COURT FILE NO.: C-3512-14 / C-3512-14A / 2001-0673
DATE: 2022-11-28

SUPERIOR COURT OF JUSTICE – ONTARIO

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

Plaintiffs

– AND –

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

Defendants

The Red Rock First Nation and The Whitesand First Nation

Third Parties

BEFORE: The Honourable Madam Justice Patricia C. Hennessy

COUNSEL: *Catherine Boies Parker Q.C./Christopher Albinati/Alexander Kirby*, for the Plaintiffs
Glynis Evans/Claudia Tsang/Cameron Fiske/Rhiannon McNamara, for Defendant the Attorney General of Canada
David Rankin/Brodie Noga/Mariam Gagi/Vanessa Glasser/Simon Cameron, for the Defendant the Attorney General of Ontario and Her Majesty the Queen in Right of Ontario
Harley Schachter/Kaitlyn Lewis, for The Red Rock First Nation and The Whitesand First Nation
Kate Gunn, for Teme-Augama Anishnabai
Spencer Bass, for Pays Plat First Nation, Netmizaaggamig Nishnaabeg First Nation, Long Lake No. 58 First Nation, Biigtigong Nishnaabeg First Nation, Biinjitiwaabik Zaaging Anishinaabek First Nation, Bingwi Neyaashi Anishinaabek First Nation and Animbiigoo Zaagi'igan Anishinaabek First Nation
Ceyda Turan, for Michipicoten First Nation
Jeremy Greenberg/Brett Robins, for Namaygoosisagagun Ojibway Nation
Christina Gray, for Gull Bay First Nation
Samuel W. Crowe, for Fort William First Nation

HEARD: November 4, 2022

ENDORSEMENT

ONTARIO MOTION TO ADJOURN STAGE THREE TRIAL

[1] Ontario brings this motion to adjourn the Stage Three trial *sine die* pending the Supreme Court of Canada (the "Supreme Court") decision on the appeal of Stage One and Stage Two of this action. The Stage Three trial is scheduled to commence mid-January 2023. The Huron and the Superior plaintiffs, the 12 interveners, and the defendant Canada oppose this motion. This motion follows an unsuccessful application to the Supreme Court for a stay of proceedings filed in July

2022. Jamal J. of the Supreme Court instructed the defendant Ontario to bring the motion before me as the case management judge.

[2] For the reasons that follow, this motion to adjourn is dismissed.

Background

[3] The background and context of this case have been set out in the decision of the Court of Appeal for Ontario (the "Court of Appeal").[1]

[4] Suffice to say, all parties agree that this is highly complex and significant litigation. It involves allegations that the Crown did not fulfill it's promises made in the Robinson-Huron and Robinson-Superior Treaties of 1850 (the "Robinson Treaties"). At trial and on appeal, the courts found that the Crown has had duties flowing from the honour of the Crown from the time the Treaty was negotiated to the present day.

[5] This action involves more that 35 First Nations representing the Anishinaabe people who currently and historically have occupied the vast territories of the Upper Great Lakes. The litigation comprises of two actions, one started by the Superior plaintiffs in Northwest Ontario in 2001 and one started by the Huron Plaintiffs in Northeast Ontario in 2015. The Robinson Treaties involved a cession of their territories in return for consideration, which included a payment made to the Chiefs at the time of the signing of the Treaty and a promise of an annuity. The annuity clause is unique among Treaties and references circumstances for augmenting the annuities. The interpretation of this clause and how it should be implemented is the subject of this litigation.

[6] The plaintiffs ask the court to find that the annuity clause requires the Crown to increase annuities based on profits from the net Crown resource revenues from the territories and to award compensation for the Crown's failure to honour and implement the promise over the last 170 years.

[7] A unanimous Court of Appeal held that the court has the authority and the obligation to impose specific and general duties on the Crown to address an injustice that brings dishonor to the Crown.[2] The purpose of the Stage Three trial is twofold; first, to consider the claim for compensation and second, to determine the allocation of liability between the federal and provincial Crown.

Ontario's Position on the Request to Adjourn

[8] Ontario submits that Stage Three of these proceedings cannot be held prior to the resolution of the pending the appeal. They say that there is a high risk that the Supreme Court decision "will materially alter the scope and nature" of Stage Three and therefore there is a risk that all or substantial parts of the hearing would need to be redone. They assert that going ahead with Stage Three, while an appeal is pending would be "catastrophic". In effect, they submit that the risk of going ahead with Stage Three would cause irreparable harm, does not favour the balance of convenience and is an inefficient use of scarce public and judicial resources.

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[1] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 DLR (4th) 2 [*Restoule* ONCA].
[2] *Restoule* ONCA, at paras. 249-53, 492 and 503.

[9] In support of its motion, Ontario argues that there is a general rule that trials should be adjourned where there is a pending appeal that could affect the course of the trial, unless there are very special reasons otherwise. In this case, Ontario says that there are no special reasons that disrupt this general rule.

[10] Ontario relies on two cases in support of this proposition: *Popovich v. Financial Investment Centre Inc.*[3] and *Atlas Construction Inc. v. Brownstones*.[4]

[11] A careful reading of these cases does not support the conclusions Ontario asserts. *Popovich* and *Atlas Construction* do not create a general rule.[5] There is no appellate authority for this general rule, nor is there authority for the proposition that the onus shifts to the responding party to show special reasons to rebut this general rule. However, in the cases Ontario cites, the courts do consider the fact of a pending appeal when considering a request for an adjournment.

[12] Nevertheless, there are "very special reasons" in this case, including:

a. the massive and complex nature of a case involving a claim of unfulfilled Treaty promises;

b. issues of significant public interest, including a constitutional dispute over Crown allocation; and

c. the matter of Crown Indigenous relations and reconciliation.

The Test on a Motion for an Adjournment

[13] The test for an adjournment under r. 52.02 of the *Rules of Civil Procedure*[6] is set out by the Court of Appeal in *Khimji v. Dhanani,*[7] *Toronto-Dominion Bank v. Hylton,*[8] and *Van Decker Estate v. Van Decker*.[9] Ontario, as the moving party, bears the onus of demonstrating that an adjournment is warranted in the circumstances.[10]

[14] The court is required to balance:

a. the interests of the plaintiffs;

b. the interests of the defendants; and

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[3] 2017 ONSC 1514 [*Popovich*].
[4] [1996] O.J. No. 703 (S.C.) [*Atlas Construction*].
[5] The courts in *Popovich* and *Atlas Construction* rely on a British Columbia Court of Appeal case from 1918, *Esquimalt & Nanaimo Railway Company v. Dunlop*, 1918 CarswellBC 109, which dealt with stay's pending appeal. The test for a stay is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.
[6] R.R.O. 1990, Reg. 194.
[7] (2004), 69 O.R. (3d) 790 (C.A.) [*Khimji*].
[8] 2010 ONCA 752.
[9] 2022 ONCA 712.
[10] *Awada v. Kanywabahizi*, 2021 ONSC 5918, at para. 13.

c. the interests of the administration of justice in the orderly processing of the civil trials on their merits.[11]

[15] The court must take into account all relevant considerations in the exercise of their discretion.[12]

[16] In *Ariston Realty Corp. v. Elcarim Inc.*,[13] Perell J. set out a non-exhaustive list of relevant factors to be considered on a request for an adjournment. These factors are an expansion of the three considerations forming the test in *Khimji*. This approach was adopted by the Court of Appeal in *Turbo Logistics Canada Inc. v. HSBC Bank Canada*.[14]

[17] The relevant factors to be considered in the balancing exercise on this motion include many of the factors listed by Perell J. but also include factors that arise in large part from the nature and scope of this case.

[18] Both Ontario and the plaintiffs addressed the factors in the test for a stay: irreparable harm and balance of convenience. The only relief available from this court is an adjournment. The tests for a stay and an adjournment are similar. I will apply the test for an adjournment while taking into account all of the factors argued by the parties.

[19] Whether an adjournment is warranted is a fact-based analysis. The circumstances of this litigation are vastly different from of the fact situations in the jurisprudence relied upon by Ontario.

[20] I have considered the *Ariston Realty* factors and narrowed them to factors that are relevant to this case and added to the list additional factors identified by the parties.

Factors Relevant to this Request for an Adjournment

1. The risk of proceeding while the appeal is pending;

2. The overall objective of a determination of the matter on its substantive merits;

3. The particular circumstances of the request for an adjournment and the reasons and justification for the request;

4. The practical effect or consequences of an adjournment on both substantial and procedural justice;

5. The competing interests of the parties in advancing or delaying the progress of the litigation;

6. The prejudice not compensable in costs, if any, suffered by the party by the granting or refusing of the adjournment;

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[11] *Khimji*, at para. 14, dissenting, but not on this point.
[12] *Hylton*, at para. 37.
[13] [2007] O.J. No. 1497 (S.C.), at para. 34 [*Ariston Realty*].
[14] 2016 ONCA 222, 401 DLR (4th) 187, at paras. 22-27.

7. Whether the ability of either party to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused;

8. The interests of the administration of justice and the interests of justice to orderly process civil proceedings; including the scarce use of judicial and public resources;

9. The case management process; and

10. Reconciliation and s. 35 of the *Constitution Act, 1982*.

[21] Ontario raised, and the plaintiffs responded to, arguments on the factors of balance of convenience and irreparable harm. I will consider these under factors 5 and 6. Factors 9 and 10 were raised specifically as additional relevant factors by the parties.

[22] There is considerable overlap between these factors. I have refrained from repetition where categories overlap; however, I have considered all of the factors raised by the parties and balanced them accordingly.

1. *The risk of proceeding while an appeal is pending*

[23] The focus of Ontario's submissions is on the high risk that the trial would have to be redone if it proceeded while the appeal was pending. Ontario argues that all of the relevant factors should be assessed through the lens of this risk.

[24] Ontario submits that the scope and features of Stage Three could be altered by the Supreme Court decision on appeal and if so, that could change the evidence and submissions necessary for determination of the issue of compensation, if any. They assert that to proceed raises the risk that the parties will spend significant time leading evidence on irrelevant issues, which would trigger a mistrial, necessitate a new trial, or represent a wasteful expenditure of resources.

[25] In response, the plaintiffs and the intervenors, who have invested similar resources of time and money on research, expert witnesses and coordinating their positions with their clients, disagree with Ontario's risk assessment. The plaintiffs say that Ontario's assessment is speculative, exaggerated, and unlikely to arise.[15]

[26] The plaintiffs submit that Ontario's factum to the Supreme Court proposes a Treaty interpretation that would continue to make the planned Stage Three evidence relevant. All of this evidence currently exists in the form of expert reports which have been exchanged between the parties and filed with the court. The data was collected, analysed and reports were written at great expense to the parties. The plaintiffs submit that no matter what the outcome at the Supreme Court, the calculation of net Crown resource revenues, Anishinaabe perspectives on sharing, and the economic context will remain relevant information.

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[15] The defendant Canada did not make independent arguments but opposes the adjournment.

[27] The plaintiffs propose that whatever risk arises, it can be mitigated by leaving open the possibility to receive both additional evidence and argument until the release of the Supreme Court decision. This is one potential approach to mitigating the risk. The plaintiffs call this the "wait and see approach".

[28] If the timing works, this approach may well address Ontario's concerns. However, Ontario flatly denies the practicality of the "wait and see approach" without responding to the detailed arguments made by the plaintiffs about the relevance of the evidence. Ontario contends that this proposal would not avoid the potential that the parties would lead irrelevant evidence possibly causing a mistrial or that a new trial would be required.

[29] At the same time, Ontario concedes that the evidence planned and in hand for Stage Three on net Crown resource revenues and Anishinaabe perspectives on sharing is relevant to the exercise of the Crown discretion and the implementation of the Treaty promise. Ontario accepts that in the exercise of their discretion, they must engage and consult with the plaintiffs on these subjects. One way or the other the information that is the basis of the proposed evidence will be relevant to the determination of what, if anything, is owed to the Anishinaabe Treaty parties for the failure to have regard to the augmentation promise for over 170 years.

[30] The "wait and see approach" proposed by plaintiffs is not unknown to Canadian courts.[16] It could mitigate against any concerns that Ontario might have of the risks of inconsistent decisions and is an obvious topic which could be addressed in case management.

[31] In 2010 the Superior plaintiffs obtained a severance Order and later in 2016, in the combined action, the plaintiffs consented to an order bifurcating the trial. The parties and the court contemplated the utility of having a trial decision on liability before proceeding with a determination of the compensation claim. It was Ontario's decision to unilaterally alter the framework on which these decisions were made by appealing before allocation of Crown liability and compensation were determined. In other words, the risk Ontario now identifies has long existed, is a condition they created, and which did not interfere with their trial preparation over the last three years. Had the pandemic shutdowns and delays not occurred, the Stage Three trial might have proceeded shortly after the release of, or in tandem, with the Court of Appeal's decision.

[32] The risk in and of itself can be addressed through a principled approach within the established case management process.

2. *The overall objective of a determination on the merits*

[33] The plaintiffs are Treaty beneficiaries of promises made over 170 years ago. The Court of Appeal has confirmed that the Crown owes a duty to their Treaty partners with respect to the annuity clause.

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[16] For example, some trial courts awaited sentencing while waiting for the Supreme Court to decide on the constitutionality of consecutive life sentences and parole ineligibility periods. See e.g.: *R. v. Fenn*, 2022 ONSC 3295.

[34] This historic dispute of immense dimensions continues to damage the Crown Anishinaabe relationship. This claim must be resolved either on its merits in this proceeding or through an honourably negotiated resolution process. Both this court and the Court of Appeal have strongly encouraged the parties to address and resolve this dispute outside the courtroom, without avail.[17] There is no doubt that an out of court approach would be a preferable way to address these historic complaints and the future relationship. But there is no indication that a settlement is imminent. The plaintiffs, their northern Ontario community neighbours and the broader public deserve a determination of the claim on the merits. An adjournment denies the plaintiffs and the public a determination on the merits and prolongs the continuing damage to the Crown Anishinaabe relationship. It is this court's obligation to provide the parties with the opportunity for the resolution of this seemingly intractable historic dispute. Ontario contends they wish to do so. For whatever reason, the parties have not been able to do this. However, the record demonstrates the extraordinary resources the parties have expended in bringing this case to trial. A fair and effective system of justice requires that the parties be provided with the court resources for a timely adjudication of this dispute.[18]

3. The particular circumstances of the request for an adjournment and the reasons and justification for the request

[35] There are two major components that form the background for this request. Most significantly for Ontario, there is the pending appeal on the issue of Treaty interpretation. This appeal will not be heard for another year. Second, Ontario also relies on what they say is the "status quo" agreement that Stage Three would not proceed until the appeal decisions of the Stage One and Stage Two decisions had been rendered.

[36] I have addressed the risk issue above. With respect to the latter assertion, the plaintiffs reject this characterization of the 2016 consent Order in the strongest terms. I agree that Ontario has mischaracterized the consent Order. It is important to correct and clarify the record in this respect.

[37] The agreements recited in the Orders refer to a determination of "threshold issues", i.e., Treaty interpretation, by "the Court". "The Court" in those recitals clearly refers to this court, the court in which the trial was being held and the court named in the title of proceedings. There was no agreement, consensus, or expectation that the quantification stage of the proceedings would await the final determination of all appeals in respect of the issues decided by the trial court.

[38] What was agreed and incorporated into the 2016 consent Order was that all issues but for quantification would be decided by the trial judge before the issues relating to quantification were heard by the trial judge.

[39] In any event, Ontario's conduct over the last three years also underscores that they did not harbour this interpretation of the consent Order until recently. From 2017 up until July 2022, Ontario actively participated in preparing for this Stage Three to begin on agreed dates. It

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[17] *Restoule* C.A., at paras. 332-3*; Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, 431 DLR (4th) 32, at paras. 491-2.

[18] See: Chief Justice Winkler, "Evaluation of civil case management in the Toronto Region: A Report on the Implementation of the Toronto Practice Direction and Rule 78," February 2008, at p. 33, online: Ontario Courts: <www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf>.

conducted itself as if it was ready and willing by committing significant resources to begin Stage Three on the scheduled date, before the resolution of any appeal. The other parties similarly conducted themselves as if bound by the consent schedule that took into account the needs and perspectives of the parties.

[40] Ontario's interpretation of the consent Order does not represent the status quo and consequently, is not a justification for the adjournment.

4. *The practical effect or consequences of an adjournment on both substantial and procedural justice*

[41] There is no doubt that the goal and the practical effect of an adjournment is a delay in the substantial determination of the issues of the compensation, if any, due the plaintiffs for the failure to implement the Treaty promise and the allocation of Crown liability.

[42] In this case, delay already constitutes an independent injustice to the plaintiffs. There is the delay from 1875 to the present in failing to honour the duty to consider whether the annuity can be augmented based upon net the net Crown resource revenues from the territories. There is the delay caused by shutdowns during the pandemic. And of course, there is the regular and predictable delay when trying to manage and schedule a complex case with dozens of lawyers and witnesses who have overlapping and competing professional obligations.

[43] It is the substantive consequences of the delay on the Treaty beneficiaries that is most grievous. The plaintiffs contend, unsurprisingly, that there are many deaths every year among Treaty beneficiaries. Should there be an award for compensation, those plaintiffs will never live to enjoy any increased Treaty benefits or reconciliation. Ontario's proposed adjournment could result in a delay up to an additional five years. This delay also continues to impede the process of reconciliation.

[44] The practical effect of an adjournment for Ontario, is that they are relieved from defending this claim for the period of the adjournment and making compensation, if any, that might be ordered. In this way Ontario is in no different position than other defendants who have an economic interest in delay.[19]

[45] Ontario minimizes the urgency to the continuation of this trial. The plaintiffs as individuals and communities will be denied possible redress for historic wrongs so long as this case remains unresolved.

5. *The competing interests of the parties in advancing or delaying the progress of the litigation*

[46] I will also assess the balance of convenience under this factor. This assessment involves a balancing of which party will suffer the greater harm if there is an adjournment. Ontario's argument on this point references back to their assessment of the risk of going forward in the face of a pending appeal.

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[19] See: *SS & C Technologies v. Bank of New York Mellon et al.*, 2021 ONSC 4682, at para. 34 [*SS&C*].

[47] One way to look at balance of convenience is to consider the harm that would be done if the adjournment was denied. Ontario identifies a single harm, that the trial would have to be redone. This 'harm' would be experienced by every other party to the litigation. Each of those other 36 parties have assessed the risk of that harm and they have come to a different conclusion. They have found the risk speculative and have considered how to manage it. Ontario's risk is no greater or different than the risk of harm to all of the other parties.

[48] The plaintiffs face the harm that flows from the possible loss of evidence if there is a long delay. Many of the plaintiffs' witnesses, including Elders are of advanced age. We have already been advised that one witness whose research has been completed and his report delivered has now encountered health challenges that make his appearance unlikely. At this time, the plaintiffs are at risk of losing his evidence and the time and expense of his research. These expert witnesses are difficult, if not impossible, to replace at this point given their specialized expertise and the amount of already committed archival research. The risk and the unique dimensions of the harm of losing Elder evidence is discussed under factors 6 and 7 below.

[49] Ontario will not experience any unique harm if their speculated risk is born out. They have available to them all of the resources necessary to manage the risk and work with the other parties who will share the goal of proceeding as efficiently as possible to come to a final determination on all of the issues.

[50] The competing interests involve a contest between a speculative harm to Ontario and an actual harm to the plaintiffs.

6. *The prejudice not compensable in costs, caused by the granting or refusing of the adjournment*

[51] Counsel for both Ontario and the plaintiffs addressed this factor as irreparable harm. Irreparable harm refers to the harm suffered and not its magnitude. In particular, it is harm that cannot be quantified or cured.[20] Ontario argues that the risk that the Stage Three trial will have to be redone constitutes a harm which cannot be quantified in monetary terms. They submit that the harm of redoing the trial includes the hardship to the witnesses and the parties, and a waste of public and judicial resources. In Ontario's words, this would be a disaster.

[52] A re-trial, if necessary, may be costly, but it is not irreparable harm. The need for a re-trial is not certain, even if Ontario is successful on appeal. There is no clear evidence before me to establish a reasonable likelihood of irreparable harm should Stage Three proceed as scheduled.[21] The evidence of the experts at this point is well-known to the parties and can be used to advance the resolution of the dispute and the implementation of the Treaty promise, no matter what the finding on Treaty interpretation.

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[20] *RJR-MacDonald*, at p. 341.

[21] See: *Dilico Anishinabek Family Care v. Her Majesty the Queen (Ontario)*, 2020 ONSC 892 (Div. Ct.), at para. 35; *Assaly c. Commissaire à l'intégrité de la Ville de Hawkesbury*, 2021 ONSC 1690 (Div. Ct.), at para 65.

[53] At the end of the day, having to redo some or all parts of a trial is a matter of time and money. But it is not irreparable harm.[22] When pressed in oral argument, Ontario could not identify any irreparable harm to them, should this request for an adjournment be denied.

[54] The plaintiffs, however, note that their evidence on the Anishinaabe perspective, which will be brought by Elders, is at risk of being lost if there is further delay. This loss would be an irreparable harm. This is in addition to the harm inherent in the delay of compensation if any, and what it will mean to Treaty beneficiaries and their communities.

[55] Until Stage Three is completed, the court cannot fulfil its obligation to address an "injustice that brings dishonour to the Crown".[23] There is prejudice in every delay but in this case, a further delay after all of these years means that Treaty beneficiaries will continue to pass away who will never see the fruits of the litigation or any of the tangible results. A delay at the request of the Crown, mere months away before trial, will further damage the Crown Anishinaabe relationship, which is not compensable in money. This is the definition of irreparable harm.

7. *Whether the ability of either party to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused*

[56] Ontario does not submit that its ability to defend this claim based on the Treaty interpretation found by the Court of Appeal would be compromised if the adjournment were refused. What they say is that their ability to defend the claim for compensation based on their preferred Treaty interpretation may be compromised.

[57] Ontario argues that if its position is accepted on appeal, the implementation of the Treaty promise is a matter for determination by the Crown, in consultation with the plaintiffs, and is not the subject of an adversarial trial. It is always open for Ontario to engage with the plaintiffs in non-adversarial consultation, should that be their preferred method of proceeding. The continuation of this trial is not and should not be an impediment to such engagement.

[58] Ontario also submits that without the decision from the Supreme Court on Treaty interpretation it would not be able to analyze their positions on Crown allocation in accordance with constitutional principles.

[59] The Court of Appeal decision, at this point in time, is the final decision. The parties have the Stage One interpretation as it was modified by the Court of Appeal, which is presumptively valid until it is set aside. Whether there ever is another decision or whether that other decision will materially differ from the current interpretation is a matter of some speculation. Ontario argues that if their proposed Treaty interpretation ultimately prevails, there is no need for any Stage Three trial. However, even if the final result is that there will be no need for a court determined decision on compensation, the evidence will not have been wasted. The rich record of evidence, subject as it will be to cross-examination and the possibility of the resolution of factual issues based on that evidence, will surely inform Ontario and the federal Crown as they take steps to honourably implement the Treaty. Ontario does not deny that contention by the plaintiffs.

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[22] *Toronto (City) v. 1291547 Ontario Inc.*, 2001 CanLII 7244 (Ont. C.A.), at para. 11
[23] *Restoule* C.A., at paras. 363, 492 and 503.

[60] The plaintiffs, however, contend that their ability to prove their case will be compromised by an adjournment. Delay at this point would put at risk Elder evidence which has been carefully planned for some time. The proposed Elders are elderly and in some cases frail.

[61] The Elders' evidence will be significant and meaningful. Taking Elder evidence prior to trial, as suggest by Ontario, disregards the cultural and historical significance of their participation in these proceedings, compromises the solemnity of the presence of the Elders in the court process and ignores the efforts to which all parties have gone, to treat the Elders with utmost respect. It is not a reasonable alternative and does not address the harm that would be caused by the delay.

8. *The interests of the administration of justice and the interests of justice to orderly process civil proceedings, including the use of scarce public and judicial*

[62] Ontario argues that an adjournment is necessary to guard against the potential waste of scarce public and judicial resources.

[63] The court must be concerned with the interests of justice including the public interest in the fair, well-ordered and timely disposition of litigation and the effective use of scarce public resources. These concerns have been priorities of the case management process over the last many years.

[64] In a complex litigation such as this, the court and the parties play a role in the maintenance of the interests of justice and the integrity of the administration of justice.

[65] The orderly administration of justice would allow the plaintiffs and Canada, who are now prepared, to complete this trial without suffering the consequences of a lengthy and unnecessary delay. It is important to note that at no point has Ontario argued that they are not prepared to proceed on the scheduled date. All of the parties have made commitments and investments in anticipation of a trial scheduled to begin in January 2023. The momentum behind this trial is enormous. Throughout 2021, more than 10 First Nations intervenors joined the plaintiffs. The issues related to their participation were addressed in contemplation of a trial set to begin according to an agreed schedule. In the face of the risk Ontario now identifies, they actively carried on in the planning process for trial. An adjournment would not respect the work that has been done by all parties to achieve this trial schedule and would bring the administration of justice into disrepute.

[66] The reputation of the administration of justice would suffer grievously if this adjournment was granted at this time on these grounds.

[67] In addition to the legitimate expectation of the parties, the interests of the administration of justice must also be concerned with the effective use of scarce public and judicial resources, which includes the time spent to date in the case management process.

[68] When Ontario decided to seek an adjournment, they had two options open to them. They were strongly encouraged to address the issue through the case management process, where the matter could have been dealt with expeditiously. Ontario chose instead to bring a motion for a stay before the Supreme Court for the same relief, i.e., an adjournment. They chose the higher risk, least efficient, and more costly way of proceeding.

[69] The administration of justice is well served when counsel and the court maintain a laser focus on the timely, most efficient way of proceeding with a dispute that the parties cannot resolve on their own. While the court has an obligation to oversee that process, counsel for the parties, especially counsel for sophisticated parties, also have obligations. This motion was brought at what can only be called the eleventh hour before the scheduled start of a long-delayed trial that has occupied years of preparation. That preparation has involved huge expenditures of public and judicial resources. In my view, the real risk of waste of those resources is if this trial is delayed one more month.

9. *The case management process under which this litigation has proceeded*

[70] This action has been case managed in a robust and collaborative fashion since 2015.

[71] The single goal and purpose of the case management process from the beginning was to avoid or manage any the types of problems that could delay or disturb the orderly proceeding of the trial. The purpose was to predict and accommodate the needs of the parties and their counsel so that they would be fully prepared to start and continue a trial which was complex and logistically complicated.

[72] The decisions, concessions and agreements made throughout case management process allowed this litigation to proceed efficiently and economically. Importantly I note that the highly complex summary trial for Stage One started approximately two years after the first case management meeting, an extraordinary achievement in all of the circumstances. I am confident that the Stage One hearing could not have preceded as efficiently or effectively had it not been for the efforts of counsel from all parties to identify the issues and work towards their resolution prior to and during the hearing.

[73] Throughout Stage One and Stage Two, counsel were encouraged to consider any and all issues or potential issues that might arise within or affecting the trial process and to bring them to the case management meetings. At these meetings, many significant procedural and substantive points, including adjournments, were resolved on a consensus basis. Often times this consensus involved difficult and strongly argued points of view. It remains a credit to counsel and their embrace of the case management process, that both Stage One and Stage Two proceeded so smoothly.

[74] As the litigation proceeded, counsel built a shared base of knowledge and experience as each issue was considered and resolved. With respect to the timing of Stage Three, the plaintiffs, Canada, the interveners, and the court relied on agreements and also on Ontario's conduct for their expectation that stage 3 would proceed on the consent schedule.

[75] Until this motion was brought at the end of July 2022, first to the Supreme Court and then only in November 2022 to this court, there was no hint that this massive undertaking of trial preparation should be adjourned without a date pending the resolution of the appeal. Ontario also presumably wants the adjournment to extend after a decision from the Supreme Court to allow it to review its strategy, evidentiary needs and possible new or different preparation for a modified Stage Three. This would take additional years.

[76] As an example of how the counsel teams have been proceeding as if the trial was going to start on schedule, Ontario advised recently that they had circulated their draft of a week-by-week witness and trial schedule. As a result, counsel for the parties, expert witnesses and Elders have managed their work, personal and professional schedules to take into account these trial dates. In addition to the disruption, inconvenience and costs to that would be incurred from an adjournment, there are huge facility arrangements that will be wasted if there is a delay of indeterminate time. Bringing a last-minute motion for an adjournment is a rejection of the shared goals of the case management process and the manner in which the preparation for this trial has proceeded up to this point.

[77] If Ontario wants to minimize or manage the risk they have identified, there is an existing successful structure in which they can do that. Ontario could commit again to engaging collaboratively in the case management process, where all issues and even potential issues can be identified and addressed in an ongoing manner.

[78] The court must consider the vast amounts of time, good faith, and effort that all parties and their counsel have invested in the case management process. It goes without saying that court and judicial resources have been similarly invested. To grant an adjournment at this time, is to ignore the accommodations and hard-fought concessions that all counsel have made on the requests of others, which has permitted this litigation to proceed without unnecessary adversarial pre-trial motions and has instead allowed for a smooth trial process that ensures that all parties are confident that they can best prosecute or defend the claim before the court.

[79] Ontario does not explain its three-year delay in bringing this request for an adjournment. This delay must also be factored into this assessment. An adjournment now, would result in the waste of years of work by the counsel teams on their own and what they have done collaboratively. It would privilege Ontario's point of view and interests at an enormous cost to all other parties. Counsel and parties must be able to rely on the case management process and all of the collaborative work that goes on there.[24] Otherwise, the case management process is completely undermined, which would undoubtedly have a negative impact on the reputation of the administration of justice.

10. *Reconciliation and s. 35 of the Constitution Act, 1982*

[80] Section 35(1) of the *Constitution Act 1982*, states that existing Aboriginal and Treaty rights of the aboriginal People of Canada are hereby recognized and affirmed. The Treaty rights from the Robinson Treaties are constitutionally enshrined and invoke the honour of the Crown to diligently and purposively implement them.

[81] There is a strong public interest in having Treaty disputes resolved expeditiously. The Court of Appeal identified that one of the barriers to the resolution of this Treaty claim between the Anishinaabe and the Crown was the dispute between the federal and provincial Crown over which Crown is responsible to fulfil the Treaty promise. This dispute has now been unresolved for over 150 years and has continuing negative impacts on the plaintiffs who are entitled to be

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[24] See: *Dhatt v. Beer*, 2021 ONCA 137, at para. 12

indifferent to it. But this issue of Crown allocation is one of the issues for Stage Three that Ontario now seeks to delay.

[82] The courts have affirmed that reconciliation is a primary consideration in proceedings involving Indigenous and Treaty rights.[25] The minority of the Court of Appeal in this case said that: "reconciliation is the objective of the legal approach to Treaty rights and the 'overarching purpose' of Treaty making and, perforce, Treaty promises."[26] An historic Treaty dispute is a barrier on the path towards reconciliation. The plaintiffs and Canada seek a trial to resolve this dispute and should be provided the opportunity to do so.

[83] If this motion is successful, it would not only delay trial proceedings, but it would delay and undermine the obligation of the honourable implementation of a Treaty promise and therefore the grand purpose of reconciliation which both the Constitution and the courts have imposed on the Crown.[27]

Summary

[84] The request for an adjournment is denied.

[85] The magnitude, complexity and historic dimensions of this case are extraordinary. At every decision-making point, this context must be considered.

[86] On a balancing of all of the factors identified by the parties, it is obvious that the public interest and the interest in the administration of justice are best served by proceeding with the trial according to the dates set on consent by all parties and toward which all parties and the courts have invested vast amounts of resources. There would be an unjustified waste of years of effort, time, expense, and court resources if the adjournment is permitted.

[87] Ontario will not suffer and does not claim to suffer any irreparable harm, nor any harm for which they could not be compensated. The risk which they identify is a risk shared by all parties and by the court. But for Ontario, the parties and the court do not assess the risk of proceeding as so great that it outweighs the interests of proceeding according to the schedule determined in the case management process. The "wait and see approach" proposed by the plaintiffs is one way to manage the risk, which is more balanced and proportional to the interests at stake.

[88] Counsel are encouraged to engage with this proposal in the case management process which can continue through the trial, and which will be informed by the schedule of the Supreme Court.

[89] The prejudice to the plaintiffs includes the delay in obtaining redress for historic wrongs and the continued impact of an unfulfilled Treaty promise. An adjournment now under the existing circumstances would be manifestly unfair and unnecessary in all of the circumstances. An adjournment would represent an unconscionable delay in the face of a manageable risk. The actual

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[25] *Catholic Children's Aid Society of Hamilton v. G.H., T.V. and Eastern Woodlands Métis of Nova Scotia*, 2016 ONSC 6287, at para. 92 [*CCAS of Hamilton*]; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10 [*Little Salmon*].
[26] *Restoule* ONCA., at para. 113.
[27] *CCAS of Hamilton*, at para. 92; *Little Salmon*, at para. 10.

prejudice to the plaintiffs from this proposed adjournment far outweighs any speculative prejudice to Ontario.

[90] It bears repeating that "in all its dealing with Aboriginal peoples, from assertion of sovereignty to resolution of claims and the implementation of Treaties, the Crown must act honourably."[28]

[91] In all of the circumstances, proceeding with this trial on the dates agreed to by all parties, is the honourable way to proceed.

[92] Costs to the plaintiffs. Timelines for the submissions of a costs outline will be addressed at the next case management meeting.

P. C. Hennessy J.

The Honourable Madam Justice Patricia C. Hennessy

Released: November 28, 2022

[28] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] S.C.R. 511, at para 17.