



**SUPREME COURT OF CANADA**

**CITATION:** Ontario (Attorney  
General) v. Restoule, 2024 SCC  
27

**APPEALS HEARD:** November 7 and  
8, 2023

**JUDGMENT RENDERED:** July 26,  
2024

**DOCKET:** 40024

**BETWEEN:**

**Attorney General of Ontario and His Majesty The King in Right of Ontario**  
Appellants/Respondents on cross-appeal

and

**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**

Respondents/Appellants on cross-appeal

and

**Attorney General of Canada**  
Respondent

**AND BETWEEN:**

**Attorney General of Ontario and His Majesty The King in Right of Ontario**  
Appellants/Respondents on cross-appeal

and

**Chief and Council of the Red Rock First Nation, on behalf of the Red Rock First Nation Band of Indians and Chief and Council of the Whitesand First Nation, on behalf of the Whitesand First Nation Band of Indians**  
Respondents/Appellants on cross-appeal

and

**Attorney General of Canada**  
Respondent

- and -

**Attorney General of New Brunswick, Biigtigong Nishnaabeg First Nation (also known as the Begetikong Anishnabe First Nation or the Ojibways of the Pic River First Nation), Halfway River First Nation, Federation of Sovereign Indigenous Nations, Atikameksheng Anishnawbek, Manitoba Keewatinowi Okimakanak Inc., Carry the Kettle Nakoda Nation, Assembly of Manitoba Chiefs, Anishinabek Nation, Teme-Augama Anishnabai, Temagami First Nation, Union of British Columbia Indian Chiefs, Nlaka'pamux Nation Tribal Council, Chawathil First Nation, High Bar First Nation, Neskonlith Indian Band, Penticton Indian Band, Skuppah Indian Band, Upper Nicola Band, Indigenous Bar Association in Canada, West Moberly First Nations, Athabasca Tribal Council Ltd., Tsawout First Nation, Kee Tas Kee Now Tribal Council, Saugeen First Nation, Chippewas of Nawash Unceded First Nation, Grassy Narrows First Nation, Assembly of First Nations and Namaygoosisagagun Community (who refer to themselves as the Namaygoosisagagun Ojibway Nation)**  
Interveners

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

**REASONS FOR JUDGMENT:** Jamal J. (Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)  
(paras. 1 to 311)

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**Attorney General of Ontario and His Majesty  
The King in Right of Ontario** *Appellants/Respondents on cross-appeal*

v.

**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** *Respondents/Appellants on cross-appeal*

and

**Attorney General of Canada** *Respondent*

- and -

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The King in Right of Ontario** *Appellants/Respondents on cross-appeal*

v.

**Chief and Council of the Red Rock First Nation,  
on behalf of the Red Rock First Nation Band of Indians  
and Chief and Council of the Whitesand First Nation,  
on behalf of the Whitesand  
First Nation Band of Indians** *Respondents/Appellants on cross-appeal*

and

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*Respondent*

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Atikameksheng Anishnawbek,  
Manitoba Keewatinowi Okimakanak Inc.,  
Carry the Kettle Nakoda Nation,  
Assembly of Manitoba Chiefs,  
Anishinabek Nation,  
Teme-Augama Anishnabai,  
Temagami First Nation,  
Union of British Columbia Indian Chiefs,  
Nlaka'pamux Nation Tribal Council,  
Chawathil First Nation,  
High Bar First Nation,  
Neskonlith Indian Band,  
Penticton Indian Band,  
Skuppah Indian Band,  
Upper Nicola Band,  
Indigenous Bar Association in Canada,  
West Moberly First Nations,  
Athabasca Tribal Council Ltd.,  
Tsawout First Nation,  
Kee Tas Kee Now Tribal Council,  
Saugeen First Nation,  
Chippewas of Nawash Unceded First Nation,  
Grassy Narrows First Nation,  
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*Interveners*

**Indexed as: Ontario (Attorney General) v. Restoule**

**2024 SCC 27**

File No.: 40024.

2023: November 7, 8; 2024: July 26.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Aboriginal law — Treaty rights — Historic treaties — Interpretation — Standard of review — Two treaties between First Nations and Crown containing clause according to which annual payments in exchange for ceded land would be augmented over time under certain circumstances — Annuities increased only once in 1875 — First Nations commencing actions against Crown for breach of treaties — Trial judge interpreting augmentation clause and articulating nature and content of Crown's obligation to increase annuities — Standard of appellate review for interpretation of historic treaties — Proper interpretation of augmentation clause.*

*Aboriginal law — Treaty rights — Honour of Crown — Fiduciary duty — Duty of diligent implementation — Breach — Remedies — First Nations commencing actions against Crown for breach of two treaties providing for increase over time of annual payments in exchange for ceded land — Whether Crown's obligation under augmentation clause engages specific duties flowing from honour of Crown — Whether*

*Crown has fiduciary duties in respect of augmentation clause — Whether Crown has duty to diligently implement augmentation clause — Appropriate remedy for Crown's breach of treaties.*

*Limitation of actions — Breach of treaty — First Nations commencing actions against Crown for breach of historic treaties — Whether actions statute-barred by applicable provincial limitations legislation — Limitations Act, R.S.O. 1990, c. L.15.*

In 1850, the Anishinaabe of Lake Huron and Lake Superior entered into land cession treaties with the Crown. Under these treaties, known as the Robinson Treaties, the Anishinaabe ceded their territories to the Crown in exchange for, among other things, a perpetual annual payment of £600 under the Robinson-Huron Treaty and £500 under the Robinson-Superior Treaty. At the time the treaties were signed in 1850, the annuity was equivalent to about \$1.70 per person under the Robinson-Huron Treaty and \$1.60 per person under the Robinson-Superior Treaty. The treaties contained an “Augmentation Clause”, according to which the annuities were to be increased over time if the ceded lands produced an amount that would allow the Crown to increase the annuity without incurring loss. A condition of the augmentation was that the amount “paid to each individual” would not exceed £1 (at the time, equal to approximately \$4) a year, or “such further sum as Her Majesty may be graciously pleased to order”. The annuities were increased to \$4 per person in 1875, but have been frozen at that amount since then.

The Lake Superior Anishinaabe (“Superior plaintiffs”) filed a statement of claim in 2001 seeking declaratory and compensatory relief relating to the interpretation, implementation, and alleged breach of the Augmentation Clause. The Lake Huron Anishinaabe (“Huron plaintiffs”) filed their own claim in 2014. The actions were tried together in three stages: Stage One addressed the interpretation of the treaties, Stage Two considered Ontario’s defences of Crown immunity and limitations, and Stage Three concerned the plaintiffs’ claim for damages and the allocation of liability between Canada and Ontario.

At Stage One, the trial judge held that the Crown has a mandatory and reviewable obligation under the Augmentation Clause to increase the annuities when the economic circumstances warrant — i.e., if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss. The trial judge also found that the Crown must engage in a consultative process with the treaty beneficiaries and pay an increased annuity reflecting a fair share of the net Crown resource-based revenues. She further held that the reference to £1 (or \$4) limits only the amount distributed to individuals, but does not limit or impose a cap on the total collective annuity. The trial judge rejected the argument that the Crown was under a *sui generis* fiduciary duty to administer the ceded land on behalf of the treaty beneficiaries, but she accepted that the principle of the honour of the Crown and an *ad hoc* fiduciary duty require the Crown to diligently implement the Augmentation Clause. At Stage Two, the trial judge ruled that Crown immunity and provincial limitations legislation did not bar the plaintiffs’ claims. Stage Three was argued but has been stayed pending the

present appeals. The Huron plaintiffs did not participate in Stage Three as they reached a settlement with Ontario and Canada dealing with claims for compensation in respect of past breaches of the Augmentation Clause.

The Court of Appeal allowed in part Ontario's appeals from the Stage One judgment and amended the trial judge's Stage One orders. It dismissed Ontario's appeals from the Stage Two judgment. The court issued four sets of reasons with a shifting majority on each issue. A majority ruled that treaty interpretation is a question of law reviewable on a correctness standard, even when informed by findings of fact that are reviewable on a deferential standard. A different majority held that the trial judge did not err in her interpretation of the Augmentation Clause, except in concluding that the Robinson Treaties promised the Anishinaabe a fair share of the net Crown revenues. It agreed that there is a mandatory and reviewable obligation on the Crown to increase the annuities when the economic conditions warrant, and that the reference to £1 is a limit only on the part of the total annuity that may be distributed to individuals. It also held that the honour of the Crown obliges the Crown to increase the annuities beyond \$4 as part of its duty to diligently implement the treaties. The Court of Appeal unanimously agreed with the trial judge that the Crown does not have unfettered discretion about whether to increase the annuities. As well, it held that, given the Crown's neglect of the treaty promise for almost 150 years, the court had the authority and obligation to impose specific and general duties on the Crown regarding the Augmentation Clause. Further, the Court of Appeal unanimously ruled that the trial judge erred in finding that the Crown is under an *ad hoc* fiduciary duty regarding the



implementation of the Augmentation Clause, but agreed that no *sui generis* fiduciary duty arises. The court also concluded that no statutory limitation period precluded the claims for breach of the Robinson Treaties, and that it was not necessary to consider Crown immunity. Finally, a majority of the court held that the nature of the revenue sharing required by the Augmentation Clause is to be determined by the parties in negotiations or by the trial judge in Stage Three.

Ontario appeals to the Court, raising questions about the appropriate standard of review for the interpretation of the Robinson Treaties, the proper interpretation of the Augmentation Clause, the nature and content of the Crown's obligation to give effect to that clause and the appropriate remedy for its breach, and the relevance of statutory limitation periods to the claims. The Huron and Superior plaintiffs cross-appeal on the question of the Crown's fiduciary duties. Before the Court, neither Canada nor Ontario disputes that they are in longstanding breach of the annuity promises.

*Held:* The appeals should be allowed in part, the cross-appeals dismissed, and a declaration issued.

The interpretation of historic Crown-Indigenous treaties is reviewable for correctness. Applying this standard of review to the instant case, along with the relevant treaty interpretation principles, the Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss. If the Crown can increase the annuities beyond \$4 per person, it must exercise its discretion and decide whether

to do so and, if so, by how much. This discretion is not unfettered; it is to be exercised liberally, justly, and in accordance with the honour of the Crown. The frequency with which the Crown must consider whether it can increase the annuities must also be consistent with the honour of the Crown. In addition, given the longstanding and egregious nature of the Crown's breach of the Augmentation Clause, the Crown must exercise its discretion and increase the annuities with respect to the past. Having already reached a negotiated settlement concerning past breaches with the Huron plaintiffs, the Crown is directed to engage in time-bound and honourable negotiation with the Superior plaintiffs about compensation for past breaches. As well, the breach of treaty claims are not statute-barred by Ontario's limitations legislation. Finally, although no specific fiduciary duties apply in respect of the augmentation promise, the honour of the Crown requires the Crown to diligently fulfill this promise. The Crown's ongoing breach of the Augmentation Clause, in the circumstances, is also a breach of the treaties themselves.

Treaties are *sui generis* agreements intended to advance reconciliation. The Crown's assertion of sovereignty gave rise to a distinctive legal relationship between the Crown and Indigenous peoples. That distinctive legal relationship is reflected in treaties, which represent an exchange of solemn promises and are governed by special rules of interpretation. In order to promote reconciliation, treaty rights must be interpreted and implemented in accordance with the honour of the Crown — the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

Although all treaty rights must be interpreted in accordance with the honour of the Crown, there are important differences between historic (pre-1921) and modern (post-1973) treaties. The words in an historic treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of interpretation. They should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Indigenous signatories. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed. The court must be sensitive to the unique cultural and linguistic differences between the parties, and the words of the treaty must be given the sense which they would naturally have held for the parties at the time. While construing the language generously, the court cannot alter the terms of the treaty by exceeding what is possible or realistic. Treaty rights must not be interpreted in a static or rigid way; they are not frozen at the date of signature. Because a court must consider both the words of a treaty and the historical and cultural context, it is useful to approach treaty interpretation in two steps: at the first step, the court focuses on the words of the treaty clause at issue and identifies the range of possible interpretations, and at the second step, the court considers those interpretations against the treaty's historical and cultural backdrop.

The standard of review for the interpretation of historic treaties is correctness. The constitutional nature of treaties as nation-to-nation agreements that

engage the honour of the Crown and the process of reconciliation itself demands that appellate courts be given wide latitude to correct errors in their interpretation when necessary. The perpetual, multi-generational nature of treaty rights calls for the consistency of interpretation that is the goal of correctness review. A court's interpretation of treaty rights will be binding in perpetuity and has a significant precedential character. In addition, historic Crown-Indigenous treaties are binding not only on their direct signatories; they are binding upon all Canadians who, because of the Crown's assertion of sovereignty, are also effectively implicated. A court's interpretation of an historic treaty thus has extensive normative reach, which further supports correctness review.

Although the interpretation of an historic treaty right is reviewable for correctness, the factual findings underpinning that interpretation attract deference and are reviewable only for palpable and overriding error. The policy rationales supporting such deference include the need to limit the number, length, and cost of appeals, to promote the autonomy and integrity of trials, and to recognize the expertise and advantageous position of the trial judge who has reviewed the evidence. The last of these is particularly significant in historic treaty interpretation where the trial judge's factual determinations are the product of a robust and highly involved trial process.

The wording of the Augmentation Clause in the Robinson Treaties must be considered in the context of the purpose of the treaties as a whole. Under the treaties, the Anishinaabe ceded their interest in identified lands, were granted reserve lands to

live on, retained treaty rights to hunt and fish, and were promised a perpetual annuity. The Robinson Treaties departed from the fixed annuity model used in other treaties, as they allowed for the annuities to be increased or decreased, depending on the circumstances. The Augmentation Clause contemplates some general notion of sharing future revenues of the ceded territories. It gives voice to the Crown's goal of acquiring immediate access to the ceded territories and opening them up to settlement and economic development. It is also consistent with the Anishinaabe's perspectives on the treaty relationship: it demonstrates respect by acknowledging both the Anishinaabe's jurisdiction over the land and their authority to conclude an agreement with the newcomers; it shows reciprocity by making concrete their expectation that a gift would attract a reciprocal gift of commensurate value; it embodies responsibility in affirming the Anishinaabe's ongoing duties to their people, at the time the Robinson Treaties were signed and in perpetuity; and it allows for renewal since the treaties would adjust as economic circumstances changed.

At step one of the two-step framework for treaty interpretation, the wording of the Augmentation Clause must be examined to identify its possible interpretations. It provides that the annuities "shall be augmented from time to time" if the ceded lands produce an amount that would allow the Crown to "increase" the annuities "without incurring loss". A condition of the augmentation promise is that the amount "paid to each individual" would not exceed £1 a year, or "such further sum as Her Majesty may be graciously pleased to order". Although there are various possible interpretations of the Augmentation Clause, the real debate is between an interpretation

that involves both a collective and an individual part to the annuity, and an interpretation that involves only one individual part. There is an ambiguity as to what the parties intended, because the annuity is stated in another clause of the treaties to be delivered to the “Chiefs and their Tribes”, while the Augmentation Clause refers to “the amount paid to each individual”.

In order to choose the interpretation that comes closest to reflecting the parties’ common intention, it is necessary to proceed to the second step of the treaty interpretation framework and consider the wording of the Augmentation Clause against its historical and cultural backdrop. It is only at the end of the two-step exercise that a genuinely ambiguous treaty term can be resolved. Both the language of the Augmentation Clause and its historical and cultural context support an interpretation that involves only one component: a perpetual annuity payable to the “Chiefs and their Tribes” that could be increased if an economic condition was met — i.e., if the economic circumstances permitted the Crown to do so without incurring loss. The reference to the “amount paid to each individual” not exceeding \$4 does not create an obligation to pay an annuity to individuals, separate from an obligation to pay the collective; it merely imposes a condition on the obligation to augment the annuity. It would have been highly unusual for the Crown to have included in the middle of the Augmentation Clause an obligation to pay a part of the annuity to individuals, separate from the obligation to pay the collective, as this would be a fundamental change to the established patterns of treaty making and would have been unprecedented. As well, there is no evidence of an intention to grant an annuity divided between a collective

part and an individual part, or that either party believed that the annuity had both collective and individual parts. Finally, the manner in which payments were made tends to refute the suggestion of a bifurcated annuity; neither the Huron nor the Superior annuity has ever been paid contemporaneously to both the collective and to individuals.

Thus, the proper interpretation of the Augmentation Clause is that it obliges the Crown to pay a single annuity to the Anishinaabe “Chiefs and their Tribes”. There is a mandatory obligation to increase the annuity up to \$4 when the economic circumstances warrant, as was done in 1875. This increased annuity is a “soft cap” beyond which further increases are discretionary. If the economic conditions are such that the Crown can increase the annuity beyond \$4 per person without incurring a loss, the Crown must exercise its discretion to determine whether to do so and, if so, by how much. This exercise of discretion is not unfettered; it is justiciable and reviewable by the courts. The Crown must exercise its discretion, including as to how often it turns its mind to increasing the annuity, diligently, honourably, liberally, and justly, while engaging in an ongoing relationship with the Anishinaabe based on the values of respect, responsibility, reciprocity and renewal.

The Huron and Superior plaintiffs’ breach of treaty claims are not statute-barred by Ontario’s 1990 *Limitations Act*. First, the plaintiffs’ breach of treaty claims are not “actions on the case” subject to a limitation period under the Act. An action “on the case” was a common law action that allowed plaintiffs to bring claims for personal wrongs and injuries that could not be brought in trespass; they were generally limited

to actions in the nature of tort, but in some cases were extended to actions in the nature of contract as well. A claim for breach of a treaty right is fundamentally different than an action on the case. Treaty claims are not based in tort or contract: they are based on constitutional rights, engaging issues of public law rather than private law. Moreover, the 1990 *Limitations Act* applies only to a closed list of enumerated causes of action, and the action on the case cannot be used as a catch-all cause of action or basket clause capturing any claim not expressly mentioned in the Act. In addition, in the 2002 amendments to the Act, Aboriginal and treaty rights were excluded from the limitation periods established in the statute. In making these amendments, the legislature understood that treaty claims are distinct from other causes of action, and dealt with such claims explicitly.

Second, the plaintiffs' claims for equitable compensation are also not "actions of account" subject to a limitation period under the 1990 *Limitations Act*. While actions of account can include common law and equitable claims, the origin and scope of this type of action suggest it is ill-suited to the context of Crown-Indigenous treaties. An action of account was typically used at common law against a person who was required to render an account to another because of a fiduciary relationship. While the relationship between the Crown and Indigenous peoples is fiduciary in nature, no specific fiduciary obligation arises in the instant case to potentially bring the plaintiffs' claims within the scope of actions of account. In addition, the correct interpretation of the Augmentation Clause reveals that the Crown is not required to account to the treaty beneficiaries for the proceeds of the ceded territories. Rather, increases to the annuities



beyond \$4 are discretionary. Finally, there appears to be no precedent treating Aboriginal or treaty rights as actions of account.

The honour of the Crown is a constitutional principle that must guide the interpretation and implementation of the Augmentation Clause and the appropriate remedies for the Crown's breach. Although the honour of the Crown is a powerful constitutional doctrine, it is not a cause of action in itself; rather, it speaks to how obligations that attract it must be fulfilled. It is not a mere incantation, but rather a core precept that finds its application in concrete practices, and gives rise to different duties in different circumstances.

The honour of the Crown can give rise to a fiduciary duty where the Crown assumes discretionary control over a cognizable Aboriginal interest. The Crown may owe *ad hoc* and *sui generis* fiduciary duties to Indigenous peoples in respect of certain interests. An *ad hoc* fiduciary duty may arise from the relationship between the Crown and Indigenous peoples where the general conditions for such a private law fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary. In the instant case, this duty does not arise. There is no evidence that the Crown undertook to act in the best interests of the Huron and Superior plaintiffs or with utmost loyalty in discharging its obligations. Moreover, in exercising its discretion about whether to increase the annuities, the Crown must consider the wider public interest; its obligations regarding the Augmentation Clause could not have

involved an undertaking to forsake the interests of all others in favour of the Anishinaabe.

A *sui generis* fiduciary duty is specific to the relationship between the Crown and Indigenous peoples. Its origins lie in protecting the interests of Indigenous peoples in recognition of the degree of economic, social, and proprietary control and discretion asserted by the Crown over them. A *sui generis* fiduciary duty arises where there is: (1) a specific or cognizable Aboriginal interest; and (2) a Crown undertaking of discretionary control over that interest. In the instant case, there is no specific or cognizable Aboriginal interest identified by the Huron and Superior plaintiffs. Their treaty right under the Augmentation Clause is, by definition, not sufficiently independent of the Crown's executive functions, because it arises from the exercise of the Crown's executive treaty-making function. Nor is the Huron and Superior plaintiffs' pre-existing interest in their ceded land a specific or cognizable Aboriginal interest. Even if it were, the second requirement for a *sui generis* fiduciary duty — an undertaking by the Crown of discretionary control over the interest — is not met: neither the treaty text nor the context in which the Robinson Treaties were signed provide any evidence that the Crown would administer the land on behalf of the treaties' beneficiaries.

While the Crown is not subject to a fiduciary duty in respect of the Augmentation Clause, the Crown is subject to a duty to diligently implement or fulfill that promise, and its failure to do so is a breach of the Robinson Treaties. The duty of

diligent implementation holds the Crown responsible for making good on its treaty promises. This duty flows directly from the honour of the Crown and requires the Crown to take a broad purposive approach to the interpretation of a promise and to act diligently to fulfill it. This requires that the Crown seek to perform the obligation in a way that pursues the purpose behind the promise. The duty of diligent implementation cannot impose only procedural obligations regarding the implementation of the Augmentation Clause — by which the Crown would simply be required to consider or turn its mind to discretionary increases to the annuities from time to time. While the duty of diligent implementation speaks to how Crown obligations must be fulfilled, rather than specifying a particular result in a given case, courts must guard against divorcing the duty of diligent implementation from the very nature of the treaty promise at issue. Since 1875, the Crown has failed to consider whether it can increase the annuities, and thus has breached its duty to diligently implement the treaties' Augmentation Clause. In these circumstances, the Crown is required to pay an amount, which is subject to review by the courts, to compensate the Superior plaintiffs for its past breach of the Augmentation Clause.

Because the Crown has breached its duty to diligently fulfill the Augmentation Clause under the Robinson Treaties, the Huron and Superior plaintiffs are entitled to a remedy. In principle, the full range of remedies — declaratory and coercive — is available. Courts should take a purposive approach to determining the appropriate remedy. The controlling question is what is required to maintain the honour of the Crown and to effect reconciliation. In the instant case, the Anishinaabe have been

left with an empty shell of a treaty promise for almost a century and a half. In this context, a declaration setting out the rights and obligations of the treaty parties, including the Crown's obligations under the Augmentation Clause, will be a helpful and appropriate remedy as it will inform both the future implementation of the Robinson Treaties and clarify the nature of the past breach.

At the same time, given the longstanding and egregious nature of the Crown's breach, a declaration alone would be insufficient. Although the Crown was able to increase the annuities beyond \$4 per person without incurring loss in the past, and it should have exercised its discretion to do so, well over a century has passed since the Crown has turned its mind to that promise, and to the renewal of the relationship itself. The Crown has severely undermined both the spirit and substance of the Robinson Treaties. In these circumstances, a simple declaration would not adequately repair the treaty relationship or restore the honour of the Crown, sufficiently vindicate the treaty rights, or meaningfully advance reconciliation. A mere declaration would risk forcing the Anishinaabe to continue to rely on a historically dishonourable treaty partner. This would be deeply unsatisfactory and would risk leaving the Anishinaabe with an empty shell of a promise once again.

Given that the Crown has reached a negotiated settlement concerning past breaches with the Huron plaintiffs, but not with the Superior plaintiffs, further direction should be provided to the Crown regarding the Superior plaintiffs to ensure that it exercises its discretion under the Augmentation Clause in a timely and honourable

manner regarding compensation for past breaches. In respect of the period from 1875 to the present, the Crown must increase the annuity payable to the Superior plaintiffs under the Robinson Treaties beyond \$4 per person retrospectively since it would be patently dishonourable not to do so. However, proceeding immediately to a judicially calculated damages award for past breaches would not be appropriate at this time, given the nature of the treaty promise as a discretionary one, the proper role of the courts, and the need to effectively repair the treaty relationship and restore the honour of the Crown. The Augmentation Clause is not a promise on the part of the Crown to pay a certain sum of money. Rather, it is a promise to consider whether the economic conditions allow the Crown to increase the annuities without incurring loss and, if they do, to exercise its discretion and determine whether to do so and, if so, by how much. Until the Crown has exercised that discretion through honourable engagement with its treaty partners and has proposed an amount of compensation, it should generally not be judicially compelled to pay a certain sum. A judicially calculated damages award would remove any Crown discretion and any engagement between treaty partners.

Instead, a narrow, time-bound window for honourable negotiation, after which the Crown would be required, failing a settlement, to exercise its discretion honourably and determine an amount of compensation, has greater potential to fulfill the purposes of the Augmentation Clause and hold the Crown to account for its breach of the treaty to date. Negotiation and agreement outside the courts have better potential to renew the treaty relationship, advance reconciliation, and restore the honour of the Crown. This approach would also respect the proper role of the courts. The amount by

which the Crown might increase the annuity is a polycentric and discretionary determination that will inevitably reflect many social, economic, and policy considerations that may change over time, affecting the frequency and nature of net revenue and annuity calculations. Determining the amount of compensation owed for the past will involve similar considerations, including weighing the solemnity of the Crown's obligations to the Anishinaabe against the needs of other Ontarians and Canadians, Indigenous and non-Indigenous alike. This is well within the expertise of the executive branch, but is much less within that of the courts. While courts are not incompetent or unable to entertain these considerations when necessary, they are generally not well equipped to make such choices or to evaluate the wide-ranging consequences that flow from policy implementation. Accordingly, courts should exercise considerable caution before intervening.

Although it is not the business of the courts to force the Crown to exercise its discretion in a particular way, it is very much their business to review exercises of Crown discretion to ensure compliance with treaty obligations and the honour of the Crown. The Crown should be directed to engage meaningfully and honourably with the Superior plaintiffs in an attempt to arrive at a just settlement regarding past breaches. If such a settlement cannot be mutually agreed upon, the Crown will be obliged to exercise its discretion under the Augmentation Clause and set an amount as compensation. That amount, and the process through which it is arrived at, will be subject to review by the courts. The courts should focus on the justification of the Crown's determination and consider factors such as: the nature and severity of the

Crown's past breaches; the number of Superior Anishinaabe and their needs; the benefits the Crown has received from the ceded territories; the wider needs of other Indigenous and non-Indigenous populations of Ontario and Canada; and principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise under the treaty to share in the wealth of the land. If the Crown has exercised its discretion liberally, justly, and honourably, then the courts should not intervene. If the courts find that the Crown's process or its ultimate determination was not honourable, they may consider the appropriate remedy, including whether to remand the issue to the Crown for redetermination or set the amount to be paid by the Crown.

### **Cases Cited**

**Applied:** *R. v. Marshall*, [1999] 3 S.C.R. 456; **considered:** *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *R. v. Sundown*, [1999] 1 S.C.R. 393; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Southwind v. Canada*, 2021 SCC 28, [2021] 2 S.C.R. 450; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; **referred to:** *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, aff'd *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario*, [1897] A.C. 199; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Beckman v. Little Salmon/Carmacks*

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APPEALS and CROSS-APPEALS from a judgment of the Ontario Court of Appeal (Strathy C.J. and Lauwers, Hourigan, Pardu and Brown JJ.A.), 2021 ONCA 779, 466 D.L.R. (4th) 1, [2021] O.J. No. 6228 (Lexis), 2021 CarswellOnt 15629 (WL), setting aside in part a decision of Hennessy J., 2018 ONSC 7701, 431 D.L.R. (4th) 32, [2019] 3 C.N.L.R. 351, [2018] O.J. No. 6879 (Lexis), 2018 CarswellOnt 22178 (WL); and affirming a decision of Hennessy J., 2020 ONSC 3932, 452 D.L.R. (4th) 604, [2020] O.J. No. 2881 (Lexis), 2020 CarswellOnt 8989 (WL). Appeals allowed in part and cross-appeals dismissed.

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The judgment of the Court was delivered by

JAMAL J. —

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Appendix		

I. Introduction

[1] These appeals test the Crown’s commitment to reconciliation with the Anishinaabe of the upper Great Lakes after the Crown has dishonourably breached its sacred promises to them under the Robinson Treaties for almost 150 years.

[2] The Robinson Treaties of 1850 comprise the Robinson-Huron Treaty and the Robinson-Superior Treaty. Under these treaties, the Anishinaabe of the northern

shores of Lake Huron and Lake Superior ceded their vast territories in exchange for, among other things, an annual payment in perpetuity. The annuities were to be increased over time under certain circumstances. However, for almost 150 years, the annuities have been frozen at a shocking \$4 per person, after the first and only increase was made in 1875. Today, in what can only be described as a mockery of the Crown's treaty promise to the Anishinaabe of the upper Great Lakes, the annuities are distributed to individual treaty beneficiaries by giving them \$4 each.

[3] This is the second time that issues relating to the annuity payments under the pre-Confederation Robinson Treaties have come before this Court. The last time, shortly after Confederation, involved an exercise of finger-pointing by Canada and the provinces as to who had to pay the annuities (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, aff'd *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario*, [1897] A.C. 199 (J.C.P.C.) (“*In re Indian Claims*”). In the more than 125 years since then, Canada and Ontario have shown a persistent pattern of indifference to the Crown's treaty obligations. Belatedly, before this Court, neither Canada nor Ontario disputes that they are in longstanding breach of the annuity promises under the Robinson Treaties. Although the Anishinaabe have upheld their end of the treaty bargain, the Crown has failed to do the same. Remedying this failure and restoring the honour of the Crown requires returning to the foundations of the treaty relationship between the Anishinaabe and the Crown.

[4] The Robinson Treaties built on a close relationship between the British and the Anishinaabe of the upper Great Lakes that existed long before 1850. That relationship was guided by the Covenant Chain alliance, dating back to the 17th century, which symbolized the close connection between the British Crown and Indigenous peoples, including the Anishinaabe. The British and the Anishinaabe maintained this connection in part through annual gift-giving around sacred “council fires” as expressions of mutual generosity and goodwill (see H. Bohaker, *Doodem and Council Fire: Anishinaabe Governance through Alliance* (2020), at pp. xxvi and 17-18). As European settlement increased, the Crown assured the Anishinaabe that their autonomy and title to land would be protected.

[5] By the mid-1800s, however, that assurance was jeopardized as the Crown began unilaterally granting mining licences to settlers along the northern shores of Lake Huron and Lake Superior. The Anishinaabe demanded a treaty to provide them with compensation for the use of their traditional unceded territories. In September 1850, after significant negotiations between the Anishinaabe and the Crown’s representative, William Benjamin Robinson, the Huron and Superior Anishinaabe entered into land cession treaties with the Crown around a council fire at Bawaating or Sault Ste. Marie.

[6] The two treaties are substantially the same, each promising a lump-sum payment of £2,000 in addition to an annual payment of £500 under the Robinson-Superior Treaty and £600 under the Robinson-Huron Treaty. These promises are accompanied by a clause in each treaty that provides for the augmentation of the

annuities under certain circumstances (“Augmentation Clause”). The interpretation of that clause and the remedies for its breach are at the heart of these appeals.

[7] The trial in this case was divided into three stages. At Stage One, the trial judge, Hennessy J., concluded that the Crown has a mandatory and reviewable obligation to increase the annuities under the Robinson Treaties when the economic circumstances permit it to do so without incurring a loss. She held that, to fulfill this obligation, the Crown must engage in consultation with the treaty beneficiaries and pay an increased annuity reflecting a “fair share” of net Crown resource-based revenues from the ceded territories. She also concluded that the treaty relationship engaged the honour of the Crown and that the Crown has fiduciary duties as well as a duty to diligently implement its treaty promises. At Stage Two, the trial judge determined that neither Crown immunity nor provincial limitations legislation barred the Anishinaabe plaintiffs’ breach of treaty claims. Stage Three, addressing remedies, was argued before these appeals were heard but has been stayed pending this Court’s decision.

[8] The Court of Appeal for Ontario allowed Ontario’s appeals from the Stage One trial judgment in part, and dismissed its appeals from the Stage Two judgment. A five-judge panel, comprised of Strathy C.J.O. and Lauwers, Hourigan, Pardu and Brown JJ.A., released four sets of reasons addressing various issues. The justices of the Court of Appeal agreed on much, including the absence of specific fiduciary duties arising out of the treaty relationship and the inapplicability of the provincial limitations regime to the Anishinaabe’s claims. The Court of Appeal divided, however, on several



key issues, including the appropriate standard of review for historic treaty interpretation, the proper interpretation of the Augmentation Clause, and what the honour of the Crown requires when implementing the treaty promises.

[9] Ontario's appeals before this Court raise questions about the standard of review for historic treaty interpretation, the proper interpretation of the Augmentation Clause, the nature and content of the Crown's obligation to give effect to that clause and the appropriate remedy for a breach of that obligation, as well as limitations issues. The cross-appeals by the Huron and Superior plaintiffs ask this Court to reconsider whether the Crown has fiduciary duties under the Robinson Treaties.<sup>1</sup>

[10] In what follows, I conclude that although a trial judge's findings of historical fact attract deference, the interpretation of historic Crown-Indigenous treaties is reviewable for correctness. Correctness review is mandated for treaty interpretation because of the precedential and constitutionally protected nature of treaty rights and because treaties engage the honour of the Crown. Applying this standard of review, along with the treaty interpretation principles articulated by this Court, the Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss. If the Crown can increase the annuities without incurring loss, it *must* exercise its discretion and decide whether to increase the annuities and, if so, by how much. This discretion is not unfettered; it is to be exercised liberally, justly, and in

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<sup>1</sup> The designation "Huron plaintiffs" will be used to refer to the respondents/cross-appellants Mike Restoule et al. The term "Superior plaintiffs" will be used to refer to the respondents/cross-appellants Red Rock First Nation and Whitesand First Nation et al. The terms "plaintiffs" or "Anishinaabe plaintiffs" will be used to refer to both groups together.

accordance with the honour of the Crown. The frequency with which the Crown must consider whether it can increase the annuities must also be consistent with the honour of the Crown. Although the Augmentation Clause is not in itself a promise to pay the Anishinaabe a certain sum of money, no party doubts that the Crown was able to increase the annuities beyond \$4 per person without incurring loss, and that it should have exercised its discretion to do so. Thus, in my view, the Crown *must* increase the annuity under the Robinson Treaties beyond \$4 per person retrospectively, from 1875 to the present. It would be patently dishonourable not to do so. I further conclude, as both courts below did, that the plaintiffs' breach of treaty claims are not statute-barred by Ontario's limitations legislation. Finally, although no specific fiduciary duties apply in respect of the Augmentation Clause, the honour of the Crown requires the Crown to diligently fulfill this promise. The Crown's ongoing breach of its augmentation promise, in the circumstances, is also a breach of the treaties themselves.

[11] For almost a century and a half, the Anishinaabe have been left with an empty shell of a treaty promise. In this context, a declaration setting out the rights and obligations of the treaty parties, including the Crown's obligations under the Augmentation Clause, is undoubtedly a helpful remedy. But given the longstanding and egregious nature of the Crown's breach, a declaration alone will not help repair the treaty relationship or restore the Crown's honour. As I have indicated, the Crown *must* exercise its discretion and increase the annuities with respect to the past. The Crown has reached a negotiated settlement concerning past breaches with the Huron plaintiffs, but not with the Superior plaintiffs. With a view to respecting the nature of the treaty

promise, repairing the treaty relationship, restoring the honour of the Crown, and advancing reconciliation, I would also direct the Crown to engage in time-bound and honourable negotiation with the Superior plaintiffs about compensation for past breaches of the Augmentation Clause. If the Crown and the Superior plaintiffs cannot arrive at a negotiated settlement, the Crown will be required, within six months of the release of these reasons, to exercise its discretion and determine an amount to compensate the Superior plaintiffs for past breaches.

[12] Given this direction, Stage Three, if required, must be modified in accordance with these reasons and would function as a review by the courts of the Crown's process in determining the amount of compensation, and of the amount determined, both of which must be just and honourable. If the court finds that the amount determined by the Crown is not honourable, it may require the Crown to redetermine the amount or set the amount to be paid by the Crown, lest the Crown continue to undermine the very object and purpose of the treaty promise.

[13] At the end of the oral submissions before this Court, Ontario's counsel stated: "... I accept I am facing [a] 150 year history where the Crown in the broad sense has failed to engage on this, but we are here and we are listening and you are going to tell us how to approach this" (transcript, day 2, at p. 109). In the reasons that follow, it should be clear that Ontario and Canada must act *now* to respect their treaty promises to the Anishinaabe, and to help restore the honour of the Crown and the nation-to-nation alliance that the treaties represent. Doing so will require each party,

but especially the Crown, to recall the purposes behind the treaty promises. The Robinson Treaties are not merely transactional instruments about the exchange of money for a tract of land. They are living agreements embodying a relationship nurtured over many years before 1850 and requiring ongoing renewal into the future. It is time for the parties to return to the council fire and rekindle the perpetual relationship that the Robinson Treaties envision. Nothing less will demonstrate the Crown's commitment to reconciliation.

## II. Facts

[14] The essential historical facts are not materially in dispute before this Court. They were helpfully summarized in the reasons of the Court of Appeal, from which the following summary is drawn. Understanding almost 300 years of evolution in the relevant Crown-Indigenous relationship is a daunting task, but a necessary one. The historical setting provides valuable context for understanding the Robinson Treaties and what the honour of the Crown requires in their implementation.

### A. *The Anishinaabe of the Upper Great Lakes*

[15] The Anishinaabe of the upper Great Lakes are members of several First Nations who historically inhabited and continue to inhabit the northern shores of Lake Huron and Lake Superior. The Anishinaabe were organized in bands, each occupying and harvesting discrete territories considered as communal property, and each speaking dialects of their Indigenous language, Anishinaabemowin.

[16] The lands subject to the Robinson Treaties exceed 100,000 square kilometres, including the current communities of Thunder Bay, North Bay, Sault Ste. Marie, and Sudbury. At the time the treaties were signed in 1850, there were 1,422 individual beneficiaries of the Robinson-Huron Treaty and 1,240 beneficiaries of the Robinson-Superior Treaty. Although the number of current beneficiaries has yet to be determined definitively, evidence at trial suggested that in September 2017 there were 29,926 beneficiaries of the Robinson-Huron Treaty and 13,546 beneficiaries of the Robinson-Superior Treaty, living both on- and off-reserve.

B. *The Anishinaabe's System of Law and Governance*

[17] The Anishinaabe of the upper Great Lakes have a longstanding system of law and governance that informed, and continues to inform, their perspectives on the Robinson Treaties. Two key organizing principles of Anishinaabe law and governance are *pimaatiziwin*, the principle that everything is alive and sacred, and *gizhewaadiziwin*, the way of the Creator, which encompasses sacred laws of creation. When the treaties were signed, decision making in Anishinaabe society was deliberative and consensus-based. Anishinaabe *Ogimaa* (Chiefs or leaders) worked to achieve agreement among their people and were expected to provide generously for their communities. *Ogimaa* would host “council fires” where community decisions and agreements were made.

[18] The Anishinaabe's system of governance and their relationship with the Crown have always been based on the values of *respect, responsibility, reciprocity, and renewal*. The Anishinaabe sought *respect* for their jurisdiction and their authority to

conclude agreements to share their territory. They acted with a sense of *responsibility* to ensure their people could continue to depend on the land for sustenance, shelter, medicines, and spiritual well-being. *Reciprocity*, essential to the formation of alliances, meant that a gift would attract a reciprocal gift of commensurate value, based on the idea of mutual interdependence. This value reflects the notion that people must rely on one another to survive, not simply as an economic necessity, but also as a moral imperative. *Renewal* invoked the idea that relationships, such as the treaty relationship with the Crown, are ongoing and must be renewed continually.

C. *The Historical Context of Anishinaabe-Crown Relations*

(1) The Covenant Chain Alliance

[19] At the end of the Seven Years' War (1756-1763) between the British and the French, the British sought to secure the neutrality of various Indigenous nations, including the Anishinaabe of the upper Great Lakes, who had fought alongside the French. They did so by extending to them an alliance, known as the Covenant Chain, which dated back to the early 17th century and was a symbol of the close connection between British settlers and Indigenous peoples. The alliance was originally between the British and the Haudenosaunee Confederacy, and was later extended to others, including the Anishinaabe of the upper Great Lakes.

[20] The Covenant Chain alliance was symbolized by a ship tied to a tree with an iron chain to signal the interdependence of the British settlers and Indigenous

nations. As the trial judge noted, “[t]he metaphor associated with the chain was that if one party was in need, they only had to ‘tug on the rope’ to give the signal that something was amiss, and ‘all would be restored’” (2018 ONSC 7701, 431 D.L.R. (4th) 32 (“Stage One reasons”), at para. 65 (footnote omitted)). The trial judge described the Covenant Chain alliance as exemplifying the kind of “cross-cultural merging of diplomatic protocols and legal orders” that was common in the decades leading up to the signing of the Robinson Treaties (para. 89).

(2) The Royal Proclamation, 1763

[21] In response to an uprising against the British by various Indigenous nations, including Anishinaabe warriors, the British Crown issued the *Royal Proclamation, 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1). This became a defining moment in Canadian history and provided the impetus for the Robinson Treaties. In the *Proclamation*, the Crown unilaterally asserted sovereignty over what is now Canada, but also affirmed pre-existing Aboriginal title and ownership of unpurchased lands. The *Proclamation* created special rules for the purchase and sale of “Lands of the Indians” to prevent fraud and abuse, prohibited private parties from purchasing such lands, and stipulated that they could only be surrendered to the Crown.

(3) The Council at Niagara (1764)

[22] The year after the *Proclamation*, at a Council at Niagara attended by over 1,700 Indigenous people, including Anishinaabe leaders, the Crown again assured the

Indigenous attendees of their autonomy and stated that the Crown would maintain and protect their title to their lands. Gifts and wampum belts were exchanged, including the Great Covenant Chain Wampum and the 24 Nation Wampum. The trial judge described the Great Covenant Chain Wampum as an embodiment of the “merged symbols of diplomacy” between the two groups, visually represented on the belt by two figures holding hands as part of two links in a chain (Stage One reasons, at paras. 90 and 412).

(4) The War of 1812

[23] As part of the Covenant Chain alliance, Anishinaabe warriors fought alongside the British against the Americans and their Indigenous allies in the War of 1812 (1812-1815). One such warrior was Chief Shingwaukonse, who would play a key role at the Robinson Treaty Council. The military alliance between the Crown and the Anishinaabe was an important part of their ongoing relationship.

(5) The Annuity Model and Civilization Policy

[24] As settlement and resource development in Upper Canada (now Ontario) expanded in the early 19th century and the need for military alliances with Indigenous communities decreased, the Crown changed its Indigenous relations policy in two ways that would shape the content of the Robinson Treaties.

[25] First, increased migration drove the Crown to change its compensation model for land cession treaties. Beginning in 1818, the Crown replaced one-time lump-



sum payments with per person annuities of £2.10 or about \$10 per person, regardless of the size or value of the land ceded. This allowed the Crown to control its cash flow while continuing to open up more land for settlement. This amount was used in various treaties negotiated until 1850.

[26] Second, by 1830, the Crown had begun implementing its so-called “civilization” policy, which aimed to “reclaim” Indigenous peoples from “barbarism” and assimilate them into a Christian, agrarian lifestyle. This led to greater controls on the payment of annuities to prevent the “misuse” of funds. In 1830, Lieutenant Governor Sir John Colborne instituted the “Colborne Policy”, which mandated that annuities be held by the Crown and credited to the Indigenous treaty party, rather than distributed to individuals directly. Annuities were paid through a requisition system under which band chiefs could ask for items for their bands that promoted a sedentary, agricultural, European way of life. This policy remained in place in 1850 when the Robinson Treaties were concluded.

#### D. *Events Leading to the Robinson Treaties*

##### (1) Mining in the Upper Great Lakes Region

[27] Mining in the upper Great Lakes region in the 1840s was a key factor leading to the negotiation of the Robinson Treaties. During the 1840s, prospectors had begun exploring the south side of Lake Superior for minerals. In 1845, as the prospectors moved further north, the Crown began issuing mining licences in the upper

Great Lakes region, even though the Crown had no treaty with the Anishinaabe. The Anishinaabe objected to the encroachments onto their land. Anishinaabe Chiefs, including Chief Shingwaukonse, reminded the Crown of their claims to their territories, which the Crown had promised to respect, and of their past military support. By now, Anishinaabe Chiefs were concerned about the impact resource development was already having on their ability to subsist on their land. They began demanding a treaty to compensate them for the use of their traditional territories.

(2) The Vidal-Anderson Commission (1849)

[28] After pressure by Anishinaabe leaders, in 1849 the provincial government established the Vidal-Anderson Commission to evaluate the Anishinaabe's grievances and to prepare the way for a treaty. The Commission was headed by provincial land surveyor Alexander Vidal and Indian Superintendent Thomas G. Anderson, who both travelled to the northern shores of Lake Huron and Lake Superior to meet with 16 of the 22 Anishinaabe Chiefs. The Commission's report, delivered on December 5, 1849, affirmed the willingness of the Anishinaabe to treat with the Crown, provided that they could continue to hunt and fish, were given reserves to live on, and were paid a perpetual annuity as compensation. The report also set out possible terms for a treaty, including a surrender of the whole territory, which would allow the Crown to dispose of the land without encumbrance, and a perpetual annuity tied to the discovery of new wealth in the territory.

[29] No previous treaty had linked an annuity payment to the potential future value of ceded land. Describing the Anishinaabe lands as a “vast but sterile territory” (Stage One reasons, at para. 178), the Commission ultimately recommended a lower annuity than the standard \$10 per person provided under other treaties, along with the promise of an increased payment upon discovery and development of any new sources of wealth.

(3) The Mica Bay Incident (1849)

[30] On November 19, 1849, shortly before the Vidal-Anderson Commission delivered its report, Chief Shingwaukonse and Chief Nebenaigoching of the Huron Anishinaabe led a group of about 100 Anishinaabe to protest a mining site at Mica Bay. This intensified the need for a land cession agreement. The Governor General, Lord Elgin, ordered the arrest of the Anishinaabe participants, including the two chiefs, and directed the provincial government to make a treaty with the Anishinaabe of the upper Great Lakes.

(4) The Negotiation of the Robinson Treaties (1850)

[31] In January 1850, William Benjamin Robinson was appointed as treaty commissioner and tasked with negotiating final land cession agreements with the Huron and Superior Anishinaabe. Robinson, who had met Chiefs Shingwaukonse and Nebenaigoching while they were in jail in Toronto after the Mica Bay incident, had

experience in the fur trade, the mining sector, and the treaty-making process. He also had excellent relations with the Anishinaabe and spoke some Anishinaabemowin.

[32] Robinson's mandate, as set out in two orders in council, was to secure a treaty covering the northern shores of Lake Huron and Lake Superior for the smallest possible initial payment (less than £5,000), with a perpetual annuity no higher than what the Crown believed could be economically generated from an investment of the notional capital sum of £25,000 less the initial payment, and a provision for a reduced annuity if the population fell below 600.

[33] The funds available to Robinson for the intended treaty were modest and could not support the \$10 per person annuity provided under other contemporaneous treaties. This was likely because the provincial government felt the Anishinaabe were not giving up much, since the economic prospects of the land were viewed as bleak, but also because Upper Canada was in financial crisis.

[34] The treaty negotiations were held over three weeks in the late summer of 1850. The only records adduced at trial of the details of the negotiations were Robinson's diary and his official report. The records of speeches made by the Anishinaabe Chiefs at the Treaty Council have been lost. Robinson met first with the Superior delegation, led by Chief Peau de Chat, and afterwards with the Huron delegation, led by Chief Shingwaukonse. The delegations then jointly went to substantive treaty discussions at a Treaty Council in Sault Ste. Marie on September 5, 1850, which was conducted in Anishinaabemowin and English and incorporated

ceremonies and protocols typical of Great Lakes diplomacy. These ceremonies indicated that the Crown representatives had at least a functional understanding of Anishinaabe law, diplomacy, and language.

[35] Robinson began by proposing reserves for the Anishinaabe to live on and hunting rights throughout the ceded territory that were more expansive than the Crown's standard practice. The Anishinaabe accepted these proposals without further discussion.

[36] Robinson then raised the issue of compensation. The Anishinaabe delegations preferred a perpetual annuity in exchange for the entire territory, rather than a lump-sum payment for just the existing mining locations. Robinson offered the full amount he had available: £4,000 in cash and a perpetual annuity of £1,000, to be divided between the Superior and Huron First Nations. Robinson tried to justify this offer, which was lower than the amount provided under past treaties, by referring to the unique character of the land and the value of the other promises to be included. He explained that the lands were of lower quality than other lands in Upper Canada and would likely remain unsettled, except in a few places by mining companies. Additionally, the Anishinaabe would retain hunting and access rights on the ceded land, and they would benefit from trading opportunities offered by the settlers. Chief Peau de Chat, on behalf of the Superior delegation, and Chief Shingwaukonse, on behalf of the Huron delegation, each asked for time to consult their respective Councils.

[37] The next day, September 6, 1850, Chief Peau de Chat advised Robinson that the Superior delegation agreed to the proposed terms. Chief Shingwaukonse, however, told Robinson that the Huron delegation did not, and made a counterproposal for an annuity of \$10 per person. Robinson rejected this and told Chief Shingwaukonse that a majority of the chiefs had agreed to his proposal and he would draft treaties as approved by the Superior delegation. The trial judge found that Robinson's first offer had included an augmentation clause under which the Crown would increase the annuity if it received revenues from the territory that would permit it to do so without incurring loss.

[38] On September 7, 1850, Robinson read the treaty aloud to the Superior delegation. It included an annuity of £500. Two interpreters provided translation services from English to Anishinaabemowin. Chief Peau de Chat advised Robinson that he understood the treaty and was ready to sign on behalf of the Superior delegation. As Robinson recorded in his diary, "[t]hey were all perfectly satisfied & said they were ready to sign it" (Appellant's Condensed Book, at p. 47).

[39] Later the same day, Robinson met with the Huron delegation. Chief Shingwaukonse repeated his counterproposal. Robinson rejected this again and stated that those who signed the treaty would receive compensation for their people, but those who did not would receive nothing and would be without a treaty.

[40] On September 9, 1850, Chief Shingwaukonse and Chief Nebenaigoching renewed the request for a \$10 per person annuity and raised the subject of land grants

for the Métis. Mr. Robinson rejected both requests and had the Robinson-Huron Treaty read aloud to the delegation. Once again, translation services were provided. The treaty included a £600 annuity — £100 more than under the Robinson-Superior Treaty to reflect the larger Huron population — but was otherwise substantially the same as the Robinson-Superior Treaty. The trial judge found that Robinson “would have wanted the delegates to understand the augmentation clause and would therefore have insisted that the clause be carefully explained” (Stage One reasons, at para. 235). When Chiefs Shingwaukonse and Nebenaigoching saw that the other Huron Chiefs had accepted the proposed terms, they signed the treaty.

[41] Robinson then paid the chiefs the initial sum and the treaties were presented to Prime Minister Louis-Hippolyte LaFontaine on September 19, 1850. Robinson’s final report was delivered to the Indian Superintendent five days later. A month later, an order in council declared the treaties were to be ratified and confirmed.

(5) Key Provisions of the Robinson Treaties

[42] The Robinson Treaties, which are reproduced in full in an appendix to these reasons, have four common features. First, under both treaties, the Anishinaabe released or ceded their interest in the lands north of Lake Superior and Lake Huron. Second, the treaties assured the Anishinaabe that, despite ceding these lands, they would retain treaty rights to hunt and fish. Third, both treaties established reserves from the ceded territory for the Anishinaabe to live on. And fourth, both treaties provided for the payment of a lump sum with a perpetual annuity.

[43] For present purposes, three clauses in each treaty are relevant. The first is a “Surrender Clause”, under which the Anishinaabe surrendered or ceded their interest in the lands. The second is a “Consideration Clause”, which provided for an initial lump-sum payment of £2,000 under each of the Robinson Treaties, with a perpetual annuity of £600 under the Robinson-Huron Treaty and £500 under the Robinson-Superior Treaty. The third, and most important for these appeals, is an “Augmentation Clause”, which provides for an increase of the perpetual annuity under certain conditions. These three clauses are reproduced below, with headings for each clause added for convenience.<sup>2</sup>

(a) *Robinson-Huron Treaty*

**The Surrender Clause**

. . . [the Anishinaabe of the Lake Huron territory] inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honorable Hudson’s Bay Company from Canada, as well as all unconceded lands within the limits of Canada West to which they have any just claim . . . fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors for ever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed . . . .

**The Consideration Clause**

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<sup>2</sup> There exist several versions of the text for the two Robinson Treaties. The wording used in these reasons comes from the following source, which is the same source relied upon by the parties and by the courts below: Canada, *Indian Treaties and Surrenders: From 1680 to 1890 — In Two Volumes* (1891), vol. I, at pp. 147-52. Although there are slight differences in wording as between the Robinson-Huron Treaty and the Robinson-Superior Treaty, no party has suggested those differences are material to the present appeals. Accordingly, for simplicity, the text from the Robinson-Superior Treaty will be referred to throughout these reasons.



. . . for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the 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 Augmentation Clause**

The said William Benjamin Robinson, on behalf of Her Majesty, Who desires to deal liberally and justly with all Her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-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.

#### (b) *Robinson-Superior Treaty*

### **The Surrender Clause**

. . . [the Anishinaabe of the Lake Superior territory] from Batchewanaung Bay to Pigeon River, at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the charter of the Honorable the Hudson's Bay Company from the said tract. And also the islands in the said lake within the boundaries of the British possessions therein . . . freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed . . . .

### **The Consideration Clause**

. . . for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer . . . .

### **The Augmentation Clause**

. . . The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided, further, that the number of Indians entitled to the benefit of this Treaty shall amount to two-thirds of their present number (which is twelve hundred and forty), to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty, the annuity shall be diminished in proportion to their actual numbers.

#### *E. Payment of the Annuities After 1850*

[44] Based on the Anishinaabe population of the Huron and Superior territories in 1850, the annuity was about \$1.70 and \$1.60 per person, respectively. Except for a brief period between 1851 and 1854 when the Huron annuity was paid in goods to each band, the Huron annuity has been paid in cash to individuals from 1855 to the present. The Hudson's Bay Company was responsible for distributing the Superior annuity in cash to the head of each family through the 1850s and until the 1870s. Since 1875, when the annuity was increased to \$4, it has been paid in cash to all individual beneficiaries. This was the first and only increase to the annuities ever made.

[45] After years of demands by various chiefs, in 1875 the Government of Canada increased the annuity to \$4 per person, which since then has been paid to the beneficiaries of the Robinson Treaties. The chiefs successfully petitioned for the government to pay arrears for 1850 to 1874 to recognize that the economic conditions for increasing the annuity had existed before the 1875 increase. After a dispute between Canada, Ontario, and Quebec over who was constitutionally required to pay arrears after Confederation was appealed to this Court and the Judicial Committee of the Privy Council (*In re Indian Claims*), the Crown finally began paying arrears to treaty beneficiaries in 1903.

F. *This Litigation*

[46] The Superior plaintiffs filed a statement of claim in 2001 seeking declaratory and compensatory relief relating to the interpretation, implementation, and alleged breach of the Augmentation Clause of the Robinson-Superior Treaty. The Huron plaintiffs filed their own claim in 2014. The actions were tried together in three stages. Stage One proceeded by way of motions for summary judgment and addressed the interpretation of the treaties. Stage Two, which also proceeded by way of motions for summary judgment, considered Ontario's defences of Crown immunity and limitations. Stage Three concerns the plaintiffs' claims for damages and the allocation of liability between Canada and Ontario. Stage Three has been argued based on evidence adduced by the parties and taken under reserve by the trial judge. The appeals to the Court of Appeal for Ontario and this Court concerned only Stages One and Two.

### III. Judicial History

[47] Faced with an extensive evidentiary record and many complex legal issues, both the trial judge and the Court of Appeal approached their tasks with great sensitivity and care. Both courts provided comprehensive and considered reasons, reflecting the complexity and importance of the issues involved. The following summarizes their decisions, with more detail provided when addressing each issue under appeal.

#### A. *Ontario Superior Court of Justice (Stage One), 2018 ONSC 7701, 431 D.L.R. (4th) 32 (Hennessy J.)*

[48] In the Stage One decision, the trial judge held that the Crown has a mandatory and reviewable obligation under the Augmentation Clause to increase the annuities when “the economic circumstances warrant” (para. 3). She ruled that “[t]he economic circumstances will trigger an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss” (para. 3). The Crown must engage in a consultative process with the treaty beneficiaries and pay an increased annuity reflecting a “fair share” of the net Crown resource-based revenues (see paras. 535, 559 and 576). In the trial judge’s view, the reference to £1 (at the time, equal to approximately \$4) in the Augmentation Clause limits only the amount distributed to individuals, but does not limit or impose a cap on the total collective annuity.

[49] The trial judge rejected the argument that the Crown was under a *sui generis* fiduciary duty to administer the ceded land on behalf of the treaty beneficiaries, but she accepted that the principle of the honour of the Crown and an *ad hoc* fiduciary duty require the Crown to diligently implement the augmentation promise. She also articulated several general principles to guide Stage Three of the trial relating to the relevant Crown revenues and expenses. Finally, the trial judge rejected Ontario's argument that a term for indexation of the annuities should be implied to account for inflation, ruling that the Augmentation Clause was meant to deal with such a circumstance.

B. *Ontario Superior Court of Justice (Stage Two), 2020 ONSC 3932, 452 D.L.R. (4th) 604 (Hennessy J.)*

[50] In the Stage Two decision, the trial judge ruled that Crown immunity and the applicable provincial limitations legislation did not bar the plaintiffs' claims. She held that Crown immunity under the *Proceedings Against the Crown Act, 1962-63*, S.O. 1962-63, c. 109, did not prevent the plaintiffs from recovering for breach of fiduciary duty or breach of treaty before this legislation came into force on September 1, 1963. She also held that the plaintiffs' treaty claims were not barred by the former *Limitations Act*, R.S.O. 1990, c. L.15 ("1990 *Limitations Act*"), either as claims under a "simple contract", "specialty", or "action on account" (paras. 174 and 179), and ruled that no specific limitation period under that legislation applied to breach of treaty claims.

C. *Court of Appeal for Ontario (Stages One and Two)*, 2021 ONCA 779, 466 D.L.R. (4th) 1 (Strathy C.J.O. and Lauwers, Hourigan, Pardu and Brown J.J.A.)

[51] A five-judge panel of the Court of Appeal for Ontario allowed Ontario's appeals in part from the Stage One judgment and dismissed its appeals from the Stage Two judgment. The court issued four sets of reasons: joint reasons of the court summarizing the facts and decisions below, and three additional sets of reasons addressing various issues, with a shifting majority on each issue.

(1) Standard of Review

[52] The majority (per Strathy C.J.O. and Brown J.A., Lauwers J.A. concurring) ruled that treaty interpretation is a question of law reviewable on a correctness standard, even when informed by findings of fact that are reviewable on a deferential standard. The minority (per Hourigan J.A., Pardu J.A. concurring) would have called for a "new approach" under which treaty interpretation is viewed as a question of mixed fact and law reviewable for palpable and overriding error, absent extricable errors of law, which are reviewable for correctness (paras. 528 and 552).

(2) Interpretation of the Robinson Treaties

[53] The majority (per Lauwers and Pardu J.J.A., Hourigan J.A. concurring) held that the trial judge did not err in her interpretation of the Augmentation Clause, except in concluding that the Robinson Treaties promised the Anishinaabe a "fair share" of

the net Crown revenues from the ceded territories. They agreed with the trial judge that the Robinson Treaties impose a mandatory and reviewable obligation on the Crown to increase the annuities when the economic conditions warrant. They also agreed that the reference to £1 (or \$4) in the Augmentation Clause is a limit only on the amount that may be distributed to individuals and is part of an uncapped aggregate amount that *must* be increased when the Crown can do so without sustaining a loss.

[54] The minority (per Strathy C.J.O. and Brown J.A.) held that the trial judge made extricable errors of law in her interpretation of the Robinson Treaties by: (1) failing to consider the plain meaning of the treaties' text; (2) finding ambiguity where there was none; (3) going beyond a generous interpretation of the treaties by exceeding what was possible based on the wording used; and (4) failing to consider the only reasonable interpretation of the treaties that reconciled the common intention of both parties. Like the majority, the minority rejected the trial judge's conclusion that the treaties promised the Anishinaabe a "fair share" of the future revenues of the territory. In their view, the annuity did not have two parts, with one part distributed to the collective and the other to individuals. Rather, "[t]he only reasonable interpretation is that there was only one annuity under each Treaty, which was to be (and in fact was historically) distributed in its entirety to the members of the First Nations" (para. 415). The reference in the treaties to a cap of £1 (or \$4) per person was a "soft cap" on the total value of the annuity, and could be further increased at the Crown's discretion, "through the exercise of Her Majesty's graciousness" (para. 415).

(3) Honour of the Crown

[55] The court was unanimous that the honour of the Crown is engaged, but diverged on what this requires when implementing the Augmentation Clause. The majority (per Lauwers and Pardu JJ.A., Hourigan J.A. concurring) held that the honour of the Crown obliges the Crown to increase the annuities beyond \$4 as part of its duty to diligently implement the treaties. The minority (per Strathy C.J.O. and Brown J.A.) concluded that the honour of the Crown requires the Crown, at a minimum, to turn its mind from time to time to consider increasing the annuities beyond \$4, and to periodically engage in a process with the treaty partners to determine the amount of the augmentation. However, the court unanimously agreed with the trial judge that the Crown does not have unfettered discretion about whether to increase the annuities, and that given the Crown's neglect of the treaty promise for almost 150 years, the court had the authority and obligation to impose specific and general duties on the Crown regarding the Augmentation Clause.

(4) Fiduciary Duty, Crown Immunity, and Limitations

[56] Justice Hourigan delivered the unanimous reasons for the court on the issues of breach of fiduciary duty, Crown immunity, and limitations. He ruled that the trial judge erred in finding that the Crown is under an *ad hoc* fiduciary duty regarding the implementation of the Augmentation Clause. However, he agreed with the trial judge that no *sui generis* fiduciary duty arises. He further concluded that the 1990 *Limitations Act* does not preclude the claims for breach of the Robinson Treaties.



Finally, Hourigan J.A. ruled that he did not need to consider Crown immunity because Ontario had invoked Crown immunity only regarding the claims for breach of fiduciary duty, which the court had rejected. The Court of Appeal's conclusion on Crown immunity has not been appealed to this Court.

(5) Remedies

[57] The majority (per Lauwers and Pardu JJ.A., Hourigan J.A. concurring) highlighted several features of the remedial context that the trial judge faced: the lack of effort in implementing the Augmentation Clause, other than in 1875, had resulted in a lack of guidance for future implementation; Ontario and Canada had rejected that they had any duties of disclosure or consultation in the implementation process; and the trial judge had no confidence that a simple declaration without more judicial direction would trigger good faith negotiations. In the majority's view, the trial judge had erred in excluding the costs of infrastructure and institutions built with tax revenues from the calculation of net Crown resource-based revenues. The majority added that the form, level, and aim of the sharing required by the Augmentation Clause is to be determined by the parties in negotiations or by the trial judge in Stage Three.

[58] The minority (per Strathy C.J.O. and Brown J.A.) would have directed the trial judge to invite further submissions in Stage Three concerning the implementation of the Augmentation Clause, including how often the Crown must turn its mind to the augmentation promise, what factors it should take into account in considering whether

to increase the annuities, how a potential increase ought to be calculated, and any damages resulting from the Crown's breach of the augmentation promise.

D. *Subsequent Developments*

[59] Shortly after this Court granted leave to appeal and cross-appeal in June 2022, Ontario applied to this Court for an interim order staying Stage Three of the trial, which was scheduled to begin just weeks later, until this Court rendered its decision. The Huron and Superior plaintiffs opposed the relief sought and argued that Ontario's motion should be brought before the case management judge. Sitting as rota judge, I ordered Ontario to bring its motion to stay the hearing of Stage Three of the trial to the case management judge (Order of Jamal J. dated September 26, 2022). Ontario did so. Ontario moved to adjourn the Stage Three trial, then scheduled to begin in mid-January 2023, pending this Court's decision on the present appeals and cross-appeals. Ontario's motion was dismissed in late November 2022 and was not appealed further (2022 ONSC 7368).

[60] On June 17, 2023, Canada, Ontario, and the Huron plaintiffs publicly announced that, as a result of negotiations that had been ongoing since April 2022, they had successfully concluded a proposed settlement for past claims under the Robinson-Huron Treaty for \$10 billion, based on equal payments of \$5 billion from each of Canada and Ontario. The proposed settlement was described in a joint press release as "a major milestone in the ongoing collaborative work to renew the treaty relationship and honour a treaty promise that dates back to 1850" (Crown-Indigenous Relations and

Northern Affairs Canada, *Robinson Huron Treaty Leadership, Ontario and Canada announce proposed settlement and next steps in Treaty annuities court case*, June 17, 2023 (online)).

[61] At the hearing before this Court, Ontario's counsel provided the following update. The \$10 billion settlement among the Huron plaintiffs, Ontario, and Canada deals only with past claims and is not contingent on the result in these appeals. Because of the settlement, the Huron plaintiffs did not participate in Stage Three of the trial (transcript, day 1, at pp. 11-12; transcript, day 2, at p. 103). The Superior plaintiffs participated in Stage Three, claiming \$126.285 billion from Canada and Ontario as at 2020. The Stage Three hearing concluded on September 26, 2023, with judgment reserved and expected to be delivered within six months (transcript, day 1, at pp. 1-12; transcript, day 2, at p. 103).

[62] After the hearing before this Court, the Chief Justice issued an order staying Stage Three of the trial pending this Court's decision (Order of Wagner C.J. dated November 9, 2023).

[63] On December 15, 2023, federal legislation to fund Canada's \$5 billion share of the settlement amount received royal assent (Bill C-60, *An Act for granting to His Majesty certain sums of money for the federal public administration for the fiscal year ending March 31, 2024*, 1st Sess., 44th Parl., 2021-22-23, enacted as *Appropriation Act No. 4, 2023-24*, S.C. 2023, c. 33, Sch. 1). The supplementary estimates document prepared by the federal government in support of Bill C-60 stated

that the settlement relates to past annual payments under the 1850 Robinson-Huron Treaty and that “[o]nce the agreement is finalized, funds will be paid to a trust established by the First Nations” (*Supplementary Estimates (B), 2023-24* (2023), at p. 1-2).

[64] On February 26, 2024, the settlement was finalized and approved by the Ontario Superior Court, which applauded the “historic agreement” and confirmed that the settlement is “to take effect regardless of the outcome of the appeal before the Supreme Court of Canada” (2024 ONSC 1127, at paras. 10 and 13 (CanLII), per Morawetz C.J.).

#### IV. Issues

[65] Ontario’s appeals raise questions about the standard of review for the interpretation of historic treaties such as the Robinson Treaties, the proper interpretation of the Augmentation Clause, the nature and content of the Crown’s obligations to implement the Augmentation Clause and the appropriate remedy for the Crown’s breach of those obligations, as well as limitations issues. The cross-appeals of the Huron and Superior plaintiffs raise whether the Crown has fiduciary duties under the Robinson Treaties.

[66] To address these issues, I will consider the following questions:

1. What are the governing principles for the interpretation of historic Aboriginal treaties such as the Robinson Treaties?
2. What is the standard of review for the trial judge's interpretation of the Robinson Treaties?
3. What is the proper interpretation of the Augmentation Clause in the Robinson Treaties?
4. Are the claims of the Huron and Superior plaintiffs under the Robinson Treaties statute-barred by provincial limitations legislation?
5. What is the nature and content of the Crown's obligation to implement the Augmentation Clause? Does the Crown have duties flowing from the principle of the honour of the Crown, and is the Crown under a fiduciary duty?
6. What is the appropriate remedy for the Crown's failure to implement the Augmentation Clause?

V. Analysis

A. *The Interpretation of Historic Aboriginal Treaties*

[67] I begin by reviewing the principles for interpreting historic Aboriginal treaties, which were correctly identified by the trial judge and the Court of Appeal. I will focus on four relevant features figuring prominently in the discussion of the standard of review that follows in the next section: the nature of treaties as *sui generis* agreements intended to promote reconciliation; the importance of interpreting treaty rights in accordance with the honour of the Crown; the differences between historic and modern treaties; and finally, the particular principles governing the interpretation of historic treaties and the two-step approach to interpretation set out in this Court’s decision in *R. v. Marshall*, [1999] 3 S.C.R. 456.

(1) Treaties Are *Sui Generis* Agreements Intended To Advance Reconciliation

[68] Treaties have long been an important means of reconciling the interests of Aboriginal and non-Aboriginal peoples in Canada. Reconciliation is aimed at building a “mutually respectful long-term relationship” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at para. 30). It has been described as both “a first principle of Aboriginal law” (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 (“*Mikisew Cree 2018*”), at para. 22) and “the grand purpose of s. 35 of the *Constitution Act, 1982*” (*Little Salmon*, at para. 10).

[69] As this Court explained in *Little Salmon*, at para. 8, per Binnie J.:

Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations. The objective was not only to build alliances with First Nations but to keep the peace and to open up the major part of those territories to colonization and settlement.

[70] The Crown’s assertion of sovereignty over Aboriginal societies gave rise to a distinctive or *sui generis* legal relationship between the Crown and Aboriginal peoples (*Desautel*, at para. 25, citing *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78). That distinctive legal relationship is reflected in treaties, which represent an exchange of “solemn promises” and are unique or *sui generis* agreements governed by special rules of interpretation (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at pp. 404 and 410; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at pp. 1038 and 1043; *Badger*, at para. 41). Treaties are *sui generis* because “they are the product of the special relationship between the Crown and Aboriginal peoples that is aimed at achieving reconciliation” (P. W. Hogg and L. Dougan, “The Honour of the Crown: Reshaping Canada’s Constitutional Law” (2016), 72 *S.C.L.R.* (2d) 291, at p. 311).

(2) Treaty Rights Must Be Interpreted in Accordance With the Honour of the Crown

[71] This Court has also affirmed that in order to promote reconciliation, treaty rights must be interpreted in accordance with the honour of the Crown, “the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign” (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013

SCC 14, [2013] 1 S.C.R. 623, at para. 65). The honour of the Crown imposes an “obligation of honourable dealing” with Aboriginal peoples (*Little Salmon*, at para. 42).

[72] The honour of the Crown is an ancient principle of common law dating back to pre-Norman England (Hogg and Dougan, at pp. 293-94, citing D. M. Arnot, “The Honour of the Crown” (1996), 60 *Sask. L. Rev.* 339). It was reflected in the Crown’s promise in the *Royal Proclamation, 1763* that it would protect the Aboriginal peoples inhabiting the British territories of North America from exploitation by non-Aboriginal peoples (*Little Salmon*, at para. 42). Because of its connection with s. 35(1) of the *Constitution Act, 1982*, the honour of the Crown has been called “a constitutional principle” and is now “an important anchor in this area of the law” (*Little Salmon*, at para. 42; see also *Manitoba Metis*, at para. 69; *Mikisew Cree 2018*, at para. 24).

[73] The honour of the Crown is “always at stake” in the Crown’s dealings with Aboriginal peoples (*Badger*, at para. 41; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 16; *Mikisew Cree 2018*, at para. 23). The making, interpretation, and implementation of treaties must be approached in a way that maintains the honour and integrity of the Crown (*Badger*, at para. 41; *Haida Nation*, at paras. 17 and 19; *Manitoba Metis*, at para. 73).

[74] I will return to the honour of the Crown later when discussing the Crown’s obligation to implement the Augmentation Clause of the Robinson Treaties.

### (3) Differences Between Historic and Modern Treaties



[75] Although all treaty rights must be interpreted in accordance with the honour of the Crown (*Little Salmon*, at para. 71; Hogg and Dougan, at pp. 314-16), there are important differences between historic and modern treaties. Historic treaties were negotiated between the Crown and Aboriginal peoples before 1921, while modern treaties were negotiated after 1973, in the wake of this Court's decision in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. *Calder* recognized Aboriginal rights with respect to land and led the Government of Canada to negotiate modern treaties in those parts of Canada where there were no treaties (see P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 28:18; J. Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties", in J. Borrows and M. Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (2017), 105, at p. 105; J. Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2010), 26 *N.J.C.L.* 25, at pp. 27-28; D. Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011), 54 *S.C.L.R.* (2d) 475, at pp. 475-77).

[76] The difference between historic and modern treaties is not primarily about the age of the document. As Binnie J. remarked in *Little Salmon*, at para. 54, "[t]oday's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document." Historic and modern treaties were each negotiated under markedly different circumstances and often resulted in very different treaty texts. Historic treaties were often relatively brief,

negotiated quickly, and intended to record oral promises made by the Crown to Indigenous signatories, who usually required translation and did not have the benefit of legal advice (*Badger*, at paras. 52-53; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 7; Jai (2010), at p. 27). Such treaties were “typically expressed in lofty terms of high generality and were often ambiguous” (*Little Salmon*, at para. 12). As a result, “courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome” (para. 12).

[77] Modern treaties, by contrast, are usually the “product of lengthy negotiations between well-resourced and sophisticated parties” (*Little Salmon*, at para. 9; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 36). They often consist of minutely detailed instruments, negotiated over the course of years, with the Indigenous signatories represented by lawyers and other experts (*First Nation of Nacho Nyak Dun*, at para. 36; *Moses*, at para. 7; Hogg and Wright, at § 28:38). As a result, because “[c]ompared to their historic counterparts, modern treaties are detailed documents[,] deference to their text is warranted” (*First Nation of Nacho Nyak Dun*, at para. 36).

#### (4) Principles Governing the Interpretation of Historic Treaties

[78] The legal principles governing the interpretation of historic treaties, such as the Robinson Treaties of 1850, are well established. The words in a treaty “must not be interpreted in their strict technical sense nor subjected to rigid modern rules of

[interpretation]” (*Badger*, at para. 52, cited in *Marshall*, at para. 14). At the same time, as Binnie J. cautioned in *Marshall*, “[g]enerous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse” (para. 14):

The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown’s approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) . . . . The bottom line is the Court’s obligation is to “choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles” the [Aboriginal] interests and those of the British Crown (*Sioui*, per Lamer J., at p. 1069 (emphasis added)). [para. 14]

[79] In *Marshall*, McLachlin J., as she then was, dissenting on other grounds, summarized the principles for interpreting treaties as including the following (at para. 78):

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, “Interpreting *Sui Generis* Treaties” (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, “Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test” (1997), 36 *Alta. L. Rev.* 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the [A]boriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles

the interests of both parties at the time the treaty was signed: *Sioui, supra*, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger, supra*, at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger, supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra*; *Horseman, supra*; *Nowegijick, supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger, supra*, at para. 76; *Sioui, supra*, at p. 1069; *Horseman, supra*, at p. 908.

9. Treaty rights of [A]boriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown, supra*, at para. 32; *Simon, supra*, at p. 402.

[80] Justice McLachlin noted that because a court must consider both the words of a treaty and the historical and cultural context, it is useful to approach treaty interpretation in two steps. At the first step, the court focuses on the words of the treaty clause at issue and identifies the range of possible interpretations. At the second step, the court considers those interpretations against the treaty's historical and cultural backdrop. As McLachlin J. explained (at paras. 82-83):

First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger, supra*, at para. 76, “the scope of treaty rights will be determined by their wording”. The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty’s historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties’ common intention. This determination requires choosing “from among the various possible interpretations of the common intention the one which best reconciles” the parties’ interests: *Sioui, supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon, supra*, at pp. 402-3; *Sundown, supra*, at paras. 30 and 33.

[81] Justice McLachlin’s legal framework in *Marshall* reflects the current state of the law. It has been cited approvingly by this Court (*R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, at para. 18; *Little Salmon*, at para. 105, per Deschamps J., concurring) and by appeal courts across Canada (*Beattie v. Canada*, 2002 FCA 105, 288 N.R. 254, at para. 9; *Horseman v. Canada*, 2016 FCA 238, at para. 8 (CanLII); *Canada v. Jim Shot Both Sides*, 2022 FCA 20, 468 D.L.R. (4th) 98, at para. 170, rev’d in part 2024 SCC 12; *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, [2021] 3 W.W.R. 561, at paras. 105-6, 149 and 277; *Chingee v. British Columbia (Attorney General)*, 2005 BCCA 446, 261 D.L.R. (4th) 54, at para. 15; *R. v. Morris*, 2004 BCCA 121, 237 D.L.R. (4th) 693, at para. 39, rev’d 2006 SCC 59, [2006] 2 S.C.R.

915; *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365, 418 D.L.R. (4th) 157, at para. 50; *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, 206 D.L.R. (4th) 638, at paras. 39 and 53; *Newfoundland and Labrador v. Nunatsiavut Government*, 2022 NLCA 19, at para. 20 (CanLII)). It was also cited and applied in the case under appeal by the trial judge (Stage One reasons, at paras. 324, 327-29 and 398-475) and the Court of Appeal for Ontario (para. 109, per Lauwers and Pardu JJ.A., and paras. 388 and 421, per Strathy C.J.O. and Brown J.A.).

[82] With these principles in mind, I now turn to the standard of appellate review for the interpretation of historic treaties.

## B. *The Standard of Appellate Review for the Interpretation of Historic Treaties*

### (1) Introduction

[83] The question of the appropriate standard of appellate review for the interpretation of historic treaties was the subject of extensive submissions before the Court of Appeal and this Court. Important legal policy considerations militate toward both a more and less deferential standard on certain parts of the interpretive exercise. Greater deference may be justified because a court interpreting an historic treaty must often rely on the trial judge's findings of fact based on historical evidence and expert testimony. But less deference may also be owed because treaty interpretation involves the application of constitutional principles such as the honour of the Crown, with

lasting implications for the nation-to-nation relationship between Indigenous peoples and the Crown.

[84] The majority in the Court of Appeal (per Strathy C.J.O. and Brown J.A., Lauwers J.A. concurring) ruled that a trial judge’s interpretation of historic treaties is reviewable for correctness. Drawing on *Marshall* and *R. v. Van der Peet*, [1996] 2 S.C.R. 507, the majority held that despite the shift towards greater appellate deference to trial courts reflected in decisions of this Court such as *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, “the *Marshall* standard of review remains in place, including the principle that legal inferences or conclusions regarding the meaning of a historical treaty provision drawn by a trial judge from historical facts are not entitled to deference on appellate review” (para. 404). For the majority, the *sui generis* nature of treaties as “agreements that are intended to last indefinitely” offered policy support for this view (paras. 406-8).

[85] The minority (per Hourigan J.A., Pardu J.A. concurring) would have recognized a “new approach” to appellate review of historic treaty interpretation by trial judges (para. 552). Under that approach, while extricable errors of law would still be reviewable for correctness (para. 577), treaty interpretation would be viewed as a question of mixed fact and law, reviewable only for palpable and overriding error (paras. 558-59). For the minority, the critical role of historical context and the special

process trial courts engage in when interpreting historic Aboriginal treaties support a more deferential standard of review (paras. 563 and 570).

[86] Before this Court, Ontario and Canada, supported by the Attorney General of New Brunswick, argue that the interpretation of historic treaties is primarily a question of law attracting correctness review. Findings of fact such as historical findings and credibility determinations continue to attract deference, but a trial judge's ultimate conclusion as to the common intention of the treaty signatories does not. Conversely, the Huron and Superior plaintiffs, supported by most if not all of the interveners representing Indigenous organizations, assert that historic treaty interpretation is a mixed fact and law inquiry, similar in some respects to appellate review of contractual interpretation discussed in *Sattva*. While extricable errors of law would remain reviewable for correctness, a trial judge's interpretation of treaty rights must be deferred to absent palpable and overriding error.

[87] As I explain below, the question of whether historic treaty interpretation attracts appellate deference asks whether the trial court's interpretation of a treaty right must be correct. In my view, the answer is yes. Findings of historical fact are particularly important in interpreting historic treaties and attract appellate deference absent palpable and overriding error or an extricable error of law. However, the constitutionally protected nature of treaty rights requires that appeal courts be given broad scope to intervene on issues of treaty interpretation. As a result, the standard of review for the interpretation of historic treaties is correctness.



(2) Discussion

[88] The law on the standard of appellate review seeks “to achieve an appropriate division of labour between trial and appellate courts in accordance with their respective roles” (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 35). Trial courts primarily resolve factual and legal disputes raised before them, while appellate courts primarily ensure that legal rules are applied consistently, as required by the rule of law, and delineate and refine legal rules when necessary (para. 35; *Housen*, at para. 9).

[89] The division of labour between trial and appellate courts is reflected in the rules governing the standard of appellate review for questions of law, questions of fact, and questions of mixed fact and law. Questions of law, which involve identifying “what the correct legal test is” (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35; *Sattva*, at para. 49), attract no appellate deference and are reviewable for correctness (*Housen*, at paras. 10, 19, 23, 28, 33 and 36; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 36). Correctness review for questions of law recognizes the law-making function of appellate courts and ensures that legal rules are applied consistently in similar situations (*Housen*, at para. 9).

[90] Findings of fact, inferences of fact, and questions of mixed fact and law (which involve applying a legal standard to the facts) are, absent an extricable error of law, all reviewable for palpable and overriding error (*Housen*, at para. 26; *Southam*, at

para. 26). The policy reasons for appellate deference to such questions include limiting the number, length and cost of appeals, promoting the autonomy and integrity of trial proceedings, and recognizing the expertise of the trial judge and their advantageous position given their first-hand exposure to the evidence (*Housen*, at paras. 16-18).

[91] As noted by former Justice Robert J. Sharpe, “[a]t the core of the debate over the appropriate standard of review are the competing principles of deference and legality” (*Good Judgment: Making Judicial Decisions* (2018), at p. 204). Deference entails an appellate court showing respect for a trial judge’s institutional advantages on factual issues and refraining from retrying the case on appeal (p. 204). Legality involves the appellate court’s duty to “ensure the overall legal integrity of the decision-making process” and intervening “when first-instance decisions do not respect the law’s general standards” (p. 204).

(a) *Guiding Case Law*

[92] Ontario and Canada’s correctness arguments rely heavily on the standard of review analysis in *Van der Peet* and *Marshall*. In *Van der Peet*, this Court set out distinct standards of review for the factual and legal inquiries involved in addressing Aboriginal rights. Factual findings attract deference, but determinations of the scope of Aboriginal rights do not. As Lamer C.J. explained in an oft-cited passage in *Van der Peet* (at para. 82):

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

[93] *Van der Peet* was an Aboriginal rights case, not a treaty case. Yet the correctness standard applied in *Van der Peet* to determine the “scope” of an Aboriginal right was later applied in *Marshall*, at para. 18, this Court's leading case on historic treaty interpretation. Writing for the majority in *Marshall*, Binnie J. cited the above passage from *Van der Peet* as also bearing on the interpretation of treaty rights. Findings of fact are given deference, while conclusions as to the scope of the relevant rights, based on the facts as found, are determinations of law attracting no deference (para. 18).

[94] Ontario and Canada say that the standard of review applied in *Marshall* determines the standard in historic treaty interpretation more broadly. I disagree. As the Huron plaintiffs note, both *Van der Peet* and *Marshall* were decided based on errors that, after this Court's decision in *Housen*, are properly characterized as extricable errors of law. In *Van der Peet*, the trial judge had applied the wrong legal test when determining whether an Aboriginal right existed on the facts as he found them. In *Marshall*, the trial judge had failed to consider a relevant factor, namely, extrinsic

evidence, when determining the existence and scope of the treaty right. Although both cases are relevant to determining the standard of review in these appeals, they are not dispositive.

[95] The Huron plaintiffs cite cases outside the Aboriginal law context to urge a deferential standard of review. They suggest that the interpretive exercise in this Court's decision in *Sattva*, a case that overhauled the standard of review in contractual interpretation, shares parallels with historic treaty interpretation. Before *Sattva*, a trial judge's interpretation of a contract was viewed as a question of law and attracted no deference. This Court in *Sattva* recharacterized the interpretation of a contract as a question of mixed fact and law and changed the presumptive standard of review from correctness to palpable and overriding error. The Huron plaintiffs acknowledge that treaties and contracts are distinct, but they say that the similarity of the fact-intensive and context-specific nature of treaty and contractual interpretation suggests that appellate deference is also justified in cases of treaty interpretation.

[96] I will address *Sattva* in more detail below. For now, it suffices to note that the analogy between treaty and contractual interpretation as both involving a mixed-fact-and-law inquiry is an imperfect one. Historic Aboriginal treaties are not contracts; they are "far more" than contracts (*R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24). This distinction is not merely semantics. It has real consequences for how courts interpret historic treaties, which is a significantly more complicated and nuanced exercise than contract interpretation. Unlike contracts, treaties are exchanges of solemn

promises engaging the honour of the Crown and must be interpreted broadly, flexibly, and generously (para. 24; *Moses*, at para. 107, per LeBel and Deschamps JJ., dissenting on other grounds). As Professor Janna Promislow explains:

Serving the ends of justice in the treaty interpretation context, however, is more complex than the interpretation of contracts, due to the historical nature of the agreements and the constitutional character of the moments of agreement — and because the foundational values behind protecting historic treaty rights are arguably less understood and more contentious than the values behind protecting freedom of contract.

(“Treaties in History and Law” (2014), 47 *U.B.C. L. Rev.* 1085, at p. 1172)

[97] I would make two additional observations about the jurisprudence on this issue. First, *Marshall* is not the only treaty case that provides guidance on the applicable standard of review. Other cases suggest that this Court has always reviewed treaty interpretation on a correctness standard. For example, in *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, this Court had to decide whether events after the signing of the Robinson-Huron Treaty had the effect of surrendering Aboriginal rights in unceded land. The Court affirmed that factual issues are reviewable for palpable and overriding error, but then immediately added that the “legal findings based on those facts” do not attract deference (pp. 574-75). Similarly, in *Sundown*, this Court held that a member of a Cree First Nation could build a hunting cabin as reasonably incidental to the exercise of a treaty right to hunt for food in a traditional expeditionary style. Speaking for the Court, Cory J. accepted the trial judge’s findings of fact, but then appeared to review the interpretation of the scope of the relevant treaty right for correctness (paras. 26-43).

[98] Second, intermediate appellate courts have considered treaty interpretation as a question of law warranting correctness review (see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. (4th) 666, at para. 85; *Lac La Ronge Indian Band*, at para. 148; *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2019 ABCA 14, at para. 39 (CanLII); and *West Moberly First Nations*, at paras. 363-64, where the majority (per Bauman C.J., Goepel J.A. concurring) applied correctness review, while the dissent (per Smith J.A.), at para. 130, would have applied the standard of palpable and overriding error, absent an extricable error of law).

[99] In these appeals, then, the question is whether there are persuasive grounds for this Court to refashion the presumptive standard of review for treaty interpretation. As the Huron plaintiffs fairly note, the inquiry is “not whether *Sattva* has ‘displaced’ *Marshall*, but whether the same policy considerations that were held to justify deference in *Sattva*, justify a similar approach here” (R.F., at para. 44). I am not convinced that they do. Compelling considerations of legal policy suggest that correctness review should continue to apply to historic treaty interpretation.

(b) *Legal Policy Considerations Supporting Correctness Review*

[100] As has been recognized by this Court and the scholarly literature, the choice of a particular standard of review reflects a legal policy determination about the nature and purpose of the appellate process in a given context — what this Court described as the “appropriate division of labour between trial and appellate courts in accordance with their respective roles” (*Ledcor*, at para. 35; see also *Sattva*, at para.

51; *Housen*, at paras. 8-36; Sharpe, at pp. 204-5 and 208-16; D. Jutras, “The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?” (2006), 32:1 *Man. L.J.* 61, at p. 66; Y.-M. Morissette, “Appellate Standards of Review Then and Now” (2017), 18 *J. App. Prac. & Process* 55, at p. 76; R. D. Gibbens, “Appellate Review of Findings of Fact” (1991-92), 13 *Adv. Q.* 445, at p. 445; J. Sopinka, M. A. Gelowitz and W. D. Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal* (5th ed. 2022), at ¶¶2.6-2.35).

[101] This Court’s decision in *Sattva* is instructive as to how the applicable standard of review is shaped by legal policy considerations. There, this Court explained that the interpretation of a written contract was generally considered a question of law. This rule originated in England at a time when there were “frequent civil jury trials and widespread illiteracy” (para. 43). The interpretation of written documents such as contracts was characterized as a question of law, not because the core questions were inherently “legal”, but because “only the judge could be assured to be literate and therefore capable of reading the contract” (para. 43). Today, that reasoning no longer applies. This led this Court to decide, as a matter of legal policy, that absent an extricable error of law, contractual interpretation should now be treated as a question of mixed fact and law reviewable for palpable and overriding error (para. 50). The principal factors for this change in legal policy were to limit appellate intervention to cases where the results could affect parties beyond the particular dispute and to reflect the role of appeal courts “in ensuring the consistency of the law, rather than in providing a new forum for parties to continue . . . private litigation” (para. 51). Deference to trial

courts also promotes “the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings” (para. 52).

[102] Professor Daniel Jutras has helpfully explained that the standard of appellate review “is not a matter of principle”, in the sense that it “does not turn on some essential nature of appeals, or on some fundamental right to error correction for disappointed litigants” (p. 66). Rather, the standard of appellate review reflects an attempt to make the “best and most effective compromise between competing policy considerations”, at least some of which may extend beyond the immediate interests of the parties (p. 66; see also p. 71). In treaty interpretation, various aspirations and concerns must be managed, including the potential for delay, cost considerations, and the private interests of parties to the litigation, but also the wider public interest, the constitutional nature of the rights at stake, and the important role of the honour of the Crown in the interpretive task.

[103] Against this backdrop, there are at least two significant reasons why the interpretation of historic Crown-Indigenous treaties should be, as a matter of sound legal policy, subject to correctness review. First, treaty rights are constitutionally protected by s. 35(1) of the *Constitution Act, 1982*, and relatedly, treaties are nation-to-nation agreements that engage the constitutional principle of the honour of the Crown. And second, treaty interpretation has significant precedential value because it concerns enduring, multi-generational compacts. I will address each point in turn.



(i) Treaty Rights Are Constitutional Rights and Engage the Honour of the Crown

[104] As already noted, historic Crown-Indigenous treaties are *sui generis* agreements protected under s. 35(1) of the *Constitution Act, 1982*. The constitutional nature of treaty rights demands that appellate courts be given wide latitude to correct errors in their interpretation. Historic treaties “establish or reaffirm a fundamental and enduring relationship between the Crown and an [A]boriginal people” (B. Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000), 79:2 *Can. Bar Rev.* 196, at p. 209). They are “an exchange of solemn promises between the Crown and the various Indian nations” (*Badger*, at para. 41). Since 1982, s. 35(1) of the *Constitution Act, 1982* has recognized and affirmed that existing treaty rights have constitutional status and attract related constitutional protections.

[105] The special significance of constitutional rights for selecting the appropriate standard of review has been highlighted in various legal contexts. For example, despite lowering the presumptive standard of review for contractual interpretation, this Court in *Sattva* ruled that, in the commercial arbitration context, correctness would continue to apply where a “constitutional questio[n]” is at issue (paras. 50 and 106). Similarly, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, this Court clarified that, in reviewing administrative decisions, the correctness standard applies to certain “constitutional questions”, including the “scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*” (paras. 17 and 55).

[106] All the courts below recognized the constitutional character of treaty interpretation. The trial judge stated that s. 35(1) of the *Constitution Act, 1982* “informs the exercise of treaty interpretation”, and noted that “[b]ecause treaty promises are analogous to constitutional provisions, they must be interpreted in a generous and liberal manner” (Stage One reasons, at para. 336). She acknowledged that the Robinson Treaties enumerate rights “protected by s. 35 of the *Constitution Act, 1982*” (para. 463). She also recognized that “[t]reaties are part of the constitutional fabric of this country” (Stage Two reasons, at para. 151), a description later echoed by Hourigan J.A. in the Court of Appeal (C.A. reasons, at para. 634). Likewise, Strathy C.J.O. and Brown J.A. highlighted that, unlike ordinary contracts, treaties have a “broader public, political role as foundational documents that establish the bases of relations between Aboriginal peoples and the larger Canadian community” (para. 407, citing Newman, at p. 486).

[107] Relatedly, as noted above, treaties are nation-to-nation agreements that must be interpreted in accordance with the constitutional principle of the honour of the Crown. This transforms the interpretive exercise from a simple determination of the rights and obligations between private parties into an exercise of constitutional interpretation. The goal of this exercise of constitutional interpretation is ultimately to advance a matter of utmost public interest and concern — the process of reconciliation itself.

[108] In this case, for example, this Court has to interpret the scope and content of constitutionally protected rights and obligations that embody the very conditions on

which pre-existing Indigenous peoples agreed to share their most precious gift — the land itself — with newcomers. An appellate court must be able to correct errors in the interpretation of those rights when necessary, for Indigenous and non-Indigenous Canadians alike.

[109] I would add that the applicable standard of review cannot turn on whether the Indigenous parties succeeded at trial. In the next case, the situation may be different. An Indigenous appellant will have a pressing interest in ensuring that an appellate court can review whether a trial judge correctly interpreted the relevant treaty rights when ruling against them. A correctness standard thus promotes justice for all parties when interpreting such foundational constitutional rights.

(ii) Historic Treaty Interpretation Has Significant Precedential Value

[110] Another important factor in determining the appropriate standard of review is whether the trial court's decision on a particular issue has precedential value because it is likely to be of interest to judges and lawyers in the future (*Ledcor*, at paras. 41-43; *Southam*, at para. 37). Writing extra-judicially, Justice Yves-Marie Morissette has described this as the “normative reach” of a court's determination (p. 76). A decision involves a question of law if the reasons offered in support rule on not just the dispute of the parties before the court, but also extend to other actual or potential disputes (p. 76).

[111] In the Court of Appeal, the majority (per Strathy C.J.O. and Brown J.A., Lauwers J.A. concurring) explained that historic treaty interpretation, because of the “perpetual, multi-generational nature” of treaty rights, calls for the consistency of interpretation that is the goal of correctness review (para. 410). The minority (per Hourigan J.A., Pardu J.A. concurring) was, however, reluctant to find the interpretation of the Augmentation Clause in the Robinson Treaties had significant precedential value because no other known treaty has such an escalating annuity provision (para. 557).

[112] In my view, the significant precedential character, or broad “normative reach”, of a court’s interpretation of the Augmentation Clause suggests that the standard of appellate review must be correctness. As the majority of the Court of Appeal suggested, a court’s interpretation of these treaty rights will be binding in perpetuity. Treaty texts are “evidence of the transgenerational rights and obligations of the treaties and their promises”, and are “meant to impose obligations on the British sovereign and the delegated colonial governments and subjects into the distant future” (J. Y. Henderson, *Treaty Rights in the Constitution of Canada* (2007), at p. 33). The text of the Augmentation Clause itself requires the parties to revisit the amount of the annuity “from time to time”. The need for consistency of interpretation in the future strongly militates toward correctness review.

[113] Yet the future-oriented significance of historic treaties is only one element of their precedential character. Historic Crown-Indigenous treaties are binding not only on their direct signatories; they are binding upon *all Canadians* who, because of the

Crown's assertion of sovereignty, are also effectively implicated in these founding agreements. A treaty is a compact "not only among the provinces or 'founding peoples', but also 'between the non-Aboriginal population and Aboriginal peoples'" (S. Grammond, "Treaties as Constitutional Agreements", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 305, at p. 306). Seen from this perspective, a court's interpretation of an historic treaty has extensive normative reach. This further supports correctness review in historic treaty interpretation. A deferential standard of review ultimately "allows for the possibility of errors that will remain uncorrected in the interest of finality" (Jutras, at p. 67). Such a possibility is in tension with the precedential significance of historic treaty interpretation, not only for their immediate signatories, but for all Canadians, now and in the future.

(c) *Factual Findings Remain Reviewable for Palpable and Overriding Error*

[114] Although the interpretation of an historic treaty right is reviewable for correctness, the factual findings underpinning that interpretation, including findings of historical fact, attract deference and are reviewable only for palpable and overriding error (*Housen*, at para. 10; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 53). The same deferential standard applies to inferences of fact (*Housen*, at para. 25; *H.L.*, at para. 53).

[115] The policy rationales supporting deference to such factual determinations include the need to limit the number, length, and cost of appeals, to promote the

autonomy and integrity of trial proceedings, and to recognize the expertise and advantageous position of the trial judge who has reviewed the evidence (*Housen*, at paras. 11-18; Gibbens, at pp. 445-48). The last of these is particularly significant in historic treaty interpretation where, as here, the trial judge's factual determinations are the product of a robust and highly involved trial process. As the minority (per Hourigan J.A., Pardu J.A. concurring) said of the trial judge (at para. 576):

. . . the trial judge took extensive efforts to involve and hear from the Indigenous Treaty partners. She conducted the proceedings in various Indigenous communities, immersed herself in the teachings of these communities' many knowledge keepers, and permitted Anishinaabe ceremony to come into the courtroom and the court process, through witnesses, counsel, and members of the First Nations.

The minority said that appellate intervention in such circumstances would “undervalu[e]” the trial judge’s process and would suggest that “the involvement of the Treaty partners, particularly the Indigenous signatories, did not make the trial judge better situated to decide the case” (para. 576).

[116] The trial judge’s sensitive trial process and deep engagement with Indigenous treaty partners undoubtedly made her better situated than an appellate court to decide factual matters, including the historical context in which the Robinson Treaties were signed and the credibility and reliability of witnesses (*Van der Peet*, at para. 81; *Housen*, at para. 20).

[117] However, Justice Hourigan at the Court of Appeal took this point further. He stated that findings of historical fact in historic treaty cases will essentially determine the legal consequences of those findings, and that it is “artificial” to see these as two inquiries each governed by different standards of review (para. 558):

In a case where the primary goal of the analysis is to ascertain the signatories’ intentions for executing a treaty, the determination of the historical facts and the legal consequences of those findings are usually two sides of the same coin. Once the trial judge has determined the parties’ intention, there is very little work remaining; the legal consequences flow directly from the fact-finding. It is artificial to suggest that there is a two-step process and that different review standards should apply to each step.

[118] I respectfully disagree with this reasoning. The legal meaning of an Aboriginal treaty is distinct from its factual or historical context. In this case, for example, the Court of Appeal agreed on a set of joint reasons outlining the findings of historical fact (at paras. 10-68), but disagreed on the legal significance of these facts when interpreting the Augmentation Clause of the Robinson Treaties. Although the trial judge’s findings of historical fact are undoubtedly important, they do not determine the issue of treaty interpretation.

### (3) Conclusion

[119] I conclude that while the trial judge’s factual findings, including her findings of historical fact, attract deference, her interpretations of the treaty rights do not. Having regard to these standards of review, I now turn to the interpretation of the Augmentation Clause of the Robinson Treaties.

C. *The Interpretation of the Augmentation Clause in the Robinson Treaties*

(1) Introduction

[120] The trial judge and the majority and minority of the Court of Appeal each applied the two-step *Marshall* framework and principles for treaty interpretation, but arrived at different readings of the Augmentation Clause. The key interpretive issues addressed by the courts below were: (1) whether the Augmentation Clause established an annuity with both a collective and an individual part; (2) whether increases to the annuity, or to any of its parts, were mandatory or discretionary; and (3) the manner in which the increases should be calculated.

[121] The trial judge ruled that the Crown has a mandatory and reviewable obligation to increase the annuities when the economic circumstances warrant, which will occur if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss (Stage One reasons, at para. 3). In her view, the annuities must reflect a “fair share” of the net-Crown resource-based revenues of the ceded territory (para. 535). She interpreted the reference to £1 in the Augmentation Clause as limiting only the amount distributed to individuals, which could be increased in the Crown’s discretion, but as not limiting or imposing a cap on the amount distributed to the collective (paras. 397 and 463-64).

[122] The majority of the Court of Appeal agreed with the trial judge’s interpretation, except for her conclusion that the treaties promised the treaty



beneficiaries a “fair share” of the net revenues from ceded territories (paras. 86, 123 and 308-25). The minority of the Court of Appeal also rejected the trial judge’s “fair share” conclusion, but identified other errors of law in the trial judge’s interpretation (paras. 448-86). To the minority, the Robinson Treaties did not promise a two-part annuity, with one part distributed to individual beneficiaries, and the other part to the collective (para. 415). The reference in the treaties to a cap of £1 (or \$4) was a “soft cap” on the total value of the annuity that could be increased at the discretion of the Crown, through the exercise of Her Majesty’s graciousness (para. 415).

[123] Before this Court, Ontario endorses the minority’s interpretation. Canada has not appealed from the Court of Appeal majority’s interpretation, but notes that its position at trial was closer to the minority’s view. The Huron and Superior plaintiffs endorse the majority’s reading.

[124] As I explain below, although I agree with the minority’s interpretation of the Augmentation Clause, I respectfully disagree with some of its reasons. I will consider each of the two steps of the *Marshall* framework.

(2) Step One: Examining the Wording of the Augmentation Clause To Identify the Possible Interpretations

[125] The wording of the Augmentation Clause must be considered in the context of the purpose of the Robinson Treaties as a whole. Under the treaties, the Anishinaabe ceded their interest in identified lands, were granted reserve lands to live on, retained

treaty rights to hunt and fish, and were promised a lump sum of money and a perpetual annuity.

[126] The Robinson Treaties departed from the fixed annuity model used in some other contemporary treaties. They allowed for the annuities to be increased or decreased, depending on the circumstances, rather than continuing as fixed amounts in perpetuity. The Crown broke with its longstanding practice since 1818 of setting the annuity at \$10 per person multiplied by the population at the time the treaties were signed. Instead, the treaties provided for a lower initial annuity, with provision for future increases under certain conditions. In 1850, the annuity under the treaties was between \$1.60 and \$1.70 per person. In 1875, it was increased to \$4 per person. In 1903, arrears were paid for the years between 1850 and 1876, because the Crown accepted that during this time its revenues would have permitted an increase to \$4 per person “without incurring loss”.

[127] The starting point in interpreting the Augmentation Clause is to examine “the specific words used” (*Marshall*, at para. 5, per Binnie J.) and to determine “their facial meaning” (para. 82, per McLachlin J.). As this Court has emphasized, the “scope of treaty rights” is “determined by their wording” (*Badger*, at para. 76). In this case, there was no suggestion that the treaties were modified by oral promises or that the Robinson Treaties incompletely recorded the agreement between the Anishinaabe and the Crown. There is also no dispute that, as the trial judge found as fact, the treaties were read aloud and translated from English to Anishinaabemowin and “carefully

explained” to the Anishinaabe before they were signed (Stage One reasons, at paras. 230 and 234-35).

[128] This case is unlike *Marshall*, in which this Court held that the written text of the “peace and friendship” treaties of 1760-61 between the British and the Mi’kmaq was “incomplete” (para. 41). There, the Court invoked the principle of the honour of the Crown to imply a “right of access to things to trade” as a necessary adjunct of an express right to trade referred to in the treaties (para. 44). Nobody has suggested on appeal to this Court that a term ought to be implied into the Robinson Treaties to give them efficacy. The Court must simply interpret the treaties under the principles in *Marshall*.

[129] The relevant language is in the Consideration Clause and Augmentation Clause of each treaty, both of which are reproduced earlier in these reasons and in the appendix.

(a) *Uncontroversial Points About the Consideration and Augmentation Clauses*

[130] Several points are uncontroversial about these clauses.

[131] First, as consideration under the Robinson-Huron Treaty, the Crown paid a lump sum of £2,000, plus a perpetual annuity of £600. Under the Robinson-Superior

Treaty, the lump-sum payment was £2,000, and the perpetual annuity was £500. The Robinson-Huron beneficiaries received more because they had a larger population.

[132] Second, the annuities are to be delivered to the “Chiefs and their Tribes” at a “convenient season of each summer”.

[133] Third, the Crown agreed that the annuity “shall be augmented from time to time”, if the ceded lands produce an amount that would allow the Crown to “increase the annuity” “without incurring loss”.

[134] Fourth, a first condition of the augmentation is that the amount “paid to each individual” would not exceed £1 a year, or “such further sum as Her Majesty may be graciously pleased to order”.

[135] Fifth, a second condition is that the annuity “shall” be “diminished” proportionately if the number of people entitled “to claim the full benefit” of the treaty falls to two-thirds of the population at the time the treaties were signed (1,422 under the Robinson-Huron Treaty and 1,240 under the Robinson-Superior Treaty).

(b) *Ambiguities Identified by the Trial Judge*

[136] The trial judge identified two ambiguities in the Augmentation Clause. The “first and most confounding ambiguity” that she identified is whether “the parties intended that the promise of a perpetual annuity would be a collective, as opposed to

an individual, entitlement” (Stage One reasons, at para. 400). This ambiguity arises, the trial judge said, because the perpetual annuity is stated to be delivered to the “Chiefs and their Tribes”, while any augmentation of the annuity refers to “the amount paid to each individual”. She said that there is an “obvious missing link” between the perpetual annuity “paid to the Chiefs and their Tribes” and the “reference to individual payments” (para. 405).

[137] The second ambiguity that the trial judge identified was “how to calculate the productivity of the territory to determine if and when increases are triggered” (para. 410).

(c) *Four Possible Interpretations of the Augmentation Clause*

[138] Having identified these two ambiguities, the trial judge set out three possible interpretations of the Augmentation Clause, and alluded to a fourth. These four interpretations provide a useful framework for this Court’s interpretation of the clause.

(i) The First Interpretation

[139] The first interpretation is that “the Crown’s promise was capped at \$4 per person; in other words, once the annuity was increased to an amount equivalent to \$4 per person, the Crown had no further liability” (Stage One reasons, at para. 459). On this interpretation, any increase above \$4 per person is within the Crown’s complete and unfettered discretion (para. 407). This was Ontario’s position at trial and before the

Court of Appeal. It was unanimously rejected by both levels of court, and Ontario has since abandoned it.

(ii) The Second Interpretation

[140] The second interpretation is that “the Crown was obliged to make orders (*‘as Her Majesty may be graciously pleased to order’*) for further payments above \$4 per person when the economic circumstances permitted the Crown to do so without incurring loss” (Stage One reasons, at para. 460 (underlining added)), which the trial judge called the “economic condition” (para. 461).

(iii) The Third Interpretation

[141] The third interpretation, which the trial judge said “includes the second interpretation”, is that “the Treaties were a collective promise to share the revenues from the territory with the collective”; that is, “to increase the lump sum annuity so long as the economic condition was met” (Stage One reasons, at para. 461). On this interpretation, “[t]he reference to £1 (equivalent of \$4) in the augmentation clause is a limit only on the amount that may be distributed to individuals” (para. 461). The first condition — “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” — *creates* a separate payment to individuals out of the total annuity.

[142] Under the third interpretation, the treaty promise to an annuity thus involves two parts: a collective part that must be increased without limit and without discretion when the economic condition is met, and an individual part paid or distributed to individuals — what the trial judge described as a “distributive amount” (para. 464). The distributive amount is capped at £1 (or \$4), unless the Crown exercises discretion to increase it (“as Her Majesty may be graciously pleased to order”). Crucially, on this view, the discretion contained in the words “as Her Majesty may be graciously pleased to order” qualifies *only* the “individual” or “distributive” part of the annuity, but not the collective part or, by extension, the annuity as a whole (see C.A. reasons, at paras. 198 and 203 (majority)). There is no discretion as to whether to increase the collective part of the annuity and, if so, by how much. That is dictated solely by the economic condition.

[143] The third interpretation thus involves both a *bifurcated* and *hybrid* annuity. The annuity is *bifurcated* into collective and individual parts. It is also a *hybrid* annuity, in that the collective part is mandatory, completely without discretion, and without a cap, while the individual part is mandatory below \$4 per person, but then discretionary above \$4 per person once the \$4 cap is reached. The third interpretation also results, as the Court of Appeal minority noted, in “the collective [or total] entitlement” being “greater than the sum of the individual amounts that were to be distributed to members of the Robinson-Huron and Robinson-Superior Treaty First Nations” (para. 413).

[144] The third interpretation was advanced by the Huron and Superior plaintiffs at trial and ultimately adopted by the trial judge and the majority of the Court of Appeal (per Lauwers and Pardu JJ.A., Hourigan J.A. concurring). It has been advanced again by the plaintiffs before this Court.

(iv) The Fourth Interpretation

[145] The fourth interpretation, which the trial judge alluded to but did not explore, is that the annuity involves only one component — a perpetual annuity payable to the “Chiefs and their Tribes” — that would be increased if the economic condition was met. The annuity is subject to a cap of £1 (or \$4) per person, but this is a “soft cap” and can be increased in the exercise of the Crown’s discretion (“as Her Majesty may be graciously pleased to order”). This interpretation was explored and ultimately adopted by the minority of the Court of Appeal. The majority of the Court of Appeal never considered this interpretation.

[146] Under the fourth interpretation, the reference to £1 (or \$4) in the first condition of the Augmentation Clause (“provided that the amount paid to each individual shall not exceed” £1) does not *create* a separate payment to individuals. Instead, it simply limits the amount by which the annuity can be increased. It recognizes that the population of treaty beneficiaries might grow, and that the total annuity obligation may correspondingly grow, increasing the Crown’s overall obligation. The first condition, which allows for an increase in the overall annuity, is mirrored by the



second condition, which provides for the annuity to be correspondingly reduced if the population falls below the stated number. Both conditions apply to the total annuity.

[147] On this reading, increases up to \$4 per person are mandatory, while increases above \$4 per person are discretionary. There is no cap on the amount the Crown can provide in the exercise of its discretion. If the population of the treaty beneficiaries were to fall below two-thirds of the population at the time the Robinson Treaties were signed, the annuity would be reduced in proportion to the population (though this has never happened). The promised annuity thus has only one part: the payment to the “Chiefs and their Tribes”.

[148] The fourth interpretation, which the trial judge acknowledged “has a certain logic” (Stage One reasons, at para. 456), largely reflected the position advanced by Canada at trial (paras. 377-80 and 408; Canada’s R.F., at paras. 30 and 34). It was also the alternative position advanced by the Huron and Superior plaintiffs at trial (Stage One reasons, at para. 455; Huron plaintiffs’ memorandum of argument (Stage One), at paras. 757-60; Superior plaintiffs’ factum (Stage One), at para. 350).

[149] Before this Court, Canada submits there is only a “limited difference” between the third and fourth interpretations adopted by the majority and minority of the Court of Appeal, respectively (R.F., at para. 31). Both interpretations require the Crown to diligently implement the Robinson Treaties by augmenting the annuities through an exercise of discretion. Both also recognize that the Crown’s discretion is justiciable and not unfettered. Under the third interpretation, adopted by the majority,

the Crown's obligation to augment the annuities is *mandatory*. Under the fourth interpretation, adopted by the minority, the Crown's obligation to augment the annuities is *discretionary*. Canada says that this difference "ha[s] little practical effect" for the past breaches of the treaties in these appeals (para. 33). This is because both Canada and Ontario have accepted that the annuities should be increased: the annuities have not been increased since they were set at \$4 per person in 1875, and there is no debate that the economic condition is met (para. 33). As the Court of Appeal minority stated, "in light of the Crown's neglect of the Treaty promise for over a century and a half, the court ha[s] the authority and the obligation 'to impose specific and general duties on the Crown'" (para. 503, citing Stage One reasons, at para. 497). Canada thus acknowledges that the Crown's failure to honour the Robinson Treaties "for approximately 150 years is subject to the courts' review and will be compensable" (R.F., at para. 34). Ontario also accepts that the courts can review the Crown's failure to honour the Robinson Treaties, but says that remedies such as damages and compensation are inappropriate (A.F., at para. 111).

[150] I agree that given Ontario and Canada's concession that the annuities should be increased, there may be little practical difference between the third and fourth interpretations regarding the quantum of the annuities compensating for past breaches of the Robinson Treaties. The issue is far from academic, however, in relation to the remedy this Court should grant in these appeals or the future implementation of the Augmentation Clause. Whether the Augmentation Clause imposes a mandatory or discretionary obligation to augment the annuities, and whether the annuities have both

collective and individual components, are issues that must be resolved. I will therefore proceed to the second step of the *Marshall* framework and consider the possible interpretations of the Augmentation Clause against the historical and cultural backdrop, to choose from among the possible interpretations the one that comes closest to reflecting the parties' common intention.

(3) Step Two: Considering the Wording of the Augmentation Clause Against the Historical and Cultural Backdrop

[151] The real debate before this Court, as it was before the Court of Appeal, is between the third and fourth interpretations of the Augmentation Clause. However, in the interest of completeness, I will say a few words about the first two interpretations.

(a) *The First Interpretation*

[152] The first interpretation — that the Crown has an unfettered and unreviewable discretion as to whether to increase the annuity above \$4 per person — can be rejected summarily for reasons of legal principle. An interpretation based on unfettered discretion does not fit within Canadian notions of legality and cannot reflect the common intention of the parties to the Robinson Treaties. It is a legal impossibility.

[153] Discretion refers to those “decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options” within constraints imposed by law (*Baker v. Canada (Minister of Citizenship and*

*Immigration*), [1999] 2 S.C.R. 817, at para. 52). The legal constraints can include, but are not limited to, “statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*” (para. 56; see also *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33). In the present context, the relevant legal constraints include the constitutional principle of the honour of the Crown.

[154] This Court has long recognized that “there is no such thing as absolute and untrammelled ‘discretion’” (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Vavilov*, at para. 108; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 73). As noted by LeBel J. in *Montréal (City)*, at para. 33, “in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness”. Our law requires discretion to be “exercised within a specific legal framework”, and recognizes that “[d]iscretionary acts fall within a normative hierarchy” (para. 33). In a similar vein, Sir William Wade and Christopher Forsyth have stated that “in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms” (*Wade & Forsyth’s Administrative Law* (12th ed. 2023), at p. 303). Wade and Forsyth declared that a claim of unfettered discretion by government is “constitutional blasphemy. . . . Unfettered discretion cannot exist where the rule of law reigns” (p. 16). It is therefore not surprising that Ontario abandoned reliance on the first interpretation, or that it was unanimously rejected by the courts below.

[155] I note that the Court of Appeal minority characterized the first interpretation as a “hard cap”, which it rejected as being inconsistent with the Crown’s discretion to increase the annuity above \$4 per person based on the “‘Her Majesty’s graciousness’ clause” (paras. 452 and 454). Whether the first interpretation is characterized as being an “unfettered discretion” or a “hard cap” with no obligation to exercise discretion yields the same conclusion: the first interpretation is simply not a plausible reading of the treaty promise in the Augmentation Clause.

(b) *The Second Interpretation*

[156] The second interpretation — that the Crown is *required* to increase the annuity above \$4 per person when the economic condition is met — forms a component of the third interpretation, which I discuss next.

(c) *Choosing Between the Third and Fourth Interpretations*

[157] Recall that under the third interpretation, which was accepted by the trial judge and the majority of the Court of Appeal (per Lauwers and Pardu JJ.A., Hourigan J.A. concurring), the annuity involves both a collective and an individual part. Under this interpretation, the Crown *must* increase the collective part of the annuity when the economic condition is met. There is no discretion as to whether to make those collective increases, and no cap on the total amount of the increase. The individual part of the annuity is a subset of the total annuity. The Crown is required to increase the individual part to \$4 per person where the economic condition is met; however, increases above

\$4 per person are within the Crown’s discretion. Under this interpretation, the total entitlement is greater than the sum of the individual entitlements distributed to the individual treaty beneficiaries.

[158] Under the fourth interpretation, which was accepted by the Court of Appeal minority, the annuity involves only one part — a perpetual annuity payable to the “Chiefs and their Tribes” — that is to be increased if the economic condition is met. The annuity is subject to a cap equivalent to the aggregate sum of £1 (or \$4) per person, but this is a “soft cap” and can be increased in the exercise of the Crown’s discretion (“as Her Majesty may be graciously pleased to order”).

[159] The Court of Appeal majority did not meaningfully engage with the fourth interpretation which, in my respectful view, was an error of law.

[160] I agree with some of the reasons given by the Court of Appeal minority for preferring the fourth to the third interpretation, but disagree with others.

[161] I agree with the Court of Appeal minority that, on a purely textual basis, the third interpretation is somewhat “strained and illogical” (para. 454). I do not read the reference to “the amount paid to each individual” as *creating an obligation to pay individuals*, separate from an obligation to pay the collective. The obligation to pay is created by the earlier language in the Consideration Clause that expressly provides that the perpetual annuity is “to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer”. The reference to “the amount paid to each

individual”, which follows in the Augmentation Clause, *imposes a condition on the obligation to augment the annuity*. As the Court of Appeal minority noted (at para. 429), the trial judge herself described the first condition as establishing a “condition of the increase” of the annuity up to the £1 (or \$4) cap (Stage One reasons, at para. 403 (emphasis added)). The condition of the obligation to augment is that “the amount paid to each individual shall not exceed” £1 a year. After the £1 (or \$4) cap is reached, further increases could be made only as an exercise of discretion, “as Her Majesty may be graciously pleased to order”. The first condition relating to the augmentation (“provided that”) is then followed by a second condition (“provided, further, that”) relating, in parallel manner, to a reduction of the annuity if the population of beneficiaries falls below two-thirds of the population at the time the Robinson Treaties were signed.

[162] I also agree with the Court of Appeal minority that it “seems strange” for Robinson to have buried in the middle of the Augmentation Clause an obligation to pay an annuity to individuals, separate from the obligation to pay the collective (para. 472). This would have been a highly unusual way to make such a fundamental change to the established patterns of treaty making at the time the Robinson Treaties were signed. Since 1818, no treaty had provided annuities with both collective and individual components.

[163] I respectfully disagree with the Court of Appeal minority, however, that the third interpretation adopted by the trial judge “fail[s] to give any effect to the ‘Her

Majesty's graciousness' provision of the augmentation clause" (para. 431). As Canada fairly notes, both the third and fourth interpretations "confirm that the Crown retains discretion regarding when and how annuity increases will be determined and paid" (R.F., at para. 35). The trial judge expressly acknowledged that "the Crown does maintain significant discretion under the Treaties, including the implementation process" (Stage One reasons, at para. 569). Instead, the difference between the third and fourth interpretations is whether the discretion relates just to an individual distributive share (the third interpretation), or to the whole of the annuity (the fourth interpretation).

[164] I also respectfully disagree with the Court of Appeal minority that the trial judge erred by "Finding Ambiguity Where There Was None" (heading of para. 436). Although I regard the third interpretation as somewhat strained and illogical, I accept that it is a possible interpretation in order to evaluate it against the historical and cultural backdrop under the second step of the *Marshall* framework. The first step of the *Marshall* framework accepts that there may be patent ambiguities from a facial reading of a treaty that are then resolved at the second step, after considering the relevant historical and cultural context. A treaty is only "ambiguous" in the legal sense if its terms can be interpreted in more than one way at the *end* of the interpretive process (see, by analogy, the approach taken to statutory interpretation in *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 24). It is only at the end of the two-step *Marshall* exercise that a genuinely ambiguous treaty term benefits from the rule that "ambiguities



or doubtful expressions should be resolved in favour of the [A]boriginal signatories” (para. 78(2), citing *Simon*, at p. 402, *Sioui*, at p. 1035, and *Badger*, at para. 52).

[165] In what follows, I begin by addressing two points that the Court of Appeal minority found detracted from the third interpretation, which in my view do not do so. The first relates to evidence that the Anishinaabe may not have understood the idea of the Crown’s discretion to augment the annuities under the Robinson Treaties. The second concerns the trial judge’s conclusion that the treaties promised the Huron and Superior beneficiaries a “fair share” of the revenues derived from the ceded territories, which the Court of Appeal unanimously rejected. Neither point conclusively suggests that the third interpretation should be rejected. I will then consider five points relating to the historical and cultural backdrop. What is striking about the historical and cultural backdrop is how little, if any, of it supports the third interpretation but is consistent with the fourth interpretation.

(i) Two Points That Do Not Help Decide Between the Third and Fourth Interpretations

1. *The Anishinaabe’s Understanding of “as Her Majesty May Be Graciously Pleasèd To Order”*

[166] I begin with the evidence of the Anishinaabe’s understanding of the Crown’s discretion, and conclude that it does not resolve whether the third or fourth interpretation reflects the parties’ common intention, as both incorporate a notion of discretion. It was not disputed before this Court that the expression “as Her Majesty

may be graciously pleased to order” connotes discretion. It was the usual way of referring to the royal prerogative (see Stage One reasons, at paras. 442 and 447; C.A. reasons, at para. 196 (majority) and at para. 463 (minority)). As explained by the plaintiffs’ expert ethnohistorian, Mr. James Morrison:

At this period [when the Robinson Treaties were signed], various versions of the phrase “Her (or His) Majesty may be graciously pleased” were in common use, both in Britain and throughout its colonial possessions. It was, in fact, the normal way of referring to the exercise of the prerogative powers of the Crown. Robinson himself was perfectly familiar with this kind of language. In 1839, for example, the House of Assembly and Legislative Council of Upper Canada prepared a joint address of congratulation to Sir John Colborne upon his appointment as Governor General of British North America. Not only did they thank Colborne for his past services (he had earlier served as Lieutenant Governor), they said that they would “rejoice in any further distinction which Her Majesty may be graciously pleased hereafter to confer upon you”. W.B. Robinson was one of the Members of the House tasked with presenting the joint address to the new Governor in Chief. [Footnotes omitted.]

(Affidavit of James Morrison, at para. 384)

[167] An issue at trial was whether the Anishinaabe understood this notion of Crown discretion under the royal prerogative before they signed the Robinson Treaties. At first blush, the trial judge seemed to find that they did not, and therefore it could not have formed part of the common intention of the parties. She referred to the evidence of Elder Rita Corbiere, who translated the Robinson Treaties into Anishinaabemowin, and explained that there was no way to translate the phrase “as Her Majesty may be graciously pleased to order”. As the trial judge stated:

Elder Corbiere described her challenges in doing the translation. There were a number of words and phrases for which she said there was no direct translation (*e.g. cede, surrender*). She also said that the number “two thousand” would have been very hard to translate, perhaps impossible. There is no word for “title” in the language and, in fact, there was no concept of alienation of land. In her testimony, Elder Corbiere further explained how there is no way to translate, “as Her Majesty may be graciously pleased to order.” She testified that the Anishinaabe lived with notions of what they expected of their leaders: to be generous, to live in a good way, to do right by the people.

The Robinson Treaties use formal English and legal terminology. I am not at all convinced that the presence of interpreters could or should have given Robinson confidence that the Chiefs understood the concepts of discretion, royal prerogative, or Her Majesty’s graciousness, if such concepts had been embedded into the Treaties. And, therefore, such concepts could not have informed the common intention of the parties.  
[Underlining added.]

(Stage One reasons, at paras. 446-47)

[168] The minority of the Court of Appeal concluded that this finding of the trial judge involved a misapprehension of the evidence and was inconsistent with her other findings (para. 432). The minority correctly noted that Elder Corbiere had not testified that there was no way to translate “as Her Majesty may be graciously pleased to order”. Instead, she had testified that it meant that Her Majesty would be “generous”. As the minority explained:

The trial judge said that the witness, Elder Corbiere, who translated the Treaties from English to Anishinaabemowin and then back to English, testified that there was no way to translate “as Her Majesty may be graciously pleased to order”. In fact, Elder Corbiere testified that she translated the phrase to mean “and even more will be given to the Anishinaabek if the Gischpin Gchi-Gimaa Kwe [‘Big Chief Lady’] has a good heart and has a mind to do so.” Elder Corbiere testified that while she could not translate “graciously”, the Anishinaabe expected leaders to be generous. The translation that she provided, “if [the Queen] has a good

heart and has a mind to do so”, reasonably conveys the meaning of “as Her Majesty may be graciously pleased to order”.

(para. 433, citing Stage One reasons, at para. 446)

[169] In my view, the minority’s conclusions are supported by Elder Corbiere’s evidence. In her translation of the Robinson Treaties into Anishinaabemowin, Elder Corbiere noted that the expression “as Her Majesty may be graciously pleased to order” could not be precisely translated into Anishinaabemowin, but the Anishinaabe would have understood that Her Majesty (“Gchi Gimaa Kwe”, or the “Big Chief Lady”) would be “generous” and would decide according to the principles of respect, love, and honesty. Her comments on this important point are worth quoting in full:

William Benjamin Robinson, the one who is standing in for the Gchi Gimaa Kwe, who wishes to deal fairly with the Anish[i]naabek and will be fair and be good to them, also plans that if they make money from the land, the one in charge of the Province (there is no Anishinaabe word for province) will increase the money given out yearly, only if they will not lose money; and the money will be increased from time to time by this much: an amount worth one English money (there is no Anish[i]naabe word for pound), and even more will be given to the Anish[i]naabek if the Gchi Gimaa Kwe has a good heart and has a mind to do so. (The expression “as Her Majesty may be graciously pleased to order” is not possible to translate exactly into Anish[i]naabemowin. I am told it is a legal/governance phrase regarding decisions by the Queen. Anishinaabek would understand that Gchi G[i]maa Kwe would be generous (gizhewaadzi) and decide according to the principles of Respect (Mnaadendimowin), Love (Zaagidwin), and Honesty (Gwekwaadziwin).)  
[Emphasis added; emphasis in original deleted.]

(Huron plaintiffs’ Condensed Book, at pp. 53-54)

[170] Elder Corbiere’s oral testimony during her examination-in-chief confirmed the written translation she had provided to the court:

BY MR. NAHWEGAHBOW:

Q. So you've provided the translation, how would that have been understood by the Anishinaabe?

A. Well, graciously pleased. "Graciously pleased", I could not translate that into — "graciously" what the word "graciously" meant. I don't know if it's an expression when you address the Queen, be a gracious lady.

And the way the Anishinaabek lived, with the Seven Teachings, to be generous, to be kind, to be truthful, and all those good teachings, good heart teachings that were given to us, if they lived those, then they would also expect the — then they expect the leader, the Queen, to be living the same way. We have the same beliefs, because she is the main leader of Anishinaabek.

...

And in the same way, the Anishinaabek expected the Queen to be the same way as their beliefs, that she would show love, according to the principles of respect, Mnaadendimowin; Zaagidwin, love; and honesty, that she would do right by the people. [Emphasis added.]

(Huron plaintiffs' Condensed Book, at pp. 62-63)

[171] Plainly, if Elder Corbiere's evidence were taken as suggesting that the Anishinaabe did not understand the idea of discretion, then the trial judge would have made a palpable and overriding error in concluding that the idea of the Crown's discretion could not have formed part of the common intention of the parties. The Court of Appeal majority, however, did not read the trial judge's finding that way. The majority accepted that "the trial judge was palpably wrong" in writing that the Anishinaabe did not understand the idea of discretion, because "Robinson successfully conveyed the concept of Crown discretion at the Treaty Council" (para. 219). But the majority also found that the trial judge "simply misspoke" (para. 221), and thus concluded that her error was not overriding. She had meant to say that the Anishinaabe

would not have understood the idea of “unfettered discretion” (para. 221). They would not have understood how a leader could choose to act “arbitrarily without regard for the needs, requests, or expectations of others”, because this was “not consistent with Anishinaabe conceptions of leadership or their expectations of the Crown” (para. 227). The majority noted that the trial judge elsewhere made “numerous references to ongoing Crown discretion”, and therefore she “did not intend to exclude all Crown discretion, just unfettered discretion” (para. 221).

[172] I agree with the Court of Appeal majority that the trial judge “simply misspoke” when she wrote that the Anishinaabe did not understand the idea of discretion. She could not have adopted the third interpretation of the Augmentation Clause, which involves the idea of discretion, had she found that the Anishinaabe did not understand this idea.

[173] I also agree with the Court of Appeal majority that what the trial judge had meant to say was that the Anishinaabe would not have understood the idea of *unfettered* discretion. The Anishinaabe understood that the Crown would be generous in exercising the discretion referred to in the Robinson Treaties and would take the Anishinaabe’s needs and circumstances into account, as well as the needs and circumstances of non-signatories. The opening words of the Augmentation Clause support this understanding of the Crown’s discretion: “[t]he said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects. . . .” However, the way in which the Anishinaabe understood the idea of

Crown discretion does not help choose between the third and fourth interpretations of the Augmentation Clause because both of them involve the idea of discretion.

## 2. *The Trial Judge's Comments on "Fair Share"*

[174] The trial judge's conclusion that the Robinson Treaties promised the Huron and Superior beneficiaries a "fair share" of the revenues derived from the ceded territories, which the Court of Appeal unanimously rejected, also does not help in choosing between the third and fourth interpretations because both interpretations include some general concept of sharing future revenues from the ceded territories.

[175] In summarizing the third interpretation, the trial judge said 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" (Stage One Partial Judgment for Huron Action, at para. 1(d) (emphasis added), reproduced in A.R., vol. I, at p. 145, and see also para. 3(c); Stage One Partial Judgment for Superior Action, at paras. 1(d) and 3(c), reproduced in A.R., vol. I, at pp. 151-52). In doing so, the trial judge accepted the position of the Huron plaintiffs that the common intention of the parties "would be accomplished by renewing the treaty relationship and moving to a fair sharing agreement of the land and its resources" (Stage One reasons, at para. 362). She later noted that the treaty implementation issues include "[w]hat is a fair share of the net revenues received from the Treaties' territories?" (para. 535). She observed that the plaintiffs argued that the default position is that "the Anishinaabe should receive 100%

of net Crown revenues or, in the alternative, two-thirds of the net Crown revenues to increase the annuities” (para. 556). The trial judge stated that the question of what is a “fair share” for the Anishinaabe would be “before the court at Stage Three or in a future process”, but that it was “impossible to gauge fairness to the parties” on the record at trial (para. 561).

[176] The Court of Appeal unanimously overturned the trial judge’s conclusion that the treaties granted the Anishinaabe a right to a “fair share” of the net Crown revenues from the treaty territories for the past 170 years. But, as I will explain, the Court of Appeal also unanimously accepted that, broadly speaking, some notion of “sharing” was contained in the treaty promise of an augmentation of the annuity if the Crown could do so without incurring loss.

[177] The Court of Appeal majority stated that it was possible to “deconstruct the [trial] judgments into two possible promises for analytical purposes” (para. 288). The majority noted that “[t]he first is that the augmentation clause was a promise to share in the value of the land. The second is that a ‘fair share’ was promised” (para. 288). The Court of Appeal unanimously accepted the first interpretation, and rejected the second. In my view, they were correct to do so.

[178] The majority accepted that the first view, that the treaties promised a “share in the value of the land” (para. 289) and a “revenue sharing model” (para. 307), was “well supported and w[as] not effectively challenged by Ontario” (para. 307). The majority cited the trial judge’s statement that, under the third interpretation, “the



Treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met” (para. 291 (emphasis deleted), citing Stage One reasons, at para. 461). The minority agreed that the purpose of the Augmentation Clause was to provide some form of “future revenue sharing, subject to a soft ‘cap’” (para. 464). They noted that “[t]he ‘Her Majesty’s graciousness’ clause provided the Crown with discretion to increase the annuities if it could do so without loss and assured the Anishinaabe that a ‘liberal and just’ Sovereign would share the wealth of the land with them if and when it was possible to do so” (para. 464).

[179] It is plain that the Augmentation Clause contemplates, broadly speaking, some general notion of sharing future revenues that is consistent with the common intention of the parties. It gives voice to the Crown’s goal of acquiring immediate access to the ceded territories and opening them up to settlement and economic development. It is also consistent with the Anishinaabe’s perspectives reflected in the principles of respect, responsibility, reciprocity, and renewal. It demonstrates respect by acknowledging both the Anishinaabe’s jurisdiction over the land and their authority to conclude an agreement with the newcomers. It shows reciprocity by making concrete the Anishinaabe’s expectation that a “gift” would attract a reciprocal “gift” of commensurate value (C.A. reasons, at para. 296). It embodies responsibility in affirming the Anishinaabe’s ongoing duties to their people, at the time the Robinson Treaties were signed and in perpetuity. And it allows for renewal since the Robinson

Treaties would adjust as economic circumstances changed (para. 306, citing Stage One reasons, at paras. 469-70).

[180] Even accepting, however, a general concept of revenue sharing, as did the majority and minority of the Court of Appeal, this does not resolve whether the Robinson Treaties provided for an annuity with both collective and individual parts, or whether the augmentation was obligatory or discretionary. It also does not clarify what form the “sharing” should take. As the Court of Appeal majority stated, “[t]he parties in negotiations, or the trial judge in Stage Three, must determine the form, level, and aim of the sharing that the augmentation clause requires” (para. 323). They added that this exercise should be “led . . . by the Treaty parties’ ‘shared goals, expectations, and understandings’ in 1850, including the Anishinaabe principles of respect, responsibility, reciprocity, and renewal, identified by the trial judge, and the Crown’s commitment to being both liberal and just” (para. 323). This is “the task of reconciliation” (para. 324). I agree with these observations, subject to the discussion below regarding the appropriate remedy.

[181] The Court of Appeal unanimously rejected the view that the Augmentation Clause promised the Anishinaabe a “fair share” of the net Crown revenues from the ceded territories (paras. 308-25 (majority); paras. 448-86 (minority)). The majority noted that, although at one level, nobody would quarrel with the idea of a “fair share”, or that the Robinson Treaties should be “fair”, ultimately the “elusive” concept of a “fair share” is “rhetorical gloss” (paras. 289 and 313). The Court of Appeal majority

found, and counsel for the plaintiffs acknowledged before this Court, that the concept of a “fair share” originated with counsel (paras. 315-17; transcript, day 1, at p. 85). It is not supported by evidence or any of the historical records and is not reflected in the actual text of the Robinson Treaties. As the Court of Appeal majority observed, the idea of a “fair share” “adds nothing substantive but has the potential to work mischief” (C.A. reasons, at para. 313). The potential mischief is that the concept of a “fair share” “tends to focus the mind on the amount or percentage of revenue that ought to be redirected to the Treaty First Nations, rather than on the state of affairs that this promise to share sought to, and ought to, achieve” (para. 319 (majority)). As I explain below, the “sharing” is to be effected by an exercise of Crown discretion that reflects the honour of the Crown and abides by the Crown’s promise to the Anishinaabe “to deal liberally and justly with all Her subjects”, having regard to the relative wealth and needs of all the Crown’s subjects, signatories and non-signatories alike.

### 3. *Conclusion*

[182] I conclude that neither the trial judge’s comments on the Anishinaabe’s understanding of the nature of the Crown’s discretion or regarding whether the Robinson Treaties promised a “fair share” of revenues derived from the ceded territories helps decide between the third and fourth interpretations, both of which involve general notions of Crown discretion and the sharing of future revenues from the ceded territories.

[183] I now turn to address five points that detract from the third interpretation and support the fourth.

(ii) Five Points Detracting From the Third Interpretation and Supporting the Fourth

1. *An Annuity With Both Collective and Individual Components, and With a Mandatory Obligation To Increase the Collective Component Without Limit, Would Have Been Unprecedented*

[184] First, a treaty annuity with both a collective and an individual part would have been unprecedented. It would also have been unprecedented for a treaty to have an annuity with a collective part, which the Crown was obliged to increase without limit and without Crown discretion, if an economic condition was met.

[185] I recognize that the fourth interpretation is also unprecedented to some extent, since, as the trial judge noted, there was no precedent for a treaty with either an augmentation provision or one subject to a cap (Stage One reasons, at para. 454). But the notions of an augmentation clause and a cap appear on the face of the Robinson Treaties; by contrast, the notion of a bifurcated annuity subject to a mandatory obligation to increase the collective part without limit can be gleaned only through a somewhat strained exercise of interpretation.

2. *A Mandatory Obligation To Increase the Annuity Without Limit Is Difficult to Reconcile With the Crown's Dire Economic Circumstances*

[186] Second, a mandatory obligation to increase an uncapped annuity is difficult to reconcile with the Crown's dire economic circumstances at the time the Robinson Treaties were signed. As the trial judge found, "the Province was broke" (Stage One reasons, at para. 219). I agree with the Court of Appeal minority that "[h]aving regard to the province's desperate financial circumstances, it would have made no sense for Robinson to promise the Anishinaabe an unlimited collective annuity, while at the same time limiting individual payments" (para. 439). I also agree with the minority that "it seems highly unlikely that Robinson would have proposed, and Lord Elgin would have approved, a treaty that committed the government to an unlimited, mandatory and perpetual 'sharing' of future revenues" (para. 471). In fact, Robinson was "instructed to impact on the minds of the [Anishinaabe] that they ought not to expect excessive remuneration" (Order in Council No. 31, January 11, 1850, Exhibit 001-0738).

[187] To some extent, the province's dire financial circumstances might be said to cut both ways. If the province was broke, what better way to secure the treaty territory immediately than by paying larger annuities only if the ceded territories generated sufficient revenue? And as the Court of Appeal majority fairly noted, "Robinson does not appear to have expected that significant revenues would be generated from the territory" (para. 143). Paying more only contingent on, and out of, future resource revenues would have been an innovative solution, especially if those revenues were not expected to be large. But again, I agree with the Court of Appeal minority, that "[i]t seems even more unlikely that, had Robinson received those instructions from the Queen's representative, he would not have mentioned them in his

diary, in his report to the Executive Committee, or in his subsequent communications” (para. 471). There is simply no pre- or post-treaty record describing an annuity that was subject to a mandatory obligation to be increased without limit.

[188] I disagree with Ontario, however, that the notion of an uncapped annuity should be rejected because it would require a form of accounting of the revenues from the ceded territories. As correctly noted by the Court of Appeal majority, “some rough form of accounting was required in order to determine whether the augmentation clause was triggered, under any interpretation” (para. 141). The reference in the Augmentation Clause to the Crown’s discretion being engaged if the Crown could, “without incurring loss . . . increase the annuity” contemplates evaluating whether the Crown would suffer a loss, even though the Robinson Treaties do not set out specific criteria for that evaluation.

3. *There Is No Evidence of an Intention To Grant a Bifurcated Annuity With Collective and Individual Components*

[189] Third, there is no contemporaneous historical evidence of an intention to grant an annuity divided between a collective part paid to the community and an individual part distributed to individuals. The trial judge came to a contrary conclusion, however, inferring that it was “likely” that Robinson was “under some pressure from some Chiefs at the [Treaty] Council to ear mark some funds for individual distribution and in compliance with the Colborne Policy that limited his ability to make cash payments to individuals” (Stage One reasons, at para. 454). Because of this “pressure”

to make individual distributions, the trial judge said, Robinson “set a low cap on the individual distributive amount (the £1 or \$4 cap)” (para. 454). But, as the Court of Appeal minority found, this inference of the trial judge involved “speculation” (para. 442). There is simply “no evidence that Robinson was under pressure at the Treaty Council to earmark funds for individual distribution” (para. 442). This speculation, the Court of Appeal minority added, “also presupposes that there was a recognition at the Treaty Council that the annuity was intended to be a ‘collective’ amount from which individual ‘distributive’ shares were to be carved out. There is no evidence of any such discussion” (para. 442). I agree.

#### 4. *The Annuity Has Been Paid Only to Individuals for Over 170 Years*

[190] Fourth, the manner in which payments have been made for over 170 years under the Robinson Treaties, while of limited assistance, tends to refute the suggestion of a bifurcated annuity between collective and individual payments.

[191] It is not disputed that post-treaty conduct can be examined to help discern the parties’ intent at the time a treaty was signed, especially if the conduct “closely followed the conclusion of the document” (*Sioui*, at p. 1060; see also *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.), at para. 21, per MacKinnon A.C.J.O.). Such evidence must be examined with care and the weight it is to be given will vary with the context.

[192] Except for a brief period between 1851 and 1854 when the Huron annuity was paid in goods to each band, the Huron annuity has been paid in cash to individuals.

The Superior annuity was paid in cash to the head of each family through the 1850s and until the 1870s, but since then has been paid in cash to individuals. Neither the Huron nor the Superior annuity has ever been paid to both the collective *and* to individuals contemporaneously.

5. *Nothing in the Post-Treaty Evidence Supports a Bifurcated Annuity With Collective and Individual Components*

[193] Fifth, although the post-treaty record more generally is of limited help — the trial judge found it “vague, inconsistent, and conflicting” (Stage One reasons, at para. 318) — none of it supports the notion of either a bifurcated annuity between the collective and individuals, or a hybrid annuity with a mandatory collective component coupled with a non-discretionary individual component below \$4 and Crown discretion thereafter. As the Court of Appeal’s majority concluded, the post-treaty evidence simply shows that “the Treaties were set aside and largely forgotten for two decades”, until 1873 when the Anishinaabe asserted that the circumstances for an augmentation of the annuities had existed for some time (para. 174). I agree with the Court of Appeal minority that “there is nothing in the record to indicate that either the Crown or the Anishinaabe believed that the annuity had both a collective component and an individual component” (para. 487).

[194] Moreover, there is evidence dating to 1880 that payments were made in the form of a global annuity calculated on the basis of the aggregate sum owed to each individual, without any bifurcation between separate collective and individual



components. The *Act for granting to Her Majesty certain sums of money required for defraying certain expenses of the public service, for the financial years ending respectively the 30th June, 1876, and the 30th June, 1877, and for other purposes relating to the public service*, S.C. 1876, c. 1, referred to an “[a]nnual grant to bring up annuities payable under the Robinson Treaty to the Chippawas of Lakes Huron and Superior, from 96 cents to \$4 per head, \$14,000” (the Hon. A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (1880), at p. 18).

(4) Conclusion

[195] Both the language of the Augmentation Clause and the historical and cultural context detract from the third interpretation and support the fourth as best reconciling the intentions of both parties when the Robinson Treaties were signed. A fixed annuity, with discretion for the Crown to increase the annuity beyond a “soft cap” if economic conditions improved, allowed the Crown to secure the ceded lands for settlement and mineral development at a time when the province lacked resources. At the same time, the Anishinaabe were prepared to trust the Crown to act liberally and justly with all Her Majesty’s subjects, including the Anishinaabe, and to increase the annuity when circumstances warranted. This was entirely consistent with the Anishinaabe’s conceptions of a good leader, and reflected the principles of respect, responsibility, reciprocity, and renewal. The Robinson Treaties recognized the

Anishinaabe's authority to conclude agreements to share their territory and their responsibility to their people, embodied the idea of reciprocity and mutual dependence, and cemented a longstanding nation-to-nation relationship that would be renewed in perpetuity.

[196] In summary, I conclude that the Augmentation Clause obliges the Crown to pay an annuity to the Anishinaabe "Chiefs and their Tribes". There is a mandatory obligation to increase the annuity up to \$4 when the economic circumstances warrant, as was done in 1875. This increased annuity is a "soft cap" beyond which further increases are discretionary ("or such further sum as Her Majesty may be graciously pleased to order"). If the economic conditions are such that the Crown can increase the annuity beyond \$4 per person without incurring a loss, the Crown must exercise its discretion and determine whether to increase the annuities and, if so, by how much. This exercise of discretion is not unfettered; it is justiciable and reviewable by the courts.

[197] The Crown must exercise its discretion, including its discretion as to how often it turns its mind to increasing the annuity, diligently, honourably, liberally, and justly, while engaging in an ongoing relationship with the Anishinaabe based on the values of respect, responsibility, reciprocity and renewal. To do so, the Crown must consider factors such as: the number of treaty beneficiaries and their needs; the benefits the Crown has received from the territory and its expenses during the relevant timeframe; the wider needs of other Indigenous populations and the non-Indigenous

populations of Ontario and Canada; and the principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise to share in the wealth of the land if it proved profitable. I will discuss several of these points in more detail below when I discuss the appropriate remedy in this case.

D. *Limitations Issues*

(1) Introduction

[198] Before this Court, Ontario renews its argument that the Huron and Superior plaintiffs' claims for breach of treaty are statute-barred by a provincial limitation period. The current *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, provides that proceedings based on existing Aboriginal and treaty rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* and equitable claims by Aboriginal peoples against the Crown are governed by "the law that would have been in force with respect to limitation of actions if this Act had not been passed" (ss. 2(1)(e), 2(1)(f) and 2(2)). All parties agree that if any limitations legislation applies in this case, it is Ontario's 1990 *Limitations Act*.

[199] The relevant provisions of the 1990 *Limitations Act* are as follows:

**45.** (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

(b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;

within twenty years after the cause of action arose,

(g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,

within six years after the cause of action arose, . . . .

**46.** Every action of account, or for not accounting, or for such accounts as concerns the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of action arose, and no claim in respect of a matter that arose more than six years before the commencement of the action is enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of the action.

[200] The trial judge rejected Ontario's argument that the breach of treaty claims should be considered to be actions "upon a . . . specialty", subject to a 20-year limitation period (s. 45(1)(b)), or, in the alternative, as actions "of account" (s. 46) or actions "for contract . . . without specialty" (s. 45(1)(g)), subject to a 6-year limitation period. She emphasized that Aboriginal treaties are not contracts, whether with or without specialty. Rather, treaties are *sui generis* agreements that form "part of the constitutional fabric of this country" (Stage Two reasons, at para. 151; see also paras. 149-50). She added that the claims could not be considered to be actions "of account" under s. 46, because they pursue equitable compensation rather than a common law accounting, which is the focus of s. 46 (para. 179).

[201] Writing on behalf of the Court of Appeal, Hourigan J.A. agreed with the trial judge that the breach of treaty claims are not statute-barred. Applying the modern

approach to statutory interpretation, he reasoned that the strict textual analysis required when considering specialties is antithetical to the highly contextual nature of Aboriginal treaty analysis (paras. 656-57). In addition, actions of account under s. 46 of the 1990 *Limitations Act* were intended to be limited to merchants' accounts (para. 661). Finally, unlike the 1990 legislation, the *Limitations Act, 2002* specifically refers to Aboriginal claims, strongly suggesting that had the legislature intended to capture breach of treaty claims under the 1990 *Limitations Act*, it would have done so expressly (paras. 646 and 662).

[202] Before this Court, and for the first time in this litigation, Ontario asserts the breach of treaty claims are actions “on the case” within the meaning of s. 45(1)(g) of the 1990 *Limitations Act*, and are thus subject to a six-year limitation period (A.F., at para. 116). Ontario also disputes the Court of Appeal’s conclusion that actions “of account” are limited to common law claims relating to merchants’ accounts (para. 120). In response, the Huron and Superior plaintiffs urge this Court not to consider Ontario’s new argument regarding actions on the case, which was neither pleaded nor argued at any stage of the proceedings (Huron plaintiffs’ R.F., at para. 124; Superior plaintiffs’ R.F., at para. 103). In any event, they submit that this cause of action does not apply to the breach of treaty claims (Huron plaintiffs’ R.F., at paras. 124-30; Superior plaintiffs’ R.F., at paras. 91-94 and 105). They also agree with the Court of Appeal that s. 46 of the 1990 *Limitations Act* was intended to be limited to merchants’ accounts (Huron plaintiffs’ R.F., at para. 132; Superior plaintiffs’ R.F., at paras. 110-11). Canada does

not rely on a limitations defence and takes no position on these issues (R.F., at para. 51).

[203] Ontario has also suggested that this Court need not address limitations issues if it grants only declaratory relief in relation to the breach of treaty claims (A.F., at para. 121). For its part, Canada notes that “limitations statutes cannot prevent courts from issuing a declaration on the constitutionality of Crown conduct” (R.F., at para. 54, citing *Manitoba Metis*). In oral argument before this Court, Ontario’s counsel added that he was not “strenuously” arguing that the plaintiffs’ claims are statute-barred by a limitation period (transcript, day 1, at p. 51). Even so, I will address Ontario’s limitations arguments in order to confirm the parties’ continuing rights and obligations under the Robinson Treaties. As I will explain, the plaintiffs’ breach of treaty claims are neither “actions on the case” nor “actions of account”. As a result, their claims are not statute-barred by the 1990 *Limitations Act*.

(2) The Breach of Treaty Claim Is Not an Action on the Case

[204] This Court has recently affirmed that parties will be permitted to raise new arguments on appeal only in exceptional circumstances, having regard to, among other things, “the state of the record, fairness to all parties, the importance of having the issue resolved by th[e] [c]ourt, its suitability for decision and the broader interests of the administration of justice” (*R. v. J.F.*, 2022 SCC 17, at para. 41, citing *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 20).

[205] I have concluded that this is an appropriate case to consider Ontario's argument that the plaintiffs' claims are statute-barred under the 1990 *Limitations Act* as "actions on the case". First, the determination of this issue is primarily an exercise of characterizing the nature of the plaintiffs' claims and requires consideration of little, if any, evidence. Second, both the Huron and Superior plaintiffs have fully addressed this new submission in their factums on appeal, thereby reducing the potential for unfairness. Finally, a decision on this issue would clarify the ongoing rights of the beneficiaries under the Robinson Treaties and the Crown's concomitant obligations — issues of clear importance given their constitutional dimension.

[206] The action "on the case" is a common law action that derived from the action of trespass (*Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (C.A.), at para. 22; A. K. Kiralfy, *The Action on the Case* (1951), at p. 3). It allowed plaintiffs to bring claims for personal wrongs and injuries that could not be brought in trespass, such as claims based on culpable omissions and unintended or consequential harm (*Outerbridge*, at paras. 22-23 and 25, citing W. Blackstone, *Commentaries on the Laws of England* (1897), Book 3, at p. 122, M. Bacon, *A New Abridgment of the Law* (7th ed. 1832), vol. I, at p. 86, and G. Mew, *The Law of Limitations* (1991), at p. 92). Actions on the case were generally limited to actions in the nature of tort, but in some cases have been extended to actions in the nature of contract as well (Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), at p. 35; *Halsbury's Laws of England* (3rd ed. 1952), vol. 1, at pp. 27-28).

[207] There are at least three reasons why a claim for breach of an Aboriginal treaty is not an action on the case.

[208] First, Ontario seeks to use the action on the case as a catch-all cause of action or basket clause capturing any claim not expressly mentioned in the limitations legislation, including breach of treaty. This attempt is misguided. Some provincial limitations statutes have included residual provisions or basket clauses (see, e.g., *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(5); *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 4(1)(g); *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paras. 127-31; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at paras. 12-14). However, this Court has already held that the 1990 *Limitations Act* “applies only to a closed list of enumerated causes of action” (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 69). As a result, actions on the case cannot be interpreted so broadly as to capture all personal actions not specifically enumerated in the 1990 *Limitations Act* (*Outerbridge*, at paras. 17 and 26). Accepting Ontario’s submission on this point would effectively require this Court to read into the legislation a basket clause where one was not provided by the legislature.

[209] Second, in the 2002 amendments to the Ontario limitations legislation, the Ontario legislature dealt expressly with Aboriginal and treaty rights, excluding them from the limitation periods established in the statute. Sections 2(1)(e) and 2(1)(f) of the *Limitations Act, 2002* provide that the legislation applies to all claims *except* “proceedings based on the existing [A]boriginal and treaty rights . . . recognized and



affirmed in section 35 of the *Constitution Act, 1982*” and “proceedings based on equitable claims by [A]boriginal peoples against the Crown”. I agree with the Court of Appeal that, in making these amendments, the legislature “understood that Aboriginal treaty claims are distinct” from other causes of action, and that “when the legislature intended to deal with Aboriginal treaty claims, it did so explicitly” (para. 646).

[210] Finally, a claim for breach of an Aboriginal treaty right is fundamentally different than an action on the case. Treaty claims are not actions in the nature of tort or contract, which seek to vindicate private rights, and which derive from the law of trespass. Rather, Aboriginal treaties are *sui generis* agreements representing the exchange of solemn promises between the Crown and Indigenous peoples (*Simon*, at pp. 404 and 410; *Sioui*, at p. 1038; *Badger*, at para. 41). The rights at stake are constitutional, engaging issues of public law rather than private law.

(3) The Breach of Treaty Claim Is Not an Action of Account

[211] I would also reject Ontario’s submission that the plaintiffs’ claims for equitable compensation amount to actions of account within the meaning of s. 46 of the 1990 *Limitations Act*.

[212] In rejecting Ontario’s argument on this point, the Court of Appeal, at para. 660, referred to the Ontario Law Reform Commission’s *Report on Limitation of Actions*, which explained that actions of account under s. 46 “probably are only those which would have been brought at common law and do not include equitable actions

of account” (p. 18). Ontario provides a contrary viewpoint, citing Jeremy S. Williams, *Limitation of Actions in Canada* (2nd ed. 1980), at p. 45, who contends that an action of account can be brought incidentally to any claim “where there is a legal or equitable duty to account” (A.F., at para. 120 (emphasis added)).

[213] I accept that there is authority for the view that actions of account can include common law *and* equitable claims. Even so, the origin and scope of this action suggest it is ill-suited to the context of Crown-Indigenous treaties.

[214] The writ or action of account arose from the English feudal system in the 13th century. It was a way for land-owning lords who had rented out manors to bailiffs to compel them to account for the rents and profits derived from the property (E. O. Belsheim, “The Old Action of Account” (1932), 45 *Harv. L. Rev.* 466, at pp. 467-68). At that time, there was no clear division between equity and the common law, but the action was typically used at common law against a person who was required to render an account to another because of a fiduciary relationship (such as a guardian in socage, bailiff, or receiver) (*National Trust Co. v. H & R Block Canada Inc.*, 2003 SCC 66, [2003] 3 S.C.R. 160, at para. 34, citing *Black’s Law Dictionary* (6th ed. 1990), at p. 19; *Halsbury’s Laws of England*, at p. 24; Belsheim, at p. 472).

[215] Although the relationship between the Crown and Indigenous peoples is fiduciary in nature, for the reasons I outline in the next section, no specific fiduciary obligation, whether *ad hoc* or *sui generis*, arises to potentially bring the plaintiffs’ claims within the scope of actions of account. In addition, the correct interpretation of

the Augmentation Clause set out above reveals that the Crown is not *required* to account to the treaty beneficiaries for the proceeds of the ceded territories. Rather, increases to the annuities beyond \$4 are *discretionary*. It also cannot be said that the Crown holds the ceded territories in trust for, or for the benefit of, the Anishinaabe treaty partners.

[216] Finally, I am not aware of any precedent treating Aboriginal or treaty rights as actions of account. The two cases Ontario cites are unlike the case at bar: they involve private law contracts of purchase and sale for land, and the administration of a constructive trust (*Hanemaayer v. Freure* (1999), 2 B.L.R. (3d) 269 (Ont. S.C.J.), at paras. 98-108; *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577, at para 50). Ontario has therefore provided no precedent or any compelling basis for this Court to extend s. 46 of the 1990 *Limitations Act* to the constitutional context of *sui generis* Aboriginal treaties.

(4) Conclusion

[217] I conclude that the Huron and Superior plaintiffs' breach of treaty claims are neither actions on the case nor actions of account, and are therefore not statute-barred by the 1990 *Limitations Act*.

E. *The Crown's Obligation To Diligently Implement the Augmentation Clause*

[218] The parties agree that the honour of the Crown must guide the interpretation and implementation of the Augmentation Clause and the appropriate remedies for the Crown's past breach, but disagree on the details. This section addresses these issues and explains why neither an *ad hoc* nor *sui generis* fiduciary duty arises. I also conclude that the Crown owes a duty to diligently implement the augmentation promise under the Robinson Treaties.

(1) The Honour of the Crown Is Not a Cause of Action but Can Generate Various Duties

[219] As already noted, the honour of the Crown is a guiding constitutional principle that informs the interpretation of Aboriginal treaties. It also plays a crucial role in the implementation of treaties to ensure that no dishonour is brought to the government and, through this, to the Crown (*Haida Nation*, at para. 19; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 33; Henderson, at p. 887). The honour of the Crown imposes upon governments “a high standard of honourable dealing” with Indigenous peoples (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1109; *Manitoba Metis*, at para. 69). It is a flexible and capacious doctrine that can “measure and regulate conduct of the government in relation to [A]boriginal peoples” (J. T. S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at p. 53).

[220] Although the honour of the Crown is a powerful constitutional doctrine, it “is not a cause of action itself; rather, it speaks to *how* obligations that attract it must

be fulfilled” (*Manitoba Metis*, at para. 73 (emphasis in original)). At the same time, it is “not a mere incantation, but rather a core precept that finds its application in concrete practices”, and “gives rise to different duties in different circumstances” (*Haida Nation*, at paras. 16 and 18). The specific duties flowing from the honour of the Crown depend “heavily” on the context in which that honour is engaged (*Mikisew Cree 2018*, at para. 24; *Manitoba Metis*, at para. 74; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 25).

[221] For example, in *Haida Nation*, this Court held that the honour of the Crown gives rise to a duty to consult when the Crown contemplates an action that will affect as yet unproven Aboriginal rights or title (para. 35) and could entail a duty of honourable negotiation (para. 20). In *Badger*, this Court said that the honour of the Crown requires avoiding any appearance of sharp-dealing (para. 41). In *Marshall*, the honour of the Crown was used, absent a complete written treaty text, to ground a duty to purposively interpret treaty promises to further reconciliation (paras. 41 and 49-52). In *Wewaykum*, the Court recognized that the honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a cognizable Aboriginal interest (paras. 79 and 81). And in *Manitoba Metis*, the honour of the Crown imposed a “duty of diligent, purposive fulfillment” of the constitutional obligation set out in s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 (para. 94). The Huron and Superior plaintiffs say that the latter two duties — fiduciary duties and the duty of diligent fulfillment — arise in this case. I will address each.

(2) The Crown Has No Fiduciary Duties in Respect of the Augmentation Promise

(a) *Introduction*

[222] This Court has recognized that the Crown may owe *ad hoc* and *sui generis* fiduciary duties to Indigenous peoples in respect of certain interests. *Ad hoc* fiduciary duties arise as a matter of private law and require utmost loyalty to the beneficiary (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 44; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 43). By contrast, *sui generis* fiduciary duties are unique to the Crown-Indigenous relationship, flow from the honour of the Crown, and permit the Crown to balance competing interests (*Williams Lake*, at paras. 44 and 165; Hogg and Dougan, at p. 307). The plaintiffs say that both types of duties arise in this case.

[223] The trial judge held that the Crown owes an *ad hoc* fiduciary duty to the Huron and Superior plaintiffs regarding the Augmentation Clause because it “undertook to act exclusively in the best interest of the Treaties’ beneficiaries” when engaging in a *process* to determine if an increase to the annuities was warranted (Stage One reasons, at para. 519; see also para. 525). She found, however, that the Crown does not owe a *sui generis* fiduciary duty in relation to the treaty promise, because “there was no Crown undertaking of discretionary control over the Anishinaabe’s interest in land” (para. 511).

[224] Writing for a unanimous Court of Appeal on this point, Hourigan J.A. held that the trial judge erred in law in finding that the Crown owes an *ad hoc* fiduciary duty. There was no evidence that the Crown agreed to act solely in the best interests of the treaty beneficiaries regarding procedural matters stemming from the Augmentation Clause. Such a duty, Hourigan J.A. concluded, would put the Crown in an inevitable conflict of interest by requiring the disclosure of confidential budgetary, land use, and other information relevant to its decision making about possible increases (paras. 608-9). Concerning the *sui generis* fiduciary duty, Hourigan J.A. agreed with the trial judge that no such duty arose (para. 585). In his view, the treaty rights were “not sufficiently independent of the Crown’s executive and legislative functions to ground a cognizable Aboriginal interest”, and “there was no evidence of a Crown undertaking of discretionary control” over such an interest (paras. 627-28).

[225] In their cross-appeals, the Huron and Superior plaintiffs challenge the Court of Appeal’s view that an *ad hoc* fiduciary duty would put the Crown in a conflict of interest. They also say that the evidentiary record supports finding that the Crown *implicitly* undertook to act exclusively in the best interests of the treaty beneficiaries regarding the process to determine a potential increase to the annuities (Huron plaintiffs’ A.F. on cross-appeal, at paras. 174-85; Superior plaintiffs’ A.F. on cross-appeal, at para. 4). As for the *sui generis* fiduciary duty, both plaintiffs say that the trial judge failed to consider whether a *sui generis* fiduciary duty might arise from the augmentation promise itself or from a pre-existing cognizable Aboriginal interest in the

ceded land (Huron plaintiffs' A.F. on cross-appeal, at para. 188; Superior plaintiffs' A.F. on cross-appeal, at paras. 5, 12, 17 and 20).

[226] In response, Ontario and Canada say that the Crown has no substantive or procedural *ad hoc* fiduciary duty because it did not expressly or implicitly undertake to act exclusively in the best interest of the treaty beneficiaries regarding the Augmentation Clause (Ontario's R.F. on cross-appeal, at paras. 13, 16 and 29; Canada's factum on cross-appeal, at para. 21). They submit that the Crown could not have made such an undertaking given its public responsibilities to balance competing interests (Ontario's R.F. on cross-appeal, at paras. 13(a), 16 and 33; Canada's factum on cross-appeal, at paras. 24-25). Ontario and Canada further argue that the Huron and Superior plaintiffs' interest in augmented annuities is not a cognizable Aboriginal interest in respect of which the Crown may owe *sui generis* fiduciary duties, because this interest "is a collective interest, created by the Treaties, in Crown activity and its proceeds rather than a pre-existing interest integral to the distinctive Indigenous communities' relationship to the land" (Canada's factum on cross-appeal, at para. 35; see also Ontario's R.F. on cross-appeal, at paras. 42-47 and 57).

[227] Whether a fiduciary duty exists is a question of mixed fact and law (*Williams Lake*, at para. 38). However, specific legal errors such as the application of an incorrect legal standard are reviewable for correctness. As I will elaborate, the trial judge properly found that no *sui generis* fiduciary duty arises in this case, but she erred



in law in finding an *ad hoc* fiduciary duty. I agree with the Court of Appeal that neither duty arises.

(b) *No Ad Hoc Fiduciary Duty Arises*

[228] An *ad hoc* fiduciary duty may arise from the relationship between the Crown and Indigenous peoples “where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary” (*Williams Lake*, at para. 44). An *ad hoc* fiduciary duty arises where there is: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries; (2) a defined class of beneficiaries vulnerable to the fiduciary’s control; and (3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control (*Elder Advocates*, at para. 36; see also *Manitoba Metis*, at para. 50; *Williams Lake*, at para. 162, per Brown J., dissenting, but not on this point).

[229] I agree with the Court of Appeal that the trial judge erred in law in finding that an *ad hoc* fiduciary duty arose. There is no evidence that the Crown undertook to act in the best interests of the Huron and Superior plaintiffs in relation to the treaty promise.

[230] The trial judge characterized the legal or substantial practical interest of the Huron and Superior plaintiffs as a right to have the Crown engage in a process to

determine whether it could increase the annuities without incurring loss (Stage One reasons, at para. 525). She found that the Crown's promise to engage in this process "was made in the best interests of the Treaties' beneficiaries and with the utmost of loyalty to them" (para. 524). "The Crown has no competing interest or duty in the performance of this exercise", she explained, because "[t]here is no other group to whom the Crown owes a duty of loyalty in this process" (para. 524).

[231] The evidentiary record does not support this finding. Although "[t]here was ample evidence in the record . . . about the relationship of trust and reliance between the Treaty partners" (Huron plaintiffs' A.F. on cross-appeal, at para. 183), this evidence does not meet the high threshold required to establish an undertaking by the Crown to act in the best interests of the Huron and Superior plaintiffs. An *ad hoc* fiduciary duty "is one of utmost loyalty to the beneficiary" (*Elder Advocates*, at para. 43), and "[n]ot every undertaking will ground an *ad hoc* fiduciary duty" (J. Woodward, *Aboriginal Law in Canada* (loose-leaf), at § 3:58). There must be "a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake" (*Elder Advocates*, at para. 31). Here, there is no evidence that the Crown undertook to forsake the interests of all others in favour of the Huron and Superior plaintiffs when discharging its obligations under the Augmentation Clause, either procedurally or substantively.

[232] In addition, "situations where [the Crown] will be shown to owe a duty of [utmost] loyalty to a particular person or group will be rare, particularly where an

exercise of a government power or discretion is at issue” (Woodward, at § 3:58). In exercising its discretion about whether to increase the annuities and, if so, by how much, the Crown must consider not only the honour of the Crown, but also the wider public interest. This is apparent from the language and nature of the Augmentation Clause, which expresses the intention of “Her Majesty . . . to deal liberally and justly with all Her subjects”, and incorporates the economic condition. In these circumstances, and absent evidence to the contrary, I cannot conclude that the Crown’s obligations regarding the Augmentation Clause involved an undertaking to forsake the interests of all others in favour of the plaintiffs.

(c) *No Sui Generis Fiduciary Duty Arises*

[233] I am also unable to conclude that a *sui generis* fiduciary duty arises. A *sui generis* fiduciary duty is specific to the relationship between the Crown and Indigenous peoples (*Williams Lake*, at para. 44, citing *Wewaykum*, at para. 78, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 385, and *Sparrow*, at p. 1108). Its origins lie in protecting the interests of Indigenous peoples in recognition of the “degree of economic, social and proprietary control and discretion asserted by the Crown” over them, which left them “vulnerable to the risks of government misconduct or ineptitude” (*Wewaykum*, at para. 80).

[234] A *sui generis* fiduciary duty arises where there is: (1) a specific or cognizable Aboriginal interest; and (2) a Crown undertaking of discretionary control over that interest (*Manitoba Metis*, at para. 51; *Williams Lake*, at para. 44; *Wewaykum*,

at paras. 79-83; *Haida Nation*, at para. 18). Unlike an *ad hoc* fiduciary duty, a *sui generis* fiduciary duty permits the Crown to balance competing interests. As Brown J. explained in *Williams Lake*, at para. 165 (dissenting, but not on this point):

This form of fiduciary duty imposes a less stringent standard than the duty of utmost loyalty incident to an *ad hoc* fiduciary duty. It requires Canada to act — in relation to the specific Aboriginal interest — with loyalty and in good faith, making full disclosure appropriate to the subject matter and with ordinary diligence: *Wewaykum*, at paras. 81 and 97. It allows for the necessity of balancing conflicting interests: *Wewaykum*, at para. 96.

[235] A *sui generis* fiduciary duty does not exist at large, but rather only in relation to a specific or cognizable Aboriginal interest (*Wewaykum*, at para. 81; *Williams Lake*, at para. 52). Thus, “[t]he specific or cognizable Aboriginal interest at stake must be identified with care” (*Williams Lake*, at para. 52). The Huron and Superior plaintiffs identify two interests in relation to which, they argue, the Crown owes them *sui generis* fiduciary duties: (1) their treaty rights under the Augmentation Clause; and (2) their pre-existing interest in the ceded land, which is the source of their treaty rights under the Augmentation Clause. In my view, neither interest gives rise to a *sui generis* fiduciary duty.

(i) Treaty Rights Under the Augmentation Clause

[236] In *Williams Lake*, Wagner J. (as he then was) explained that a specific or cognizable Aboriginal interest must be “sufficiently independent of the Crown’s executive and legislative functions to give rise to ‘responsibility in the nature of a

private law duty” (para. 52, citing *Wewaykum*, at paras. 74 and 85, *Guerin*, at p. 385, and D. E. Elliott, “Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown” (2003), 29 *Queen’s L.J.* 1).

[237] The Huron and Superior plaintiffs’ treaty right under the Augmentation Clause is, by definition, not sufficiently independent of the Crown’s executive functions to give rise to a *sui generis* fiduciary duty, because it arises from the exercise of the Crown’s executive treaty-making function. The Aboriginal interest is not the right to benefit economically from the land, or the right to have the Crown administer certain land *on behalf of* the Huron and Superior plaintiffs. Rather, it is a right to receive a certain annuity and to have the Crown consider, and if appropriate make, discretionary increases to that annuity from time to time. That right stems from the treaties, and would not exist had the Crown not exercised its treaty-making powers to that effect.

[238] *Manitoba Metis* also supports this conclusion. There, this Court held that “[a]n Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation” (para. 58). Although *Manitoba Metis* concerned an Aboriginal interest in land, not a treaty right, it is consistent with the general principle that specific or cognizable Aboriginal interests cannot be established by treaty or legislation.

[239] In support of their position, the Huron and Superior plaintiffs rely on Karakatsanis J.’s statement in *Southwind v. Canada*, 2021 SCC 28, [2021] 2 S.C.R.

450, that a strong fiduciary duty arises “where the Crown is exercising control over Aboriginal and treaty rights that are protected under s. 35 of the *Constitution Act, 1982*” (para. 62, citing *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 46). The Superior plaintiffs also point to Binnie J.’s statement in *Wewaykum* that “[t]he *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to include protection of the [A]boriginal people’s pre-existing and still existing [A]boriginal and treaty rights within s. 35 of the *Constitution Act, 1982*” (para. 78).

[240] Neither *Southwind* nor *Wewaykum* stands for the proposition that a treaty right is inherently a specific or cognizable Aboriginal interest in respect of which the Crown may owe a *sui generis* fiduciary duty. *Southwind* concerned whether the trial judge erred in assessing equitable compensation for flooded reserve lands, not whether a treaty right is a specific or cognizable Aboriginal interest attracting a *sui generis* fiduciary duty. Further, para. 46 of *Ermineskin*, to which Karakatsanis J. referred in *Southwind*, simply mentioned the bands’ submission in that case that, if a fiduciary duty arose from the treaty obligation in question, it would be constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. This Court in *Ermineskin* ultimately did not find that a *sui generis* fiduciary duty arose in respect of this treaty right (paras. 49-50).

[241] Furthermore, language in prior jurisprudence of this Court referring to the more general fiduciary relationship between the Crown and Indigenous peoples does

not assist in determining whether there is a specific *sui generis* fiduciary duty in a given case. In *Wewaykum*, Binnie J. explained that *Sparrow* expanded the idea of a *sui generis* fiduciary duty to include the protection of Aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*:

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to [A]boriginal peoples. The relationship between the Government and [A]boriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of [A]boriginal rights must be defined in light of this historic relationship. [Emphasis deleted.]

(*Wewaykum*, at para. 78, citing *Sparrow*, at p. 1108.)

[242] In this passage, the Court did not suggest that the Crown has a *sui generis* fiduciary duty in respect of all Aboriginal and treaty rights. Rather, the Court simply recognized that the Crown is in a trust-like relationship with Indigenous peoples.

[243] Although this Court now uses the language of fiduciary *duties* to denote specific duties owed by the Crown in respect of cognizable Aboriginal interests, this conception is of relatively recent vintage. At the time of *Guerin* (1984) and *Sparrow* (1990), the terms “fiduciary obligation” and “fiduciary capacity” were used to “ground a general guiding principle for s. 35(1)” that “the Government has the responsibility to act in a fiduciary capacity with respect to [A]boriginal peoples” (*Sparrow*, at p. 1108; McCabe, at pp. 58-59). Some have suggested that, during this period, this Court considered the fiduciary relationship as “closely associated if not equivalent” to the

overarching principle of honour of the Crown, and that the “tendency to conflate the fiduciary relation and the honour of the Crown continued for more than a decade after *Sparrow*” (McCabe, at pp. 58-59). This would include the *Wewaykum* decision in 2002. However, under this Court’s more recent jurisprudence, including *Manitoba Metis*, it is now recognized that “the honour of the Crown remains a much broader concept than fiduciary duty” (Hogg and Dougan, at p. 307). That said, the honour of the Crown has not subsumed or overtaken the Crown’s fiduciary duties to Indigenous peoples. Rather, *ad hoc* and *sui generis* fiduciary duties continue to play an important and distinct role in shaping the relationship between the Crown and Indigenous peoples in certain circumstances.

[244] I disagree with the Superior plaintiffs that this Court’s decision in *Bear Island*, decided in 1991, stands for the proposition that the Crown owes a *sui generis* fiduciary duty regarding its obligations under the Robinson Treaties. Although the Court accepted the Crown’s concession that it “breached its fiduciary obligations to the Indians” under the Robinson-Huron Treaty (at p. 575), the Court did not decide the case based on a breach of fiduciary duty or analyze whether a specific *sui generis* fiduciary duty exists regarding the treaty rights. In these circumstances, the Court’s reference to “fiduciary obligations” is best understood as a reference to the more general fiduciary relationship discussed in earlier case law, which always exists in Crown-Indigenous dealings and reflects the broader duty of the honour of the Crown.

(ii) Pre-Existing Interest in Ceded Land



[245] Finally, the Crown does not owe a *sui generis* fiduciary duty in respect of the Huron and Superior plaintiffs' pre-existing interest in the ceded land. At trial and on appeal, the plaintiffs suggested that the interest in the ceded territory that became the subject of the Robinson Treaties was "historically occupied and communally held prior to contact and is, therefore, capable of constituting a specific or cognizable Aboriginal interest in land in the pre-Treaty context" (Stage One reasons, at para. 509). In response, Ontario and Canada pointed to the surrender provisions in the Robinson Treaties — which state that the signatories "voluntarily surrender, cede, grant and convey . . . their right, title and interest" to the Crown — as evidence that any pre-existing interest in the ceded land no longer exists.

[246] The trial judge and Court of Appeal correctly concluded that even if such a pre-existing interest still exists, and even if it would amount to a specific or cognizable Aboriginal interest, the second requirement for a *sui generis* fiduciary duty is not met. Specifically, as the trial judge found, neither the treaty text nor the context in which the Robinson Treaties were signed provide any evidence that the Crown would "administer the land on behalf of the Treaties' beneficiaries" (Stage One reasons, at para. 512). There was no undertaking by the Crown of discretionary control over the interest in land (paras. 511-12).

[247] I conclude the Crown is not subject to an *ad hoc* or *sui generis* fiduciary duty in respect of the augmentation promise in the Robinson Treaties. As I explain in

the next section, however, the Crown *is* subject to a duty to diligently implement or fulfill that promise, and its failure to do so is a breach of treaty.

(3) The Crown Has a Duty To Diligently Implement the Augmentation Promise

(a) *Introduction*

[248] All parties before this Court agree that the Crown has an obligation to diligently fulfill or implement the Augmentation Clause in the Robinson Treaties. They diverge, as the courts below did, on precisely what this duty requires of the Crown in practice, including how the past breaches of this obligation should be remedied.

[249] The trial judge held that the honour of the Crown “requires that the Crown work diligently to implement a process to consider increasing the annuities and the economic factors that interact with that decision”, but the Crown “does not have unfettered discretion on whether or how to make increases to the annuities” (Stage One reasons, at para. 568). She also acknowledged the importance of renewing the treaty relationship to allow the parties to “co-exist in a mutually respectful and beneficial relationship going into the future” (para. 573).

[250] The Court of Appeal was unanimous in the view that the honour of the Crown was engaged in this case, but divided on precisely how it should apply. The majority (per Lauwers and Pardu JJ.A., Hourigan J.A. concurring) held that, in the

circumstances, the honour of the Crown *obliges* the Crown to increase the annuities beyond \$4 per person as part of its duty to diligently implement the Augmentation Clause (paras. 87 and 241). The minority (per Strathy C.J.O. and Brown J.A.) would not have mandated an increase as part of the treaty obligation, but would have ruled that the honour of the Crown obliges the Crown, at minimum, to turn its mind from time to time to consider increasing the annuities beyond \$4 (paras. 87 and 499). The Court of Appeal was also unanimous in the view that the Crown's discretion about whether and how to augment the annuities was justiciable and not unfettered (para. 88).

[251] Before this Court, Ontario acknowledges that it has a duty to diligently implement the augmentation promise consistently with the honour of the Crown. But it says this duty is only procedural: fulfilling the duty simply requires the province to “consider” increases above the \$4 cap from time to time (A.F., at paras. 97-98 and 102). In its view, the Crown cannot be ordered by a court to pay a particular sum of money in damages to the plaintiffs to remedy a past breach of the Augmentation Clause (paras. 105 and 108). Canada says that the duty of diligent implementation simply requires the Crown to implement the Augmentation Clause in a way that “honours the purpose of the Treaties and advances reconciliation” (R.F., at para. 38). Canada and Ontario both accept that whatever discretion the Crown has in implementing the Augmentation Clause is not unfettered (Ontario's A.F., at para. 3; Canada's R.F., at para. 4).

[252] The Superior plaintiffs say that the duty of diligent and purposeful implementation is at the core of the Crown's obligations under the treaty, and requires

the Crown to take positive and timely steps to fulfill the treaty promises (A.F. on cross-appeal, at para. 55). The Huron plaintiffs suggest that the duty of diligent fulfillment operates to “constrain the exercise of [the Crown’s] discretionary powers” (R.F., at para. 109). They add that this duty is “not . . . a freestanding duty”, but instead is linked to the underlying claim for breach of treaty from which remedies, including damages, ultimately flow: “When the Crown breaches its duty to honourably implement the Treaty, it breaches the Treaty itself” (para. 109).

[253] As I explain below, I disagree with Ontario’s submission that the duty of diligent implementation imposes only procedural obligations regarding the implementation of the Augmentation Clause. Instead, I conclude that the Crown is required, and indeed was always required, to act in an honourable and timely way to pursue the purpose behind the treaty promise. As I explain when addressing remedies in the next section, this requires the Crown to pay an amount, subject to review by the courts, to compensate the Superior plaintiffs for its past breach of the Augmentation Clause, which in this case is a breach of both the duty of diligent implementation and of the treaty itself.

(b) *The Duty of Diligent Implementation*

[254] The duty of diligent implementation holds the Crown responsible for making good on its treaty promises. The duty was first recognized in this Court’s decision in *Manitoba Metis*, which concerned certain obligations owed to the Red River Métis in the *Manitoba Act, 1870*. The Red River Métis had forcefully resisted colonial

advances for many years, but agreed to become part of Canada in 1870. In return, Canada agreed to grant 1.4 million acres of land to Métis descendants and to recognize certain existing landholdings. These two pledges were set out in ss. 31 and 32 of the *Manitoba Act, 1870*, a constitutional instrument.

[255] Over the years, the Crown set aside some land for the Métis descendants, but errors and delays ensued. Allotments were abandoned, distributions of land became random, and speculators began acquiring Métis land through legal loopholes. In 1981, the Manitoba Metis Federation and individual Métis claimants sued the attorneys general of Canada and Manitoba for declarations that the Crown had breached a fiduciary duty owed to the Métis in implementing the *Manitoba Act, 1870* and had failed to implement the land grant promise consistently with the honour of the Crown. Both the trial judge and the Manitoba Court of Appeal dismissed the action.

[256] This Court unanimously found that no fiduciary duties arose out of the Crown's promises to the Métis in s. 31 of the *Manitoba Act, 1870*. Writing for the majority, McLachlin C.J. and Karakatsanis J. nevertheless ruled that the Métis were entitled to a declaration that the Crown had failed to act diligently in implementing the land grants. This duty flowed directly from the honour of the Crown and required the Crown to take a broad purposive approach to the interpretation of the land grant promise and to act diligently to fulfill it (para. 75).

[257] Elaborating on the second requirement, the majority explained that although the law "assumes that the Crown always intends to fulfill its solemn promises,

including constitutional obligations” (para. 79, citing *Badger*, and *Haida Nation*, at para. 20), the Crown’s responsibilities go further: “. . . if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled” with “due diligence” (para. 79, citing *Moses*, at para. 23).

[258] The Crown’s duty to ensure that its obligations are fulfilled requires that the Crown “seek to perform the obligation in a way that pursues the purpose behind the promise” to avoid leaving Indigenous parties with an empty shell of a promise (para. 80). It is a “narrow and circumscribed duty” which, in *Manitoba Metis*, was said to be “engaged by the extraordinary facts before us”, namely, a “persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown’s duty to act honourably in fulfilling its promise” (paras. 81-82). The majority found that the prompt and equitable implementation of the land grant promise was fundamental to reconciliation, which the Crown’s mistakes and inaction had prevented. In the majority’s view, “[a] government sincerely intent on fulfilling the duty that its honour demanded could and should have done better” (para. 128). The Court ultimately issued a declaration that the federal Crown had failed to implement the land grant provision in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown (para. 154).

[259] Since *Manitoba Metis*, the duty of diligent implementation has received only limited attention in the jurisprudence (see, e.g., *First Nation of Nacho Nyak Dun*,

at para. 52; *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565, 486 D.L.R. (4th) 1, at paras. 150-52; *Watson v. Canada*, 2020 FC 129, at paras. 499-500 (CanLII); *Yahey v. British Columbia*, 2021 BCSC 1287, 43 C.E.L.R. (4th) 1, at paras. 1779-87). This Court's comments in *Manitoba Metis* remain the most complete and authoritative statement of the law on this duty.

[260] Although all parties agree the Crown has an obligation to diligently fulfill or implement the Augmentation Clause in the Robinson Treaties, Ontario insists, like the Court of Appeal minority concluded, that the duty is only procedural: the duty will be fulfilled if the Crown shows it has at least considered or turned its mind to increasing the \$4 annuity from time to time.

[261] I accept that the duty of diligent implementation speaks to *how* Crown obligations must be fulfilled, rather than specifying a particular result in a given case (*Manitoba Metis*, at para. 73). Nevertheless, the Court must guard against divorcing the duty of diligent implementation from the very nature of the treaty promise at issue. The duty of diligent implementation itself does not dictate a particular result in this case. However, what it means to diligently and honourably implement the augmentation promise cannot be understood in terms of procedure alone, without reference to what the augmentation promise requires. In this case, all parties have agreed that an increase to the annuity in respect of the past is required. To determine what the duty of diligent implementation or fulfillment requires in this case, the Court must consider the question posed in *Haida Nation* in the context of the duty to consult: “. . . what is required to

maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake”? (para. 45). In doing so, the Court must bear in mind that the honour of the Crown is a concept that necessarily “finds its application in concrete practices” (para. 16).

[262] I cannot accept Ontario’s submission that a purely procedural duty — by which the Crown is simply required to “consider” or “turn its mind” to discretionary increases to the annuities from time to time — would maintain the honour of the Crown or effect reconciliation between the parties. Since 1875, when the first and only increase to the annuities was made, the Crown has failed to consider whether it can increase the annuities without incurring loss and, if so, to exercise its discretion to determine whether and by how much to increase them. For well over a century, the Crown has shown itself to be a patently unreliable and untrustworthy treaty partner in relation to the augmentation promise. It has lost the moral authority to simply say “trust us”.

[263] I pause here to note the trial judge’s view that determining whether the Crown had fulfilled its duties under the Robinson Treaties were “not Stage One issues” (Stage One reasons, at para. 393; see also C.A. reasons, at para. 326). Yet, before this Court, both Canada and Ontario frankly acknowledged that, for some 150 years, the Crown has breached its duty to diligently implement the treaties’ augmentation promise. In doing so, they agreed that they have failed to uphold both the honour of the Crown and the principles of respect, responsibility, reciprocity, and renewal that underpinned the Anishinaabe’s perspective on the treaty relationship with the Crown



(transcript, day 1, at p. 6; Canada’s R.F., at para. 34). They agreed that some level of increase beyond \$4 for the period between 1875 and today is required (transcript, day 1, at p. 15). This acknowledgement is reflected in the \$10 billion settlement recently reached between the Huron plaintiffs, Ontario, and Canada for past breaches of the augmentation promise.

(c) *Conclusion*

[264] I have no difficulty concluding that the Crown has clearly breached its duty to diligently fulfill the augmentation promise under the Robinson Treaties. As I explain below, I also have no difficulty concluding that the Huron and Superior plaintiffs are entitled to a remedy for this breach.

F. *The Remedy for the Crown’s Failure To Diligently Implement the Augmentation Promise*

(1) Introduction

[265] The remedy owed by the Crown for its breach of the Robinson Treaties, and the potential for that remedy to advance reconciliation, are pivotal issues in these appeals.

[266] The trial judge held that implementing the treaty promise requires the Crown to engage in a consultative process with the beneficiaries and pay an increased annuity, reflecting what she called a “fair share” of the proceeds of the territory. She

rejected Ontario's submission that a declaration simply stating that the Crown was under an obligation to act honourably to fulfill the purpose of the Robinson Treaties would sufficiently restore the treaty relationship and the Crown's honour (Stage One reasons, at para. 496).

[267] The majority of the Court of Appeal (per Lauwers and Pardu JJ.A., Hourigan J.A. concurring) ruled that it was reasonable for the trial judge to have no confidence that a simple declaration would trigger good faith negotiations (para. 276). They encouraged the parties to "negotiate, rather than litigate, the remaining issues", including remedies (para. 327). They noted that negotiations allow the court to step back from "[c]lose judicial management" that "may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster" (para. 328, citing *First Nation of Nacho Nyak Dun*, at para. 60). Negotiated agreements, they added, would also create precision, continuity, transparency, and predictability in the treaty relationship and would be afforded judicial deference (para. 329).

[268] The Court of Appeal minority (per Strathy C.J.O. and Brown J.A.) would have directed the trial judge to invite further submissions concerning the implementation of the treaties, including on: (a) the frequency with which the Crown is required to turn its mind to augmenting the annuities; (b) the considerations to be taken into account when determining whether the Crown can increase the annuities without incurring loss; (c) calculation of the amounts by which the Crown should have increased the annuities; and (d) damages resulting from the Crown's breach (para. 506).

They recognized that “promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes” can advance reconciliation (para. 494, citing *Mikisew Cree 2018*, at para. 22). But they also agreed with the trial judge that, given the Crown’s neglect of the treaty promise for over a century and a half, the court had the authority and the obligation “to impose specific and general duties on the Crown” (paras. 503-4, citing Stage One reasons, at para. 497).

[269] Although Ontario now concedes that it has breached its constitutional duties under the Robinson Treaties, it argues that only declaratory relief is available for this breach. Substantive or coercive remedies, including damages, are unavailable because the honour of the Crown is not itself a cause of action (A.F., at paras. 105 and 108); substantive or coercive remedies would “naturally drive the parties into an adversarial relationship” (para. 111); and declaratory relief would be consistent with the principle that “decisions about the allocation of public resources belong to legislatures and to the executive”, not the courts (para. 113, citing *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286, at para. 20). In these circumstances, Ontario says, a declaration that the Crown must exercise its discretion consistently with the honour of the Crown, and that this discretion is subject to review by the courts, is an appropriate and effective remedy.

[270] Canada and the Huron and Superior plaintiffs say that substantive or coercive remedies, including damages, are available here and should be determined at

Stage Three. According to the Huron plaintiffs, the choice of remedy should be informed by whether it serves to repair the treaty relationship, restore the honour of the Crown, and give effect to the parties' shared understanding of the treaty (R.F., at para. 115). The Superior plaintiffs add that a monetary award is consistent with reconciliation and that awarding compensation after identifying losses caused by the Crown's failure to exercise its discretion is the "core work" of the court (R.F., at para. 115). In Canada's view, declaratory remedies, while available here, are unlikely to be sufficient given the longstanding and ongoing nature of the Crown's breach (R.F., at para. 44).

[271] In my view, a declaration clarifying the rights and obligations of the parties is an appropriate remedy in this case, as it will inform both the future implementation of the Robinson Treaties and clarify the nature of the past breach. At the same time, given the longstanding and egregious nature of the Crown's breach of the Augmentation Clause for almost a century and a half, a declaration, while helpful, would be insufficient to renew the treaty relationship and restore the Crown's honour. The Crown *must* provide redress for the conceded breach of its duty. In doing so, the Crown should take into account various factors including, but not limited to, the nature and severity of the breaches, the number of Anishinaabe and their needs, the benefits the Crown has received from the ceded territories and its expenses over time, the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada, and the principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise under the treaty to share in the wealth of the land if it proved profitable. However, it is appropriate for

that redress to be negotiated by the treaty partners, in a manner that is consistent with the goal of reconciliation.

[272] As I will elaborate, I would therefore provide further direction requiring the Crown to engage in honourable and time-bound negotiation with the Superior plaintiffs concerning compensation for past breaches of the Augmentation Clause. If the parties are unable to arrive at a negotiated settlement, then the Crown must, within six months of the release of these reasons, exercise its discretion under the Augmentation Clause and set an amount to compensate the Superior plaintiffs for past breaches. The amount, and the process through which it is arrived at, will be subject to review by the courts.

(2) The Full Range of Remedies Is Available

[273] The Crown's breach of the augmentation promise is both a breach of the duty of diligent fulfillment and a breach of the treaty itself. In principle, the full range of remedies — declaratory and coercive — is available.

[274] It is a well-established principle of Canadian law that “[w]here there are legal rights there are remedies” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 102). Indeed, “a right has practical value only to the extent that it is vindicated by an adequate remedy” (J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (3rd ed. 2014), at p. 1). Likewise, Aboriginal and treaty rights protected under s. 35(1) of the *Constitution Act, 1982* will “not be meaningful without effective

remedies” (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 15:2).

[275] To respect their constitutional status, uphold the honour of the Crown, and advance reconciliation, Aboriginal and treaty rights can be no less enforceable than other constitutional rights (*Sparrow*, at pp. 1106-7; see also *Van der Peet*, at paras. 20-21). As the guardians of the Constitution and guarantors of constitutionally entrenched rights, courts are responsible for ensuring that Aboriginal and treaty rights are protected by adequate, effective, and meaningful remedies (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 753).

[276] Where the Crown has breached its treaty obligations or the duties arising from the honour of the Crown, the full range of remedies, including damages and other coercive relief, is available to remedy that breach (Roach, at § 15:2). In the duty to consult context, for example, this Court has recognized that a breach of the duty “can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct” (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37, citing *Haida Nation*, at paras. 13-14).

[277] As with other constitutional rights, courts should take a purposive approach to determining the appropriate remedy for breaches of treaty obligations (Roach, at

§ 15:2). As always, “[t]he controlling question . . . is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake” (*Haida Nation*, at para. 45). Restoring the honour of the Crown “requires the courts to be creative” within a principled legal framework and provide remedies that “forward the goal of reconciliation” (Hogg and Dougan, at p. 292; see also Roach, at §§ 15:1-15:2).

(3) A Declaration Is an Appropriate Remedy in This Case

[278] In my view, a declaration is an appropriate remedy in that it will offer a definitive statement of the rights and obligations under the Augmentation Clause to guide the parties in negotiating compensation for past breaches and to encourage the renewal of the treaty relationship moving forward.

[279] A declaration is “a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights” (L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 1). Declaratory relief is discretionary. A court may award a declaration where “(a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought” (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 81; see also *Daniels v. Canada (Indian Affairs and Northern*

*Development*), 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11, and *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46). A declaration should not be issued if it is not “capable of having any practical effect in resolving the issues in the case” (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 833).

[280] All parties agree that this Court can issue declaratory relief in this case. First, there is no question as to this Court’s jurisdiction over the issues in these appeals. Second, the dispute between the parties is real and not theoretical: the parties disagree about many live issues, including the correct interpretation of the Augmentation Clause, the duties it imposes on the Crown, and the remedy for the Crown’s breach of these duties. Third, although the Crown has acted dishonourably in neglecting its duties under the Augmentation Clause for close to 150 years, the long history of this litigation and the recent \$10 billion settlement between the Crown and the Huron plaintiffs regarding past breaches suggest that all parties have a genuine interest in resolving the issues. Fourth, although before this Court Ontario now accepts that the appropriate remedy is a declaration stating that the Crown is required to exercise its discretion as to whether to augment the annuities, it has opposed declaratory relief of the kind sought by the plaintiffs for most of this litigation. Until recently, Ontario maintained that it had not breached the Augmentation Clause because it possessed unfettered discretion as to whether to increase the annuities beyond \$4. In this sense, it has opposed a declaration recognizing its breach of the Augmentation Clause from day one. However, as this Court explained in *Shot Both Sides v. Canada*, 2024 SCC 12, at para. 81, the Crown’s belated concession of a breach of a treaty right should not foreclose the



possibility of declaratory relief. To hold otherwise would “privilege form over substance with respect to the nature of the ‘real’ dispute before us, and would overlook the protracted nature of the dispute that led the parties to this point” (para. 81).

[281] In my view, there is considerable value in this Court providing a declaration that clarifies the Crown’s obligations regarding the Augmentation Clause and recognizes that the Crown has breached those obligations. Such a declaration will be a definitive statement of rights that the treaty partners can rely on in negotiations to determine how the Augmentation Clause must be honourably implemented regarding both the past and the future (see *Manitoba Metis*, at para. 137). In this regard, I agree with the following observations of Justice Rowe, writing extra-judicially with Diane Shnier:

Declarations allow courts to state generally what is necessary to comply with constitutionally guaranteed treaty rights, and allow the government flexibility in how to achieve that compliance. Further, declarations about a discrete issue or aspect of an agreement may facilitate negotiation outside the litigation process, which can be particularly important in the context of treaties with Aboriginal peoples.

(“The Limits of the Declaratory Judgment” (2022), 67 *McGill L.J.* 295, at p. 318)

[282] As this Court has noted, declaratory relief “is not meant to represent the end of the reconciliation process” for the Crown’s breach of a treaty; it “merely helps set the stage for further efforts at restoring the nation-to-nation relationship and the honour of the Crown” (*Shot Both Sides*, at para. 74).

(4) A Declaration Is Appropriate, but Insufficient

[283] While a declaration is appropriate, I am of the view that a bare declaration, without more, is insufficient given the egregious and longstanding nature of the breaches at issue in these appeals. In these circumstances, a simple declaration would not adequately repair the treaty relationship or restore the honour of the Crown. It would not sufficiently vindicate the treaty rights or meaningfully advance reconciliation.

[284] The treaties concluded between the parties were fundamentally alliances of equals founded on the principles of mutual respect, mutual responsibility, reciprocity, and renewal (Stage One reasons, at para. 423). In requiring the Crown to periodically revisit the annuity and consider increasing the amount, the Augmentation Clause embodies the parties' desire for a continually renewing bond that would keep them in a relationship with one another in perpetuity. Yet today, well over a century has passed since the Crown has turned its mind to that promise, and by extension to the renewal of the relationship itself. Ontario expresses concern that any remedy beyond a pure declaration would "drive the parties into an adversarial relationship" (A.F., at para. 111). The Superior plaintiffs respond that it is not the requested remedy that has done this, but rather the Crown's "abject failure" for almost 150 years to honour sacred treaty rights (R.F., at para. 113). I agree with the Superior plaintiffs. The Crown cannot reasonably have believed that giving its treaty partners \$4 each annually since 1875 was in any way honourable.

[285] What is more, since the Robinson Treaties were concluded in 1850, the Crown has derived enormous economic benefit from the ceded territories through mining and other activities. Meanwhile, as the Court of Appeal noted, the Anishinaabe treaty partners have experienced many deprivations in their communities, such as “substandard housing and boil water advisories” (para. 322). One treaty partner has thrived, while the other has often experienced immense hardship.

[286] Before leaving this point, it is appropriate to recall that the trial judge found that the Robinson Treaties were motivated largely by the principles of kinship and mutual interdependence, as reflected in the Covenant Chain. This enduring alliance has been depicted using the metaphor of a ship tied to a tree with a metal chain: “The metaphor associated with the chain was that if one party was in need, they only had to ‘tug on the rope’ to give the signal that something was amiss, and ‘all would be restored’” (Stage One reasons, at para. 65). The Anishinaabe treaty partners have been tugging on the rope for some 150 years now, but the Crown has ignored their calls. The Crown has severely undermined both the spirit and substance of the Robinson Treaties.

[287] Because of this, and as the trial judge observed, “after 168 years of no action on the part of the Crown, the court cannot simply accept the Crown’s acknowledgment of their duty of honour and permit the Crown to carry on without further direction” (Stage One reasons, at para. 492). I agree with the Huron plaintiffs that a mere declaration would risk forcing them “to continue to rely on a historically dishonourable Treaty partner to take steps to restore the Treaty relationship” (R.F., at

para. 117). This would be deeply unsatisfactory and would risk leaving the Anishinaabe treaty partners with an empty shell of a promise once again. I would therefore provide additional direction to the Crown regarding the Superior plaintiffs to ensure that it exercises its discretion under the Augmentation Clause in a timely and honourable manner regarding past breaches.

(5) Further Direction Is Needed

[288] As I have said, I am of the view that the full range of remedies, including damages, is available for breach of treaty claims, just as they are for breaches of other constitutional rights. Even so, I am not convinced that proceeding immediately to a judicially calculated damages award for past breaches in Stage Three is appropriate at this time, given the nature of the treaty promise, the proper role of the courts, and the need to effectively repair the treaty relationship and restore the honour of the Crown.

(a) *The Nature of the Treaty Promise*

[289] I agree with the Superior plaintiffs that after more than a century of Crown neglect, they have the right to a remedy. I have concluded that the Crown *must* increase the annuity beyond \$4 per person regarding the past, since it would be patently dishonourable not to do so. However, the fact of the matter is that the Augmentation Clause is not a promise on the part of the Crown to pay a certain sum of money. Rather, it is a promise to consider whether the economic conditions allow the Crown to increase

the annuities without incurring loss and, if they do, to *exercise its discretion* and determine whether to increase the annuities and, if so, by how much.

[290] The Crown must exercise this discretion liberally and justly, consistently with the honour of the Crown and the language of the treaty itself, but it retains the authority and, in the present circumstances, has the obligation to set a figure that it considers will meet those requirements. Until the Crown has exercised that discretion through honourable engagement with its treaty partners and has proposed an amount of compensation, it should generally not be judicially compelled to pay a certain sum of money to redress the harms occasioned by its neglect. Absent a settlement, the Crown will be required to explain to the Superior plaintiffs and the court how it reached its determination and why. This would permit the court to pay careful attention to the manner in which the Crown exercised its discretion, having regard to both the amount determined and the process by which it arrived at that amount, when assessing whether the Crown's determination is honourable.

[291] I hasten to add that this does not mean that the Crown should *never* be judicially compelled to pay a certain sum of money as determined by a court. Under some circumstances, a court may decide to intervene and set the amount to be paid by the Crown. For example, a failure by the Crown to pay an honourable amount in all the circumstances should not limit a court to quashing the amount set by the Crown and remanding the issue to the Crown for redetermination. In such a case, a court may need to make a determination that the Crown refuses to make, or that it makes dishonourably.

The Crown cannot be allowed to continue to undermine the very object and purpose of the treaty promise.

[292] However, now that this Court has finally determined the Crown's obligations under the Augmentation Clause, and given Ontario's position before this Court that "we are listening and you are going to tell us how to approach this", it can be expected that the Crown will diligently honour its longstanding treaty promise to the Anishinaabe. In my view, given the nature of the treaty promise at issue, the Crown must be afforded a circumscribed window within which to exercise its discretion, either through honourable negotiation or by determination of the Crown if necessary. This will create space for the parties to repair and renew their treaty relationship. As this Court recognized in *Haida Nation*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (para. 14).

(b) *The Proper Role of the Courts*

[293] Directing the Crown to exercise its discretion forthwith is also a measured approach that appropriately respects the proper role of the courts and the separation of powers. As Professor Kent Roach has explained in the context of Aboriginal rights:

. . . courts that enforce Aboriginal rights must also consider a range of other factors and competing interests. Courts should provide remedies that respect institutional roles including the limits on the judiciary. In many cases, courts are hopeful that issues can be resolved out of court by a process of consultation and negotiation. This approach is particularly

attractive in the Aboriginal rights context because of its potential to allow Aboriginal nations to exercise some degree of self-determination and because of the complexity of the issues and the broad range of reasonable solutions and forms of reconciliation. At the same time, Aboriginal rights may ultimately have to be enforced by the courts, albeit in a way that respects institutional roles and is fair to all those affected. [§ 15:2]

[294] Professor Roach's comments are instructive in relation to treaty rights as well. As in the *Charter* context, it is true here that "an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. . . . [A] court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 56). The amount by which the Crown might increase the annuity is a polycentric and discretionary determination that will inevitably reflect many social, economic, and policy considerations that may change over time, affecting the frequency and nature of net revenue and annuity calculations. Determining the amount of compensation owed for the past will involve similar considerations. I stress that courts are not incompetent or unable to entertain these considerations when necessary. Indeed, I acknowledge the jurisdiction of the courts to order compensation at Stage Three if appropriate to do so. However, I also recognize that courts are generally not well equipped to make polycentric choices or to "evaluate the wide-ranging consequences that flow from policy implementation" (*Doucet-Boudreau*, at para. 120, per LeBel and Deschamps JJ., dissenting; see generally *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 723-24). Accordingly, courts should exercise considerable caution before intervening in such circumstances.

[295] In this regard, I am mindful that in Stage Three of this trial, argued and taken under reserve in September 2023, the Superior plaintiffs claimed damages totalling approximately \$126 billion to compensate them for the Crown’s past breaches of the Augmentation Clause. This figure is equivalent to approximately two-thirds of the total reported annual revenue of the province of Ontario, from all sources, in the 2022-23 fiscal year (Minister of Finance, *2023 Ontario Economic Outlook and Fiscal Review — Building a Strong Ontario Together, Background Papers* (2023)). I hasten to emphasize that the magnitude of this figure in no way drives the remedy in this decision. Naturally, where the Crown has defaulted on its payment obligations for almost 150 years, the amount due will be substantial. The Anishinaabe signatories cannot now be short-changed by the Crown’s sticker shock, which is solely the result of the Crown’s own dishonourable neglect of its sacred treaty promises.

[296] At the same time, I have concluded that the Augmentation Clause constitutes a promise on the part of the Crown to *exercise its discretion* as to potential increases to the annuities beyond \$4 per person where it can do so without incurring loss. This discretion must be exercised honourably, but also in accordance with Her Majesty’s desire “to deal liberally and justly with all Her subjects” — to do justice to the Anishinaabe treaty partners and Her Majesty’s other “subjects”. Accordingly, in exercising its discretion, the Crown will have to engage in complex polycentric decision making that weighs the solemnity of its obligations to the Anishinaabe and the needs of other Ontarians and Canadians, Indigenous and non-Indigenous alike. This is



well within the expertise of the executive branch, but is much less within the expertise of the courts.

[297] These principles concerning the proper role of the courts dovetail with the idea that “[r]econciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences” (*First Nation of Nacho Nyak Dun*, at para. 4). As Lamer C.J. wrote in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, “it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve . . . a basic purpose of s. 35(1) — ‘the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown’” (para. 186; see also F. Hoehn, “The Duty to Negotiate and the Ethos of Reconciliation” (2020), 83 *Sask. L. Rev.* 1). As this Court has recognized in the duty to consult context, “[t]rue reconciliation is rarely, if ever, achieved in courtrooms” (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24; see also *Mikisew Cree 2018*, at para. 22).

[298] Even so, as my colleague Martin J. wisely observed during Ontario’s oral submissions before this Court, accountability most certainly *does* take place in a courtroom (transcript, day 1, at p. 9). Indeed, “judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance” (*First Nation of Nacho Nyak Dun*, at para. 34). As in the present case,

litigation may sometimes be the only way to bring an intransigent party to the negotiating table with a view to reaching a settlement and advancing reconciliation.

[299] Although it is not the business of the courts to force the Crown to exercise its discretion in a particular way, it is very much the business of the courts to review exercises of Crown discretion for constitutional compliance — to ensure that the Crown exercises its discretion in accordance with its treaty obligations and the constitutional principle of the honour of the Crown. It is appropriate in this case for this Court to order the government to repair the breach of its constitutional obligations, while leaving it up to the executive branch to determine the best means of doing so (see generally *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96; *Ardoch Algonquin First Nation v. Canada (Attorney General)*, 2003 FCA 473, [2004] 2 F.C.R. 108, at paras. 46-47, per Rothstein J.A. (as he then was)). While not a perfect analogy, a direction to this effect bears a family resemblance to an order in the nature of mandamus, insofar as it orders that discretion be exercised, without specifying exactly how (see D. J. M. Brown, J. M. Evans and A. J. Beatty, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 1:24; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at pp. 127-28; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), at pp. 767-68, aff'd [1994] 3 S.C.R. 1100; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, at para. 41).

(c) *Renewing the Treaty Relationship and Restoring the Crown's Honour*

[300] I am also guided by the fact that the Robinson Treaties were not *only* about securing land in exchange for a monetary annuity. As the trial judge found, “[f]rom the Anishinaabe perspective, the central goal of the treaty was to renew their relationship with the Crown” (Stage One reasons, at para. 412 (emphasis added)). For the Anishinaabe, “the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances” (para. 423). The Huron plaintiffs say this best: “What the Treaty promises is . . . an ‘ongoing relationship’ with procedural and substantive aspects. The Crown cannot fulfill its duty by paying an arbitrary sum of money without engaging its Treaty partner” (R.F., at para. 101 (emphasis added)). The Superior plaintiffs would be deprived of the relational aspect of the treaty if Stage Three of this litigation were to proceed as currently conceived. Accordingly, even though the Crown now concedes that it has breached the Augmentation Clause, Stage Three should not proceed directly to a traditional damages calculation.

[301] Of course, some may point out that the Crown has had almost 150 years to exercise its discretion and that, because of its failure to do so, compensation should now be available to the Superior plaintiffs in Stage Three immediately. Given the long history of this litigation and the dishonourable nature of the Crown’s breach of treaty, I am sympathetic to this view. Yet it bears repeating that the Augmentation Clause is not a promise to pay a certain sum of money. It is a promise by the Crown to consider increases beyond \$4 and, where appropriate, to exercise its discretion to increase the

annuities. At this stage, a judicially calculated damages award would remove from the treaty implementation any exercise of Crown discretion and engagement between treaty partners — the very essence of the treaty promise respecting increases beyond \$4. It would also fail to effectively renew the treaty relationship and restore the honour of the Crown.

[302] In my view, then, a court-calculated compensation award for past breaches in relation to the Superior plaintiffs is not *yet* an appropriate recourse. Instead, I would direct a narrow, time-bound window for negotiation, after which the Crown is (failing a settlement) required to exercise its discretion honourably in a manner consistent with these reasons and determine an amount of compensation. Such a remedy has greater potential to fulfill the purposes of the Augmentation Clause and hold the Crown to account for its breach of the treaty to date. This limited timeline for negotiation strikes a delicate balance between ensuring the Superior plaintiffs receive compensation without extensive delay and encouraging real restoration of the treaty relationship.

[303] Although I recognize that the augmentation promise does not expressly require the parties to negotiate and agree on an annuity increase, it is undeniable that negotiation and agreement outside the courts have better potential to renew the treaty relationship, advance reconciliation, and restore the honour of the Crown. After all, historic treaties represent the “establishment of a relationship of trust and mutual assistance” between Indigenous peoples and the Crown, but the details of that relationship “must be the object of permanent negotiations, in view of fleshing out the

general principles governing the relations between the two peoples” (S. Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (2013), at p. 286).

[304] Because of the considerations discussed above, I would declare the following:

1. Under the Augmentation Clause of the Robinson Treaties, the Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss.
2. If the Crown can increase the annuities without incurring loss, it must exercise its discretion as to whether to increase the annuities and, if so, by how much.
3. In carrying out these duties and in exercising its discretion, the Crown must act in a manner consistent with the honour of the Crown, including the duty of diligent implementation.
4. The Crown’s discretion must be exercised diligently, honourably, liberally, and justly. Its discretion is not unfettered and is subject to review by the courts.
5. The Crown dishonourably breached the Robinson Treaties by failing to diligently fulfill the Augmentation Clause.

6. The Crown is obliged to determine an amount of honourable compensation to the Superior plaintiffs for amounts owed under the annuities for the period between 1875 and the present.

[305] With a view to respecting the nature of the treaty promise, repairing the treaty relationship, restoring the honour of the Crown, and advancing reconciliation, I would also direct the Crown to engage *meaningfully* and *honourably* with the Superior plaintiffs in an attempt to arrive at a just settlement regarding past breaches. If such a settlement cannot be mutually agreed upon, the Crown will be obliged, within six months of the release of these reasons, to exercise its discretion and determine an amount to compensate for past breaches. Given that the Superior plaintiffs have now been waiting almost a century and a half for their treaty entitlement, the amount to be paid would not be stayed pending any potential review by the courts, and should be paid to the Superior plaintiffs within a reasonable period of time sufficient to allow for the necessary legislative approvals.

[306] To allow for the parties to take steps aimed at reconciliation and repairing the treaty relationship, I would also order that the stay imposed in respect of the Stage Three proceedings continue for an additional six months from the release of these reasons. If the Superior plaintiffs desire additional time to arrive at an honourable settlement with the Crown, it would be open to them to seek a further extension of the stay in the trial court. Given the long history of this litigation and the Crown's dishonourable conduct, it will not be open to the Crown to seek such an extension if

opposed by the Superior plaintiffs. If a further extension is granted, the Crown will have until the expiry of that extension to come to a negotiated agreement or to determine an amount of compensation.

[307] If a negotiated settlement regarding the past is not reached, the Superior plaintiffs may seek review before the courts of both the process the Crown has undertaken and the substantive amount it has determined as compensation. If Stage Three proceeds, it must of course be modified in accordance with these reasons.

[308] If the Crown has exercised its discretion liberally, justly, and honourably in determining compensation in respect of the past breaches, then the courts should not intervene. A reviewing court should allow the Crown, as decision-maker, a degree of deference in relation to its exercise of discretion (see Sharpe, at p. 221-22). In assessing the Crown's determination, the court must consider the Crown's submissions on how it reached its determination, and why, bearing in mind the Crown's expertise in making complex polycentric decisions and recognizing that the exercise of discretion may permit a range of honourable results. The court should focus on the justification of the Crown's determination, having regard to the honour of the Crown.

[309] Although this is by no means an exhaustive list, the court should consider the following factors when reviewing the amount that the Crown sets: (a) the nature and severity of the Crown's past breaches, including the Crown's neglect of its duties for close to a century and a half; (b) the number of Superior Anishinaabe and their needs; (c) the benefits the Crown has received from the ceded territories and its

expenses over time; (d) the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada; and (e) principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise under the treaty to share in the wealth of the land if it proved profitable.

[310] Given these directions, it should be apparent that Stage Three will not begin as an open-ended judicial assessment or quantification of damages for past breaches. Rather, Stage Three, if required, will begin as a review of the process in which the Crown has engaged and the substantive amount the Crown has determined as compensation to the Superior plaintiffs. However, if the court finds that the Crown's process or determination was not honourable, it may consider the appropriate remedy, including whether to remand the issue to the Crown for redetermination or set the amount to be paid by the Crown, lest the Crown continue to undermine the very object and purpose of the treaty promise. Although Stage Three has proceeded on the basis of an incorrect interpretation of the Robinson Treaties, it would be open to the parties to rely on some of the evidence already adduced before the trial judge to inform the court's review of the Crown's exercise of discretion.

## VI. Disposition

[311] I would allow Ontario's appeals in part, dismiss the Huron and Superior plaintiffs' cross-appeals, grant a declaration as set out in para. 304 of these reasons, and provide the directions set out in paras. 305-10. I would grant the Huron and Superior plaintiffs their costs of the appeals and cross-appeals on a solicitor-client basis.



## Appendix — Text of the Robinson Treaties

As reproduced in Canada, *Indian Treaties and Surrenders: From 1680 to 1890 — In Two Volumes* (1891), vol. I, at pp. 147-52:

### **The Robinson-Huron Treaty (1850)**

This Agreement, made and entered into this ninth day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault St. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Shinguacouse Nebenaigoching, Keokouse, Mishequonga, Tagawinini, Shabokeshick, Dokis, Ponekeosh, Windawtegowinini, Shawenakeshick, Namassin, Naoquagabo, Wabakekek, Kitchipossegun by Papasainse, Wagemaki, Pamequonaishumg, Chiefs, and John Bell, Paqwutchinini, Mashekyash, Idowekeesis, Waquacomiek, Ocheek, Metigomin, Watachewana, Minwawapenasse, Shenoquom, Ouingegun, Panaissy, Papasainse, Ashewasega, Kageshewawetung, Shawonebin and also Chief Maisquaso (also Chiefs Muckata, Mishoquet and Mekis), and Mishoquetto, and Asa Waswanay and Pawiss, Principal Men of the Ojibeway Indians inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honorable Hudson's Bay Company from Canada, as well as all unconceded lands within the limits of Canada West to which they have any just claim, of the other part, Witnesseth: that for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the 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; they the said Chiefs and Principal Men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors for ever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their tribes in common for their own use and benefit; and should the said Chiefs and their respective tribes at any time desire to dispose of any part of such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit and to the best advantage. And the said William Benjamin Robinson, of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make or cause to be made the payments as before mentioned; and further, to allow the

said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General of Indian Affairs, or other officer of like authority, being first had and obtained; nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree that in case the Government of this Province should, before the date of this agreement, have sold, or bargained to sell, any mining locations or other property on the portions of the territory hereby reserved for their use, then and in that case such sale or promise of sale shall be perfected by the Government, if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs. The said William Benjamin Robinson, on behalf of Her Majesty, Who desires to deal liberally and justly with all Her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-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.

The said William Benjamin Robinson, of the first part, further agrees on the part of Her Majesty and the Government of this Province that in consequence of the Indians inhabiting French River and Lake Nipissing having become parties to this treaty the further sum of one hundred and sixty pounds Provincial currency shall be paid in addition to the two thousand pounds above mentioned.

Schedule of reservations made by the above named subscribing Chiefs and Principal Men:—

1st. Pamequonaishcung and his band, a tract of land to commence seven miles from the mouth of the River Maganetawang and extending six miles east and west by three miles north.

2nd. Wagemake and his band, a tract of land to commence at a place called Nehickshegeshing, six miles from east to west by three miles in depth.

3rd. Kitcheposkissegun (by Papasainse), from Point Grondine, westward, six miles inland by two miles in front, so as to include the small Lake Nessinassung (a tract for themselves and their bands).

4th. Wabakekik, three miles front, near Shebawenaning, by five miles inland, for himself and band.

5th. Namassin and Naoquagabo and their bands, a tract of land commencing near La Cloche, at the Hudson Bay Company's boundary; thence westerly to the mouth of Spanish River; then four miles up the south bank of said river and across to the place of beginning.

6th. Shawinakeshick and his band, a tract of land now occupied by them and contained between two rivers called White Fish River and Wanabitasebe, seven miles inland.

7th. Windawtegowinini and his band, the peninsula east of Serpent River and formed by it, now occupied by them.

8th. Ponekeosh and his band, the land contained between the River Mississaga and the River Penebewabecong, up to the first rapids.

9th. Dokis and his band, three miles square at Wanabeyakoknun, near Lake Nipissing, and the island near the fall of Okickendawt.

10th. Shabokishick and his band, from their present planting grounds on Lake Nipissing to the Hudson Bay Company's post, six miles in depth.

11th. Tagawinini and his band, two miles square at Wanabitibing — a place about forty miles inland, near Lake Nipissing.

12th. Keokonse and his band, four miles from Thessalon River eastward by four miles inland.

13th. Mishequanga and his band, two miles on the lake shore, east and west of Ogawaminang, by one mile inland.

14th. For Shinguacouse and his band, a tract of land extending from Maskinongé Bay, inclusive, to Partridge Point, above Garden River, on the front, and inland ten miles throughout the whole distance, and also Squirrel Island.

15th. For Nebenaigoching and his band, a tract of land (extending from Wanabekinegunning west of Gros Cap to the boundary of the lands ceded by the Chiefs of Lake Superior, and inland ten miles throughout the whole distance, including

Batchewanaung Bay), and also the small island at Sault Ste. Marie used by them as a fishing station.

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Reservations continued:—

For Chief Mekis and his band, residing at Wasaquising (Sandy Island), a tract of land at a place on the main shore opposite the island, being the place now occupied by them for residence and cultivation, four miles square.

For Chief Muckata Mishaquet and his band, a tract of land on the east side of the River Naishcouteong, near Pointe aux Barils, three miles square, and also a small tract in Washanwenega Bay, now occupied by a part of the band, three miles square.

### **The Robinson-Superior Treaty (1850)**

This Agreement, made and entered into on the seventh day of September in the year of Our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Joseph Peau de Chat, John Ininway, Mismuckqua, Totomenai, Chiefs, and Jacob Wasseba, Ahmutchewagaton, Michel Shebageshick, Manitoshanise and Chigenaus, Principal Men of the Ojibeway Indians inhabiting the northern shore of Lake Superior, in the said Province of Canada, from Batchewanaung Bay to Pigeon River, at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the charter of the Honorable the Hudson's Bay Company from the said tract. And also the islands in the said lake within the boundaries of the British possessions therein, of the other part, Witnesseth: that for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer, not later than the first day of August, at the Honorable the Hudson's Bay Company's Posts of Michipicoton and Fort William; they, the said Chiefs and Principal Men do freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said Chiefs and their tribes in common for the purposes of residence and cultivation. And should the said Chiefs and their respective tribes at any time desire to dispose of any mineral or other valuable productions upon the said reservations the same will be at their request sold by order of the Superintendent General of the Indian Department for the time being, for their sole use and benefit and to the best advantage. And the said William Benjamin

Robinson, of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make the payments as before mentioned; and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General of Indian Affairs being first had and obtained; nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree that in case the Government of this Province, should before the date of this agreement, have sold or bargained to sell any mining locations or other property on the portions of the territory hereby reserved for their use and benefit, then and in that case such sale or promise of sale shall be perfected if the parties interested desire it, by the Government, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs. The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided, further, that the number of Indians entitled to the benefit of this Treaty shall amount to two-thirds of their present number (which is twelve hundred and forty), to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty, the annuity shall be diminished in proportion to their actual numbers.

Schedule of reservations made by the above named and subscribing Chiefs and Principal Men:—

First.—Joseph Peau de Chat and his tribe, the reserve to commence about two miles from Fort William (inland) on the right bank of the River Kiminitiquia; thence westerly six miles parallel to the shores of the lake; thence northerly five miles; thence easterly to the right bank of the said river, so as not to interfere with any acquired rights of the Honorable the Hudson's Bay Company.

Second.—Four miles square at Gros Cap, being a valley near the Honorable Hudson's Bay Company's post of Michipicoton for Totomenai and tribe.

Third.—Four miles square on Gull River, near Lake Nipigon, on both sides of said river, for the Chief Mishe-muckqua and tribe.

*Appeals allowed in part and cross-appeals dismissed.*

*Solicitors for the appellants/respondents on cross-appeal the Attorney General of Ontario and His Majesty The King in Right of Ontario: Lenczner Slaght, Toronto; Ministry of the Attorney General — Crown Law Office — Civil, Toronto.*

*Solicitors for the respondents/appellants on cross-appeal 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: Nahwegahbow Corbiere, Rama, Ont.; Arvay Finlay, Victoria.*

*Solicitors for the respondents/appellants on cross-appeal the Chief and Council of the Red Rock First Nation, on behalf of the Red Rock First Nation Band of Indians, and the Chief and Council of the Whitesand First Nation, on behalf of the Whitesand First Nation Band of Indians: Duboff Edwards Schachter Law Corporation, Winnipeg.*

*Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada — Department of Justice Canada, Ottawa.*

*Solicitors for the intervener the Attorney General of New Brunswick: Cox & Palmer, Saint John.*

*Solicitors for the intervener the Biigtigong Nishnaabeg First Nation (also known as the Begetikong Anishnabe First Nation or the Ojibways of the Pic River First Nation): Stockwoods, Toronto.*

*Solicitors for the intervener the Halfway River First Nation: Devlin Gailus Watson, Victoria.*

*Solicitors for the intervener the Federation of Sovereign Indigenous Nations: Maurice Law, Calgary.*

*Solicitors for the intervener Atikameksheng Anishnawbek: Maurice Law, Calgary.*

*Solicitors for the intervener Manitoba Keewatinowi Okimakanak Inc.: Jerch Law, Winnipeg.*

*Solicitors for the intervener the Carry the Kettle Nakoda Nation: Maurice Law, Calgary.*

*Solicitors for the intervener the Assembly of Manitoba Chiefs: Fox, Calgary.*

*Solicitors for the intervener the Anishinabek Nation: First Peoples Law, Ottawa.*

*Solicitors for the interveners Teme-Augama Anishnabai and the Temagami First Nation: First Peoples Law, Vancouver.*

*Solicitors for the interveners the Union of British Columbia Indian Chiefs, the Nlaka 'pamux Nation Tribal Council, the Chawathil First Nation, the High Bar First Nation, the Neskonlith Indian Band, the Penticton Indian Band, the Skuppah Indian Band and the Upper Nicola Band: Mandell Pinder, Vancouver.*

*Solicitors for the intervener the Indigenous Bar Association in Canada: Pape Salter Teillet, Toronto.*

*Solicitors for the intervener the West Moberly First Nations: Camp Fiorante Matthews Mogerma, Vancouver.*

*Solicitors for the intervener the Athabasca Tribal Council Ltd.: Thompson, Laboucan & Epp, Edmonton.*

*Solicitors for the intervener the Tsawout First Nation: DGW Law Corporation, Victoria.*

*Solicitors for the intervener the Kee Tas Kee Now Tribal Council: Olthuis, Kleer, Townshend, Toronto.*



*Solicitors for the interveners the Saugeen First Nation and the Chippewas of Nawash Unceded First Nation: Olthuis, Kler, Townshend, Toronto.*

*Solicitors for the intervener the Grassy Narrows First Nation: Cavalluzzo, Toronto.*

*Solicitor for the intervener the Assembly of First Nations: Assembly of First Nations, Ottawa.*

*Solicitors for the intervener the Namaygoosisagagun Community (who refer to themselves as the Namaygoosisagagun Ojibway Nation): Falconers, Toronto.*