Court File No. 2001 – 0673

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CHIEF and COUNCIL OF RED ROCK FIRST NATION, on behalf of the RED ROCK FIRST NATION BAND OF INDIANS, THE CHIEF and COUNCIL of the WHITESAND FIRST NATION on behalf of the WHITESAND FIRST NATION BAND OF INDIANS and the RED ROCK FIRST NATION and the WHITESAND FIRST NATION as representative plaintiffs on behalf of all Robinson Superior Treaty Beneficiaries other than those First Nations and their members who claim not to be Robinson Superior Treaty Beneficiaries

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, and HIS MAJESTY THE KING IN RIGHT MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants

KIASHKE ZAAGING ANISHINAABEK (also known as GULL BAY FIRST NATION), FORT WILLIAM FIRST NATION, MICHIPICOTEN FIRST NATION, BIIGTIGONG NISHNAABEG FIRST NATION (also known as BEGETIKONG ANISHNABE FIRST NATION OR OJIBWAYS OF THE PIC RIVER FIRST NATION), NETMIZAAGGAMIG NISHNAABEG FIRST NATION (also known as PIC MOBERT FIRST NATION), PAYS PLAT FIRST NATION, LONG LAKE NO. 58 FIRST NATION, BINGWI NEYAASHI ANISHINAABEK (formerly known as SAND POINT FIRST NATION), BIINJITIWAABIK ZAAGING ANISHINAABEK (formerly ROCKY BAY FIRST NATION), and ANIMBIIGOO ZAAGI'IGAN ANISHINAABEK FIRST NATION

Added Party Plaintiffs

NOTICE OF REVIEW FOR CONSTITUTIONAL COMPLIANCE

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Court File No. CV-01-0673

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CHIEF and COUNCIL OF RED ROCK FIRST NATION, on behalf of the RED ROCK FIRST NATION BAND OF INDIANS, THE CHIEF and COUNCIL OF THE WHITESAND FIRST NATION on behalf of the WHITESAND FIRST NATION BAND OF INDIANS as representative plaintiffs on behalf of all Robinson Superior Treaty Beneficiaries other than those First Nations and their members who claim not to be Robinson Superior Treaty Beneficiaries

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA, and HIS MAJESTY THE KING IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF ONTARIO as representing HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants

and

KIASHKE ZAAGING ANISHINAABEK (GULL BAY FIRST NATION), FORT WILLIAM FIRST NATION, MICHIPICOTEN FIRST NATION, BIIGTIGONG NISHNAABEG FIRST NATION (also known as BEGETIKONG ANISHNABE FIRST NATION OR OJIBWAYS OF THE PIC RIVER FIRST NATION), NETMIZAAGGAMIG NISHNAABEG FIRST NATION (also known as PIC MOBERT FIRST NATION), PAYS PLAT FIRST NATION, LONG LAKE NO. 58 FIRST NATION, BINGWI NEYAASHI ANISHINAABEK (formerly known as SAND POINT FIRST NATION), BIINJITIWAABIK ZAAGING ANISHINAABEK (formerly ROCKY BAY FIRST NATION), and ANIMBIIGOO ZAAGI'IGAN ANISHINAABEK FIRST NATION

Added Party Plaintiffs

NOTICE OF REVIEW FOR CONSTITUTIONAL COMPLIANCE

PART I - INTRODUCTION

1. Pursuant to the decision of the Supreme Court of Canada in *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 (“***Restoule***”), the plaintiffs, Red Rock First Nation (also known as Red Rock

Indian Band or "**Red Rock**"), Whitesand First Nation ("**Whitesand**"), and the added party plaintiffs, Kiashke Zaaging Anishinaabek (Gull Bay First Nation), Fort William First Nation, Michipicoten First Nation, Biigtigong Nishnaabeg First Nation (also known as Begetikong Anishnabe First Nation or Ojibways of the Pic River First Nation), Netmizaaggamig Nishnaabeg First Nation (also known as Pic Mobert First Nation), Pays Plat First Nation, Long Lake No. 58 First Nation, Bingwi Neyaashi Anishinaabek (formerly known as Sand Point First Nation), Biinjitiwaabik Zaaging Anishinaabek (formerly Rocky Bay First Nation), and Animbiigoo Zaagi'igan Anishinaabek First Nation (collectively, the "**Superior Anishinaabe First Nations**") [1] seek review for constitutional compliance of:

a) The process in which the Crown[2] has engaged with the Superior Anishinaabe First Nations which the Supreme Court of Canada (the "**Supreme Court**") mandated as a potential means of arriving at an agreed upon liberal, just, and honourable compensation amount to be paid by the Crown for past breaches of the augmentation clause of the Robinson Superior Treaty of 1850 (the "**Treaty**"); and

b) The substantive amount the Crown has determined as compensation[3] for its longstanding, egregious, and dishonourable breach of its sacred treaty promise to share in the wealth of the Treaty

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[1] The Superior Anishinaabe First Nations are comprised of two groups: (1) Red Rock First Nation, Whitesand First Nation, Kiashke Zaaging Anishinaabek (Gull Bay First Nation), Fort William First Nation, Michipicoten First Nation and Animbiigoo Zaagi'igan Anishinaabek First Nation, each of which was either represented at the Treaty Council in 1850 or has since adhered to the Treaty (the "**Treaty Beneficiary First Nations**"); and (2) Biigtigong Nishnaabeg First Nation, Netmizaaggamig Nishnaabeg First Nation, Pays Plat First Nation, Long Lake No. 58 First Nation, Bingwi Neyaashi Anishinaabek and Biinjitiwaabik Zaaging Anishinaabek, each of which maintains an unextinguished Aboriginal title claim in relation to lands that the Crown claims to have been ceded (the "**Contingent Interest First Nations**").

[2] The "Crown" is comprised of the two Defendants, His Majesty the King in Right of Canada ("**Canada**") and His Majesty the King in Right of Ontario ("**Ontario**").

[3] This amount is set out in the **Canada Decision** and the **Ontario Decision**, defined in paragraph 28 and which are the subjects of this review for constitutional compliance.

territory if it proved profitable, which promise ought to have been diligently implemented in the past by way of augmented annuities under the Treaty.

2. It is anticipated that this review will be heard in the traditional territory of the Superior Anishinaabe First Nations at Thunder Bay, Ontario, during the weeks of June 2 through 6 and June 9 through 13, with additional time for hearing on June 18, 19 and 20, 2025, if necessary.

3. This Notice only seeks relief in respect of the review of the Crown's exercise of discretion regarding past compensation. It does not address any of the remaining Stage 3 issues that still require adjudication.

4. This Notice requests relief within the review process as against the Crown in two stages (Stages "A" and "B") to avoid any conflict amongst the Superior Anishinaabe First Nations in pursuing the relief in Stage "A".

PART II - RELIEF REQUESTED AS PART OF THE CONSTITUTIONAL REVIEW

Stage "A" Relief

5. The Superior Anishinaabe First Nations seek the following relief from this Court:

(a) A declaration that the process undertaken by the Crown to engage with the Superior Anishinaabe First Nations in an attempt to arrive at a just settlement regarding past breaches was not liberal, just, honourable, or justified, and did not comply with its obligations pursuant to s. 35 of the *Constitution Act, 1982* and was not constitutionally compliant;

(b) A declaration that the substantive amount of compensation of $3.6 billion that the Crown has determined on January 27, 2025, in its discretion, as compensation for its

past breaches of the Treaty's annuity augmentation promise to December 31, 2024, is not liberal, just, honourable, or justified, and does not comply with its obligations pursuant to s. 35 of the *Constitution Act, 1982* and is not constitutionally compliant;

(c) An order requiring the Crown to pay, in addition to the $3.6 billion, an additional amount in compensation for the past breaches of the Treaty's annuity augmentation promise, in an amount to be decided by the Court, that is liberal, just, and honourable and consistent with the Crown's obligations pursuant to s. 35 of the *Constitution Act, 1982,* in the following manner:

(i) An order that the amount identified as compensation under (c) above is to be allocated amongst the 12 Superior Anishinaabe First Nations in accordance with the percentages set forth in this Court's Intervention Order of the "Group of 7",[4] and Amended Claim, Intervention and Representation Order, both dated February 17, 2022;

(ii) An order that the share for the Treaty Beneficiary First Nations shall be paid to them within a reasonable period of time sufficient to allow for any required legislative approvals;

(iii) A declaration regarding the share of the Contingent Interest First Nations, on terms to be provided by the Contingent Interest First Nations;

[4] The "Group of 7" consisted of the the current Contingent Interest First Nations and Animbiigoo Zaagi'igan Anishinaabek First Nation, which has since become a Treaty Beneficiary First Nation.

(d) An order requiring the Crown to pay, in addition to any amount identified in (c) above, additional compensation to Whitesand and Red Rock, in an amount to be decided by the Court, that is liberal, just, and, honourable and consistent with the Crown's obligations pursuant to s. 35 of the *Constitution Act, 1982*, to recognize the unique losses experienced by Whitesand and Red Rock that are over and above and different than the losses suffered in common with the other 10 Superior Anishinaabe First Nations;

(e) In the alternative to (c) and (d), an order requiring the Crown to exercise its discretion regarding the amounts to be paid for compensation for past breaches in accordance with this Court's reasons;

(f) An order requiring the Crown to pay, by way of compensation for its longstanding and egregious breaches of the Treaty's annuity augmentation clause, an amount that will fully indemnify each of the 12 Superior Anishinaabe First Nations for all their fair and reasonable expenses of participating in these Court proceedings and the Supreme Court mandated negotiation and engagement process that are greater than $40 million, including their fair and reasonable legal fees and disbursements,[5] but only to the extent that such expenses are identified by the Court in Stage "B" of the review process as being fair and reasonable; and

(g) Costs of this review proceeding on a full indemnity basis.

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[5] The legal fees and disbursements sought to be included in the claim to full indemnity is not simply a reference to court costs that might be payable by a losing party under the rules of court, generally pursuant to a Rule 57 costs determination.

Stage "B" Relief

(h) If the Crown is ordered to pay full indemnity of all fair and reasonable expenses by way of compensation in Stage "A", an order quantifying those fair and reasonable expenses greater than $40 million, including a determination of the fair and reasonable fees claimed by legal counsel;

(i) If the Crown is not ordered to pay full indemnity of all fair and reasonable expenses by way of compensation in Stage "A", an order quantifying what part of those full indemnity expenses claimed that are greater than $40 million dollars, if any, are to be paid by the Crown as part of a costs award in respect of the past court proceedings including Stage 3 and the negotiation and engagement process; and

(j) An order quantifying the Court costs of the Superior Anishinaabe First Nations of these review proceedings.

PART III - SUMMARY OF FACTS

6. The Treaty provided, among other matters, for payment to the "Chiefs and their Tribes" of a lump sum collective perpetual annuity that would be augmented from time to time, if the Crown could do so without incurring loss (the "**Augmentation Clause**")[6].

7. The Supreme Court identified the annuity and Augmentation Clause as a sacred promise to share in the wealth of the land (the Treaty territory) if it proved profitable.

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[6] The full text of the augmentation clause as set forth in the Treaty document itself is set out at para. 43 of *Restoule*.

8. Over the 175 years since the signing of the Treaty, the Crown has consistently and egregiously breached the Treaty promise to augment the annuity. The annuity was raised just once – in 1875, from $1.61 per person to $4.00 per person.

9. Despite the fact that the economic conditions permitting the Crown to advert to increases in the annuity existed in the past, the Crown never turned its mind to augmenting the annuity above $4 per person.

10. Further, despite the fact that the annuity was payable to the "Chiefs and their tribes", Canada has only paid the $4 annuity to individual members of the First Nations (or through the Hudson's Bay Company to the heads of families for their members for the first decades after the Treaty).

A. THE SUPREME COURT DECISION

11. In interpreting the Augmentation Clause, the Supreme Court decided that:

(a) The Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss.

(b) 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.

(c) 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.

(d) The Crown's discretion must be exercised diligently, honourably, liberally, and justly, and in accordance with the Anishinaabe principles underlying the Treaty

(respect, responsibility, reciprocity, and renewal). Its discretion is not unfettered and is subject to review by the courts.

12. The Supreme Court concluded that, by failing to ever consider increases above $4, despite the economic condition being satisfied, the Crown was in egregious and longstanding breach of both the Treaty itself and the duty of diligent implementation. In particular, the Court observed:

(a) The Crown has shown "a persistent pattern of indifference" (para. 3);

(b) "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'." (para. 262);

(c) "For almost a century and a half, the Anishinaabe have been left with an empty shell of a treaty promise." (para. 11);

(d) "The Crown has severely undermined both the spirit and substance of the [Treaty]." (para. 286).

13. To remedy these egregious breaches, the Court ordered the Crown to *meaningfully* and *honourably* engage with the Superior Anishinaabe First Nations over a six-month period to attempt to reach a negotiated settlement on an amount to be paid to compensate the First Nations for the breaches of both the Treaty's Augmentation Clause and the duty of diligent implementation of the Treaty. The Supreme Court instructed the Treaty partners to negotiate past compensation in a manner consistent with the goal of reconciliation and quantified in a manner that considers increases in the

annuity beyond $4 per person retrospectively.[7] If the parties could not reach an agreement, the Crown was required to exercise its discretion and determine an amount to compensate for its past breaches, within six months of the release of the Supreme Court's reasons.

14. The Supreme Court also decided that if a negotiated settlement regarding past compensation is not reached, the Superior Anishinaabe First Nations may seek review before this Court of both the process the Crown has undertaken and the substantive amount it has determined as past compensation through the Crown's exercise of discretion.

15. The Supreme Court contemplated that the parties would rely on "the evidence already adduced before the trial judge to inform the court's review of the Crown's exercise of discretion".[8]

16. In determining the amount to be set as liberal, just, and honourable compensation for past breaches, the Supreme Court directed the Crown to consider the following non-exhaustive factors:

(a) The nature and severity of the breaches ("**Factor 1**"),

(b) The number of Anishinaabe and their needs ("**Factor 2**"),

(c) The benefits the Crown has received from the ceded territories and its expenses over time ("**Factor 3**"),

(d) The wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada ("**Factor 4**"), and

(e) 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 ("**Factor 5**").

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[7] *Restoule*, at para. 10.
[8] *Restoule*, at para. 310.

B. THE NEGOTIATION AND ENGAGEMENT PROCESS

17. The Superior Anishinaabe First Nations proposed two tracks for the time-bound and honourable negotiation and engagement process directed by the Supreme Court. The first was to heed the Supreme Court's direction to "return to the council fire and rekindle the perpetual relationship" of the Treaty, in accordance with Anishinaabe protocols and traditions.[9]

18. The second would involve detailed negotiations between representatives of Canada and Ontario and a team representing the Superior Anishinaabe First Nations, made up of five Chiefs, one Councillor, and two legal teams. Despite the flexibility and dedication of the Superior Anishinaabe First Nations, their quest for a just result on both tracks faced serious setbacks.

19. The parties met for one Council Fire between the Superior Anishinaabe First Nations Chiefs and the responsible Ministers from both Canada and Ontario at the Old Whitesand Reserve on September 15, 2024. The Council Fire was truncated by the Ministers' travel schedules and compromised by their lack of authority to make binding commitments at the time.

20. Despite numerous invitations from the Superior Anishinaabe First Nations, the Ministers were unable to coordinate and commit to another Council Fire meeting before the end of 2024. Ultimately, the Ministers joined in the negotiation meetings for 2.5 days in January 2025.

21. The negotiation and engagement process began on August 13, 2024. The parties met 27 times in person and by videoconference, including in-person meetings over 18 days in Toronto and Thunder Bay. Most of these meetings were all-day meetings facilitated by a neutral party

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[9] *Restoule*, para. 13: "[I]t should be clear that Ontario and Canada must act *now* to respect their treaty promises to the Anishinaabe … 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."

proposed by the Superior Anishinaabe First Nations, the former Clerk of the Privy Council and former High Commissioner to the United Kingdom, Janice Charette.

22. The parties also exchanged detailed correspondence setting out their respective positions. They were guided in their discussions by the record from the proceedings before this Court, and the records from all appeal courts, with emphasis on the Stage 3 trial evidence. The majority of this process occurred "on the record" with the expectation that this Court may be called upon to review what had occurred.

23. Throughout this process, the Chiefs and Councillor representing the First Nations repeatedly expressed their frustration that the Crown representatives were not meaningfully negotiating with them. In particular, the Chiefs and Councillor took issue with the Crown representatives' position that they could not formalize agreements on particular issues or make compromises that the Crowns claimed would "fetter the discretion" of the Ministers. Further, the Crown representatives often expressed that they did not have the authority to take formal positions in the meetings and could simply report to the true "decision makers" and seek instructions.

24. The Superior Anishinaabe First Nations had envisioned a meaningful negotiation process of back and forth, and give and take between the parties. Instead, they expressed that they were simply given the opportunity to "blow off steam".

25. On December 20, 2024, Canada and Ontario made on-the-record settlement offers to the Superior Anishinaabe First Nations of $1.5 billion each.[10] Each offer was made contingent on the

[10] Canada's offer was exclusive of costs, which it stated could be agreed upon or assessed by the Court. Ontario's offer was inclusive of costs.

other government making an offer that matched or exceeded the amount. Canada's offer included an explanation. Ontario's explanation followed on December 27, 2024.

26. The Superior Anishinaabe First Nations counteroffered with a settlement for $35.696 billion, exclusive of costs, on January 7, 2025, on the record, following up with a written explanation on January 11, 2025.

27. The Superior Anishinaabe First Nations then proposed an "off the record" mediation with Ms. Charette serving as the mediator. This occurred on January 22-23, 2025 with the Ministers in attendance (or available virtually) throughout.

28. No settlement was reached. On January 27, 2025, the Crown exercised its discretion and set the amount to compensate the Superior Anishinaabe First Nations for past breaches. It did so by way of letters from Canada's Minister for Crown-Indigenous Relations and Northern Affairs (the "**Canada Decision**") and from Ontario's Minister of Indigenous Affairs and First Nations Economic Reconciliation (the "**Ontario Decision**").

PART IV - STANDARD OF REVIEW

29. The issue for this Court in its review of the Crown's exercise of discretion is whether the amount of compensation for past breaches, and the negotiation and engagement process that led to it, are compliant with the Crown's Treaty obligations, as protected by s. 35 of the *Constitution Act, 1982* and the honour of the Crown, itself a constitutional principle.

30. The Court must determine whether the Crown has exercised its discretion liberally, justly, and honourably in determining compensation in respect of the past breaches to ensure that the

Crown acts in accordance with its Treaty obligations and the constitutional principle of the honor of the Crown.

31. The Superior Anishinaabe First Nations submit that the Crown's exercise of discretion and its participation in the negotiation and engagement process has fallen far short of its constitutional obligations. It has failed to restore the honour of the Crown and provide just compensation for its longstanding and egregious breaches of the Treaty augmentation promise. It is not consistent with reconciliation.

32. After 175 long and difficult years for the Superior Anishinaabe First Nations, a just remedy is long overdue. It is time for this Court to step in and require the Crown to honour its Treaty promise.

33. The review that the Court is now called upon to conduct is a *sui generis* review process designed by the Supreme Court with respect to the Constitution, the Treaty right at issue, and the longstanding and egregious nature of the Crown's breaches. Its purpose is to ensure the Crown acts in accordance with both its honour, and the Superior Anishinaabe First Nation's constitutionally protected Treaty right.

34. A correctness standard applies to questions regarding the Crown's obligations under the Treaty, and the honour of the Crown. Both are constitutional principles.

35. A correctness standard also applies to questions regarding the implementation of the Treaty obligation that have the effect of defining or limiting the nature, scope or content of the Treaty right in question.

36. This includes questions related to the “form, level, and aim of the sharing that the augmentation clause requires”, which “must 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”. This is “the task of reconciliation”.[11]

37. In judging the Crown’s discretionary determinations, no deference is warranted in respect of the Crown’s views, interpretation, or determinations of past historical facts, such as whether there were net Crown benefits to be shared, based on relevant revenues and expenses. Historical facts are not a matter of Crown discretion. The Crown’s discretion does not allow it to rewrite history.

38. Where the Crown has exercised its discretion based on an incorrect interpretation of its obligations under the Treaty or the principle of the honour of the Crown, the result cannot be just, honourable, or constitutional. It is the courts – not the Crown – who must define what the Constitution requires. These questions must be answered correctly.

39. Where the Crown has correctly recognized the nature, scope, and content of the Treaty right and the requirements of the honour of the Crown, and considers only relevant facts, it is entitled a degree of deference in the exercise of its discretion where the discretionary decision involves complex polycentric decision-making. Nevertheless, the exercise of discretion must still be justified and justifiable, in accordance with the Treaty right, the honour of the Crown, and the principle of reconciliation.

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[11] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, at para. 180.

PART V - GROUNDS OF REVIEW

A. THE CROWN HAS MISCONSTRUED ITS EXERCISE OF DISCRETION AND FAILED TO ACCOUNT FOR THE LOSSES SUFFERED BY THE SUPERIOR ANISHINAABE FIRST NATIONS

40. Compensation that facilitates reconciliation must restore to the Superior Anishinaabe First Nations what they lost as a result of the Crown's dishonourable conduct for 175 years. However, in their explanations for their exercises of discretion, Canada and Ontario fail to remedy the losses actually suffered by the Superior Anishinaabe First Nations – in fact, they incorrectly take the position that this is not a goal of the compensation.

41. The Crown – and in particular Ontario – have worked hard to construct a framework for their discretion by which they can effectively ignore the First Nation's losses. These losses were caused by the Crown's failure to diligently implement the Augmentation Clause in the past. It has misconstrued and misunderstood the purpose of its exercise of discretion.

42. By only considering the *present* needs of the Superior Anishinaabe First Nations – and ignoring their past losses, including the losses and needs of past members who lived in poverty and died after leading shortened lives without ever seeing the promise of the Treaty fulfilled – both Ontario and Canada are giving themselves credit for the longstanding nature of their breaches.

43. The Superior Anishinaabe First Nations accept that one purpose of the Crown's exercise of discretion, especially as it relates to breaches of duties flowing from the honour of the Crown, must be "reconciliatory justice". The Superior Anishinaabe First Nations also accept that the requirements and goals of reconciliatory justice can differ from those of "corrective justice" in civil litigation. However, Ontario has inappropriately constructed a Crown-centric view of

reconciliatory justice that seeks to benefit itself. It cannot be that reconciliatory justice is something *less than* corrective justice.

44. The Crown's refusal to reckon with the losses that it has inflicted on the Superior Anishinaabe people is most apparent in their refusal to employ a bring forward rate that accounts for the lost opportunity costs. Both Ontario and Canada erroneously, and dishonourably, apply the long-term government bond rate. This bring forward rate is insufficient as it ignores what the Superior Anishinaabe First Nations were deprived of by the Crown's refusal to diligently implement the Treaty promise and provide augmented annuities when they were due: the ability to have invested and spent those past increased annuities for the benefit of their communities.

45. In selecting the bond rate and rejecting the rates put forward by the Superior Anishinaabe First Nations, both Ontario and Canada rely on technical arguments relating to the availability of equity markets in the past and the "risk premium" of equities. In doing so, they have entirely misconstrued, ignored or disregarded the unchallenged evidence of the Chiefs both from Stage 3 and the negotiation and engagement process, as well as the expert evidence.

B. THE CROWN FAILED TO PROPERLY ACCOUNT FOR INDIRECT FINANCIAL BENEFITS

46. A just, liberal, and honourable compensation amount would properly account for *all* of the benefits that the Crown obtained from the Treaty territory, regardless of how these benefits are categorized or collected by the Crown. Canada and Ontario have failed to do so.

47. All experts who testified regarding this issue at the Stage 3 trial agreed that the Crown collects certain financial benefits from the resources of the territory and beyond the net Crown resource revenues ("**NCRRs**"). These indirect financial benefits take different forms, notably taxes

on the profits of companies and individuals involved in the resource extraction industries. All parties accept and acknowledge these principles.

48. Nevertheless, Canada entirely ignores these indirect financial benefits in its quantification of compensation. Instead, it bases compensation entirely on the NCRRs. This explanation is deeply flawed.

49. Unlike Canada, Ontario properly accepts that it must account for its indirect financial benefits from the resources of the territory. However, the manner in which Ontario does so is unreasonable, arbitrary, and inconsistent with a liberal and just reading of the Treaty promise.

50. While claiming that the Superior Anishinaabe First Nations did not provide adequate support for their quantification of the Crown's indirect financial benefits, Ontario then arbitrarily decides to use a top up of 25% of the amount of their flawed NCRR calculation with no rationale whatsoever. Moreover, by linking indirect benefits to a portion of direct revenues, Ontario's approach risks assigning a value of zero to indirect benefits in the future, if the Crown shifts entirely to tax-based revenue collection from the Treaty territory or if they continue to maintain that, since 1962, there has been no NCRRs to share. Such an approach is neither justified nor justifiable.

C. THE CROWN HAS FAILED TO PROPERLY DETERMINE THE BENEFITS RECEIVED FROM THE TERRITORY

51. The Crown's approach to assessing the compensation owed to the Superior Anishinaabe First Nations is further undermined by its failure to arrive at a consistent and reasonable determination of the benefits received from the Treaty territory. Instead of engaging in a principled and coherent assessment, Canada and Ontario have adopted conflicting methodologies that result

in vastly different estimates of the benefits the Crown derived from the Treaty territory. This effectively results in the Treaty promise bearing two different meanings, something not contemplated in 1850 or anytime thereafter.

52. Canada, relying solely on NCRR calculations that exclude any portion of revenues indirectly captured by the Crown through mostly taxation, estimates the shareable wealth to be between $5.5 billion and $11.132 billion. Ontario, in contrast, revises Prof. Boadway's and Prof. Smart's NCRR calculations and arrives at an adjusted NCRR amount of $2.7 billion, and assigns an arbitrary amount of $675 million for indirect revenues, to arrive at a significantly lower shareable wealth of $3.375 billion.

53. The inconsistency between their approaches results, even at the unjustified bond rates used, in a staggering $2.8 billion gap between Ontario's maximum and Canada's minimum estimates for NCRRs, and an even more striking $8.4 billion difference between their highest valuations. This disparity would be even greater had Canada included even a portion of indirect revenues the Crown captured through taxation in its calculations. The fundamental discrepancy in assessing shareable benefits reflects a lack of diligence and coherence in the Crown's methodology.

54. Rather than conducting a transparent, good-faith assessment based on an objective evaluation of the evidence, Canada and Ontario have each advanced self-serving calculations that fail to fully account for the wealth derived from the Treaty territory. This Court must determine the correct approach to calculating the benefits derived from the treaty territory—an issue that is not only crucial for assessing the past entitlement of the Superior Anishinaabe First Nations but also essential for ensuring the proper implementation of the Treaty promise in the future.

D. THE CROWN'S IMPOPER AND SPECULATIVE RELIANCE ON POLYCENTRIC CONSIDERATIONS

55. Both Canada and Ontario rely on "polycentric considerations" in a way that serves to hollow out their solemn obligations under the Treaty.

56. Both Canada and Ontario invoke "polycentric considerations" as though it is a magical incantation that relieves them of the need to justify their decision. The reliance on "polycentric considerations" is both speculative and improper.

57. It is speculative to rely upon a polycentric consideration that is unconnected in any material way to the quantification of the past compensation. Seeking to rely upon polycentric considerations without a proper factual foundation being identified first is improper, as there are no justifiable reasons to support the decision.

58. Neither Canada nor Ontario in their explanations properly account for the fact that, for the past 175 years, the Crown has already made their discretionary decisions based on polycentric considerations regarding the extraction of resources from the Treaty territory and their treatment of the Superior Anishinaabe First Nations. These decisions cannot now be reversed or reconsidered.

59. In nearly every instance in the past, the Crown has privileged the interests of the non-Indigenous population of the territory, Ontario, and Canada, over the interests of their treaty partner. Nevertheless, the Crown ignores this fact and instead places a vague and speculative reliance on past "polycentric considerations" to deprive the Superior Anishinaabe First Nations of compensation for the past breaches and true reconciliatory justice.

60. Further, both Canada and Ontario rely on speculation about future economic circumstances in an attempt to offset their Treaty obligations. Such an approach is dishonourable and seeks to benefit the Crown for delaying its implementation of the Treaty for so long.

61. The reference by the Supreme Court to polycentric considerations in the quantification of past compensation was not intended to eviscerate the Treaty obligation.

E. THE CROWN UNREASONABLY RELIES ON ONTARIO'S EVIDENCE FROM THE STAGE 3 TRIAL

62. Both Canada and Ontario place unjustified weight on the evidence and NCRR calculations of Professors Smart and Boadway from the Stage 3 trial. The just and honourable approach would have been to truly acknowledge the serious flaws in their testimony and figures, and place greater weight than they did on Professor Stiglitz's opinions and Mr. Hutchings' calculations.

63. The exercise of discretion was not an invitation for the Crown to simply ignore or gloss over the issues with the Crown's evidence.

64. In its explanation, Ontario places itself in the position of the trier of fact and then chooses to "prefer" the evidence of its own witnesses on multiple significant issues. The just and honourable approach would have been to take a truly objective view of the Stage 3 evidence.

F. THE CROWN FAILED TO ACCOUNT FOR THE NEEDS OF THE FIRST NATIONS

65. In assessing compensation, the Crown failed to properly consider the profound needs of the Superior Anishinaabe First Nations, despite this being a necessary factor that the Supreme Court identified.

66. In their explanations, Canada and Ontario paid lip service to the deep and substantial needs of the First Nation communities. These needs were powerfully expressed by both the Chiefs and Elders in their testimony during the Stage 3 trial and the Chiefs and Councillor in the engagement sessions with the Crown representatives. These needs are also evident in well-being data introduced into evidence by the parties at Stage 3 and the negotiation and engagement process. Canada and Ontario acknowledged this great need in their explanations. However, they failed to truly reckon with this need and determine appropriate compensation accordingly.

67. Instead, the Crown relied on an argument that annuities under the Treaty – or compensation for past breaches of the Augmentation Clause – is not meant to address 100% of the present needs of the Superior Anishinaabe First Nations to discount the powerful evidence from the Anishinaabe representatives and refuse to properly consider how their assessment of compensation must account for this need.

68. In essence, the Crown has sought to rely on its other dishonourable and colonial actions towards the Anishinaabe – and Indigenous people across this province and country – to downplay the significant needs of the Superior Anishinaabe First Nations flowing from the Crown's centuries long neglect of the Augmentation Clause.

G. THE CROWN IMPROPERLY PEGGED THEIR DISCRETION TO THE HURON SETTLEMENT

69. It was unjust, unfair, and dishonourable for the Crown to set the Robinson Huron Treaty ("**RHT**") settlement of $10 billion as the standard against which they measured the reasonableness or honourableness of their compensation to the Superior Anishinaabe First Nations.

70. The $3.6 billion compensation for the Superior Anishinaabe First Nations (plus costs of $40 million) amounts to roughly equivalent, on a *per capita* basis, to the $10 billion settlement (including costs) with the RHT First Nations in 2023. This fact leaves the strong impression that this amount was a pre-ordained result that the Crown had set as a ceiling, regardless of the Supreme Court decision or the negotiation and engagement process. Even the reasonable apprehension of such conduct by the Crown is a stain upon its honour.

71. Further, both Canada and Ontario are explicit that they considered the RHT settlement as a relevant factor in the exercise of their discretion, despite the Superior Anishinaabe First Nation's strong opposition to the Huron settlement being a valid comparator. Canada and Ontario nonetheless considered the RHT settlement amount as a benchmark or guidepost against which to assess the reasonableness of the compensation for the Superior Anishinaabe First Nations. Both Canada and Ontario also expressly considered a comparison of the compensation between both groups on a *per capita* basis, as they believed that a substantial difference would not be reasonable, honourable, or advance reconciliation.[12]

72. The way in which the Crown factored the RHT settlement into its assessment reveals that the Crown has failed in its duty to negotiate honourably. The Crown has effectively bound the Superior Anishinaabe First Nations to a settlement that they neither agreed to nor participated in, revealing that its engagement in the negotiation and engagement process was not in good faith and merely performative.

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[12] Canada Decision, p. 36; Ontario Decision, para. 240.

73. Further, both Canada and Ontario refuse to provide details regarding the RHT settlement negotiations and rationale used to arrive at the $10 billion figure, on the basis of privilege and confidentiality. The Crown may be entitled to assert confidentiality over the RHT settlement, but it cannot then simultaneously rely on it as a relevant consideration to establish a past compensation payment under the Treaty.

H. CANADA IMPROPERLY DEDUCTS PAYMENTS ERRONEOUSLY MADE

74. In Canada's exercise of discretion, it deducts from the amount owing to the Superior Anishinaabe First Nations over $300 million (at the bond rate) for the present value of annuities already paid in the past.

75. It is unjust and dishonourable for Canada to deduct these amounts. It is improper for Canada to now claim credit for past annuity payments that it paid *to the wrong recipients*. The amounts should not be deducted from the total amount of compensation.

I. THE CROWN'S EXERCISE OF DISCRETION TO THE PRESENT IS UNTETHERED TO TRIAL-TESTED EVIDENCE POST-2019

76. The Crown considers the relevant time-period for the exercise of its discretion to be from 1850 to "present". There is, however, no evidence of revenues or expenses post-2019 because the Crown has not shared this data with the Superior Anishinaabe First Nations.

77. Canada nonetheless unilaterally decided to compensate up to the end of 2024, estimating the NCRRs from 2020 to 2024. Ontario appears to have considered no data for this period, despite claiming to compensate for it.

J. THE CROWN'S FAILURE TO ACCOUNT FOR VINDICATION, DETERRENCE, AND/OR PUNITIVE DAMAGES

78. The Superior Anishinaabe First Nations have maintained that the nature and severity of the longstanding breaches call for deterrence and vindication compensation similar to *Charter* damages, and/or punitive damages, to be awarded, over and above the amount of compensation otherwise payable.

79. It is not honourable for the Crown to invoke the presumption that the Crown intends to fulfill its promise after 175 years of the Crown's advertent neglect of its Treaty obligations.

K. THE CROWN'S APPROACH TO THE NEGOTIATION AND ENGAGMENT PROCESS WAS DISHONOURABLE

80. With a view to respecting the nature of the treaty promise, repairing the treaty relationship, restoring the honour of the Crown, and advancing reconciliation, the Supreme Court directed the Crown to engage in time-bound and honourable negotiations with the Superior Anishinaabe First Nations about compensation for past breaches of the Augmentation Clause. The Court required the Crown to *meaningfully* and *honourably* engage with the Superior Anishinaabe First Nations in the six months following its decision. The Crown failed to do so. Its approach to the negotiation and engagement process was not consistent with its constitutional obligations pursuant to the honour of the Crown. For this reason alone, its exercise of discretion cannot stand.

81. The Supreme Court was clear that it was time for the parties to "return to the council fire" and repair their relationship. However, in the six-month negotiation and engagement process, the Crown barely even paid lip service to this important exhortation from the Court.

82. A "Council Fire" has real meaning for the Anishinaabe people. It is a sacred gathering on the land through which leaders (or those with decision-making authority) would gather to discuss

important issues, make decisions, and maintain relationships with “kin”. However, this is not how the Crown treated the negotiation and engagement process.

83. In contrast to the meaningful Council Fires amongst decision makers envisioned by both the Supreme Court and the Superior Anishinaabe First Nations, they were relegated to meetings with Crown representatives who claimed to be unable to make decisions or binding commitments, and who were merely there to “listen”.

84. The Crown’s approach to the Council Fires showed a profound disrespect for the Superior Anishinaabe First Nations, and an utter lack of commitment to heed the Supreme Court’s direction to rekindle the Nation-to-Nation relationship.

L. THE CROWN SHOULD FULLY INDEMNIFY THE FIRST NATIONS

85. The Crown should be required to fully indemnify the Superior Anishinaabe First Nations for all fair and reasonable expenses and costs including all legal fees that they have either paid or that have yet to be paid, in an amount to be either agreed or decided upon by this Court in Stage “B”. Moreover, those expenses should be included as part of the overall compensation to the Superior Anishinaabe First Nations (over and above the amount for unpaid past annuity augmentations), not as Court costs. The amount of expenses to be paid should not simply result in a reduction of the compensation to be allocated amongst the Superior Anishinaabe First Nations.

86. To the extent that it is not covered by the collective $40 million being provided by the Crown for costs, the Crown should be required to pay any additional amounts necessary to fully indemnify the Superior Anishinaabe First Nations for their efforts to force the Crown to comply with its Treaty obligations.

M. FURTHER GROUNDS

87. Such further grounds as the Superior Anishinaabe First Nations may advise.

PART VI - RELIEF REQUESTED

88. The Superior Anishinaabe First Nations ask this Court for the relief identified in Part II above.

89. In accordance with the decision of the Supreme Court and the terms of the Treaty itself, the Superior Anishinaabe First Nations ask this Honourable Court to set an amount for compensation to be paid by the Crown that is honourable, liberal, and just.

90. Doing so will finally bring to an end a longstanding breach that has deprived the Superior Anishinaabe First Nations of their Treaty right for over a century and a half and left an indelible stain on this country. It will send the message to the Crown that it can no longer undermine the very object and purpose of the Treaty promise.

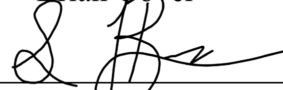
91. In the alternative, if this Court concludes that the exercise of Crown discretion does not comply with the Crown's constitutional obligations – but that the Court cannot set the just and honourable amount of compensation itself – the issue of compensation should be remanded to the Crown for redetermination within a limited time period in accordance with the Court's reasons.

February 8, 2025.

Harley Schachter

Kaitlyn Lewis

Brian Gover



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