Appeal Court File No. C66455
Sudbury Superior Court File Nos. C-3512-14 & C-3512-14A
Thunder Bay Superior Court File No. 2001 – 0673

COURT OF APPEAL FOR ONTARIO

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
(Respondents)

- and -

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

Defendants
(Respondent & Appellants)

- 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
(Respondent & Appellants)

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PART I – THE APPELLANT, THE COURT APPEALED FROM AND THE RESULT BELOW

1. Her Majesty the Queen in right of Ontario ("Ontario") appeals from partial judgments granted by the Superior Court of Justice dated June 17, 2019.

2. The Red Rock and Whitesand First Nations (the "Superior plaintiffs") are parties to the Robinson Superior Treaty of 1850. The plaintiffs in *Restoule, et al v. Canada & Ontario* (the "Huron plaintiffs") represent Indigenous beneficiaries of the Robinson Huron Treaty.

3. Both actions seek increased Treaty annuities linked to net Crown revenues from the Treaty territories, from 1851 and into the future. The plaintiffs assert that the Crown's obligation to pay annuities was never limited to the £1 per-person referred to in the Treaty texts, equivalent to $4, the amount paid since 1875. In the alternative they plead that their $4 annuities should be indexed to mitigate the effects of inflation.

4. The judgments below result from a 'summary trial' of motions for partial summary judgment brought by the plaintiffs on Treaty interpretation issues.[1] The trial was conducted by Justice Patricia Hennessy of the Superior Court, who released reasons for decision on December 21, 2018 (the "Reasons").[2] The form and content of the judgments below were ultimately settled by the trial judge on June 17, 2019 following extensive submissions in case management.[3]

5. Partial judgment was granted in favour of the plaintiffs in the form of declaratory relief. The plaintiffs' alternative claim for indexing the monetary amounts stated in the Treaties, which had been supported by Ontario, was dismissed.

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[1] The notices of motion brought by the plaintiffs in the two actions were substantively identical.
[2] *Restoule v Canada (Attorney General),* 2018 ONSC 7701
[3] The partial judgments are substantively identical but for the costs fixed in the plaintiffs' favour.

PART II – OVERVIEW

6. The lands subject to the Robinson Treaties exceed 100,000 square kilometres. They include the watersheds within Canada of Lakes Huron and Superior, from Penetanguishene on Georgian Bay to the international border beyond the west end of Lake Superior.

7. In 1850 those lands were almost entirely undeveloped. They constituted the far north-west of the United Province of Canada, an area understood by Crown actors to have very limited potential for agriculture or other intensive forms of settlement. They were recognized to have mining potential, however, triggering events that led to the Treaties.

8. Both Treaties provide for a cession of lands to the Queen and for First Nation reserves. They were also the first Treaties in what is now Canada to expressly provide for continuing rights to hunt and fish on ceded lands not taken up for other purposes. This provision was consistent with the Crown's expectation that there would not be substantial, permanent non-Indigenous settlement of these lands, unlike lands that had been the subject of earlier Treaties in what is now southern Ontario.

9. Each of the Robinson Treaties provide for financial compensation in the form of an immediate payment (£2,000/$8,000), plus a base-line "perpetual annuity" in the amount of £500 ($2,000) under the Superior Treaty; £600 ($2,400) under the Huron Treaty. Both Treaties also contain a unique "augmentation clause", which is the principal focus of this litigation:

> 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, <u>provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order</u>;[4]

[4] Robinson Superior Treaty and Robinson Huron Treaty in Alexander Morris, *Treaties of Canada*, Ex19, pp 303, 306

10. The parties agree and the trial judge accepted that this clause requires the Crown to increase the Treaty annuities should the Crown receive sufficient net revenues from the Treaty territories to permit an increase without the Crown incurring loss. The key issues relate to the nature of and limits on that obligation, as expressed by the language underlined above.

11. Much argument at trial focused on the nature of the $4 "cap", and whether "such further sum as her Majesty may be graciously pleased to order" contemplates the potential exercise of discretion by the Crown, as opposed to an obligation to order increases, and if so the nature of such discretion. Ontario, Canada and the Huron plaintiffs argued that the parties intended a non-discretionary obligation on the Crown to increase annuities up to $4 per-person (to an aggregate of $4 multiplied by the populations of the Treaty First Nations), contingent on the receipt of sufficient net Crown revenues from the Treaty territories, plus a Crown discretion to pay more. They differed on the nature of that discretion.

12. Ontario accepts that the Crown has a responsibility to exercise this discretion from time to time to determine if it is appropriate to increase the upper limit of the annuity. In doing so the process the Crown follows must uphold the honour of the Crown, and the process can be challenged should it fail to do so. The substantive exercise of this discretion may be guided by a broad range of potential policy considerations, however. Accordingly, a high level of judicial deference is appropriate, consistent with the expectations of the Treaty parties.

13. The trial judge instead accepted the novel theory proposed on behalf of the Superior plaintiffs, that the $4 per-person limit relates exclusively to what portion of the annuities the Crown may distribute to individuals (subject to a Crown discretion to distribute more), and has no relationship to the Crown's aggregate annuity obligations. On this theory the annuities are owed to First Nation collectives, and are not subject to any stipulated limit. In the absence of any evidence of discussions or agreement amongst the Treaty parties about such additional

amounts, the trial judge found that annuities must correspond to a "fair share" of net Crown resource-based revenues – without defining a "fair share".

14. In the Reasons this result was reached in the context of a finding that a purpose of the Robinson Treaties was to reflect in the annuities the value of the Treaty territories,[5] without explaining what this meant. In settling the judgments below the trial judge added that the Crown must "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".[6] This declaration was made in the absence of evidence indicating that the value of resources was discussed or even raised during the Treaty negotiations, and without defining "the value of the resources" or explaining why or how this differs from the net Crown revenue analysis.

15. All parties accept that the annuities paid under the Robinson Treaties should no longer be limited to $4 per-person. The critical challenge is to adopt an interpretation of the Robinson Treaties that advances reconciliation, which is the overarching goal of s.35 of the *Constitution Act, 1982,*[7] without exceeding the proper role of the courts. This includes the requirement that an interpretation should remain true to the common intentions of the Treaty parties when the Treaties were made.

16. The judgments below exceed the proper role of the courts in two ways. First, they ignore the common intentions of the Treaty parties as disclosed by the evidence. The trial judge unreasonably discounted or completely ignored the bulk of the historical evidence regarding how the Treaty parties actually understood the Crown's annuity obligations, relying instead on select,

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[5] Reasons, para 3
[6] Judgments Below, AB-2a and 2b, para 1(d)
[7] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; see *Mikisew Cree First Nation v Canada*, 2005 SCC 69 [*Mikisew* 2005]

equivocal evidence to reach a result that in effect amends these Treaties.

17. The historical record shows clearly that Crown representatives understood that the Crown was obliged to augment the Treaty annuities to a maximum of $4 per person if net revenues from the Treaty territories were sufficient, subject to a discretion – not an obligation – to pay more. Historical records and the weight of ethnohistorical opinion evidence indicate that many Indigenous leaders understood this as well.

18. Second, the judgments mandate judicial control over annuities owing by requiring payment of a "fair share" that the courts will have to define based on policy or moral considerations, and presumably revisit as circumstances change - when no such thing was agreed to. Crown discretion intended by the Treaty parties has been replaced by judicial discretion.

19. The trial judge also erred: (i) in reaching an interpretation of the Treaties that is internally inconsistent and so ambiguous and complex as to provide a recipe for ongoing controversy rather than reconciliation;[8] (ii) in ruling that the Crown is subject to a fiduciary duty superimposed on its Treaty annuity obligations, where the tests for fiduciary duty are not met and where recognizing such duties is unnecessary; and (iii) in rejecting the plaintiffs' indexing claim.

20. Ontario submits that the principal reason the $4 per-person annuities paid under the Robinson Treaties since 1875 are no longer appropriate is that the purchasing power of fixed monetary amounts has been hugely devalued by persistent inflation – an economic phenomenon that did not exist and was not contemplated by the Treaty parties in 1850.

21. The appropriate and honourable response, Ontario submits, is for the courts to recognize an implied Treaty term to index the $4 per-person to restore its purchasing power to what the Treaty parties intended. Recognition of such a term would advance reconciliation in a manner that respects the intentions and understandings of the Treaty parties.

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[8] Illustrated by the significant difficulty the parties and the trial judge had settling the judgments below.

PART III – SUMMARY OF FACTS

22. The evidence at trial included thousands of historical documents (entered on consent as evidence for the truth of their contents) and testimony from eleven expert witnesses relating to the historical, social and cultural contexts of the Robinson Treaties, including the Treaty negotiations and the conduct of the parties before and after the making of the Treaties. The plaintiffs also led evidence from several Elders.[9] None of the witnesses provided oral history evidence of relevant historical events,[10] though two Elders testified with respect to how provisions of the Treaty text might have been translated based on their knowledge of Anishinaabemowin, English and Anishinaabe culture and perspectives.[11]

23. 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, as discussed in Part IV.

24. We set out below a few facts not already covered in the Overview, including some discussion of post-Treaty evidence shedding light on how the Treaty parties understood the annuities promise – evidence barely touched on in the Reasons. A more comprehensive summary of relevant facts is contained in Ontario's closing submissions,[12] and the Court may

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[9] Reasons, paras 8-11
[10] Submissions of David Nahwegahbow, TRN-Vol 69:10136-10140:19-3
[11] Reasons at para 445; Elder Rita Corbiere, TRN-Vol 16:2264-2265, 2283-2309; Elder Rita Corbiere, Original Treaty Text and Anishinaabemowin Translation, Ex25; Elder Fred Kelly, TRN-Vol 22:3000-3033, 3045-3049; Elder Fred Kelly, Treaty Text, Anishinaabemowin Translation, Ex31
[12] Closing Submissions of Ontario, ExMM; Examples of Historical Records Confirming Euro-Canadian Understanding of a $4 Cap, ExNN

also be assisted by the chronology agreed to by the parties at the request of the trial judge.[13]

25. By 1850, many Treaties had been negotiated between the Crown and First Nations providing for the cession of lands to the Crown in what is now Ontario, facilitating rapidly expanding settlement by non-Indigenous actors.[14] Beginning in 1818 a pattern developed in which the compensation involved annual payments, based on roughly £2.10 (equivalent to $10) per-person, multiplied by the First Nation Treaty party's population at the time the Treaty was made.[15] Annuities under these Treaties did not increase if a Treaty First Nation's population increased, but were generally subject to *pro rata* reduction should the population fall below a stated fraction of its Treaty-time population.[16]

26. With the exception of Treaties calling for the cession of lands that had previously been set aside as reserves, none of the historical Treaties dealing with large areas provided for compensation based on land values or an accounting of proceeds from the lands ceded (referred to in the Reasons as a 'proceeds model'), though the Crown hoped that proceeds from the lands would be sufficient to cover annuities.[17]

27. By the mid-19th century many Anishinaabe leaders of the First Nations which would become parties to the Robinson Treaties had considerable knowledge of events occurring around them, including south of the American border, and were aware of the annuities paid under American Treaties and Treaties over lands in what is now southern Ontario. They had been in contact with fur traders, explorers and European military officers for more than two centuries,

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[13] Joint Chronology, Ex87, although the trial judge does not appear refer to it.
[14] Reasons, paras 100-105
[15] Reasons, paras 101-102
[16] Reasons, para 591
[17] Reasons, paras 103, 105, 167

and many of their warriors had fought alongside French, American and British soldiers.[18] Anishinaabe leaders were also aware that non-Indigenous societies, values and laws were different from theirs, and that representatives of the Queen and the Province of Canada did not operate within Anishinaabe cultural norms. [19]

28. Starting in 1845 the Province of Canada issued 'tickets' for mining locations on the shores of Lakes Huron and Superior, without the Crown first negotiating a cession of lands or otherwise securing consent from the Anishinaabe.[20] This triggered vigorous complaints and requests for a Treaty from Anishinaabe leaders, ultimately leading to investigations including the Vidal-Anderson Commission of 1849, and the Robinson Treaties in 1850.[21]

29. The requests for compensation were framed differently at different times by different leaders. They included specific requests for annuities, and more general requests for 'pay' for resources already taken off their lands and those still to be taken, or a 'share' of the benefits from mining resources. As time passed, Anishinaabe leaders increasingly focused on requests for annuities.[22]

30. In November 1849, Chiefs Shingwaukonse, Nebenaigoching[23] and lawyer Allan Macdonell led a party of Anishinaabe to occupy a mine at Mica Bay on eastern Lake Superior.[24] Mining was stopped, troops were dispatched, and these individuals were later arrested and taken

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[18] Reasons, paras 34-35, 68, 94, 109, 110, 125-126, 145, 164-165, 228; Joint Chronology, Ex87, pp 4, 5; Alan Corbiere TRN-Vol 27:3923
[19] James Morrison, TRN-Vol 12:1893-1908; Heidi Bohaker, TRN-Vol 25:3445:4-22
[20] Reasons, paras 113, 186
[21] Reasons, para 118-138, 257, 431; Report of Alexander von Gernet, July 2017, Ex79, p 182 ("von Gernet Second Report")
[22] See Schedule C; Report of Jean-Philippe Chartrand Report, April 25, 2017, Ex65, p. 428, see also Sections 3.3, 6.1.2, 6.2.3 ("Chartrand Report"); von Gernet Report, Ex78, pp 56, 79-80; Alexander von Gernet, TRN-Vol 60:8834-8842, 8794-8799, Vol 61:8884-8889
[23] Of Garden River First Nation and Batchewana First Nation, respectively.
[24] Reasons, paras 183

to Toronto for trial, where it appears they met with W.B. Robinson.[25] The Mica Bay incident was critical to the Crown accelerating steps in early 1850 to negotiate a treaty.[26]

31. The report of the Vidal-Anderson Commission was delivered in late 1849.[27] The trial judge appears to place significant weight on selected aspects of the Report, while disregarding others.[28] The Report covers a number of topics including:

(a) the willingness of the First Nations to enter into a treaty, and the compensation requested by the Anishinaabe leaders (in the form of perpetual annuities);
(b) the value of the lands and the limited anticipated impact of a treaty on traditional Indigenous land uses; and
(c) how Crown officials in the 19th century understood the nature of the "Indian Title".[29]

32. Given the limited information available regarding the potential value of the lands, the Commissioners offered a novel suggestion:

> It will not be easy to ascertain the actual value of this vast but sterile territory, on account of its being so little known, but while making terms in accordance with present information of its resources, provision might be made if necessary, for an increase of payment upon further discovery and development of any new sources of wealth.[30]

33. W.B. Robinson was appointed as a treaty commissioner on January 11, 1850. The Order in Council ("OIC") appointing him provided no clear guidance with respect to the specifics of Robinson's mandate, including what financial consideration he could offer. [31]

34. A subsequent OIC dated April 16, 1850 set out Robinson's mandate and confirmed the

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[25] Reasons, paras 184-5, 187; Report of W.B. Robinson, Sept 24, 1850 ("Robinson Report"), Ex01-1680, p 17
[26] Reasons, para 195
[27] Vidal-Anderson Commission Report, Ex01-0701
[28] Reasons, paras 139 to 186, 195, 253, 258, 271, 467
[29] Reasons, para 157; Vidal-Anderson Commission Report, Ex01-0701, pp 2-6. This historical view of "Indian Title" was adopted by the Judicial Committee of the Privy Council in *St. Catherine's Milling and Lumber Company v R*, [1888] UKPC 70, (1889) LR 14 App Cas 46, at paras 7, 13
[30] Reasons, para 174; Vidal-Anderson Report Ex01-0701, p 5
[31] Reasons, paras 194, 196; Order-in-Council made Jan 11, 1850, Ex24

objective of the Crown to obtain "the extinction of the Indian title" for "the whole territory on the North and Northeastern Coasts of Lakes Huron and Superior." The 'April OIC' also provided direction to Robinson with respect to financial terms he could offer: [32]

(a) He could access up to £7,500 to fund both the negotiations and an initial cash payment to the Indigenous parties upon conclusion of a treaty;
(b) The initial payment should be "as small a sum as possible", and no more than £5,000;
(c) Further compensation should be in the form of a "perpetual annuity";
(d) The amount of the annuity should be no higher than what could be generated through 6% interest on a notional capital sum equal to £25,000 minus the initial payment – implying that annuities would amount to no more than £1,200 ($4,800) if the initial payment was the maximum permitted (i.e. 6% interest on £20,000); and
(e) "a deduction of £2.10s per head should be made" to the annuity if the number of claimants should drop below 600 – i.e. a 'diminution clause'. This implied that annuities should not exceed $10 per-person even if the First Nations' populations dropped substantially.[33]

35. No evidence explains why the April OIC specified £25,000 as a notional capital sum, and there appears to be no correlation between the population of the First Nations that would become Treaty parties, which the government was aware greatly exceeded 600, and either £25,000 or the interest that £20,000-£25,000 could generate at 6%.[34] Robinson's mandate was likely influenced by the Crown's view that the lands had limited potential for extensive settlement and the fact that the Province was in financial crisis. It had received very little for mining tickets within the area, and annuities of $10 per-person would have called for aggregate annuities far higher than those called for by any previous treaty.[35] The stipulated diminution clause was consistent with

[32] Reasons, para 197-198; Order-in-Council dated Apr 16, 1850, Ex01-0767, Ex01A-0767 (transcription); von Gernet Second Report, Ex79, pp 116-117
[33] von Gernet Second Report, Ex79, p 117; von Gernet, TRN-Vol 61:8966-8967:17-10
[34] Reasons, para 200; von Gernet Second Report, Ex79, pp 114-117 (fn 317), 172-176
[35] Reasons, para 199, 202-205, 219, 254; von Gernet Second Report, Ex79, pp 116-117, 172-176

uncontested evidence that Crown actors were concerned to avoid future annuities ever exceeding the $10 per-person provided for by previous treaties.[36]

The Treaty Council: September 3-9, 1850

36. Chief Peau de Chat of the Fort William First Nation acted as a principal spokesman for the Lake Superior First Nations.[37] Chief Shingwaukonse of the Garden River First Nation was a respected and prominent speaker amongst the Lake Huron Chiefs. He was supported throughout by Chief Nebenaigoching of the Batchewana First Nation, but as the negotiations progressed it became clear that he was not supported by the other Chiefs.[38]

37. During the negotiations Robinson and Chief Shingwaukonse used interpreters proficient in Anishinaabemowin and English, and knowledgeable about the First Nations who would become parties to the Treaties.[39] Robinson also spoke some Anishinaabemowin and had experience with Anishinaabe in the fur trade and previous negotiations on behalf of the Crown.[40] As stated by plaintiffs' expert witness James Morrison in his report for the Royal Commission on Aboriginal Peoples ("RCAP" report), and adopted by the trial judge:

> … the interpreters at the 1850 treaty council, both official and unofficial, were a genuine part of the multicultural world of the upper great lakes. All had considerable experience as cultural brokers.[41]

38. Robinson and Crown actors intended to ensure that the Anishinaabe Chiefs and leaders left the Council with a full and faithful understanding of the terms of the Treaties.[42] The trial judge accepted that Robinson would have wanted them to understand the augmentation clause

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[36] von Gernet Second Report, Ex79, p 117; von Gernet, TRN-Vol 61:8966-8967:17-10
[37] With the exception of the Batchewana First Nation, which was closely allied with Chief Shingwaukonse: Reasons at para 234; Chartrand Report, Ex65, section 4.5
[38] Reasons, paras 229, 232, 234
[39] Reasons, paras 440-1; Morrison Report, Ex14, paras 335, 401; Chartrand Report, Ex65, section 5.4.3
[40] Reasons, paras 190, 214
[41] Reasons, para 440; James Morrison RCAP Report, Ex14, exhibit D, p 110
[42] Reasons, paras 235, 448

and would therefore have insisted that the clause be carefully explained.[43] In addition, lawyer Allan Macdonell was present at the Treaty council[44] and would have provided advice to the Robinson Huron Chiefs.[45]

39. Negotiations commenced on September 5th, with Robinson proposing a single treaty. His terms included "reasonable reservations" and the continuation of traditional harvesting practices on the balance of the First Nations' traditional lands, except for areas that had or would in the future be taken up, plus financial compensation in two forms: £4,000 ($16,000) to be paid immediately, plus an annuity of £1,000 ($4,000) for all the First Nation parties. [46] These terms were consistent with Robinson's mandate under the April OIC.

40. Robinson justified his initial offer by distinguishing the circumstances of the treaty he was mandated to negotiate from prior treaties over lands with significant agricultural potential, and from American treaties. He correctly anticipated that the difference between the annuities he was proposing and the annuities payable under the southern treaties – based on $10 per-person at the time of treaty – would become the critical point of contention.[47]

41. Chief Peau de Chat and the other Superior Chiefs told Robinson on September 6th that they were ready to accept his terms.[48] Although there is no evidence in the record speaking directly to when the augmentation clause was introduced, the trial judge inferred that Robinson would have introduced the concept prior to this point in the negotiations.[49]

42. Chiefs Shingwaukonse and Nebenaigoching, however, asked for $10 per-person and a

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[43] Reasons, para 235
[44] Reasons, paras 226, 473
[45] Morrison TRN-Vol 12:1805:18-23; Vol 13:2045-2046; Morrison RCAP Report, Ex14, exhibit D, p 84
[46] Reasons, para 214-217; Robinson's Diary, Sept 5, 1850, Ex01-0855, p 4
[47] Reasons, paras 216-8; Robinson Report, Ex01-1680, p 17
[48] Reasons, para 224; Robinson's Diary, Sept 6, 1850, Ex01-0855, p 5
[49] Reasons, paras 220, 265-80

very large reserve.[50] The judge found that "Chief Shingwaukonse…was aware of the Crown's pattern of offering the equivalent of $10 per capita as an annuity and sought parity for his people."[51] Robinson replied that he could not agree to those terms.[52]

43. The Robinson Superior Treaty was concluded on September 7th after being read and explained in Anishinaabemowin.[53] Robinson emphasized that the Treaty text "was carefully read over & translated" to "Chief Peau de Chat and his Chiefs & principal men", by the interpreters used by Robinson, who "[m]ade them fully comprehend all the provisions of it."[54] The trial judge accepted that "the interpreters covered the 'shall not exceed £1 (equivalent of $4)'".[55]

44. Following the signing of the Superior Treaty,[56] Robinson continued negotiations with the Huron Chiefs. Chief Shingwaukonse maintained his request for $10 annuities, but it became apparent to Robinson that this position was not supported by the other Huron Chiefs. Robinson ultimately announced that he would prepare a treaty similar to the one signed by the Superior Chiefs, and conclude a treaty with those Huron Chiefs who were prepared to sign.[57]

45. Chiefs Shingwaukonse and Nebenaigoching maintained their position until the last minute, but ultimately relented when all others were ready to sign the Treaty text Robinson had prepared. The terms were substantially the same as those of the Superior Treaty,[58] although the initial annuity amount was increased to £600, and particularly large reserves were provided for

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[50] Reasons, paras 226-7; Robinson Report, Ex01-1680, pp 18-9; Robinson's Diary Sept 5, 1850, Ex01-0855, p 5; Morrison RCAP Report, Ex14, exhibit D, pp 129, 184
[51] Reasons, paras 228
[52] Reasons, para 227
[53] Reasons, paras 230-1; Joint Chronology, Ex87, p 32; Robinson Report, Ex01-1680, p18; Robinson's Diary, Sept 7, 1850, Ex01-0855, p. 5
[54] Reasons, paras 230, Robinson's Diary Sept 5, 1850, Ex01-0855, p 5
[55] Reasons, para 442
[56] Robinson Superior Treaty, in Morris, *Treaties of Canada*, Ex19, pp 302-4
[57] Reasons, para 232-3; Robinson's Diary Sept 7, 1850, Ex01-0855
[58] Reasons, para 234; Robinson Report, Ex01-1680 at 18; Robinson's Diary, Sept 9, 1850, Ex01-0855, p 6; Robinson Huron Treaty, in Morris, *Treaties of Canada*, Ex19, pp 305-9

the First Nations led by Chiefs Shingwaukonse and Nebenaigoching.[59] Robinson's diary entry for September 9th indicates that the Huron Treaty text was read and explained twice on September 9th; once at the outset of the council session and again before the document was signed.[60]

46. Robinson's official report on the Treaty negotiations notes that he "concluded the treaty on the basis of a small annuity and the immediate and final settlement of the matter, rather than paying the Indians the full amount of all moneys on hand, and a promise of accounting to them for future sales". He explained that:

> 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.[61]

47. Robinson had compelling personal reasons for avoiding a 'proceeds model' of compensation. His brother-in-law Samuel Peters Jarvis had been dismissed from the Indian Department over allegations he had embezzled funds owed to First Nations from reserve land sales. In that context "the last thing" Robinson would have wished to create was a situation under which the government would be obliged to indefinitely track and account for every dollar generated by the Treaty territories.[62] Robinson also reported that he "had no difficulty in making [the Anishinaabe negotiators] comprehend" the augmentation clause he had "inserted".[63]

Post-Treaty Events

48. The trial judge's treatment of post-Treaty events was limited almost exclusively to a

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[59] Schedule of reserves in the Robinson Huron Treaty, in Morris, *Treaties of Canada*, Ex19, pp 19, 306-8
[60] Reasons, para 234; Robinson's Diary Sept 9, 1850, Ex01-0855, p 6
[61] Reasons, para 251; Robinson Report, Ex01-1680, p 18
[62] Affidavit of James Morrison, March 30, 2017, Ex14 at para 368 ("Morrison Report"); Morrison TRN-Vol 13:1938-39; 2032:3-13;2030:19-24; 2034:4-24
[63] Robinson Report, Ex01-1680 p 19

consideration of whether post-Treaty letters, petitions and memorials from Anishinaabe leaders had value in the interpretive exercise. She found they did not,[64] and therefore did not undertake any meaningful analysis of the many documents from the latter half of the 19th century that evidence how the Anishinaabe understood the annuity promise. Moreover, other than three short paragraphs referring briefly to how annuities were paid under the Robinson Treaties, the augmentation to $4 in 1875, and a dispute over arrears in the latter half of the 19th century, [65] the trial judge also did not discuss any of the extensive Crown correspondence, arbitrations and litigation that took place during the post-Treaty period in relation to annuities under the Robinson Treaties. Nor did the judge consider what light that historical record might shed on what the Crown intended or understood the augmentation clause to mean.

49. From the outset, all annuities under the Superior Treaty were paid in cash to individuals,[66] as requested by the Anishinaabe.[67] Between 1851 and 1854 annuities under the Huron Treaty were paid in goods under a requisition system similar to those in place for treaties over lands to the south. Under that system goods for individual First Nations and their members were requisitioned by the Chiefs and approved by the Superintendent General. Starting in 1855, annuities have been distributed to individual Robinson Huron beneficiaries in cash.[68]

50. The initial annuities under the Robinson Treaties worked out to approximately $1.50 per-person when distribution began in 1851.[69] This per capita amount fell over time as populations

[64] Reasons, paras 304, 318
[65] Reasons, paras 290-292
[66] Reasons, para 290
[67] Letter from Robinson to Simpson, Oct 2, 1850, Ex01-0861 (manuscript), Ex 1A-0861 (transcription); Chartrand Report, Ex65, pp. 125, 260, 271, 278
[68] Reasons, para 290; Chartrand Report, Ex65, pp. 281, 287; Report of Gwynneth Jones, 8 February 2016, Ex10, p 126 ("Jones Report")
[69] Reasons, para 289

increased.[70]

51. Between 1871 and 1873, Canada negotiated Treaties 1, 2 and 3 with First Nations to the west of the Robinson Treaties Territories. Although the Robinson Treaties served as a model for the post-Confederation "numbered treaties",[71] the numbered treaties provide for annuities on a per-person basis - $5 per person from 1873 – with no provision for augmentation.[72]

52. By the end of the 1860s, First Nations representatives began to assert that their annuities should be augmented to $4.[73] In April 1873, Simon Dawson wrote to the Secretary of the Governor General, forwarding a petition from the Robinson Treaties First Nations requesting an increase in their annuities to $4 per-person.[74] Dawson had been the senior engineer in charge of the construction of an immigrant travel route from Prince Arthur's Landing to the Red River settlement,[75] and had recently acted as Treaty Commissioner in the Crown's efforts to negotiate Treaty 3, becoming familiar with First Nation leaders in the Treaty 3 area and nearby Fort William.[76] In that letter, Dawson argued that the lands ceded under the Robinson Treaties were sufficiently productive to warrant an increase to "at least $4, if not such further sum" – plainly referring to the language of the Treaty texts.

53. These requests gave rise to a series of communications between Canada and Ontario with respect to who was responsible for payment of augmented annuities and whether net revenues

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[70] See items 7 in Schedule E; Chartrand Report, Ex65, p. 296
[71] Morris, *Treaties of Canada*, Ex01-1173, pp 16
[72] See Morris, *Treaties of Canada*, Ex01-1173, pp 315, 319, 324, 338-9
[73] Reasons, para 294; see for example Schedule E, entries 4-8; Chartrand Report, Ex65, pp. 298, 343-348; see also Canada's description of First Nation requests for augmentation in its factums in the Robinson Annuities case before the Arbitrators at pp 12-13 (Ex01-1340), at the SCC at p 3 (Ex01-1367) and at the JCPC at p 2 (Ex01-1375).
[74] Reasons, para 294; Letter from S.J. Dawson Apr 7, 1873, Schedule D, item 7
[75] Report of Jean-Philippe Chartrand, July 20, 2017, Ex67, p 28 ("Chartrand Second Reply Report")
[76] Morris, *Treaties of Canada*, Ex01-1173, p 45

from the territories were sufficient to require an increase.[77] These communications refer to $4 per-person as: the "full amount of annuity stipulated for in their Treaties"; "the full augmentation"; "the maximum amount of annuity stipulated"; and "the maximum figure".[78]

54. Canada began paying augmented annuities in 1875 to "the maximum amount of annuity thereby stipulated, namely $4.00 per head…".[79] This was done without prejudice to the dispute between Canada and Ontario with respect to which government was responsible for the augmented annuities.[80] Canada has continued to make $4 payments to the members of the First Nation parties to both Treaties since 1875.[81]

55. In the late 1870s Robinson Treaty First Nations began petitioning the federal government claiming that they were entitled to augmentation of their annuities for years prior to 1875.[82] Those increasingly heated petitions asked for payment of arrears in the amount of $4 per-person, per year.[83] None refer to greater amounts or possible communal entitlements. Arrears were ultimately paid starting in 1903, on the basis that annuities could never be required in excess of $4 per-person multiplied by the number of Treaty First Nation members.[84]

56. Litigation amongst Canada, Ontario and Quebec ultimately resolved who was liable to pay both past and future annuities under the augmented annuities clause of the Robinson Treaties.[85] The litigation was initially brought against Ontario by Canada, acting on its own

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[77] Chartrand Report, Ex65, pp. 293-298
[78] See for example Schedule D, items 8, 11, 12; Chartrand Report, Ex65, p 422
[79] Joint Chronology, Ex87, p. 41; Order in Council (Canada), Jul 22, 1875, Ex01-1134
[80] Joint Chronology, Ex87, p. 41; Chartrand Report, Ex65 at 297; Report by Oliver Mowat, Oct 14, 1874, Ex01-1116
[81] Reasons, para 291
[82] Reasons, paras 292, 294
[83] Reasons, para 294; Morrison RCAP Report, Ex14, exhibit D, p. 175; Morrison TRN-Vol 13: p 2067-2071
[84] Reasons, para 292; Jones Report, Ex10, pp 211, 223, 225, 231, 233.
[85] Jones Report, Ex10, pp 186-211; Chartrand Report, Ex65, pp. 312-313; Schedule D, items 22-31

behalf and on behalf of the Indigenous parties to the Robinson Treaties. This claim (the "Robinson Treaties Annuities Case") was brought on the basis that the Crown's obligation to pay annuities under the Robinson Treaties could be no higher than $4 per-person.[86] The Judicial Committee of the Privy Council determined in 1896 that Canada, rather than Ontario, was responsible for paying the augmented annuities, basing its decision primarily on s. 111 of the *Constitution Act, 1867*.[87] The Crown's obligation to pay augmented annuities was held to be a liability of the Province of Canada, contingent on the Crown's receipt of sufficient net revenues from the Treaty territories, and not a charge on the ceded lands or the revenues.[88]

57. The Crown's obligation to pay increased annuities under the Robinson Treaties was subsequently quantified and taken into account in complex proceedings involving Canada, Ontario and Quebec regarding provincial liabilities in relation to the debt of the Province of Canada under s. 112 of the *Constitution Act, 1867*.[89]

58. These proceedings included submissions with respect to the proper interpretation of the augmentation clause, including whether the Crown's obligation was limited to $4 multiplied by the population of the Treaty First Nations in 1850, and subsequently with respect to how many individuals qualified for the purpose of calculating the Crown's maximum obligation.[90] A short chronology regarding these proceedings is presented at **Appendix A**. At all times they were conducted on the basis that the obligation to pay augmented annuities could never exceed $4 per-person.[91]

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[86] *Canada v Ontario*, [1897] AC 199, CR [11] AC 308, 1896 CarswellNat 44 (JCPC) [*Robinson Annuities – JCPC*]; Schedule D, items 22-30; Jones Report, Ex10 p. 186-211
[87] (UK), 30 & 31 Victoria, c 3 [*Constitution Act, 1867*]; *Robinson Annuities – JCPC* at paras 7, 14, 16
[88] *Robinson Annuities – JCPC* at paras 5, 7, 12, 18; Jones Report, Ex10, pp. 210-211
[89] Jones Report, Ex10, p 211-239; Schedule D, items 22-31
[90] See for example Schedule D, items 23-5; Jones Report, Ex10, ss XI, XII; see for example EB Borron to O Mowat, 26 May 1891, Ex01-1291; Report of EB Borron, 31 December 1891, Ex01-1306
[91] See for example, Schedule D, items 22-31

59. No records in evidence indicate that any government official ever suggested that the Crown might be under a legal obligation to pay more than $4 per-person, or would ever be required to pay a collective annuity in addition to the $4 per-person paid since 1875. Numerous documents authored by Crown actors confirm their understanding that $4 was the maximum annuity the Crown was liable to pay under the Treaties.[92] A few historical documents speak to the possibility of the Crown exercising discretion to increase annuities above the $4 cap.[93] None suggest that the Crown understood the possibility of an increase above $4 as a matter of legal obligation.[94] Post-Treaty documents evidencing how the Crown understood the annuity promise are listed in **Schedule D**.

60. The evidence at trial included many post-Treaty historical documents expressing or otherwise reflecting how Anishinaabe leaders and Elders understood the Crown's obligation to pay annuities in excess of the initial £500/600. Those documents were identified and analyzed in the expert reports and testimony of ethnohistorian Jean-Philippe Chartrand.[95] They include numerous petitions before 1875 for increased annuities (requesting $4 per-person), many petitions in the three decades thereafter seeking arrears for years prior to 1875 (to $4 per-person), correspondence from Indian Agents reporting on conversations with Indigenous leaders, and an affidavit sworn by an Elder of the Batchewana First Nation who had been present during the negotiations in 1850 that describes how Robinson explained the augmentation clause. Post-Treaty documents evidencing Anishinaabe understandings of the annuity promise are listed in **Schedule E**.

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[92] See for example, documents listed in Schedule D
[93] Schedule D, items 20, 21
[94] Schedule D, items 12, 16, 21. See also: Chartrand Report, Ex65, pp 302-5, 357-358
[95] Chartrand Report, Ex65, pp 333-376; Report of Jean-Philippe Chartrand, May 19, 2017, Ex66, pp 17, 23, 60, 64 ("Chartrand Reply Report"); Chartrand Second Reply Report, Ex67, s 4.4

61. The majority of these documents are consistent with the Crown's understanding that its obligation to increase annuities was capped at $4 per-person, subject to the possibility that the Crown might choose to pay more.[96] A few documents, starting in the 1880s, express an erroneous understanding that the Crown had promised to increase annuities up to $10 per-person.[97] The record is clear that Robinson did not make such a promise and the trial judge made no finding that he did. Even these documents reflect an Indigenous understanding that the annuities promised are subject to a stipulated cap.

62. There does not appear to be any inconsistency on the issue of whether the annuity was subject to a cap. No document from the post-Treaty period suggests that the Indigenous Treaty parties expected to be paid an uncapped collective annuity in addition to the individual annuity they were already receiving, much less an uncapped "fair share" of net revenues. Indigenous leaders expressed their entitlement to annuities in terms of amounts per-person.

The Advent and Impact of Persistent Inflation

63. The parties in this litigation agreed to the following facts with respect to the advent and impact of persistent inflation:

(a) Prices rose and fell in what is now Canada in the 19th century, but persistent and sustained inflation was not an existing or recognized economic phenomenon in 1850 or for decades thereafter;

(b) Persistent and sustained inflation arose as an economic phenomenon decades after 1850 and has subsequently reduced the purchasing power of one pound in the currency of the Province of Upper Canada (which was converted to a dollar equivalent of $4 in 1851) to less than 10 per cent of what was the case in 1850;[98] and

(c) It is reasonable to believe that persistent and sustained inflation will continue to

[96] See Schedule E
[97] See entries 14-16 in Schedule E
[98] While not the subject of evidence before the Courts, Ontario has pleaded that inflation has reduced the purchasing power of $4 to less than 5% of what was the case in 1850.

devalue the purchasing power of the dollar in the future.[99]

PART IV – ISSUES & ARGUMENT

Issues on this Appeal

64. A principal question on this appeal is whether the trial judge erred in declaring that the Crown is under an obligation to increase the annuities paid under the Robinson Treaties, without limit, to an amount that corresponds to a "fair share" of net Crown resource-based revenues from the Treaty territories (without defining "fair share"). Ontario submits that this question raises the following Treaty interpretation and implementation issues:

- Did the trial judge err in finding that there is no monetary limit on the Crown's aggregate annuity obligations?
- Did the trial judge err in interpreting the Robinson Treaties in a manner that does not recognize Crown discretion with respect to whether annuities will be increased beyond $4 per-person, or with respect to the amount of any additional annuities?
- Did the trial judge err in interpreting the Robinson Treaties to require payment of annuities corresponding to a "fair share", without defining "fair share", and where the parties did not discuss this concept during the Treaty negotiations much less reach agreement on what it means?
- Did the trial judge err in declaring that the Crown's obligation to increase annuities (to an amount corresponding to a "fair share" of net Crown resource-based revenues from the Treaty territories) must be implemented "so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the value of the resources …"?

65. This appeal also raises the following questions:

- Is the Crown under a fiduciary duty to perform its Treaty annuity obligations? More particularly, did the trial judge err in finding that the Crown is subject to a fiduciary duty to act exclusively in the interests of First Nation Treaty parties in conducting a forensic exercise to determine net Crown resource-based revenues from the Treaty

[99] Agreed Statement of Facts Regarding Inflation, Ex52

territories, and with respect to payment of annuities?

- Did the trial judge err in declaring that "[f]or the purposes of determining the amount of net Crown resource-based revenues in a particular period: … relevant expenses … do not include the costs of infrastructure and institutions that are built with Crown tax revenues"?
- Did the trial judge err in rejecting Ontario's position with respect to the interpretation of the augmentation clause, including its submission that the Robinson Treaties include an implied term which requires the annuity figures stated in the Treaty texts to be 'indexed' to mitigate the extensive erosion of purchasing power that has resulted from persistent inflation.

66. We begin by briefly discussing the applicable standards of review and relevant principles of Treaty interpretation.

A. Applicable Standards of Review

67. The applicable standard of review for findings on questions of law is that of correctness.[100] This includes legal findings based on findings of fact.[101] The interpretation of treaties is ultimately a legal issue, reviewable on a standard of correctness, even when informed by findings of fact that will be reviewable on the deferential standard properly applicable to factual determinations.[102] While findings of fact are accorded deferential treatment, the determination of Treaty or Aboriginal rights on the basis of those facts mandates no deference from an appellate court.[103] Further, when a trial judge's findings of fact are intermingled with

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[100] *Housen v Nikolaisen*, 2002 SCC 33 at para 8 (majority) and para 105 (minority) [*Housen*]. The SCC has recently confirmed that *Housen* continues to apply, *Salomon v Matte-Thompson*, 2019 SCC 14 at para 31. In this case, the SCC held that the decision of the Court of Appeal that concluded that the judge had made palpable and overriding errors as a result of viewing the evidence in a "narrow, siloed approach" at para 41.

[101] *R. v Marshall* (1999), [1999] 3 SCR 456 at para 18 [*Marshall No. 1*]; *R v Van der Peet* (1996), [1996] 2 SCR 507 at para 82 [*Van der Peet*]; *R v Caron*, 2015 SCC 56 at para 61 [*Caron*]

[102] *Caron* at para 61; *Marshall No. 1* at paras 18-21,39-40; *Van der Peet* at para 82

[103] *Caron* at para 61

principles of Treaty interpretation, they may be entitled to less deference.[104]

68. For findings on questions of mixed fact and law, the standard is correctness for legal determinations that "can be readily 'extricated' from the factual context", but palpable and overriding error where they cannot be extricated from determinations of fact.[105]

69. The palpable and overriding error standard of review is also applicable to findings of fact.[106] Although this standard is high, appellate courts have reversed findings of fact in Aboriginal law cases on a number of occasions.[107]

70. Where evidentiary difficulties resulted in the Supreme Court reversing findings of fact made by the trial judge in *Mitchell v. Minister of National Revenue,* the Court stated: "[s]parse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim", and overturned the findings of the trial judge because of "the application of a very relaxed standard of proof" and "an unreasonably generous weighing of tenuous evidence".[108]

71. An appellate court may also interfere with a finding of fact if the court below has disregarded or misapprehended relevant evidence. Where the record discloses a lack of appreciation of relevant evidence and disregard of such evidence, it falls upon the reviewing court to intercede.[109] An appellate court may reconsider trial evidence when there is a reasoned belief that the trial judge must have ignored or misconceived the evidence in a way that affected

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[104] *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158 at para 158 [*Keewatin*], aff'd *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*]
[105] *Housen* at para 36; *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60 at para 23 (Binnie J, for the majority)
[106] *Housen* at paras 36, 49; *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 4, 53-57, 70, 110
[107] *E.g*: *Mitchell v MNR*, 2001 SCC 33 [*Mitchell*], discussed below; *Lovelace v. Ontario*, 2000 SCC 37 at paras 40; *Delgamuukw v British Columbia* (1997), 153 DLR (4th) 193 (SCC) at paras 80 and 108, see also paras 53-54 discussing Lambert JA's approach in the BCCA [*Delgamuukw*]; *Keewatin* at para 162.
[108] *Mitchell* at paras 29-54 (quotes taken from para 51)
[109] *D'Costa v Mortakis*, 2000 CanLII 5676 at para 37 (CA), citing *R v Harper* [1982] 1 SCR 2 at 21.

the judge's conclusions.[110] While trial judges need not grapple with every piece of evidence in their reasons, they must give reasons for rejecting cogent, uncontradicted evidence.[111]

B. Principles Governing Treaty Interpretation

72. The Supreme Court of Canada has articulated the principles that courts should apply when interpreting Treaties between the Crown and First Nations. Those principles are summarized below and are well established.

73. Canadian law governs Treaty interpretation cases, including s. 35 of the *Constitution Act, 1982* and the related jurisprudence developed by Canadian courts.[112] Indigenous legal principles have not been applied to interpret Treaty rights, although they have been referred to in assessing historical facts relevant to the proof of s.35 rights.[113]

74. The overarching 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 [Indigenous and Crown] at the time the treaty was signed."[114]

75. A court engaged in Treaty interpretation must start by examining the words used in any written memorandum of the Treaty's terms. It must then examine extrinsic evidence of the historical and cultural context of the Treaty. More specifically, this requires that treaty documents be interpreted in light of:

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[110] *Toneguzzo-Norvell (Guardian ad litem of) v Burnaby Hospital*, [1994] 1 SCR 114 at 121; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 71

[111] *British Columbia v Canadian Forest Products Ltd.*, 2018 BCCA 124 at para 168; *Koropeski v. American Biaxis Inc.*, 2008 MBCA 130 at para 100; Donald J M Brown, *Civil Appeals*, Carswell: 2019, 13:2220

[112] *Van der Peet* at para 49; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 67 [*Manitoba Métis*]

[113] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 35 and 50 citing *Delgamuukw* at para 148

[114] *Marshall No 1* at para 14, Binnie J; at paras 78, 83, McLachlin J, as she then was, dissenting but not on this point; *R v Sioui* [1990] 1 SCR 1025, [1990] SCJ No 48 at para 114 [*Sioui*]; *R v Morris*, 2006 SCC 59 at para 18, Binnie J; at para 107, McLachlin CJ dissenting [*Morris*]

(a) The immediate historical record, including relevant Indigenous oral tradition and oral history evidence;
(b) The stated objectives of the Indigenous parties and the Crown; and
(c) The political and economic context in which those objectives were reconciled.[115]

76. Further, "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". This principle accepts the relevance of the post-Treaty conduct of the Treaty parties, including the potential significance of an absence of complaints.[116]

77. "…[W]ords in the Treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing."[117] This also applies where a technical construction is advanced by an Indigenous litigant.[118]

78. It has generally been accepted that "ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of [First Nations] under treaties must be narrowly construed."[119] As it applies to Treaties, however, this interpretive maxim is subject to the overarching goal of choosing "from among the various possible interpretations of common intention the one which best reconciles the interests of both parties [Indigenous and Crown] at the time the treaty was signed."[120]

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[115] *Marshall No 1* at paras 5, 11-14, 41, Binnie J.; at paras 82-83, McLachlin J, as she then was, dissenting; *R v Badger* [1996] 1 SCR 771 at para 52 [*Badger*]
[116] *Marshall No 1* at para 11 quoting from *R v Taylor and Williams* (1981), 34 OR (2d) 360 (ONCA) at 236; *Keewatin* at paras 167-74
[117] *Badger* at para 52
[118] *Blueberry River Indian Band v Canada* [1995] 4 SCR 344 at paras 5-8; *St. Mary's Indian Band v Cranbrook* [1997] 2 SCR 657 at paras 15-16
[119] *Badger* at para 41
[120] *Morris* at para 18. See also cases cited at footnote 115

79. When the wording of a Treaty is silent on an issue the Supreme Court of Canada has deduced the common intention of the parties from historical, political, and cultural contexts.[121] The Supreme Court has also shown willingness to make use of "implied terms to make honourable sense of the treaty arrangement",[122] particularly where the Court concludes that doing so would promote reconciliation. The implication of a Treaty term remains based on common intention, albeit common intention that is not expressed in the Treaty text.

80. As recognized by Chief Justice Lamer in *Sioui,* "[e]ven a generous interpretation of [a Treaty] … must be realistic and reflect the intention of both parties, not just that of the [Indigenous parties].[123] A Treaty is "not an empty vessel to be filled up using interpretive principles with whatever [terms] the parties or the court thinks, with hindsight, would be a good idea, fair, or consistent with the honour of the Crown,"[124] and "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse." [125] The courts have no jurisdiction to amend a Treaty or otherwise deviate from what can plausibly be found to constitute the common intentions of the Treaty parties.

C. The trial judge erred in declaring that the Crown is under an obligation to increase the annuities paid under the Robinson Treaties, without limit, to an amount that corresponds to a "fair share" of net Crown resource-based revenues from the Treaty territories

1. The trial judge erred in failing to recognize a monetary limit on the annuity obligation

81. The trial judge accepted that the following provision of the augmentation clause was explained by the interpreters at the Treaty council, without apparent objection:[126]

> … 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

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[121] *Sioui* at paras 108, 111-120; *Marshall No 1* at paras 24-31, 35, 41-43
[122] *Marshall No 1* at para 14
[123] *Sioui* at para 114
[124] *Inuit of Nunavut v Canada (Attorney General)*, 2014 NUCA 2 at para 72
[125] *Marshall No 1* at para 14
[126] Reasons, para 442

graciously pleased to order; …

82. Ontario's position at trial was (and remains) that the reference here to one pound ($4) established a limit on the Crown's unqualified – albeit contingent – obligation to augment annuities. The Crown must increase annuities to $4 multiplied by the population of the Treaty First Nations if it receives sufficient net Crown resource revenues from the Treaty territories, and has discretion to increase annuities further. Canada and the Huron plaintiffs agreed with this position, but argued that the Crown must exercise this discretion so as to increase annuities further if it receives sufficient net revenues to permit such an increase without incurring loss.

83. The Superior plaintiffs argued that the stipulated $4 relates exclusively to what may be distributed to individuals, and that this distributive amount is only a portion of an uncapped collective annuity payable to the First Nations. On this novel theory – which the trial judge accepted – the possibility of Her Majesty ordering "such further sum" relates only to increasing the amounts that may be distributed to individuals. The trial judge went so far as to find that only this "interpretation comes close to reflecting the parties' common intention."[127]

84. The trial judge's acceptance of this theory is an error in law calling for appellate intervention on any standard of review. This theory calls for a strained reading of the Treaty text, is not supported by credible evidence and is contradicted by an extensive body of evidence, including evidence demonstrating how the Treaty parties understood what they had agreed to – much of which is not addressed in the Reasons.

a) Strained Reading of the Treaty Texts

85. The text of the Robinson Huron Treaty contains the following language that is central to this litigation, and very similar to the corresponding text of the Superior Treaty:

… for and in consideration of the sum of two thousand pounds of good and lawful

[127] Reasons, paras 461-462

> 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;
>
> ……..
>
> *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;…*[128] *(augmentation clause in italics)*

86. A plain reading of these provisions, it is submitted, points to the following:

(a) A promise to pay a perpetual annuity not less than £600 under the Huron Treaty (£500 under the Superior Treaty);

(b) A promise to increase the annuity up to a maximum of £1 per-person in a given year, should the ceded lands produce sufficient revenue to enable the government to do so without incurring loss; and

(c) A Crown discretion to order a "further sum" beyond £1 per-person.

87. The language of the Treaty texts does not specify a 'proceeds model' of compensation. Such a model would have been inconsistent with the concept of an "annuity",[129] and novel for a treaty involving the cession of a substantial area that had not previously been set aside as reserve

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[128] Robinson Huron Treaty, Ex19, pp 305-306; for the Robinson Superior Treaty, please see: Morris, *Treaties of Canada*, Ex19, pp 302-4

[129] For example: "An annuity is defined as 'a yearly payment of a certain sum of money granted to another in fee for life, or for years, charging the person of the grantor only.'" (*Ganton v Size,* 22 UCQB 473, 1863 CarswellOnt 107 at para 1); "a yearly payment of a certain sum of money, granted to a person for life, for years, or in fee, chargeable upon the *person* of the grantor; it, therefore, differs from a rent-charge, which is charged upon and *land*." (*Dictionary of Jurisprudence,* 1848, *sub verbo* "annuity", italics in original), "The grant of an annual sum of money, for a term of years, for life, or in perpetuity; which differs from a rentcharge in being primarily chargeable upon the grantor's person, and his heirs if named, not upon specific land." (*A New English Dictionary* [*Oxford English Dictionary,* 1st ed], Vol I 1888, *sub verbo* "annuity"), see also: *The Law Dictionary,* 1810; *A New Law Dictionary,* 1839

land.[130] The Treaty texts also say nothing about revenue sharing; they speak to annuities that may be increased in defined circumstances.

88. The trial judge's interpretation suffers from the further difficulty that the language would expressly require augmentation of annuities if sufficient revenues exist, while saying nothing about the amount by which annuities must increase. Particularly given the limited financial mandate under which Robinson was operating and the province's dire financial circumstances,[131] it is completely implausible that Robinson would have failed to stipulate the amount of possible mandatory increases,[132] or that he would have used this language to require payment of all net revenues or a "fair share".

89. Further, the $4 cap appears immediately after what the trial judge viewed as the language calling for augmentation (ending with "then and in that case the same shall be augmented from time to time"), and immediately prior to the 'diminution clause'.[133] Both of those clauses speak to the magnitude of the Crown's aggregate exposure for annuities. It makes little sense to conclude that a provision having no relationship to the magnitude of the Crown's annuity obligations would have been inserted between those two clauses.

90. Moreover, neither Robinson nor the Anishinaabe negotiators would have seen any need to insert a provision that says nothing about the Crown's aggregate annuity obligations, and serves only to limit what the Crown is permitted to pay individuals. Robinson would have had no reason to insert a clause that limits the Crown's ability to distribute annuities in cash to

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[130] Reasons, para 105
[131] Reasons, paras 199-203, 219, 430
[132] Robinson wanted to avoid uncertainty and future controversy: Morrison TRN-Vol 13:1938-1941:1-15; 2030:19-24; 2032:3-13; 2034:4-24; Morrison Report, Ex14, para 368
[133] "… ; 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."

individuals, unless that clause also limited the Crown's aggregate liabilities. If the clause was intended simply to limit what portion of the annuities the Crown could pay to individuals, it would have made no sense to recognize an apparently unfettered Crown discretion to pay more. The trial judge's explanation, addressed below, is entirely speculative and cannot be reconciled with the evidence.

b) Absence of Credible Evidence Supporting the Finding that the $4 Per-Person "Cap" Relates Only to what can be Distributed to Individuals

91. The only witness who advanced the interpretation of the $4 limit found by the trial judge was Dr. Paul Driben.[134] The three other ethnohistorians who gave evidence on the meaning of the $4 in the Treaty texts indicated that the Treaty parties understood the Crown's augmented annuity obligations to be connected to amounts per individual[135] – as was the case under prior Treaties, and would be the case under the subsequent numbered Treaties. There is also no support for this novel theory in the evidence or the academic literature.[136]

92. Dr. Driben speculated that Robinson must have inserted this clause to limit the amount of cash to be distributed to First Nation members, so as to limit their access to alcohol.[137] During closing argument, plaintiffs' counsel suggested a broader reason: that the Crown was concerned more generally about annuities being spent "improvidently" by First Nation members, rather than for the collective benefit of the Treaty First Nations.[138] There is no evidence in the historical record that such concerns were expressed in relation to the Robinson Treaties or played

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[134] Report of Paul Driben, 22 November 2015, Ex03 ("Driben Report"), esp at pp 179-82; Paul Driben, TRN-Vol 4:418, TRN-Vol 6:704-722, 735-762 and Vols 5 and 7
[135] Morrison Report, Ex14, para 388; von Gernet Second Report, Ex79, pp 146-7; Chartrand Report, Ex65, pp 18, 245, 419, 422, 432 and 466-67
[136] Driben, TRN-Vol 6:789:3-7; Morrison TRN-Vol 12:1888
[137] Driben, TRN-Vol 6:-705; Driben Report, Ex03, pp 167-68, 179-82
[138] Closing Submissions of the Red Rock and Whitesand First Nations, ExJJ, paras 9, 10, 341-9; Harley Schachter, TRN-Vol 71:10469, 10493-10507, TRN-Vol 78:11835:15-24

any role in shaping those Treaties, as conceded by Dr. Driben during his cross-examination with respect to limiting access to alcohol.[139]

93. Moreover, Dr. Driben agreed with other witnesses that the $4 cap was included in the Treaties entirely at the instance of the Crown;[140] no evidence suggested that it originated with the Anishinaabe. He ultimately conceded on cross-examination, however, that he is not qualified to speak to Crown intention.[141] This may explain why the trial judge does not appear to rely on Dr. Driben's evidence on the subject matter of the $4 cap. The trial judge did, however, adopt the theory Dr. Driben's evidence purported to support, finding that:

> Robinson, under some pressure from some Chiefs at the council to ear mark 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.[142]

94. This analysis is speculative and gravely flawed:

(a) There is no evidence that the Colborne Policy[143] was understood to limit Robinson's ability "to make cash payments to individuals". Had that policy been applied, no cash payments of annuities would have been made to individuals. Subject to the minor caveat noted below, however, Robinson Treaty annuities have always been paid in cash, as requested by the Chiefs;

(b) Crown actors in 1850 understood that the Crown had the ability to control the manner in which Treaty annuities were paid, as a matter of policy, without supporting language in

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[139] Driben, TRN-Vol 6:776; see also Morrison, TRN-Vol 12:1885-7:21-16

[140] Driben Report, Ex03, pp 167-168; Driben, TRN-Vol 4:418-419:20-4, Vol 6:716; Morrison Report, Ex14, paras 360, 383, 387-88-64; Chartrand Report, Ex65, pp 185-6, 246, 252-3; von Gernet Second Report, Ex79, pp 145-6

[141] Driben, TRN-Vol 6:789, 791-792 with respect to this concession, and with respect to Dr. Driben not having considered post-Treaty conduct of the Crown in assessing his theory.

[142] Reasons, para 454

[143] The Colborne Policy, instituted in 1830 by Lieutenant Governor Sir John Colborne as part of the broader "civilization" policy, changed the annuity system in place at that time, which called for annual payments in cash, to a system in which annuities were held by the Crown in accounts for Treaty First Nations. Chiefs could then requisition goods and/or services, which would be funded by those accounts. See Reasons, para 106

the Treaty texts - as it was doing for the annuities owing under previous Treaties. This understanding is confirmed by the fact that while annuities under the Superior Treaty were always paid in cash, for a few years in the 1850s annuities under the Huron Treaty were distributed by way of requisition. Accordingly, the Crown had no reason to include a clause that limits distributions to individuals – unless the clause also capped the Crown's aggregate liability;

(c) Even on the interpretation of the trial judge, the $4 limit on what the Crown can pay to individuals could be increased at the discretion of the Crown[144] – implying that the limit would have little or no significance for Crown conduct;

(d) Under the trial judge's interpretation, the Crown is not *required* to pay $4 to individuals; $4 is the *maximum* individual distribution (subject to discretionary increase). This interpretation therefore could not satisfy Anishinaabe desires to ensure that annuities were paid in cash. Accordingly, the Anishnaabe had no reason to include such a clause (even if it had been negotiated rather than "inserted" by Robinson, as Robinson explained);

(e) Apart from opinion evidence from Dr. Driben, that the trial judge does not rely upon and which he conceded he was not qualified to provide, no evidence indicates that this finding corresponds to what the Treaty parties intended;

(f) Extensive evidence indicates that the parties had a very different understanding, including testimony from all the other ethnohistorians who testified about how the Treaty parties understood the augmentation clause.[145] As discussed below, this includes an extensive body of evidence the trial judge takes no account of.

95. In the absence of evidence indicating that anyone understood the $4 cap to operate as the trial judge has interpreted it, and having chosen (correctly) not to rely on Dr. Driben in this respect, the trial judge relied instead on more general findings about what the Treaty parties must have intended going into the negotiations in order to reach a fair agreement that was consistent with Anishinaabe expectations and Crown liberality and generosity. As discussed in the next

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[144] Reasons, para 454

[145] Jean-Philippe Chartrand; Alexander von Gernet; James Morrison

section, this part of the judge's analysis is also deeply flawed.

c) Reliance on Sparse, Equivocal Evidence to Find that the Treaty Parties Could Not Have Intended a $4 Cap on the Crown's Aggregate Annuity Obligations

i) Sparse, Equivocal Evidence of Crown Intention

96. The Reasons include a few references to undisputed facts regarding financial pressures faced by the Crown in the pre-Treaty period (which are not supportive of the judge's interpretation) and the Crown's desire to regularize mining licenses in the territory (which is neutral with respect to what annuities were promised).[146] Otherwise, the only analysis conducted by the trial judge regarding the Crown's intentions and understanding of the annuity promise relates to her finding that Robinson and Lord Elgin wished to be just and liberal.[147]

97. This finding seems to have been made in support of the judge's conclusion that the $4 in the Treaty texts could not have been intended by the Crown to refer to, or limit, the Crown's aggregate annuity obligations. The judge's reasoning appears to be as follows:

(a) Robinson and Lord Elgin wanted to be "liberal and just";[148]

(b) A $4 cap on the Crown's aggregate annuity obligations would not be liberal and just because it would deprive the Anishinaabe of the revenue-based compensation that the trial judge finds they wanted, and it was less than half of what prior Treaties in Ontario provided for (putting aside the fact that the $10 per-person annuities under the prior Treaties were capped at Treaty time populations, and the fact that as Robinson explained at the Treaty council, it was not anticipated that lands ceded under the Robinson Treaties would be extensively taken up);[149]

(c) Therefore, Robinson could not have intended for the $4 cap to be a limit on the Crown's aggregate annuity obligations under the Treaties.[150]

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[146] Reasons, paras 202, 206, 219, 254, 430-437, and 474
[147] Reasons, paras 424-429, 437 and 475
[148] Reasons, paras 426-429, 437
[149] Reasons, paras 245-249, 453, 467
[150] Reasons, para 453 and 465

98. While Crown actors indicated that the treaty terms should be liberal and just, such statements should be understood in their historical context.[151] In context, they are not inconsistent with an annuity capped at $4 or 'such further sum as her Majesty may be graciously pleased to order'.

99. The trial judge refers to Chancellor Boyd's 1885 decision in *St. Catherine's Milling & Lumber Co v. R.*,[152] quoting portions of the following sentence:

> the liberal treatment of the Indians, and the solicitude for their well-being everywhere manifested throughout this treaty, are the outgrowth of that benevolent policy [the policy flowing from the *Royal Proclamation*] which before Confederation attained its highest excellence in Upper Canada (words quoted by the trial judge are underlined).[153]

100. Chancellor Boyd was referring here to Treaty 3, which was concluded in 1873 and provided for annuities of $5 per-person.[154] The words omitted by the trial judge demonstrate that Chancellor Boyd believed this fixed annuity of $5 per-person was consistent with a desire by the Crown to ensure the well-being of the Indigenous beneficiaries, acting with liberality and benevolence.

101. In other parts of the same decision, Chancellor Boyd described the "benevolent policy" cited by the trial judge. That policy was the Crown's policy of negotiating Treaties for surrender of Indigenous lands, viewed as benevolent in contrast to the alternative of allowing settlers to take possession of territory without offering compensation – as had occurred in many other parts of Canada.[155] Chancellor Boyd's comments do not support the interpretation reached by the trial

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[151] Reasons, paras 424-425; Robinson Report, Ex01-1680 and Exhibit 01-0851 (manuscript), pp 18-19; Robinson Superior Treaty and Robinson Huron Treaty in Morris, *Treaties of Canada*, Ex19, pp 303, 306
[152] *St. Catherine's Milling & Lumber Co v. R.*, [1885] OJ No 67, 10 OR 196 (H Ct J) [*St. Catherine's Milling – trial*]
[153] Reasons at para 425, footnote 261, citing *St. Catherine's Milling – trial* at para 36
[154] *St. Catherine's Milling – trial* at paras 26, 34
[155] *St. Catherine's Milling – trial* at para 24

judge; they indicate that historical treaties of cession providing for annuities fixed at $5 per-person were viewed as just and liberal.

102. Apart from Dr. Driben, discussed above, the only witness who opined that the Crown may have intended to create an uncapped annuity obligation was James Morrison, whose evidence on this point does not appear to have been relied on by the trial judge. He opined that Robinson wanted to ensure that the Anishinaabe "would benefit if there was any unexpected bonanza in land and resource revenues….So Robinson held out the possibility of an even further increase in the annuity [i.e. beyond $4 per-person]. Rather than establish a fixed ceiling for the increase, he left the final figure to be determined by the Crown."[156] No evidence indicates that Robinson had this intention. Further, Mr. Morrison was unable to explain how the Crown might be required to increase annuities above $4 per-person, particularly in the context of his acceptance that the reference to "such further increase as her Majesty may be graciously please to order", was a deliberate reference to royal prerogative.[157] Mr. Morrison's view also fails to take into account the language of the clause as it was understood by Crown actors in the 19th century, as disclosed by post-Treaty evidence. He conceded that he had not considered the post-Treaty record, despite his own view that thorough ethnohistorical analysis would have required this.[158]

103. Had Robinson truly wished to "ensure" that the Treaty First Nations would receive all or some of further Crown revenues generated from the ceded lands, he readily could have included language to accomplish this. Instead, Robinson took care to indicate that the possibility of annuities higher than one pound per-person corresponded to an *ex gratia* discretion; i.e. <u>not</u> a

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[156] Morrison Report, Ex14, para 388
[157] Morrison Report, Ex14, para 388; Morrison TRN-Vol 12:1806, 1809:7-17; Vol 13: 2039-41:8-9
[158] This failure may be due in part to the fact that Mr. Morrison was directed by his terms of reference to be highly selective about what post-Treaty evidence he considered for the purposes of this case (see Morrison TRN-Vol 12:1878-1880; Vol 13:2042-2043)

matter of legal right or obligation.

ii) Sparse, Equivocal Evidence of Anishinaabe Intention

104. A necessary element of the trial judge's conclusion that the Anishinaabe would not have agreed to an annuity capped at $4 per-person was her finding that Anishinaabe leaders insisted upon a Treaty that provided them with a share of the wealth from the territories, or reflected the value of the territories.[159] The trial judge based this finding to a large extent on a review of pre-Treaty Anishinaabe demands.[160] In fact, however, Anishinaabe demands for compensation were framed quite differently at different times by different leaders.[161]

105. Implicit in the Reasons is the trial judge's view that a fixed *per capita* annuity was incapable of satisfying Anishinaabe demands.[162] The evidence, however, does not support this view. The trial judge focused on a few petitions that can be interpreted as demands for a share of wealth generated from mining in the territory, particularly from Chiefs Peau de Chat and Shingwaukonse.[163] Many Anishinaabe leaders, however, requested perpetual annuities expressed in fixed amounts per-person, including Chief Peau de Chat closer to 1850. As Vidal and Anderson reported, by 1849 Anishinaabe leaders wanted compensation in the form of annuities.[164]

106. No evidence indicates that a proceeds model or sharing of revenues was discussed during the Treaty negotiations. It is undisputed, however, that Chiefs Shingwaukonse and

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[159] Reasons, paras 245-250, 453, 466
[160] Reasons, paras 126-127, 245-249, 467
[161] See Schedule C; Chartrand Report, Ex65, p 428 and Sections 3.3, 6.1.2, 6.2.3; von Gernet Second Report, Ex79, p 65
[162] Reasons, paras 245-250, 453
[163] Reasons, paras 127, 131-2, 134, 246-7, 467.
[164] See Schedule C, in particular item 8 at pp 4, 5, 7, 9; see also von Gernet Second Report, Ex79, pp. 40-41, 65; von Gernet, TRN-Vol 60:8796, 8821, 8833, 8836; Chartrand Report, Ex65, p 428 and Sections 3.3, 6.1.2, 6.2.3

Nebenaigoching demanded $10 per-person, and only abandoned that demand at the last minute.[165]

107. Robinson's report, his diary and the weight of the ethnohistorical evidence support the view that Chief Shingwaukonse's demand for $10 per-person was a reference to a fixed perpetual annuity. Robinson's diary entry for September 6th, records the demand by Chief Shingwaukonse for annuities as simply: "Said he wanted $10 per head forever…".[166] The Reasons accept that "Chief Shingwaukonse…was aware of the Crown's pattern of offering the equivalent of $10 per capita as an annuity and sought parity for his people."[167] This finding is well supported by the evidence.[168]

108. Contrary to this finding and the weight of the evidence, the trial judge later suggests that "[i]nstead of retreating from a shared proceeds model, Chief Shingwaukonse could have just as easily been asking for a higher floor or a "starting salary" (as it was called)[169] for the annuity."[170] This view of the $10 demand would not represent "parity" with previous treaties. It would be more favourable, for lands considered by the Crown to be of far lower value than lands to the south, that were not anticipated to be extensively taken up.[171]

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[165] Reasons, paras 226-34; Robinson's Diary, Ex01-0855; Robinson Report, Ex01-1680 and Exhibit 01-0851 (manuscript)

[166] Robinson's Diary, Ex01-0855, p 5; Robinson Report, Ex01-1680, p 18; Chartrand Report, Ex65 pp 181-7; Morrison Report, Ex14, para 349; Morrison RCAP Report, Ex14, Exhibit D, p 126, 129, 132; von Gernet Second Report, Ex79, p. 125; Driben Report, Ex03, p 118-9; Chartrand, TRN-Vol 43:6271-73; von Gernet, TRN-Vol 60:8834-42, 8794-99, Vol 61:8884-8889. On the stand, both Mr. Morrison and Dr. Driben suggested for the first time that the demand for $10 per-person was a demand for $10 per-person plus potential augmentation, without explaining why their reports had not expressed this opinion or why if that was the case Robinson would describe the request as "$10 per head forever". See Driben, TRN-Vol 4:409-11; Vol 5:498; and Morrison, TRN-Vol 13:1970, 2010-2017.

[167] Reasons, para 228

[168] Morrison Report, Ex14, para 361; see for example von Gernet, TRN-Vol 60:8834-8842, 8794-8799, Vol 61:8884-8889

[169] No documents in the historical record refer to the demand by Chiefs Shingwaukonse and Nebenaigoching for $10 per-person annuities as a "starting salary" or a "floor".

[170] Reasons, para 248

[171] Robinson Report, Ex01-1680, p 17

109. The trial judge did not make a finding in line with this theoretical possibility, but did suggest that:

> …there is simply no foundation for speculating that Chief Shingwaukonse's demand for a per capita annuity during the Treaty Council is proof that he or the other Chiefs had given up or retreated from their long-held position that the compensation had to reflect the value of the territory.[172]

110. It is not clear, however, how value of the territory would have been understood. The only noted discussion of value during the Treaty council was in contrast to the rich agricultural lands to the south, which were rapidly being taken up, leading to substantial displacement of the Indigenous treaty parties.[173] In that context, it makes excellent sense that Chief Shingwaukonse would have hoped to achieve parity with annuities promised previously, but not more. This evidence strongly suggests that Chief Shingwaukonse had moved away from a proceeds model, if he was ever committed to such a model - just as Chief Peau de Chat had moved away from such a model by the time of the Vidal-Anderson Commission.

iii) Erroneous Application of Principles of Respect, Reciprocity, Responsibility and Renewal

111. In coming to her view on common intention, the trial judge also appears to have relied on evidence of Anishinaabe principles of respect, responsibility, reciprocity and renewal "as manifested in Anishinaabe stories, governance structures, and political relationships, including alliance relationships".[174] On the basis of this evidence, the trial judge made a number of findings relevant to her interpretation of the Treaties:[175]

(a) "The Anishinaabe sought respect for their autonomy, their relationship with the land,

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[172] Reasons, para 249
[173] Robinson's Diary, Ex01-0855; Robinson Report, Ex01-1680 and Exhibit 01-0851 (manuscript)
[174] Reasons, paras 411, 412-423, 470; this evidence was provided by Dr. Stark, Dr. Bohaker, Mr. Corbiere, and to a lesser extent, Dr. Driben.
[175] Reasons, para 411

and their concepts of governance …";[176]

(b) "The Anishinaabe Chiefs and leaders had every reason to expect that their 'gift' [of access to and administration over their land] attracted a reciprocal 'gift', commensurate with the value of what they had provided";[177] and

(c) Renewal of the Crown's relationship with the Anishinaabe was the "central purpose of the Robinson Treaties".[178]

112. Notions of respect, responsibility, reciprocity and renewal are highly flexible. None of the experts upon which the trial judge relies for her findings on the Anishinaabe perspective explain how these principles point to one understanding of the augmentation clause over another. They can encompass a range of understandings, including, in Ontario's submission, a Treaty with fixed annuities, as was the case in prior and subsequent Treaties, or a Treaty in which the Crown is obliged to increase annuities up to a fixed limit, and to consider further increases.

113. The trial judge appears to have placed particular reliance on the principle of renewal.[179] Not only does she find that renewal was "the central purpose" of the Treaties, she proceeds on the basis that the Treaties must be interpreted in a manner that demands ongoing renewal.[180] In the view of the trial judge, a $4 cap on the Crown's aggregate annuity obligations would mean the Treaties were a 'one-time transaction', which is inconsistent with the principle of renewal; therefore such a cap could not have been intended.[181]

114. There is no evidence suggesting that renewal was "the central purpose" for either the Crown or the Anishinaabe. While the Crown hoped to repair its relationship with the Anishinaabe of the Upper Great Lakes, which had been damaged because of the government's

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[176] Reasons, para 415
[177] Reasons, paras 419-420
[178] Reasons, para 334
[179] Reasons, paras 334, 421-423, 465, 573
[180] Reasons, paras 334, 465, 573
[181] Reasons, paras 465

issuance of mining licenses without a Treaty being in place,[182] its primary motivation in seeking to negotiate a treaty with the Anishinaabe in 1850 was to obtain a cession of lands, thereby regularizing mining locations, opening up the lands to future non-Indigenous development in an honourable manner that would avoid another Mica Bay incident.[183] As Chief Justice Strong observed in the Robinson Annuities case before the Supreme Court, "these lands were acquired by the Crown with a view to settlement, for developing mineral deposits, and for the purpose of applying the timber to purposes of utility…"[184]

115. Similarly, the Anishinaabe wished to restore a more respectful relationship with the Crown, but their primary objective was to persuade the government to respect their rights and negotiate a treaty providing for compensation before further development occurred.[185]

116. No evidence indicated that that the Anishinaabe would have refused a Treaty that did not require ongoing renewal, or that the Crown would have agreed to such a Treaty - which is patently unlikely. None of the other Treaties made by the Crown with First Nations appear or have been found to require ongoing renewal.

d) Contrary Evidence Illustrating Crown Intention and Understanding

117. The interpretation reached by the trial judge is plainly inconsistent with the evidence shedding light on what the Crown intended and how Crown actors and other non-Indigenous individuals understood the augmentation clause. The trial judge misapprehended or failed to take into account that evidence, and failed to even mention the post-Treaty conduct and

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[182] Jean-Philippe Chartrand, TRN-Vol 45:6554-5; Vol-46:6612-3:12-8

[183] Morrison TRN-Vol 14:2126-2131, 2141, 2151-2160; Chartrand Report, Ex065, pp 46, 53-54 and 142-148; von Gernet Second Report, Ex079, p 112; OIC, April 16, 1850, Ex01-0767, Ex1A-0767 (transcription); OIC, January 11, 1850, Ex01-0737; Letter from Colonel Bruce to William Robinson dated January 11, 1850, Ex68-0008

[184] *Ontario v Dominion of Canada*, [1895] 25 SCR 434 at para 28

[185] See Schedule C; see also Chartrand Report, Ex65, pp 54-63, 70-83 and sections 3.3, 3.4, 3.5, and von Gernet Report, Ex78, pp 77-85

statements of Crown actors and other non-Indigenous individuals that contradict the judge's interpretation.

118. The trial judge acknowledged that Robinson likely obtained the idea for an augmentation clause from the Vidal-Anderson Report,[186] but apparently failed to appreciate that the report recommended compensation in the form of annuities, not revenue sharing.

119. The trial judge also failed to advert in her Reasons to the implications of the OIC dated April 16, 1850 outlining Robinson's financial mandate for the Treaty negotiation. The following aspects of the April OIC are significant:

(a) The Crown sought a Treaty with annuities that were not related to the value of resources extracted or value of the land, and which could not go up, but could go down if First Nation populations dropped - like annuities under existing Treaties;
(b) Robinson was instructed to negotiate a Treaty under which annuities would never be more than $10 per-person, even if Treaty First Nation populations fell dramatically; and
(c) Like the previous Treaties over lands in Upper Canada (Canada West) calling for annuities, the April OIC contemplated a link between the Crown's aggregate annuity obligations and the population of the First Nation parties, although in this case the link only related to the stipulated diminution clause.[187]

120. While the trial judge refers to this OIC in her summary of the facts, no weight was placed on it in coming to a view of Crown intention.[188] Instead, the trial judge found that Robinson met with Lord Elgin prior to the Treaty Council in late August 1850, at which time Robinson sought and received Lord Elgin's approval for the augmentation clause. The trial judge appears to proceed on the basis that instructions received from Lord Elgin – of which we have no record – completely superseded Robinson's mandate under the April OIC, rendering the OIC

[186] Reasons, para 162
[187] OIC, Apr 16, 1850, Ex01-0767, Ex1A-0767 (transcription)
[188] Reasons, paras 197-8

irrelevant.[189]

121. While the augmentation clause goes beyond the instructions provided in the April OIC, the OIC remains an important document for understanding Crown intention. In the context of this OIC, it is very unlikely that Robinson would have sought or been given authority to promise uncapped annuities, or annuities that might ever amount to more than $10 per-person.

122. The trial judge also failed to give any weight to Robinson's report made shortly after the Treaties were concluded, in which Robinson sought approval for having "concluded the treaty on the basis of a small annuity", rather than "a promise of accounting to them for future sales…[which alternative] 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."[190] The judge's interpretation is inconsistent with any normal use of the word annuity, much less "a small annuity", and it will require precisely the endless accounting and "trouble" that Robinson reports he avoided. The trial judge fails to address this contradictory evidence notwithstanding its obvious importance.

123. Further, while representations by the Treaty commissioner may be significant evidence of Crown intention, Treaties are between the Crown and Indigenous signatories. Findings regarding the subjective intention of a Treaty commissioner cannot, without more, impact upon the proper interpretation of a Treaty.[191] As explained further below, in order for the trial judge's interpretation of the augmentation clause to align with a possible view of the common intention of the Treaty parties, 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. There is no basis to

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[189] Reasons, paras 263-4, 474-475
[190] Robinson Report, Ex01-1680, pp 18-19, Ex01-0851 (manuscript)
[191] *Keewatin* at para 160; *Grassy Narrows* at para 40

accept this proposition, nor did the trial judge suggest one.

124. Many historical documents from the post-Treaty period shed light on how Crown actors and other non-Indigenous individuals understood the augmentation clause. Some were created just days after the Treaties were negotiated. Some relate or respond to Anishinaabe statements regarding their annuities, and a large body of evidence relates to the lengthy dispute amongst Canada, Ontario and Quebec regarding responsibility for the Crown's annuity obligations under the Robinson Treaties.[192] This ultimately involved quantification of the Crown's liability for augmented annuities under these Treaties, for the past and the future. Throughout the course of this dispute the three governments operated on the basis that the Crown's maximum obligation for annuities under the Robinson Treaties was $4 per-person (or 'such further sum as her Majesty may be graciously pleased to order', as a matter of discretion), with no further communal entitlement.[193]

125. As confirmed by the only expert witness to carefully review the post-Treaty record to assess how the Treaty parties understood the annuity promise, Mr. Chartrand, the record demonstrates that Crown officials unequivocally understood the Crown's obligation to augment annuities to be limited to $4 per-person (multiplied by the population of the Treaty First Nations), subject to the possibility of a discretionary increase, with no separate or additional community entitlement.[194] No witness contradicted Mr. Chartrand's interpretation of the post-

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[192] With Canada acting on its own behalf and on behalf of the Treaty First Nations.

[193] See for example the statement of Justice Burbidge in his Reasons for Award of 13th February 1895, delivered 14th February 1895 (Schedule D, item 26): "I am of opinion, and as to that I do not know that there is any controversy between the parties, that if any year since the two Treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the Government of the Province of Canada, or its successor, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase, not exceeding four dollars for each individual. So much they were entitled to as a matter of law and right. Any increase beyond that would have been a matter of grace", and other documents listed in Schedule D.

[194] Chartrand Report, Ex65, p 299

Treaty documents speaking to Crown intention.

126. There is a complete absence of evidence in this extensive post-Treaty record that any Crown actor or other non-Indigenous individual ever suggested or acted on the basis that the $4 cap applied only to what could be distributed to individuals, or that the Crown might be required to increase annuities above $4 per-person. The Crown's obligation to pay augmented annuities was invariably and exclusively expressed in terms of $4 per-person.[195]

127. In light of this evidence, including the text of the Treaties, it is clear that the interpretation reached by the trial judge is inconsistent with what the Crown intended and understood, and therefore inconsistent with any reasonable view of common intention. The trial judge does not discuss or apparently take any account of this post-Treaty evidence, or Mr. Chartrand's evidence, regarding the Crown's understanding of the augmentation clause. This represents an error in principle that in itself calls for reversal of the decision below.

e) Contrary Evidence Illustrating Anishinaabe Intentions and Understanding

128. The record of Anishinaabe complaints and petitions relating to annuities under the Robinson Treaties in the post-Treaty period is extensive. The trial judge identifies a few of these post-Treaty documents in her Reasons. Other than the affidavit of Mr. Mashekyash, however, she does not discuss examples in any detail. Instead, she declines to place any weight on the post-Treaty evidence going to Indigenous understanding, stating that "the post-Treaty written record has limited value in the interpretive exercise", and that "[w]e cannot rely on these post-Treaty accounts to support any particular understanding of the Anishinaabe intention, nor understanding of limits, if any, on the promise to increase annuities".[196]

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[195] See Schedule D

[196] Reasons, para 303-304 and 318

129. The trial judge explains this approach on the basis that "the various petitions suggest an inconsistent, often conflicting understanding of the annuity augmentation clause", and that the post-Treaty record "shows different people at different times and places held different views."[197] The trial judge also refuses to rely on post-Treaty records that refer to an entitlement to $4 as demonstrating that the Anishinaabe understood the Crown's obligation to augment annuities to be capped at $4, on the basis that the Anishinaabe must have neglected to "define the full treaty obligation" in these petitions. The trial judge states that the Anishinaabe were "modest" and "diplomatic", they were not detail-focused, and their way of life had been seriously disrupted by other pressing issues related to scarcity of game, prosecutions for harvesting and being pressured to "remove" to other settlement areas.[198]

130. The fact that there is some inconsistency in the historical record is not surprising; nor is the limited inconsistency present here a valid basis to reject an important category of evidence. While there are some inconsistencies between the various post-Treaty letters, petitions and memorials with respect to Anishinaabe understandings of the maximum augmentation, and when such an augmentation should occur, the trial judge failed to take into account the following:

(a) Augmented annuities were almost invariably expressed as potentially increasing to a stipulated per-person amount (i.e. $4 or $10 per-person);
(b) Many requests demonstrate an understanding that augmentation (to $4 or $10 per-person) was dependent on the Crown receiving sufficient net revenues;
(c) No evidence demonstrates an Anishinaabe understanding that the Crown was under a legal obligation to increase the annuities without limit or to a "fair share";
(d) No requests for annuities were framed as a share of Crown revenues; and
(e) There is no record of requests for communal annuities over and above what individuals might be paid; demands for annuities were almost invariably made in per-person terms.[199]

[197] Reasons, para 304 and 318
[198] Reasons, paras 305, 315, 319
[199] See Schedule E

131. As discussed by Mr. Chartrand, the most commonly held Indigenous understanding was that Treaty annuities would increase to $4 per-person, and that such an increase was obligatory should the revenues from the Treaty Territories be sufficient, although some post-1880 accounts indicate an expectation that annuities would increase to $10 per-person.[200]

132. The trial judge refers to two letters from 1884 from Chief Solomon James and Indian Agent Charles Skene, which, she concludes: "note that the Anishinaabe think they are 'entitled' to an advance above the $4".[201] These letters do not, however, support the conclusion that the Anishinaabe understood that the Crown had agreed to an uncapped annuity. Chief James states that the "Government should carefully consider the increase from four dollars ($4.00)…" [emphasis added],[202] signaling an understanding that the Crown had discretion to determine annuity increases above $4. The ambiguous reference to a claim for an "advance above the $4" in the Skene letter[203] was likely a reference to an understanding that annuities would increase to $10 per-person, consistent with assertions put forward by other Lake Huron Chiefs around the same time.[204]

133. The plaintiffs strived at trial to find support in the historical record for any Anishinaabe understanding of an entitlement to collective annuities over and above payments to individuals. In addition to an 1851 petition that simply refers to the possibility of augmented annuities without describing them further,[205] they identified:

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[200] Chartrand Report, Ex65, p 407. These assertions may be traceable in part to discussions at a Council of Lake Huron Indigenous leaders held at Parry Island in the summer of 1883 (see Chartrand Report, Ex65, p. 404).
[201] Reasons, paras 294 and 306
[202] See item 10 in Schedule E
[203] See item 17 in Schedule E
[204] See item 14 in Schedule E
[205] See item 19 in Schedule E

(a) letters written by Indian Agent George Ironside and W.B. Robinson from late 1850 which express and respond to information received by Ironside that Chief Shingwaukonse had "become very much dissatisfied with the late Treaty, and to imagine that the Indians, generally, have been most shamefully deceived thereby", and that the Chief intended to travel to England to petition the Queen to request that the Treaty terms be altered, "particularly as regards the amount which they are to receive annually". Ironside's letter also indicated that "[t]hey say, too, that one Cause of their dissatisfaction is that the services of a Carpenter to reside permanently at their village was not guaranteed to them" in the Treaty terms; [206] and

(b) a January 1852 petition from the Fort William First Nation,[207] which complains that the Treaty terms did not record a promise that they would be supplied at Fort William with clothing annually, and that while the Anishinaabe had been encouraged to "build houses where your children will be warm", they had not received nails or woodworking tools.

134. Robinson's letter responding to Ironside's report denied that he had made any promise for a resident carpenter, explaining that he had, however, agreed to provide £25 towards the construction of the Chief's house. Robinson ended his letter with a suggestion that Ironside:

> … 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 to the Gov' to [illegible] it without loss".

135. The dissatisfaction of the Chief with some unidentified aspect of the Treaty annuities, and the disputed side-promise for a resident carpenter, were different concerns. The trial judge found, however, that Robinson's reference to the annuity augmentation clause "was intended to assuage Chief Shingwaukonse's concerns over…how the increased annuity could satisfy the collective desires of the Anishinaabe to bring a carpenter into the community."[208] It is not clear that

[206] See item 18 in Schedule E
[207] See item 20 in Schedule E
[208] Reasons, para 294

Robinson's reference to the augmentation clause had anything to do with the issue of a carpenter. In any event, this speculative finding, which was limited to a single Chief, is not inconsistent with the Crown's understanding of the annuity promise. Particularly given the early distribution of Huron Treaty annuities through the requisition system, the Chief could have requested that annuities be used to pay for a carpenter. These documents do not demonstrate an Anishinaabe understanding consistent with the interpretation reached by the trial judge.

136. With respect to the January 1852 petition the trial judge found only that "it shows the confusion over whether the Treaty promised annuity payments by way of goods or services".[209] On its face the petition says nothing about collective annuities and, as opined by Mr. Chartrand, the surrounding historical record demonstrates that the complaints about goods in this petition were likely in reference to the ongoing practice of distributing annual Imperial "presents" on Manitoulin Island.[210] Like the 1850 exchange, it is equivocal evidence that does not provide meaningful support for the interpretation reached by the trial judge. It is not clear that the trial judge relied upon these documents, and it would have been an error to do so.

137. With respect to the trial judge's finding that the post-Treaty petitions cannot be relied upon because petitioners would not have set out their understanding of the "full treaty obligation", the record in fact demonstrates that Robinson Treaties First Nations forcefully expressed grievances when they felt that their rights were not being fully honoured. During the pre-Treaty period Anishinaabe leaders forcefully and repeatedly demanded recognition of their claims to the territory as well as compensation for use of their land and resources, going so far as to resort to armed occupation of the mine at Mica Bay.[211] In this context, the trial judge finds

[209] Reasons, para 294
[210] Chartrand TRN-Vol. 45:6482-6514
[211] Reasons, paras 123-127, 257, and documents referenced in Schedule C

that Chief Shingwaukonse demonstrated "the primary requirements of an Anishinaabe leader: significant personal achievement coupled with a responsibility for others" by steadfastly and persistently "pressing …claims all the way up to the … Governor General".[212] The Robinson Treaty First Nations submitted many other grievances to the government during the post-Treaty period, and in fact engaged in a long and increasingly heated campaign of petitions seeking arrears up to $4 per-person for the period before 1875.[213]

138. In the face of this extensive record, the absence of records indicating that Indigenous actors believed the Crown might ever be under a legal obligation to increase annuities without limit, or indicating that there was a communal entitlement to annuities above what individuals might be paid, is significant. Lack of post-Treaty complaints from Indigenous Treaty parties has been found by the Supreme Court to be a relevant factor in determining common intention.[214]

139. The trial judge does discuss the 1893 affidavit of John Mashekyash, an Elder of the Batchewana First Nation, translated by a member of the Garden River First Nation.[215] As presented by plaintiffs' expert witness James Morrison in his RCAP report:

> There is considerable agreement between the *anishnabe* interpretation of this particular clause [the augmentation clause] and the way W.B. Robinson claimed he had explained it. In 1893, John Mashekayash – who had signed the Lake Huron Treaty as a principal man of the Batchewana Band – remembered how the discussion of the augmented annuities had proceeded:
>
> > Mr. Robinson said we would get five dollars per head. Mr. Robinson then also told us that next year that (sic) we would get one dollar and a half per head and that for four years; and at the end of the four years when the government will have sold enough of the land you now have ceded to them to enable them to give you four dollars per head you will get that every year as an annuity. When you get the four dollars per head per year I now promise you then the government which I here represent will have fulfilled my promise I am now making to you. But if your great Mother the queen

[212] Reasons, para 35
[213] Reasons, para 294; Schedule C; Morrison TRN-Vol 13:2067-2071
[214] *Grassy Narrows* at para 40
[215] Reasons, paras 307-313

> should think it right to give you more it will only be by her gracious goodness towards you to do so.[216]

140. The trial judge finds "it is possible that Mr. Mashekyash interpreted the Treaties' promise in the same way that the Crown Defendants do today", but disregards his account because "there is no evidence that other signatories or other Chiefs held this interpretation of the Treaties", and "[g]iven the frailties of Mr. Mashekyash's recollections so long after the event…on its own, it does not support any widespread understanding of the Huron Chiefs at the time the Robinson Huron Treaty was signed". She also suggests that his account can have no bearing on the interpretation of the Superior Treaty. [217]

141. Other than Dr. Driben, none of the ethnohistorical witnesses suggested that the Mashekyash affidavit was unreliable, and Dr. Driben pointed to no basis for this view other than the passage of time. Moreover, in his own evidence, Dr. Driben relied on an 1887 account of the Penetenguishine adhesion without explaining whether or how that account could be more reliable than Mr. Mashekyash's only 6 years later.[218]

142. The trial judge did not consider that Mr. Mashekyash lived at least 8 years after swearing his affidavit, and there is no evidence that his memory was impaired. Nor do the contents of the affidavit suggest he was suffering from any cognitive issues.[219] Further, a review of the entirety of Mr. Mashekyash's affidavit demonstrates that his recollection is remarkably consistent with what we know of the negotiations, including elements that could not be gleaned from reviewing

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[216] Morrison RCAP Report, Ex14, exhibit D, p 172; Affidavit of Elder John Mashekyash dated Jun 1, 1893, Ex01-1332 (manuscript), Ex1A-1332 (transcription)
[217] Reasons, paras 311 and 313
[218] Driben Report, Ex03, pp 148-149; Driben TRN-Vol 5:503-5:20-12, TRN-Vol 6:856-860. Petition by Chiefs and Councillors of Parry Island Indians, Mar 25, 1887, Ex01-1257 (manuscript). The account suggested annuities would be increased incrementally to $10 per person, over a period of 10 years, after which time they would not increase further.
[219] Morrison TRN-Vol 13:2054-2057

the Treaty text.[220]

143. The trial judge's analysis also fails to recognize that if Robinson had taken care to convey this understanding to Batchewana representatives, there is no reason to believe he met with them alone for this purpose, or used a materially different explanation in his dealings with other First Nations. This would be inconsistent with the trial judge's finding that Robinson would have taken care to accurately convey the meaning of the augmentation clause as he had written and understood it,[221] and the fact that the Treaty terms were interpreted in open council.

144. While the post-Treaty records demonstrating Indigenous understandings regarding the meaning of the augmentation clause are not as unequivocal as the record with respect to the Crown's understanding, this evidence is nevertheless compelling, and plainly inconsistent with the decision below.

2. Failure to Recognize Crown Discretion

145. Ontario submits that the language "or such further sum as Her Majesty may be graciously pleased to order" corresponds to a Crown discretion to increase annuities beyond $4, but not an obligation to do so. The discretion must be exercised through a process that satisfies the honour of the Crown.

146. Canada ultimately took the position at trial that the Crown is obliged to increase annuities above $4 if net Crown revenues from the Treaty territories allow this without loss, while retaining discretion to determine by how much the annuities should increase, in a manner that is liberal and generous to the First Nations but also takes into account the interests of other Canadians. The plaintiffs argued that the Crown had an obligation to increase annuities above $4

[220] Chartrand TRN-Vol 44:6406-6407
[221] Reasons, paras 235, 448

per-person, but differed in their approach. The Huron plaintiffs pleaded that the Crown is obliged to exercise this discretion to increase annuities to an amount that equals a "fair share" of net Crown revenues, and ultimately argued that a "fair share" equals 100%.[222]

147. The Reasons say very little about what discretion the Crown may or may not have in implementing the annuity obligations of the Robinson Treaties. Under the interpretation of the trial judge, however, the Crown would appear to have no discretion with respect to whether annuities will be increased or in what amount. Should there be sufficient net Crown revenues from the Treaty territories, the Crown must increase the annuities to an amount that corresponds to a "fair share" of same. Failing agreement amongst the Treaty parties regarding what is a "fair share", the Court will decide.

148. This result appears to have been based in part on the trial judge's finding that the First Nation parties would not have understood the concept of discretion.[223] No evidence supports that finding, which is palpably wrong.

149. The concept of discretion in the hands of a leader is not inherently complex or difficult to convey. The affidavit of Mr. Mashakayesh confirms that an Elder present at the Treaty council understood the concept of discretion. The testimony of Elder Rita Corbiere also indicated that the concept of discretion can be conveyed in Anishinaabemowin.[224] Further, the finding of the trial judge that the Anishinaabe could not have appreciated the concept of discretion is inconsistent with her finding that the Robinson Treaties do provide for Crown discretion over whether annuity payments in excess of $4 may be made to individuals.[225]

150. The trial judge's finding that the words "or such further sum as Her Majesty may be

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[222] A position the trial judge rejected in her Reasons at paragraph 560 but declined to include in the judgments below.
[223] Reasons, para 447
[224] Elder Corbiere Translation, Ex25, p 6; Elder Corbiere, TRN-Vol 16:2306-2309
[225] Reasons, para 454

graciously pleased to order" reflects a Crown discretion is clearly correct, even though the trial judge's finding with respect to the subject matter of that language is palpably wrong. As noted by the plaintiff's expert witness James Morrison, these words were "the normal way of referring to the exercise of the prerogative powers of the Crown", and "Robinson himself was perfectly familiar with this kind of language."[226]

151. In 1850, the term "graciously" was used to signify an act that might be performed as a matter of grace or favour, as distinguished from right or obligation: in Latin, *ex gratia,* as opposed to a thing demanded or granted *ex debito.* It was also sometimes used simply to reference actions of the monarch.[227] Even if the word "graciously" was used in the latter sense, the phrase "as Her Majesty may be pleased to order" clearly contemplates a discretionary decision, not something that must be ordered.

152. Once it is recognized that $4 per-person was always intended to serve as a limit on the non-discretionary part of the augmentation clause, as argued above, it follows that the possibility of higher payments are a matter of Crown discretion, not unqualified obligation.

153. As the judge failed to recognize any Crown discretion with respect to increasing annuities above $4 per-person, she made no findings on how such discretion should be exercised.

154. The honour of the Crown applies both to the interpretation of the Robinson Treaties, including the phrase "or such further sum as Her Majesty may be graciously pleased to order", and the Crown's implementation of the discretion referenced by this phrase.[228]

155. In *Haida*, the Supreme Court recognized that the honour of the Crown can give rise to

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[226] Morrison Report, Ex014, para 384

[227] *A Dictionary of the English Language*, 1785; *The Critical Pronouncing Dictionary*, 1825; Samuel Johnson's *Dictionary of the English Language*, 1855; *Dictionary of Terms and Phrases used in American or English Jurisprudence*, 1879; *A New English Dictionary* [*Oxford English Dictionary*, 1st ed], Vol III, 1897.

[228] *Mikisew* 2005 at paras 33, 51; *Manitoba Metis* at paras 68-71; *Marshall No 1* at paras 49-51

procedural obligations. That decision and the line of cases which followed recognize a procedural obligation to consult and possibly accommodate Indigenous rights' holders when asserted or proven rights might be adversely impacted by government action.[229] While the obligation is 'procedural', it has fundamentally altered the way that the Crown and Indigenous communities relate to one another.[230]

156. Ontario submits that *Haida* consultation is not triggered by the exercise of the Crown's discretion to augment annuities above the indexed $4 cap, because a decision on whether to augment would not adversely impair the right to annuities, and because the functional purpose of *Haida* consultation and potential accommodation would not apply in this context. Ontario accepts, however, that:

(a) The honour of the Crown applies to the Crown's exercise of this discretion;
(b) 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;
(c) 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;
(d) 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
(e) An honourable process includes providing Treaty First Nations with an explanation of any decision reached, though this would not require formal reasons.

These are significant and meaningful obligations, which are consistent with evidence at trial regarding what the Anishinaabe would have expected from the Crown.[231]

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[229] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 10-11 [*Haida*], *Mikisew* 2005, at para 57
[230] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 1, 67, 70-71; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38
[231] Chartrand TRN-Vol 46:6683-6688; 6711-6715

157. Ontario submits that interpreting the augmentation clause in a manner that imposes significant procedural obligations on the Crown accords with the Supreme Court's direction to look to the honour of the Crown as an interpretive principle, and advances the goal of reconciliation without fundamentally altering the nature of the annuity promise as it was understood by the Treaty parties.

158. The substantive exercise of this discretion would be guided by a range of potential policy considerations, however. The evidence discloses no agreement amongst the parties with respect to principles that must guide the substantive exercise of such discretion. Further, Ontario submits that Robinson would not have sought to constrain the Queen's discretion or the recently achieved authority of the Provincial Legislature to control government finances.[232]

159. In the absence of principles anchored in common intention disclosed by the evidence, Ontario submits that imposing substantive constraints on the exercise of the Crown's discretion would be an error in Treaty interpretation. Doing so would also lead to the courts reviewing the substance of policy decisions made by the Crown with respect to the allocation of scarce financial resources. As the Supreme Court of Canada has confirmed in a variety of circumstances, the courts should remain highly deferential of government policy decisions.[233] "[T]he role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make."[234] Even greater deference is owed to

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[232] Gerard V La Forest, *Natural Resources and Public Property under the Canadian Constitution* (University of Toronto Press, 1969) at xi-xiv and 3-14 (see in particular p 13: "The province [of Canada] had thus achieved recognition [in 1847] of the principle that it should have the same control over provincial territorial and casual revenues as the British parliament exercised in England.")

[233] *R v Imperial Tobacco Canada Ltd* 2011 SCC 42 at para 87**;** *Gordon v Canada (Attorney General)*, 2016 ONCA 625 at paras 231-32, leave to appeal refused, [2016] SCCA No 445; *Newfoundland (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees (NAPE)*, 2004 SCC 66 at paras 83-84; see also *Vriend v Alberta* [1998] 1 SCR 493 at para 136

[234] *M v H*, [1999] 2 SCR 3 at para 78

legislative and policy decisions that involve the spending and allocation of scarce financial resources.[235]

> It has been a constitutional principle of our parliamentary system for at least three centuries that such disbursement [of public funds] is within the authority of the legislature alone. The appropriation, allocation or disbursement of such funds by a court is offensive to principle.[236]

This type of Crown decision-making can only be reviewed on the basis of abuse of discretion, such as bad faith, or unconstitutionality.

3. An Undefined "Fair Share"

160. All parties to the Robinson Treaties likely intended the annuities agreed upon to be "fair" in context.[237] Moreover, while the right to annuities is not an interest in the ceded lands or to a share of the proceeds therefrom,[238] the augmentation clause can reasonably be seen as providing for annuities that correspond to a defined share of net Crown revenues, should any net revenues be received. It is quite a different thing, however, for parties to agree to annuities equal to a "fair share" of net revenues in the abstract – the result reached by the trial judge.

161. The trial judge did not define the concept of a "fair share" or articulate related principles, beyond stating in the Reasons that a fair share must be less than 100%. Defining a "fair share" was deferred to a later stage of the litigation.[239]

162. The fact that the trial judge was unable to define a "fair share" after an extensive trial

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[235] *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)* (1991), 2 OR (3d) 716, [1991] OJ No 439 at paras 43-51 (Div Ct), leave to appeal refused, 1991 CarswellOnt 3388, [1991] OJ No 3201 (CA) [*Hamilton-Wentworth*]; *Huron-Perth Children's Aid Society v Ontario (Ministry of Children and Youth Services)*, 2012 ONSC 5388 at paras 2, 52-58 (Div Ct)
[236] *Hamilton-Wentworth* at para 44; see also *Amalgamated Transit Union Local 1374 v Saskatchewan (Minister of Finance)*, 2017 SKQB 152 at para 45; *Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064 at paras 36-40 (Div Ct)
[237] The doctrine of the honour of the Crown likely presumes this in terms of Crown intentions.
[238] *Robinson Annuities - JCPC*, at para 18
[239] Reasons at paras 560-561

focusing on Treaty interpretation is not surprising. Nothing in the historical record suggests that this abstract concept was discussed during the Treaty negotiations, much less agreed upon.

163. There is also no principled basis on which the courts can infer common intention on this issue; for instance, there was no established pattern of conduct or prior agreements dealing with "fair share" that the parties might have had in mind. On the Treaty interpretation reflected in the judgments below, this is an issue of critical importance that the trial judge implicitly determined cannot be resolved based on common intention disclosed by the evidence.

164. The trial judge failed to consider and take into account the fact that an absence of common intention on the meaning of what constitutes a "fair share" indicates that no such agreement was reached. This is an error in law.

165. 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. Although courts have sometimes appealed to "fairness", they have done so in the context of supporting principles.[240] The court must have some principled basis or method of evaluation which does not exist here.[241] 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.

166. When a court is faced with a question that cannot be answered with any assurance of correctness, the appropriate course of action is for the court to decline to answer the question.

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[240] E.g. for the interpretation of "fair value" in corporations statutes see: *Consulate Ventures Inc. v Amico Contracting & Engineering (1992) Inc.*, 2011 ONCA 418; for "fair price" of corporate shares under articles of incorporation see: *Copthorne Holdings Ltd v. R.*, 2011 SCC 63; for division of assets in separation agreements pursuant to family law statutes see: *Hartshorne v Hartshorne*, 2004 SCC 22; or for a "fair share" of profits in the context of a commercial contract, where a collateral agreement was found to have been entered into for that purpose and industry standards were appealed to, see: *Multivision Films Inc. v McConnell Advertising Co*, [1983] OJ No 198 at paras 62-70 (HCJ).

[241] *Berthin v Berthin*, 2016 BCCA 104 at paras 46-50; *Multivision Films Inc* at paras 63-65

The court should not assume jurisdiction of a matter without sufficient foundation.[242] A matter must have a sufficient legal component to be justiciable.[243] If the nature of the issue does not permit an answer through the interpretation of law, that issue is not justiciable.[244]

167. 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.[245] 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. This is an error in law.

4. Implementation

168. The judgments below declare that "[t]he 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".

169. This declaration is not expressed in the Reasons. It was added by the trial judge in settling the partial judgments, over objections from the defendants. No explanation supports it.

170. The Treaty purpose identified in this declaration appears to be a partial amalgam of two quite different findings that appear in the Reasons:

(a) that Crown is under an obligation "to diligently implement the Treaties' promise to achieve their purpose *(i.e. of reflecting the value of the territories in the annuities) …"*

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[242] Lorne M Sossin, "Boundaries of Judicial Review: The Law of Justiciability in Canada", 2 ed, (Thomson Reuters Canada Limited: Toronto, 2012) at 32 and 71, p 32 *Reference re Excise Tax Act (Canada)*, (sub nom. *Reference re Goods & Services Tax*) [1992] 2 SCR 445 (SCC) at 485.
[243] Donald J M Brown, *Civil Appeals*, Carswell: 2019, 5:1120; *Reference re Canada Assistance Plan (British Columbia)*, [1991] 2 SCR 525, 1991 CarswellBC 168 at para 33
[244] *Reference re Succession of Quebec*, [1998] 2 SCR 217, 1998 CarswellNat 1299 at para 26; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 10; see also *Zaghbib v Canada*, 2016 FCA 182 at para 26.
[245] See discussion under previous section: *Failure to Recognize Crown Discretion.*

[emphasis in the original];[246] and

(b) that the Crown is under an obligation to increase the annuities paid under the Robinson Treaties (without limit) to an amount that corresponds to a "fair share" of net Crown resource-based revenues from the Treaty territories.[247]

171. No evidence indicates that the "value of resources" or a "fair share" thereof were discussed during the Treaty negotiations, indicating that this finding is not based on common intention. Nor do the Reasons or judgments below indicate what is meant by these concepts.

172. The adoption of a "fair share" standard in this context raises the same problems with respect to justiciability and exceeding the proper role of the judiciary discussed above. If anything these concerns are amplified here, where a wide range of fiscal policy decisions could arguably be called into question on the basis of this implementation principle.

173. Further, this implementation principle raises serious challenges. Presumably the "value of the resources" here is a reference to economic value, at least in part, but assuming so:

(a) Is it the theoretical value of resources *in situ* and, if so, based on what assumptions and economic models?
(b) Is it the value of resources actually extracted from the Treaty territories, in which case how will this be measured, and net of what costs, incurred by whom?
(c) If this is intended to reflect – at least in part – economic value received by private actors as a result of business activities, how are the costs and risks incurred by such actors to be assessed and accounted for?
(d) How will the courts assess the private actors' "fair share" of the value realized as a result of their business activities, in addition to the "fair share" government may receive, and the further "fair share" that will inform the quantum of annuities?
(e) How will this "fair share" analysis assist in determining what is a "fair share" of net Crown resource-based revenues? How are these concepts related?

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[246] Reasons at para 3.
[247] Reasons at paras 3, 555-561

174. None of these issues were discussed when the Treaties were negotiated, and none have been explained or adverted to in the trial judge's Reasons.

175. More broadly, the judgments below contain ambiguities and inconsistencies that will make implementation extremely difficult. Determining net Crown resource revenues realized from the Treaty territories for any given period will be challenging given the complexity of Crown finances and the extent to which they have evolved since 1850. There will likely be some difficult issues regarding which Crown revenues should be included, that the judgments below only begin to address. There will be even more difficult issues regarding what Crown expenses should be deducted from relevant gross revenues, and the extent to which such expenses should be taken into account. This complexity is exemplified by the error committed by the trial judge in declaring that "[f]or the purposes of determining the amount of net Crown resource-based revenues in a particular period: … relevant expenses … do not include the costs of infrastructure and institutions that are built with Crown tax revenues" – discussed in section E below.

176. The exercise demanded by the judgments below will become even more complex after arriving at a valuation of net Crown recourse-based revenues for a given period. The courts will very likely then be required to address what share of that amount should be paid (or should in the past have been paid) as increased annuities – in the absence of principles agreed upon by the parties or any precedent that would define a fair share.

177. If the judgments below stand, all these complex issues will have to be addressed in the context of the quite different and at least as ambiguous declaration that "[t]he 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". This finding further complicates an exercise that is already exceedingly complex. The implementation principles articulated in paragraph 2 of the judgments below do not solve this

problem, as they do not define or clarify the parties' rights and obligations.

178. Absent agreement amongst the Treaty parties that will be very difficult to achieve, the courts will be obliged to resolve these issues on an ongoing basis, making complex policy decisions regarding the appropriate structure and allocation of Crown finances. For all these reasons, Ontario submits that if the judgments below are upheld, they will almost inevitably be the source of ongoing litigation, rather than reconciliation.

D. Error in Superimposing Fiduciary Duties on Treaty Obligations

179. In her Reasons, the trial judge found that the Crown does not owe a *sui generis* fiduciary duty with respect to the augmentation of Robinson Treaty annuities, but nevertheless does owe an *ad hoc* fiduciary duty "to engage with the process to determine if the Crown can increase the annuities without incurring loss". [248]

180. More specifically, the trial judge held that it was possible for the Crown to act "exclusively in the best interest of the Treaties' beneficiaries in their promise to engage in a process to determine if net Crown revenues can increase the annuities without incurring loss" "and with the utmost of loyalty to them", because:

> … The Crown has no competing interest or duty in the performance of this exercise. There is no other group to whom the Crown owes a duty of loyalty in this process.[249]

181. In settling the judgments below the trial judge extended this process-based fiduciary duty, without further reasons, to also include a requirement to pay augmented annuities, if owing.[250]

182. Ontario submits that the Treaty promise at issue does not engage either a *sui generis* or an *ad hoc* fiduciary duty, because the requirements to establish either type of fiduciary duty are not

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[248] Reasons, para 533. The reasons do not distinguish between the federal and provincial Crowns, because that is one of the Crown liability allocation issues to be argued in Stage 3.
[249] Reasons, paras 519, 524.
[250] Judgments Below, AB-2a and 2b, para 1

met and because the honour of the Crown and the Constitution already protect that interest, thereby imposing the proper legal standards and safeguards.

1. The trial judge correctly held no sui generis fiduciary duty applies

183. In rejecting the *sui generis* fiduciary duty claimed by the plaintiffs, Ontario submits that the trial judge applied the correct test (whether there is a cognizable interest and a Crown undertaking of discretionary control)[251] and reached the correct conclusion:

> 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.[252]

184. Ontario agrees that the augmentation clause relates to Treaty annuities and not to management of land on behalf of First Nations. It is not akin to the facts in *Guerin*, the case in which the Supreme Court first developed the *sui generis* fiduciary duty applicable in the Indigenous context.[253] As Justice Dickson explained in *Guerin*, the *sui generis* fiduciary duty flows from the fact that First Nations could only alienate their interest in land to the Crown, thereby creating a fiduciary duty on the Crown to act in the best interests of, and with utmost loyalty to, a First Nation in dealing with its alienated lands.[254] This underpinning of *sui generis*

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[251] See e.g. *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 44 and 52-53 [*Williams Lake*], citing *Manitoba Metis* at paras 49 and 51, *Wewaykum Indian Band v Canada*¸2002 SCC 79 at paras 79-83 [*Wewaykum*], and *Guerin v The Queen*, [1984] 2 SCR 335 at p 385 [*Guerin*]
[252] Reasons, paras 511-512
[253] *Guerin* at 375-389.
[254] *Guerin* at 376

fiduciary duty is why the Supreme Court has repeatedly held that it can only arise with respect to cognizable Aboriginal interests that are "pre-existing" (i.e. flowing from historic use or occupation) and not interests founded by treaty, legislation or executive action.[255]

185. Although the trial judge did not decide the "specific or cognizable interest" part of the *sui generis* fiduciary duty test, Ontario submits that this requirement is also not met. The Treaty First Nations do not have a legal interest in the lands ceded under the Robinson Treaties. Instead, they have interests that relate to those lands, including a right to augmentation of Treaty annuities – contingent on the Crown receiving sufficient net revenues from the ceded lands. The annuity obligations are entirely founded on the Robinson Treaties. While the augmentation of the annuities is an exercise informed by net Crown revenue from the land, the legal interest at issue remains the annuity and the contingent augmentation thereof, not an interest in land.[256]

2. The trial judge erred in holding that an ad hoc fiduciary duty applies

186. Canadian law recognizes two broad classes of fiduciary duty – *per se* and *ad hoc* fiduciary duties.[257] *Per se* fiduciary duties arise in the context of recognized types of fiduciary relationships: e.g. guardian and ward; solicitor and client; doctor and patient, and the *sui generis* fiduciary duty recognized between the Crown and First Nations. *Ad hoc* fiduciary duties arise in contexts where there is generally no pre-existing fiduciary relationship, but instead a relationship where the beneficiary has some vulnerability and the fiduciary has undertaken to act exclusively

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[255] *Guerin* at 379; *Manitoba Métis* at para 58; *Williams Lake* at paras 52-54. While the federal Specific Claims Tribunal held (in *Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 3), that s. 14(1)(a) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 is broad enough to ground a claim for breach of fiduciary duty by the federal government when treaty annuities are not paid, the Tribunal was applying a statutory cause of action (as was also the case in *Williams Lake*), was dealing with the deliberate non-payment of set treaty annuities by the federal government from 1885-88 (as "punishment" to First Nations for their participation in the North-West Rebellion) and, in any event, appears to have equated a breach of the honour of the Crown with a breach of fiduciary duty (para 426)

[256] *Robinson Annuities – JCPC* at para 18

[257] See *Galambos v Perez*, 2009 SCC 48, particularly at paras 36-37 and 76-77

in the best interests of the beneficiary with respect to a legal interest of the beneficiary that stands to be adversely affected by the fiduciary's exercise of discretion or control.[258]

187. Ontario submits that having correctly concluded that the Crown is not under a *sui generis* fiduciary duty in this context, the trial judge erred in then concluding that an *ad hoc* fiduciary duty applies.[259]

188. There appears to be no dispute over the relevant test to establish an *ad hoc* fiduciary duty,[260] and that the plaintiffs constitute a defined class of beneficiaries (the second step of the test). In issue are the first and third steps:

- Step one: Did the Crown undertake to act exclusively in the best interests of the Robinson Treaty beneficiaries with respect to the treaty augmentation promise?
- Step three: Do the Treaty beneficiaries have a legal or substantial practical interest that stands to be adversely affected by the Crown's exercise of discretion or control?

189. At trial, Canada and Ontario submitted that both of these steps were not met, in part because the Crown must manage public lands by balancing competing interests and therefore Crown discretion must be exercised in accordance with this broader public interest.[261] The trial judge rejected these arguments, primarily by reducing the Crown undertaking to a procedural undertaking, specifically: a "promise to engage in a process to determine if the economic circumstances warrant an increase to the annuities".[262]

190. Ontario accepts that in promising to augment annuities – up to $4 per-person – the Crown

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[258] The Supreme Court has discussed *ad hoc* fiduciary duties in the Indigenous context in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*] and *Manitoba Métis*, but has not yet recognized an *ad hoc* fiduciary duty in the Indigenous context.

[259] Ontario is not aware of any other case involving Indigenous claimants where this has occurred. In *Manitoba Métis*, arguments in favour of both *sui generis* and *ad hoc* duties were rejected. In *Williams Lake*, a *sui generis* duty was recognized and therefore the possibility of an *ad hoc* duty was not considered by the majority.

[260] Reasons at para 508

[261] Crown positions summarized in the Reasons at paras 517-518.

[262] Reasons, para 519

undertook to adopt a process to determine whether net revenues called for such an increase. Ontario also accepts that the Crown is obliged to consider further increases through an honourable process. Ontario does not accept, however, that either process requires or involves an undertaking of utmost loyalty (contrary to paragraphs 523 & 524 of the Reasons).

191. There is considerable ambiguity in the Reasons with respect to the content of the *ad hoc* fiduciary duty in this case. If taken at its highest, Ontario is concerned that it would be unable to fulfil obligations that flow from such a duty in the context of the process of arriving at what annuities are owing under the judgments below. Further, imposing a fiduciary duty on the Crown's obligation to pay annuities would not appear to change that obligation.

192. With respect to the first step of the *ad hoc* fiduciary duty test, Ontario disputes that it could carry out the procedural obligations contemplated by the judgments below with utmost loyalty to the Treaty beneficiaries. The Crown has control over all sorts of information – Cabinet confidences (concerning land management decisions, the setting of royalties, etc), third party confidential business information that the government cannot share without permission, solicitor-client and litigation privileged information etc. – that it does not and legally could not owe a duty of loyalty exclusively to the Treaty beneficiaries with respect to.

193. Further, the Crown is obliged to consider many interests in deciding how to allocate scarce resources. In both making land use decisions and calculating net revenues, the Crown is obliged to proceed reasonably and honourably, but not in a manner focused exclusively on the plaintiffs' interests in maximizing net revenues to obtain higher annuities – thereby leaving fewer funds for other public purposes.

194. The trial judge seemed to recognize this reality in her discussion of the content of the *ad hoc* fiduciary duty, where she softens the usual requirement of a fiduciary to act exclusively in the best interests of the beneficiaries, without recognizing that this requirement is central to

imposing an *ad hoc* fiduciary duty:

> . … Although the content of the Crown's fiduciary duty varies, it includes, to some extent, the duty of loyalty, the duty of good faith, and the duty of disclosure (appropriate to the subject matter), among other duties.[263] [emphasis added]

195. This softening may partially reflect the concerns about attaching *ad hoc* fiduciary duties to government canvassed by the Supreme Court in *Elder Advocates,* leading the Court to conclude that the "Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare".[264]

196. In considering *Elder Advocates,* the trial judge noted that:

> However, the circumstances 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.[265]

197. Further, with respect to the third step to establish an *ad hoc* fiduciary duty (adverse affect on legal interest by Crown's exercise of discretion or control), the Crown appears to have no discretion under the judgments below with respect to whether to pay increased annuities or in what amount. In the absence of such discretion, this element of the test is not satisfied. In the event this Court recognizes that the Crown does have such discretion – as Ontario submits – it would also be improper to recognize an *ad hoc* fiduciary duty in respect of that discretion. This is because doing so would, in effect, eliminate that discretion and instead result in a duty to maximize net Crown revenue.

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[263] Reasons, paras 529-531

[264] *Elder Advocates* at paras 37, 44, 49. Also relevant is Justice Binnie's well-known statement in *Wewaykum* at para 96 that "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting".

[265] Reasons at para 526. For a further discussion by this Court see *Grand River Enterprises Six Nations Ltd. v Attorney General (Canada),* 2017 ONCA 526 at paras 172-73, 179-84, 203-04.

3. Section 35 and the honour of the Crown govern, not fiduciary duty

198. Ontario submits that there is no need to impose a fiduciary duty on the Crown in this context because the Robinson Treaties already have constitutional protection pursuant to s. 35 of the *Constitution Act, 1982* and the honour of the Crown.

199. Specifically, the Crown is bound to honourably consider whether the annuities should be augmented pursuant to the terms of the Treaties themselves, and the plaintiffs' Treaty annuity rights were given constitutional recognition and protection in 1982. This includes, but is not limited to, an obligation to consider whether sufficient net revenues have been received to warrant a mandatory increase to $4 per-person (an amount which Ontario accepts should be indexed to mitigate the effects of persistent inflation – as discussed below).

200. The trial judge addressed Canada and Ontario's arguments that s. 35 and the honour of the Crown govern, and left the matter for appellate courts to decide:

> It is not necessary for the Court at this level to consider whether one of these duties has primacy over the other. At this time, the action as pleaded relies on the doctrine of fiduciary duty, claims equitable remedies, and relies on the equitable defences that would otherwise be unavailable to the Plaintiffs. While the issue of remedies is outside the purview of this stage of the litigation, the question of the imposition of fiduciary duty must be resolved for these parties at this time. It cannot be ignored because a different model may be developed at some future point.[266] [emphasis added]

201. Potential access to equitable remedies is not a reason to find a fiduciary duty. As Justice La Forest cautioned in *Lac Minerals*, courts should not resort to fiduciary language in an "instrumental or facilitative" way in order to access equitable remedies, because this uses "a conclusion to justify a result" and "reads equity backwards".[267] This mirrors some academic

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[266] Reasons, para 505

[267] *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at 649, 652 [*Lac Minerals*]. Put another way, "the remedy tail cannot wag the liability dog": *Haida* at para 55.

critiques.[268]

202. Furthermore, a fiduciary duty must be established independently of treaty obligations. The Supreme Court discussed the need to independently establish a basis for each liability in a situation of concurrent liability in *BG Checo* (there with respect to tort and contract), and the Alberta Court of Appeal applied this guidance to the fiduciary duty context in *Pembina Resources*, concluding that "it is essential to determine whether there is an independent equitable obligation".[269] There is no basis for finding an *ad hoc* fiduciary duty in this case, arising with respect to Treaty annuities but independent of the Treaties.

203. Finally, the extraordinary nature and potential fiscal consequences of equitable remedies should call for great caution in considering whether fiduciary duties should be recognized with respect to the conduct of historical actors. Recognizing fiduciary duties in this context accentuates the risks of applying modern standards to the conduct of historical actors, by exposing the Crown to the potential for equitable damages for conduct that historical actors believed to be entirely appropriate.

204. This is particularly harsh given the view expressed by some judges that "an allegation of breach of fiduciary duty carries with it the stench of dishonesty".[270] There is no suggestion in the evidence that Crown actors believed that $4 annuities might be less than what the Treaties

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[268] Leonard I Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity" (2017) 62:4 McGill LJ 975 at 986 ("protean quality"); see also 981-82: "The 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."

[269] *BG Checo International Limited v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 36 [*BG Checo*]; *Luscar Ltd. v Pembina Resources Limited*, 1994 ABCA 356 at paras 43-46 [*Pembina Resources*]. *Pembina Resources* was recently noted as being "instructive" in *Jim Shot Both Sides v Canada*, 2019 FC 789 at para 223.

[270] *Lac Minerals* at 598 (*per* Sopinka J, joined by McIntyre J), quoting Justice Southin in *Girardet v Crease & Co.* (1987), 11 BCLR. (2d) 361 at 362 (SCJ), who in turn cites *Nocton v Lord Ashburton*, [1914] AC 932 (HL)

required; the evidence is entirely to the contrary, including the legal interpretations and decisions of the judges who sat as arbitrators in the proceedings that quantified and allocated responsibility for the Crown's obligation to pay augmented annuities.[271]

205. As Justice Binnie stated in *Wewaykum*:

> Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.[272]

206. The constitutional protections of s. 35 and the honour of the Crown set the legal standards by which Crown conduct in relation to most Aboriginal rights and interests is governed.[273] If a fiduciary duty applies in this case, the implication would seem to be that every Treaty obligation will attract a co-extensive fiduciary duty. There is no sound legal basis for such a development. Justice Binnie, writing for the Court, recognized this in *Mikisew* 2005 where he used the concept of honour of the Crown to inform treaty obligations, not fiduciary duty.[274]

E. Error regarding the Costs of Infrastructure and Institutions Built with Crown Tax Revenues

207. The judgments below contain declarations articulating "general principles" regarding what revenues and expenses should be taken into account in determining net Crown resource-based revenues for the purposes of the augmentation clause.[275]

208. These declarations were made despite a very limited record with respect to Crown finances since the 19th century, and despite the trial judge rejecting the relevance of the 19th

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[271] See Schedule D
[272] *Wewaykum* at para 121, subsequently re-quoted with approval in a judgment written by "The Court" in *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 13
[273] See e.g. *Peter Ballantyne Cree Nation v Canada (Attorney General),* 2016 SKCA 124 at para 83, leave to appeal to SCC denied June 22, 2017 and Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon, Sask: Purich Publishing Limited, 2015) at 91, as cited by the trial judge at para 502 and footnote 281 of the Reasons.
[274] *Mikisew* 2005 at para 51 ("The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties.")
[275] Judgments Below, AB-2a and 2b, para 3(b)

century arbitrations that had expressly dealt with this topic – in part based on the mistaken finding that during those arbitrations "… it was in the interests of Canada and Ontario to agree and to keep revenues as low as possible and expenses as high as possible".[276]

209. The partial judgments seek to mitigate the risks of future inconsistent findings by stating that these principles are "to be applied as general principles that are subject to clarification and further direction by the Court in a future stage of the proceeding".[277]

210. Ontario has appealed the declaration of the trial judge that "[f]or the purposes of determining the amount of net Crown resource-based revenues in a particular period: … relevant expenses … do not include the costs of infrastructure and institutions that are built with Crown tax revenues". This finding was arguably consistent with the broad finding apparently made in the Reasons that tax revenues are not relevant.[278] At the request of the plaintiffs, however, the judgments below were settled in a manner that appears to leave open the possibility that some tax revenues may be relevant, creating the potential for inconsistency.[279]

211. This 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 (CRF).[280] That evidence implies there likely will be no "infrastructure and institutions" that have been built exclusively with tax revenues. Rather, provincial infrastructure and institutions will have been built with funds drawn from the CRF, which receives a mix of tax and non-tax revenues,

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[276] Reasons, para 542. It was in Canada's interests that net revenues from the Treaty territories be high, as this would mean that it could seek indemnity from Ontario and Quebec for the $4 per-person annuities paid since 1875 (under s. 112 of the *Constitution Act, 1867*). Based on its understanding that the Crown's obligation to pay annuities could never exceed $4 per-person, and the lack of any apparent consideration of paying less, Canada had no interest in keeping net revenues low.
[277] Judgements below, AB-2a and 2b, para 3(b); See e.g. *Service Mold + Aerospace Inc v Khalaf*, 2019 ONCA 369 at paras 14-18 (and cases cited therein).
[278] Reasons, paras 547, 549
[279] Judgments Below, AB-2a and 2b, para 3(b)
[280] Scott Mantle, TRN-Vol 57:8206-10

transfers and borrowed funds, a mix that has changed over time.

212. If applied categorically, this 'general principle' may exclude expenses that should be included, at least in part. Despite the possibility of "clarification" at a later stage, Ontario submits that this principle should be set aside, leaving the matter to be addressed on a proper evidentiary record.

G. The Trial Judge Erred in Refusing to Accept that Annuities Should be Indexed to Mitigate the Impacts of Persistent Inflation

213. The principal reason why the $4 per-person annuities paid under the Robinson Treaties since 1875 are no longer appropriate and honourable, Ontario submits, is that the purchasing power of fixed monetary amounts has been hugely devalued by inflation. Recognizing an implied Treaty term that would index Robinson Treaty annuities to mitigate the impacts of persistent inflation would directly address this concern and advance reconciliation. Unlike the judgments below, this interpretation would do so in a manner that respects the intentions of the Treaty parties.

214. The trial judge treated the indexing theory and her interpretation of the augmentation clause as alternatives, which in itself was reasonable. The trial judge ultimately chose one alternative over the other, but in doing so did not reject outright an implied term to index annuities as incorrect, noting that if an appeal court finds that the augmentation clause does not operate as she has decided, the indexing claim should be reconsidered.[281]

215. As argued above, Ontario submits that the trial judge erred in choosing an interpretation of the augmentation clause that provides for an uncapped "fair share" of net Crown resource-based revenues to be paid in the form of annuities. This Court should accept the indexing claim instead.

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[281] Reasons, paras 584-597, especially paras 594-595

216. The annuities promised under the Robinson Treaties had real economic meaning to the Anishinaabe in terms of what could be purchased for that amount.[282] As noted by Wemyss Simpson in 1871, reporting as Treaty Commissioner for Treaty 1:

> The system of annual payment of money I regard as a good one, because the recipient is enabled to purchase just what he requires when he can get it most cheaply, and it also enables him to buy articles at second hand, from settlers and others, that are quite useful to him as are the same things when new. The sum of three dollars does not appear to be large enough to enable an Indian to provide himself with many of his winter necessaries; but as he receives the same amount for his wife or wives, and for each of his children, the aggregate sum is usually sufficient to procure many comforts for his family which he would otherwise be compelled to deny himself. [283]

217. No party to the Robinson Treaties anticipated in 1850, or reasonably could have anticipated, that persistent inflation would arise in the future and over time greatly reduce the economic value of the promised annuities.[284]

218. Canadian courts have yet to rule on whether a treaty term should be implied that adjusts the values of annuities payable under historic treaties to mitigate the effects of inflation on purchasing power, although the Federal Court has declined to strike such a claim,[285] and there is academic literature that supports the recognition of such a term. [286]

219. The common law test for implying a contractual term considers whether the parties intended that the term would apply in the circumstances giving rise to the dispute as being necessary to maintain the efficacy of the bargain, or whether the term otherwise meets the

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[282] Douglas McCalla, TRN-Vol 39:5912-5916; Gwynneth Jones, TRN-Vol 9:1226-27.
[283] Wemyss M. Simpson to Howe, November 3rd, 1871, contained in Morris, *Treaties of Canada*, 1880, Ex001-1173, p 43
[284] Reasons, para 574; Agreed Statement of Facts Regarding Inflation, Ex 52, paras 1-2
[285] *Horse Lake First Nation v Canada*, 2015 FC 1149 at paras 41-44; aff'd 2016 FCA 238
[286] Robert Metcs, "The Common Intention of the Parties and the Payment of Annuities under the Numbered Treaties: Who Assumed the Risk of Inflation?" (2008) 46:1 Alta L Rev 41 at 41-65; Erik Anderson, "The Treaty Annuity as Livelihood Assistance and Relationship Renewal" in Jerry P White et al, eds, *Aboriginal Policy Research: A History of Treaties and Practices*, vol 7 (Thompson Educational Publishing Inc., 2013) 73 at 88-91

'officious bystander' test – which again is anchored in common intention.[287] In *Machtinger v. HOJ Industries Ltd* (cited with approval by the Supreme Court of Canada in *M.J.B. Enterprises*), Justice McLachlin (as she then was) explained the concept of "necessity" in this area, as: "necessary in a practical sense to the fair functioning of the agreement, given the relationship between the parties", rather than strictly necessary for the existence of the contract.[288]

220. In context, the relevant questions under the common law test for an implied term should be framed as follows: What would Robinson and the Chiefs have said should happen had they been told that the value of the annuities provided by the Treaties would be devalued over time by persistent price increases to the point that the purchasing power of the annuities would drop below 10% of what was the case in 1850, and would continue to decline further? Would they have said that 'of course' an adjustment would be necessary in such circumstances? Is such an adjustment necessary to maintain the efficacy of the Treaty bargain?

221. Ontario submits that had such future circumstances been put to Robinson and the Chiefs as a possibility, they would have said that 'of course' such circumstances would call for adjustment to the $4 cap. Ontario further submits that the entirely unanticipated erosion of the purchasing power of the annuities promised by the Crown is now sufficiently extensive as to undermine the integrity of an important aspect of the Treaty bargain, namely the ongoing financial consideration promised by the Crown. Accordingly, even on the application of ordinary contract principles, a term should be implied that reverses the effects of persistent inflation on the purchasing power of the $4 annuities. The Supreme Court of Canada's jurisprudence on treaty interpretation, which looks to the honour of the Crown as an interpretive

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[287] *M.J.B. Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 29; *High Tower Homes Corp v Stevens*, 2014 ONCA 911 at para 39; Gerald H L Fridman, *The Law of Contract in Canada*, 6th ed, (Toronto: Carswell, 2011) at 463-476

[288] *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 1010

principle, and seeks to make honourable sense of treaty arrangements in the interests of reconciliation, strongly supports this result.[289]

> If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.[290]

222. Canada's expert witness historian Douglas McCalla authored a short addendum to his expert report opining that he could not be certain how Robinson would have responded to information about the possibility of persistent inflation.[291] On the stand he suggested that Robinson might have considered what should occur in the event of extreme deflation. [292] The trial judge did not suggest that Dr. McCalla's evidence provided a basis for her dismissal of the indexing claim and, in Ontario's submission, his evidence is of little use in determining whether the Court should imply a Treaty term to index annuities. His expertise does not include Crown-Indigenous interactions.[293] Further, the officious bystander test is a legal test and, in the present context, should operate on the basis that Robinson can be expected to have acted honourably.

223. The trial judge did indicate that she was "not persuaded that explaining the concept of persistent inflation and erosion of purchasing power to the parties at the Treaty Council in 1850 would have triggered an agreement to an indexing clause."[294] This finding, however, must be read in the context of the trial judge also saying that the indexing claim should be reconsidered if her interpretation of the augmentation clause is reversed. It is a deliberately soft finding that can and should – Ontario submits – be revisited by this Court. Ontario submits that acceptance of the

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[289] *Marshall No 1*, at paras 14, 43
[290] *Marshall No 1*, at para 43
[291] Addendum to McCalla Report ("McCalla Addendum"), Ex054
[292] McCalla, TRN-Vol 39:5923, 5925; McCalla Addendum, Ex54, pp 1, 5-6
[293] *Curriculum Vitae* of Douglas McCalla, Report of Douglas McCalla, June 2017, Ex54, Appendix B; McCalla, TRN-Vol 39:5856-60, 5894, 5924
[294] Reasons, para 594

need to adjust annuity payments to mitigate the impacts of persistent inflation – had the facts been put to the negotiators in 1850 – is far more likely than Robinson deliberately committing the Crown to pay an unlimited and undefined "fair share" of net revenues.

224. Implying a term to adjust annuity values in a manner that would mitigate the impacts of sustained and persistent inflation would not be amending the Treaty, which the Court has no jurisdiction to do. Instead, the Court would be recognizing that such a term is consistent with and is necessary to protect the common intentions and expectations of the Treaty parties. The common though unexpressed intention of the parties was that one pound/$4 annuities would continue to be economically meaningful in relation to their anticipated purchasing power; no one in 1850 intended that over time the annuities would become economically meaningless. As such, an honourable interpretation of the Treaties is that the monetary values stated in the Treaty texts, including the $4 per-person in the augmentation clause, should be indexed to restore their purchasing power to what the parties understood and intended.

225. For greater clarity, Ontario submits that the implied term would not have operated to index annuity values in response to <u>any</u> reduction in purchasing power following 1850, as price fluctuations would have been contemplated by the Treaty parties. Rather, the implied term calls for indexing annuities to restore their purchasing power when a substantial reduction had occurred as part of a continuing inflationary trend.

226. This is the legally correct path, Ontario submits, for this Court to address the plaintiffs' legitimate concerns regarding their $4 annuities. It would result in Robinson Treaties annuities being restored to amounts that meet the real, practical expectations of the Treaty parties, without recourse to interpretations that cannot be anchored in the common intentions of the parties.

PART V – ORDER REQUESTED

227. Ontario requests that paragraphs 1, 2, 3(c), 3(d) and 4 of the partial judgments be set aside; that sub-paragraph 3(b)(ii) of the partial judgments be amended so as to set aside the declaration that "relevant expenses … do not include the costs of infrastructure and institutions that are built with Crown tax revenues"; and that judgment be granted providing for further declaratory relief as follows:

(a) The "Robinson Superior Treaty", made on September 7, 1850, and the "Robinson Huron Treaty", made on September 9, 1850, (collectively, the "Robinson Treaties") require the Crown to pay perpetual annuities to the Indigenous Treaty parties in specified aggregate amounts - £500 and £600, respectively – and to increase the annuities in the circumstances and subject to the limits declared below;

(b) The Robinson Treaties include an implied term that requires the annuity figures stated in the Treaty texts to be "indexed" to mitigate the extensive erosion of purchasing power that has resulted from persistent inflation (the "Implied Term");

(c) In the event a Treaty territory produces sufficient net Crown revenues in a given year, the Crown must increase the annuities paid to an aggregate amount that equals $4 per-person, as adjusted based on the operation of the Implied Term,[295] multiplied by the population of the First Nation Treaty parties. This is a mandatory Treaty obligation that does not turn on the exercise of Crown discretion;

(d) The Robinson Treaties also reflect and provide for a Crown discretion regarding whether the annuities should be increased above $4 per-person (as adjusted based on the operation of the Implied Term), and if so in what amount;

(e) The Crown must exercise this discretion from time to time and when requested to do so by one or more of the Treaty First Nations, and in accordance with a process that is consistent with the honour of the Crown;

(f) Net Crown revenues produced by the Treaty territories constitute a relevant factor that may be taken into consideration in the exercise of the Crown's discretion regarding

[295] Ontario takes the position that the Implied Term would take the one pound/$4 figure stated in the Treaty texts to approximately $120 today.

whether annuities should be increased further and, if so, in what amount.

228. Ontario asks, in the alternative, the partial judgments be set aside in their entirety and that the issues determined by the partial judgments be resolved through a new trial in the Superior Court of Justice.

229. Ontario does not seek recovery of its costs on this appeal.

All of which is respectfully submitted this 22nd day of November 2019.

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Her Majesty the Queen in right of Ontario and
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APPENDIX A: Chronology Re Post-Confederation Arbitrations relating to responsibility for Robinson Treaty Annuities

1867: Confederation of the Provinces of Canada, New Brunswick and Nova Scotia under *Constitution Act, 1867*. Sections 111, 112 and 142 speak to responsibility for the Debts and Liabilities of the Province of Canada existing as of Confederation.

1870 Sept. 3: Arbitrators acting under s. 142 fix Ontario and Quebec's respective responsibilities under s. 112, for excess Debt of the Province of Canada, at 52.77% and 47.23%.[296]

Future annuity obligations under Treaties over Ontario lands are capitalized and added to the Debt of the Province of Canada. $88,000 represents the capitalized value of the future 'baseline' annuities under the Robinson Treaties.[297]

1873 July 1: The $62.5M of Debt of the Province of Canada for which Canada has no right of indemnity under s. 112 of the *Constitution Act, 1867,* is increased by approximately $10.5M.[298]

1875: Annuity payments under the Robinson Treaties are increased to $4 per person, without prejudice to whether Canada or Ontario is responsible for funding them.[299]

1891: Canada, Ontario and Quebec pass reciprocal legislation establishing a panel of "Statutory Arbitrators" to deal with financial issues.[300]

1895: February 13: The Statutory Arbitrators release Award No. 3, "on Indian Robinson Treaties, Huron and Superior". Paragraph 6 accepts Canada's argument that Ontario became solely responsible for paying augmented annuities following Confederation because they represent a charge on the ceded lands for the purposes of s. 109 of the *Constitution Act, 1867.*[301]

1895: Ontario successfully appeals paragraph 6 (and 9) of Award No. 3 to the SCC. Canada is held liable to pay augmented annuities under s. 111 of the *Constitution Act, 1867*;

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[296] Joint Historical Chronology of the Robinson Treaties of 1850, May 14, 2018, Ex87, pp. 38-9 ["Joint Chronology"]; Arbitration Award, Ex01-1078; Decision of D. L. MacPherson, Ex01-1075

[297] Letter of JM Courtney, 8 May 1884, Ex01-1211; Memorandum, 21 October 1884, Ex01-1232

[298] *An Act to re-adjust the amounts payable to and chargeable against the several Provinces of Canada by the Dominion Government, so far as they depend on the debt with which they respectively entered the Union, S.C. 1873, c. 30*. This nearly eliminated the excess Debt on which Ontario and Quebec are liable to pay interest under s. 112

[299] Joint Chronology, Ex87, pp 40-41

[300] Joint Chronology, Ex87, p 45; S.C. 1891, c. 6, Ex-01-1297. *An Act respecting the settlement, by arbitration, of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec and between the two said Provinces*: S.O. 1891, c. 2, Ex01-1290; S.Q. 1890, c. 4, Ex01-1284

[301] Joint Chronology, Ex87, p 46; Arbitration Award, 13 February 1895, Ex01-1360, pp 2-4

the majority holds that the annuities do not represent a charge on the ceded lands under s. 109.[302]

1896: The JCPC dismisses Canada's appeal in the 'Robinson Annuities Case'.[303]

1897: Canada brings a further claim to the Statutory Arbitrators in respect of annuities under the Robinson Treaties, seeking to add the value of any augmented annuities required under those Treaties to the excess Debt of the Province of Canada, for which Ontario and Quebec are conjointly liable for interest under s. 112.[304]

1898: January 7: Canada succeeds before the Statutory Arbitrators: Award No. 10 determines that liability for increased annuities under the Robinson Treaties forms part of the Debt of the Province of Canada for the purposes of s. 112 of the *Constitution Act, 1867.*[305]

Award No. 10 also articulated principles that would determine First Nation membership for the purposes of entitlement to augmented annuities (on the basis that the Crown's maximum obligation is $4 per person), and what expenses were relevant.[306]

Ontario then engaged in an accounting investigation for the period 1850 – 1892 to determine the annuities properly payable to the Robinson Treaties First Nations pursuant to the Treaties, for the past and the future. Ontario submitted to Canada and Quebec a detailed accounting of the total collections and expenditures by the Crown in respect of the Robinson Treaties territories, identifying those years in which net Crown revenues required the payment of $4 annuities.[307]

October 7: The SCC dismisses an appeal from Award No. 10.[308]

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[302] Joint Chronology, Ex87, p 46; *Ontario v Canada et* al, [1896] SCR 434, Ex01-1371

[303] Joint Chronology, Ex87, p 47; *Canada et al. v Ontario*, JCPC, 9 December 1896, Ex01- 1389

[304] Joint Chronology, Ex87, p 47; Statement of the Case of the Dominion, Arbitration on Indian Claims, 25 January 1897, Ex01-1392, p 9

[305] Joint Chronology, Ex87, p 47; Arbitration Award, 7 January, 1898, Ex01-1417; Arbitration Reasons of Chancellor Boyd, 7 January 1898, Ex01-1416; Arbitration Reasons of Sir Louis Napoleon Cassault, Ex01-1420; Extract, Transcript of Proceedings, 18 November 1897, Ex01-1410; Proceedings at Montreal, 7 January 1898, Ex01-1411, pp. 1-2, 35

[306] There appears to have been no controversy over the classes of revenues considered relevant: the Territorial Revenues of the Crown received from the ceded lands. Tax revenues were not included.

[307] Statements, 1898, Ex01-1432, 1433, 1434,

[308] Factum of the Appellant Quebec, *Canada et al. v. Ontario,* Supreme Court of Canada, 29 August 1898, Ex01-1438. *Quebec v Canada,* [1898] SCR 151, Ex01-1439. Order, Supreme Court of Canada, *Quebec v Canada,* 7 October 1898, Ex01-1440

APPENDIX A

1899: March 23: Canada, Ontario and Quebec sign off on statements of revenues and expenditures from 1851 through 1892, which are then filed with the Statutory Arbitrators.[309]

Agreement is reached amongst the three governments quantifying the Crown's obligation to pay augmented annuities for 1850 through 1892 and from 1893 into the future, as follows:

- Some years are identified when the Crown was obliged to pay augmented annuities (of $4 per person), based on net Crown revenues from a Treaty territory;
- Net Crown revenues from lands ceded under the Huron Treaty will always be sufficient to require payment of the augmented annuity of $4.00 per-person;[310]
- There was no reasonable probability that the territory ceded under the Superior Treaty will ever produce sufficient net revenue to require augmented annuities; [311]
- The Crown's obligation to pay augmented annuities in the future should be capitalized at $205,000 (based in part on the two findings just noted).[312]

1900: June 2: Counsel for Canada, Ontario and Quebec appear before the Statutory Arbitrators to request Awards confirming the agreement reached amongst the three governments.[313]

August 1: The Statutory Arbitrators issue Awards No. 15, 16 & 17: [314]

Award No. 15 determined the past and capitalized future value of augmented annuities required under the Robinson Treaties: $95,768 and $205,000, respectively, for the Robinson Huron Treaty; $17,232 and nil for the Superior Treaty.[315]

Under Award No. 16, the excess debt against which the conjoint liability of Ontario and Quebec for interest at 5% per annum, is determined to be $212,904.04, as at December 31, 1892.[316]

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[309] Report of G. Jones, 8 February 2016, Ex10 at pp 229-230. For example, see: Lake Superior: Statement of all Collections from the Territory Surrendered by the Treaty of 1850, West of Batchawannung and all Expenditures made thereon 1850-1892 Inclusive, Ex01-1430

[310] Report of G. Jones, 8 February 2016, Ex10 at pp 229-235

[311] Report of G. Jones, 8 February 2016, Ex10 at pp 229-235. Canada has continued to pay $4 per person annuities under both Robinson Treaties from 1875 to date.

[312] Report of G. Jones, 8 February 2016, Ex10 at pp 229-235; Canada Order In Council 2559, 8 December 1899, Ex01-1473. The 205K was based on: a discount rate of 4%; and agreement that augmented annuities would always be payable under the Huron Treaty, going forward, at $8,200 per year.

[313] Transcript, Unsettled Accounts Arbitration Montreal, 2 June 1900, Ex01-1480, pp 1-2

[314] Arbitration Awards Nos. 15-18, 1 August 1900, Ex01-1481, 1482

[315] Arbitration Award No. 15, 1 August 1900, Ex01-1481, pp 3-5, and Ex01-1482

[316] Arbitration Awards Nos. 15-18, 1 August 1900, Ex01-1481, p 9

SCHEDULE A: LIST OF AUTHORITIES

1. *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701
2. *Mikisew Cree First Nation v Canada*, 2005 SCC 69
3. *St. Catharine's Milling and Lumber Company v R*, [1888] UKPC 70, (1889) LR 14 App Cas 46
4. *Canada v Ontario*, [1897] AC 199, CR [11] AC 308, 1896 CarswellNat 44 (JCPC)
5. *Housen v Nikolaisen*, 2002 SCC 33
6. *Salomon v Matte-Thompson*, 2019 SCC 14
7. *R v Marshall* (1999), [1999] 3 SCR 456
8. *R v Van der Peet* (1996), [1996] 2 SCR 507)
9. *R v Caron*, 2015 SCC 56
10. *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158
11. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48
12. *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60
13. *HL v Canada (Attorney General)*, 2005 SCC 25
14. *Mitchell v MNR*, 2001 SCC 33
15. *Lovelace v Ontario*, 2000 SCC 37
16. *Delgamuukw v British Columbia* (1997), 153 DLR (4th) 193 (SCC)
17. *D'Costa v Mortakis*, 2000 CanLII 5676 (CA)
18. *R v Harper* [1982] 1 SCR 2
19. *Toneguzzo-Norvell (Guardian ad litem of) v Burnaby Hospital*, [1994] 1 SCR 114
20. *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd*, 2011 SCC 23
21. *British Columbia v. Canadian Forest Products Ltd.*, 2018 BCCA 124

22. *Koropeski v. American Biaxis Inc.*, 2008 MBCA 130

23. *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14

24. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

25. *R v Sioui* [1990] 1 SCR 1025

26. *R v Morris*, 2006 SCC 59

27. *R v Badger* [1996] 1 SCR 771

28. *R v Taylor and Williams* (1981), 34 OR (2d) 360 (ONCA)

29. *Blueberry River Indian Band v Canada* [1995] 4 SCR 344

30. *St. Mary's Indian Band v Cranbrook* [1997] 2 SCR 657

31. *Inuit of Nunavut v Canada (Attorney General)*, 2014 NUCA 2

32. *St. Catherine's Milling & Lumber Co v. R.*, [1885] OJ No 67, 10 OR 196 (H Ct J)

33. *Ontario v Dominion of Canada*, [1895] 25 SCR 434

34. *Ganton v Size*, 22 UCQB 473, 1863 CarswellOnt 107

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

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

37. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43

38. *R v Imperial Tobacco Canada Ltd* 2011 SCC 42

39. *Gordon v Canada (Attorney General)*, 2016 ONCA 625 at paras 231-32, leave to appeal refused, [2016] SCCA No 445

40. *Newfoundland (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees (NAPE)*, 2004 SCC 66

41. *Vriend v Alberta* [1998] 1 SCR 493

42. *M v H*, [1999] 2 SCR 3

43. *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)* (1991), 2 OR (3d) 716, [1991] OJ No 439 (Div Ct), leave to appeal refused, 1991 CarswellOnt 3388, [1991] OJ No 3201 (CA)

44. *Huron-Perth Children's Aid Society v Ontario (Ministry of Children and Youth Services)*, 2012 ONSC 5388 (Div Ct).

45. *Amalgamated Transit Union Local 1374 v Saskatchewan (Minister of Finance)*, 2017 SKQB 152

46. *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 (Div Ct)

47. *Consulate Ventures Inc. v Amico Contracting & Engineering (1992) Inc.*, 2011 ONCA 418

48. *Copthorne Holdings Ltd v. R.*, 2011 SCC 63

49. *Hartshorne v Hartshorne*, 2004 SCC 22

50. *Multivision Films Inc. v. McConnell Advertising Co*, [1983] OJ No 198

51. *Berthin v Berthin*, 2016 BCCA 104

52. *Reference re Excise Tax Act (Canada)*, (sub nom. *Reference re Goods & Services Tax*) [1992] 2 SCR 445 (SCC)

53. *Reference re Canada Assistance Plan (British Columbia)*, [1991] 2 SCR 525, 1991 CarswellBC 168

54. *Reference re Succession of Quebec*, [1998] 2 SCR 217, 1998 CarswellNat 1299

55. *Reference re Same-Sex Marriage*, 2004 SCC 79

56. *Zaghbib v Canada*, 2016 FCA 182

57. *Chiasson v Canada*, 2003 FCA 155

58. *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4

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

60. *Guerin v The Queen*, [1984] 2 SCR 335

61. *Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 3

62. *Galambos v Perez*, 2009 SCC 48

63. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24

64. *Grand River Enterprises Six Nations Ltd. v Attorney General (Canada)*, 2017 ONCA 526

65. *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574

66. *BG Checo International Limited v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12

67. *Luscar Ltd. v Pembina Resources Limited*, 1994 ABCA 356

68. *Jim Shot Both Sides v Canada*, 2019 FC 789

69. *Canada (Attorney General) v Lameman*, 2008 SCC 14

70. *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124, leave to appeal to SCC denied June 22, 2017

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

72. *Horse Lake First Nation v Canada*, 2015 FC 1149 aff'd 2016 FCA 238

73. *M.J.B. Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619

74. *High Tower Homes Corp v Stevens*, 2014 ONCA 911

75. *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986

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81. *A Dictionary of the English Language*, 1785

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87. Leonard I Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity" (2017) 62:4 McGill LJ 975

88. Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon, Sask: Purich Publishing Limited, 2015)

89. Robert Metcs, "The Common Intention of the Parties and the Payment of Annuities under the Numbered Treaties: Who Assumed the Risk of Inflation?" (2008) 46:1 Alta L Rev 41

90. Erik Anderson, "The Treaty Annuity as Livelihood Assistance and Relationship Renewal" in Jerry P White et al, eds, *Aboriginal Policy Research: A History of Treaties and Practices*, vol 7 (Thompson Educational Publishing Inc., 2013) 73

91. Gerald H L Fridman, *The Law of Contract in Canada*, 6th ed, (Toronto: Carswell, 2011)

SCHEDULE B: LIST OF STATUTORY AUTHORITIES

***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.**

[…]

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[…]

***Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3**

[…]

POWERS OF THE PARLIAMENT

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the

Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[…]

24. Indians, and Lands reserved for the Indians.

[…]

Property in Lands, Mines, etc.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

[…]

Canada to be liable for Provincial Debts

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

Debts of Ontario and Quebec

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

[…]

Arbitration respecting Debts, etc.

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec.

[…]

SCHEDULE C: ANISHINAABE REQUESTS FOR COMPENSATION IN THE PRE-TREATY PERIOD

	Document	Date	Exhibit Book Reference[317]
1	Chief Shingwaukonse petition to Governor General Lord Carthcart	Jun 10, 1846	01-0437; 1A-0437.2*
2	"Arrival of His Excellency the Governor General", *British Colonist* (reporting on presentation of a memorial from Chief Shingwaukonse and other Chiefs to Governor General Lord Elgin)	Oct 19, 1847	01-0569 [see column 2, under "His Excellency's Reply" & column 3 under "Saturday Morning"]
3	Memorial of Indians at the Sault Ste Marie to Governor General Lord Elgin	Jul 5, 1847	01-0548; 1A-0548.2*
4	Letter from Thomas G. Anderson, Visiting Superintendent of Indian Affairs, to J.E. Campbell, Superintendent General of Indian Affairs (reporting on findings from his visit with the Lake Huron and Superior Anishinaabe on August 18 and 19, 1848)	Aug 26, 1848	01-0604; 1A-0604.2*
5	Minutes of a Council held by T.G. Anderson at Sault Ste. Marie (Speeches of Chiefs Shingwaukonse and Peau de Chat)	Aug 18, 1848	01-0604 [see esp. pp.9-10, 12-13]; 1A-0604.2* [see esp. pp. 6-7, 9-10]
6	Letter from T.G. Anderson to J.E. Campbell forwarding a copy of "Speech of Old Pine – An Indian Chief" from an undated and unidentified newspaper (containing an alternate account of Chief Shingwaukonse's speech on Aug 18, 1848)	Oct 9, 1848	01-608 [see esp. p.9]; 1A-608.2*; [see esp. p. 3]
7	"Appeal from the Chippewa Indians to the British Government", *Montreal Gazette* (Memorial read to Governor General Lord Elgin by delegation of Lake Huron Chiefs)	Jul 7, 1849	01-0629 [see esp. p.5, column 3]; 1A-629.2* [see esp. p. 4]
8	Vidal-Anderson Commission Report	Dec 5, 1849	01-0703 [see esp. pp. 7,9-10, appendix, p.23]; 01-0701* [see esp. pp.4-5, 9]

[317] References to transcriptions have been included, where available, and are denoted with an asterisk.

SCHEDULE D: POST-TREATY EVIDENCE GOING TO THE CROWN'S UNDERSTANDING OF THE AUGMENTATION CLAUSE

	Document	Date	Exhibit Book Reference[318]
Examples of Post-Treaty Documents Evidencing a Crown Understanding of the Augmentation Clause Contrary to the Trial Judge's Findings			
1	Report from A.W. Buchanan, HBC postmaster for Sault Ste. Marie, to George Simpson, Governor HBC	Sep 11, 1850	01-0841; 1A-0841.2*
2	Report from W.B. Robinson, Treaty Commissioner to Colonel Bruce on the Treaty negotiations	Sep 24, 1850	01-0851; 01-1680*
3	*The Treaty with the Indians*, British Colonist Newspaper	Oct 1, 1850	83-0008
4	Letter from Colonel Bruce to W.B. Robinson regarding a petition from Lake Huron Chiefs, which asked for the government to consider distributing annuities based on traditional land areas rather than population. [Aug 17, 1851, Exhibits 01-0930, 1A-0930.2*]	Oct 16, 1851	01-0943; 1A-0943*
5	Report of Special Commissioners appointed Investigate Indian Affairs in Canada	1858	01-1001 [see p. 70]
6	Letter from Richard Carney, Indian Agent to R.T. Pennefather, Superintendent General of Indian Affairs reporting on a visit to Garden River First Nation	Sep 3, 1858	01-1023 [see esp. at p.3]; 1B-1023.1* [see esp. at p.2]
7	Letter from Simon Dawson, M.P to the Secretary to the Governor General	Apr 7, 1873	1A-1092.1; 1A-1092.2*
8	Report of Deputy Superintendent of Indian Affairs, William Spragge on augmented annuities under the Robinson Treaties	Apr 13, 1873	01-1094*; 01-1095

[318] References to transcriptions have been included, where available, and are denoted with an asterisk.

SCHEDULE D

9	Letter from E.B. Borron, M.P., to E.A. Meredith, Deputy Minister, Department of the Interior	Aug 6, 1874	01-1114; 1A-1114.2*
10	Letter from E.B. Borron, M.P. to David Laird, Minister of the Interior	Nov 28, 1874	01-1121; 1A-1121.2*
11	Letter from E.B. Borron to David Laird, Minister of the Interior	Apr 1, 1875	13
12	Opinion of Justice Minister Edward Blake regarding the claim for increased annuities under the Robinson Treaties	Jul 7, 1875	01-1131; 1A-1131.2*
13	Report from D. Laird, Minister of the Interior to the Federal Privy Council	Jul 12, 1875	01-1133; 1A-1133.2*
14	Federal Order in Council increasing annuities "to the maximum amount of annuity thereby stipulated, namely $4.00 per head"	Jul 22, 1875	1A-1134.1; 1A-1134.2*
15	Letter from E.A. Meredith, Deputy Minister, Department of the Interior to Indian Affairs	Sep 1, 1875	01-1138
16	Letter from Simon Dawson, M.P. to Colonel Stuart, Office of the Secretary to the Governor General	Oct 7, 1881	01-1178; 1A-1179.2*
17	Letter from Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Sir John A. MacDonald, Superintendent General of Indian Affairs	Oct 20, 1881	01-1180
18	Memo from Robert Sinclair, Indian Affairs to Colonel A. Stuart, Office of the Secretary to the Governor General	Nov, 1881	01-1181; 1A-1181.2*
19	Letter from Charles Skene, Indian Agent to John A. Macdonald, Prime Minister and Superintendent of Indian Affairs	Jan 9, 1884	01-1200; 71*
20	Account of Robinson's explanation of the augmentation clause contained in the Affidavit of Batchewana First Nation Elder John Mashekyash	Jun 1, 1893	01-1332; 1A-1332.2*

	taken by Garden River member John Driver		
21	Letter from E.L. Newcombe, Deputy Minister, Department of Justice & Solicitor of Indian Affairs to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs responding to Letter from Vankoughnet	Jun 19, 1893 Jun 17, 1893	01-1293 Responding to: 01-1334
22	In the Matter of the Arbitration between the Dominion, Ontario and Quebec: Statement of the Case of the Dominion on Indian claims arising out of the "Robinson Treaties"	Oct 5, 1893	01-1340
23	In the Matter of the Arbitration between the Dominion, Ontario and Quebec: Answer of Ontario on the case of the Dominion claims relating to the claims for increases and arrears of annuities under the Huron-Superior Treaties of 1850	Jun 25, 1894	01-1350
24	Transcripts from the Unsettled Accounts Arbitration, Indian Claims, Robinson Treaties	Nov 20,1894	01-1354 [see e.g.: pp 63-4, 66, 72-6, 115-24, 139-41, 148-227, 334-5, 338, 365-6, 369-71, 418-9, 436-8, 470-1, 477-9]
25	Award of the Arbitrators on the Indian Annuities	Feb 13,1895	01-1360, 1A-1360.2*
26	The Honourable Mr. Justice Burbidge's Reasons for Award No. 3 of 13th February 1895 in Judgments by the learned Arbitrators on Indian Annuities	Feb 14, 1895	01-1361; p. 49
27	Factum of Ontario in the SCC on its appeal from the award of the arbitrators on Indian claims arising out of the annuities payable under the Robinson Treaties	1895	01-1366
28	Factum of the Dominion in the SCC on the appeal of Ontario from the award of the arbitrators on Indian claims arising out of the annuities payable under the Robinson Treaties	1895	01-1367

SCHEDULE D

29	Factum of Quebec in the SCC on the appeal of Ontario from the award of the arbitrators on the claim of the Dominion respecting Indian annuities and arrears under the Robison Treaties	Apr 15, 1895	01-1369
30	Statement of the Case of the Dominion of Canada before the JCPC in the Robinson Annuities Case	1896	01-1375
31	Case for the Respondent Attorney General for Ontario before the JCPC in the Robinson Annuities Case	1896	01-1374
32	Memorandum for the Secretary of the Department of Indian Affairs from D. Scott, Chief Clerk and Accountant, Indian Affairs	Jan 10, 1899	01-1449; 21*
Ambiguous Post-Treaty Documents Relied on by the Plaintiffs in Support of their Argument that the Crown did not intend to Cap Augmented Annuities at $4 per-person			
33	*The Indian Treaty*, British Colonist Newspaper	Oct 1, 1850	83-0008
34	Letter from W.B. Robinson to Colonel Bruce	Dec 27, 1850	01-0887; 1A-0887.2*
Post-Treaty Documents Supportive of the Trial Judge's Findings regarding the Crown's Understanding of the Augmentation Clause			
	Nil.		

SCHEDULE E: POST-TREATY EVIDENCE GOING TO THE ANISHINAABE UNDERSTANDING OF THE AUGMENTATION CLAUSE

	Document	Date	Exhibit Book Reference[319]
Anishinaabe Oral History Accounts Referring to Annuities up to $4			
1	Affidavit of Batchewana First Nation Elder John Mashekyash taken by Garden River member John Driver	Jun 1, 1893	01-1332; 1A-1332.2*
2	Recollection of Garden River First Nation Chief Pequitehenene, son of Chief Shingwaukonse (reported by William Van Abbott, Indian Agent for Garden River First Nation, to Hayter Reed, Deputy Superintendent General of Indian Affairs)	Apr 4, 1896	01-1381
Other Post-Treaty Documents Evidencing an Anishinaabe Understanding of $4 Annuities			
3	Letter from Richard Carney, Indian Agent for Garden River First Nation to Richard Pennefather, Superintendent of Indian Affairs	Sep 3, 1858	01-1023; 1B-1023.1*
4	Memorial of the Ojebwa Indians to Governor General John Young Baronet (signed, after being read and explained to them, by a number of Lake Huron Chiefs and principal men, including some who signed the Robinson Treaties[320])	Jun 12, 1869 & Jul 24, 1870	01-1072; 1A-1072.2*
5	Petition of Fort William First Nation to the Governor General	Feb 12, 1873	01-1088; 1A-1088.2*
6	Petition of Fort William First Nation to the Governor General	Mar 1, 1873	01-1090; 1A-1090.2*
7	Petition of Fort William First Nation to the Governor General	Mar 20, 1874	01-1108; 1B-1108.1*
8	Petition on behalf of Chiefs and principal men of the Robinson Huron and Robinson Superior Anishinaabe to Governor General, Lord Dufferin	Nov 23, 1877	01-1158, 1A-1158.2*

[319] References to transcriptions have been included, where available, and are denoted with an asterisk.
[320] See Reply Report of James Morrison, Dated Sep 20, 2017, Ex16, paras 11-13

SCHEDULE E

9	Extract of a Petition of Fort William First Nation to the Governor General appended to Letter to Amos Wright, Indian Agent at Prince Arthur's landing	Oct 30, 1880	01-1175; 1A-1175.2*
10	Letter from Chief Solomon James to Member of Parliament, W.E. O'Brien	Jan 14, 1884	01-1201; 1A-1201.2*
11	Statement of Case of the Dominion on Indian Claims Arising out of the Robinson Treaties in the Arbitration between the Dominion, the Province of Canada, and the Provinces of Ontario and Quebec	Oct 5, 1893	01-1340
12	Factum of the Dominion in the Supreme Court of Canada on the Appeal of Ontario from the Award of Arbitrators on claims arising out of the Huron and Superior Treaties with the Ojibway Indians	Apr 1895	01-1367
13	Case of the Appellant the Dominion in the Judicial Committee of the Privy Council on Appeal from the Supreme Court of Canada in the Matter of the Arbitration for the settlement of accounts	1896	01-1375
Post-Treaty Documents Evidencing an Anishinaabe Understanding of $10 Annuities			
14	Petition from Spanish River First Nation Chief and Robinson Huron signatory, Pierre Oningenun to the Superintendent General of Indian Affairs, (also contained in a Resolution of Chiefs and Councillors of Spanish River First Nation at General Meeting held in Council following up on the Dec 3, 1883 petition)	Petition: Dec 3, 1883 Resolution: Jan 20, 1911	Petition: 01-1196 Resolution: 01-1262; 1A-1262.2*
15	Petition by Chiefs and Councillors of Parry Island First Nation to the Department of Indian Affairs purporting to provide an oral history account of the Penetanguishine adhesion to the Robinson Huron Treaty	Mar 25, 1887	1A-1257.1; 1A-1257.2*
16	Possibly: Letter from J. Wilson, Indian Commissioner to R. Pennefather, Superintendent of Indian Affairs reporting on a letter received from Reverand Choné on behalf of the Fort William First Nation	Sep 19, 1857	01-1012; 1B-1012*

SCHEDULE E

Post-Treaty Documents with Ambiguous References by the Anishinaabe to Annuities Above $4			
17	Letter from Charles Skene, Indian Agent to Prime Minister and Superintendent General of Indian Affairs, John A. Macdonald, reporting on a meeting with Huron Chiefs Solomon James and P. Megis; also refers to petition from Lake Huron Chiefs requesting an increase in annuities to $10, likely the Dec 3, 1883 petition from Chief Pierre Oningenun	Jan 9, 1884	01-1200; 71*
Post-Treaty Documents Relied on by the Plaintiffs in Support of their Argument that the Anishinaabe Understood they were Entitled to Unlimited Collective Annuities in Addition to Annuities Paid to Individuals			
18	Letter from Captain Ironside to Colonel Bruce conveying complaints from Chief Shingwaukonse and Robinson's response to same	Nov 20, 1850 Dec 27, 1850	01-0878; 1A-0878.2* 01-0887; 1A-0887.2*
19	Petition from Two Lake Huron Chiefs to Governor General Lord Elgin W.B. Robinson's Response	Aug 17, 1851 Oct 21, 1851	01-0931 01-0945
20	Petition from Fort William First Nation to Governor General Lord Elgin	Jan 3, 1852	01-0955; 20-0015.4.1*
Post-Treaty Documents Supportive of the Trial Judge's Findings regarding the Anishinaabe Understanding of the Augmentation Clause			
	Nil.		

Restoule, *et al* Plaintiffs (Respondents)	-and-	**Attorney General of Canada, *et al*** Defendants (Respondent/Appellants)
Red Rock First Nation, *et al* Plaintiffs (Respondents)	-and-	**Attorney General of Canada, *et al*** Defendants (Respondent/Appellants)

Court File No: C66455

COURT OF APPEAL FOR ONTARIO
Proceedings commenced in
Sudbury and Thunder Bay

APPELLANTS' FACTUM ON THE MERITS

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