a dispute that is wholly internal to the Crown.

86. As Binnie J. held in *Mikisew Cree*, 2005:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal peoples' concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.[61]

87. The 160 years in which the Treaty promises were "completely forgotten" has cast a very long shadow over the relationships which need be nurtured under the Treaty. And the last time the two Crowns litigated respective liability under this Treaty it took two and half decades to resolve. While it is understandable that both Crowns would again seek to vigorously resist a finding that they are liable for increased annuity payments, the honour of the Crown requires that process not further delay reconciliation between the Crown and Anishinaabe parties to the Treaty. In a case of this complexity and scope, there is not a bright line between litigation and Treaty implementation. Once Canada knows what is owing to the Plaintiffs, it is required to ensure the treaty is implemented by making the Plaintiffs whole. The burden of any delay in finalizing the resolution between the Crowns should not be borne by their treaty partner.

D. Issue #4: These Issues are Appropriate for Summary Determination

88. The order sought will lessen the litigation burden in the Plaintiffs and promote timely and efficient access to justice to address their important constitutional claims. The Court is not being asked to make any finding of fact or law that may be relevant to the matters that will remain outstanding between the parties. As a result, there is no possibility of inconsistent judgments or prejudice to the Defendants as they continue to litigate the questions of the appropriate remedy and their respective liability. The hearing of the

[61] *Mikisew Cree*, 2005, *supra* at para 1.

application will not delay the final resolution of the case, and it consistent with the fair and efficient conduct of the litigation as a whole.[62]

[62] *Hryniak v. Mauldin*, 2014 SCC 7; *Baywood Homes Partnership v. Haditaghi,* 2014 ONCA 450; *Butera v. Chown, Cairns LLP*, 2017 ONCA 783.

PART III – CONCLUSION & ORDER SOUGHT

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

All of which is respectfully submitted,

August 16, 2019

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Plaintiffs		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE

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FACTUM OF THE PLAINTIFFS
Stage Two: Crown Immunity, Statutory Limitations and Crown Liability
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