CITATION: Red Rock First Nation v. Canada (Attorney General), 2026 ONSC 1169
COURT FILE NO.: 2001-0673
DATE: 2026-02-27

ONTARIO
SUPERIOR COURT OF JUSTICE

The Chief and Council of Red Rock First Nation, on behalf of the Red Rock First Nation Band of Indians, The Chief and Council of the Whitesand First Nation on behalf of the Whitesand First Nation Band of Indians Plaintiffs	*Harley Schachter / Kaitlyn Lewis*, for the Plaintiffs
- and -	
The Attorney General of Canada and Her Majesty the Queen in Right of Ontario and the Attorney General of Ontario as representing Her Majesty the Queen in Right of Ontario Defendants	*Glynis Evans / Rhiannon McNamara / Kyla Pederson*, for the Defendant The Attorney General of Canada *David Rankin / Richard Odgen / Brodie Noga / Mohamed Salama / Susan Keenan*, for the Defendant The Attorney General of Ontario
- and -	
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	*Brian Gover / Spencer Bass / Geri Angelova*, for the Contingent Interest First Nations (previously the "Group of Seven" now Six); *Robert Janes / Christina Gray*, for Kiashke Zaaging Anishinaabek; *Mike Strickland; Matt Pascuzzo*, for Fort William First Nation; *Ceydan Turan*, for Michipicoten First Nation; *Peter Hollinger*, for Pays Plat First Nation; *Alan Pratt*, for Long Lake No. 58 First Nation; *Bob Botsford / Lucas Jewitt*, for Bingwi Neyaashi Anishinaabek; *Conor Carr Lori Kruse*, for Biinjitiwaabik Zaaging Anishinaabek; *Kim Fullerton; Caitlin Beresford*, for Animbiigoo Zaagi'igan Anishinaabek
- and -	
Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollect, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850, and Temagami First Nation and the Teme-Augama Anishnabai Added Party Interveners	*Catherine Boies Parker / Donald Worme / Mark Ebert / Chris Albinati*, for the Restoule Plaintiffs *Melissa Rumbles / Bruce McIvor / Kate Gunn / Katharine Brack*, for Teme-Augama Anishnabai and Temagami First Nation
	HEARD: June 1, 2, 5, 6, 7, 8, 14, 15, 19, 22, 23, 26, 2023

DECISION ON MOTION FOR CONSTITUTIONAL COMPLIANCE

HENNESSY J.

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I. OVERVIEW

[1] This is a motion for a review of Crown conduct during the engagement process and of the Crown's exercise of discretion to set compensation to the Superior plaintiffs for not fulfilling the Treaty promise.

[2] I am satisfied that the Crown's exercise of discretion falls within the range of honourable results. Therefore, I will not intervene with the Crown decision. What follows is my explanation for reaching this conclusion.

[3] This motion for a review for constitutional compliance is the latest step in the long history of the litigation over the Robinson-Superior Treaty promise of augmented annuities. I will begin with a brief review of the litigation history and then review the directions from the Supreme Court of Canada in *Ontario (Attorney General) v. Restoule,* 2024 SCC 27 before embarking on a close examination of the engagement and negotiation process, followed by a review of the exercise of discretion to determine the amount of compensation. This decision also addresses the outstanding question of allocation of responsibility for past compensation, as between Canada and Ontario.

Background

[4] In 1850, the Crown and the Anishinaabe of the Upper Great Lakes entered into the Robinson-Superior Treaty and the Robinson-Huron Treaty (the "Robinson Treaties"). In exchange for ceding their vast territories, the Anishinaabe were promised an annual payment or "annuity" in perpetuity. Both Treaties contain a nearly identical clause providing that annuities paid to the Anishinaabe would be increased over time under certain circumstances (the "Augmentation Clause").

[5] Annuities paid under the Robinson Treaties have remained frozen at $4 per person since their first and only increase in 1875. Ontario and Canada now accept that the Crown committed an egregious and longstanding breach of the Augmentation Clause by failing to diligently fulfill the Treaty promise.

[6] In 2023, after years of protracted litigation, Ontario and Canada reached a negotiated settlement with the Huron plaintiffs for $10 billion. In 2024, the Supreme Court of Canada directed the Crown to engage in honourable and time-bound negotiations with the Superior plaintiffs for compensation for past breaches of the Augmentation Clause. No settlement was reached. Having failed to come to a resolution, the Crown exercised its discretion to pay $3.6 billion in compensation to the Superior plaintiffs.

[7] As is their right, the Superior plaintiffs seek this court's review of the engagement process and the reasons for the amount set by the Crown.

The Parties

[8] This review concerns 12 First Nations situated in the Robinson-Superior Treaty territory. Red Rock, Whitesand, Fort William, Michipicoten, Kiashke Zaaging Anishinaabek (Gull Bay) and Animbiigoo Zaagi'igan Anishinaabek are adherents to the Robinson-Superior Treaty. Biigtigong Nishnaabeg, Netmizaaggamig Nishnaabeg (Pic Mobert), Pays Plat, Long Lake No. 58, Bingwi Neyaashi Anishinaabek (Sand Point) and Biinjitiwaabik Zaaging Anishininaabek (Rocky Bay) maintain claims for unextinguished aboriginal title (the "Contingent Interest First Nations"). Collectively, these 12 First Nations will be referred to as the "Superior plaintiffs", the "Superior Anishinaabe", or the "RST First Nations". Where their submissions differ, this court will distinguish accordingly.

[9] The beneficiaries of the Robinson-Huron Treaty (the "RHT First Nations") were granted leave to intervene in this review. Teme-Augama Anishnabai and Temagami First Nation (the "TAA Intervenors") were also granted leave to intervene in this review.

[10] Canada and Ontario are the respondents in this review.

Procedural History

[11] In 2001, the Superior plaintiffs filed a statement of claim alleging that the Crown breached its obligations under the Augmentation Clause. The Huron plaintiffs filed their own claim in 2014. The actions were ultimately tried together in three stages. In Stage One, this court interpreted the content of the Augmentation Clause. In Stage Two, this court determined that Crown immunity

and provincial limitation legislation does not bar the plaintiffs' claims. Stage Three, which will be discussed later in these reasons, concerned remedies and the allocation of liability between Canada and Ontario.

The Robinson-Huron Settlement

[12] On June 17, 2023, Canada, Ontario and the RHT First Nations announced that they had arrived at a proposed settlement for past claims under the Robinson-Huron Treaty for $10 billion. Ontario and Canada contributed equally to this compensation payment. The settlement was finalized and approved by the Ontario Superior Court of Justice on February 26, 2024 (the "RHT Settlement"). Having arrived at a settlement, the Huron plaintiffs did not participate in Stage Three of the trial.

Appeals to the Court of Appeal and Supreme Court of Canada

[13] Ontario appealed this court's judgment of Stages One and Two to the Court of Appeal for Ontario (*Restoule v. Canada (Attorney General),* 2021 ONCA 779). The Court of Appeal was divided on several important issues, including the interpretation of the Augmentation Clause and what the honour of the Crown requires when implementing the Treaty promise. Ontario appealed (and the Huron and Superior plaintiffs cross-appealed) to the Supreme Court of Canada. The Supreme Court summarized the litigation history concerning Stages One and Two in its written reasons.[1]

[14] The Stage Three trial took place from January to September 2023. The evidence addressed the claim for compensation for breach of treaty and also heard evidence on the question of Crown allocation. On November 9, 2023, the Supreme Court of Canada issued an order staying Stage Three of the trial pending the release of its decision on appeal. On July 26, 2024, the Supreme Court rendered its judgment on appeal. Jamal J., writing for a unanimous Court, clarified important aspects regarding the interpretation and implementation of the Augmentation Clause. A clear understanding of the Augmentation Clause is central to this review. The Supreme Court of Canada also issued Declarations and Directions to the Crown as part of a remedy for the breach.

The Decision of the Supreme Court of Canada

[15] Before the Supreme Court, both Ontario and Canada frankly acknowledged that the Crown breached its duty to diligently implement the augmentation promise.[2]

[16] The Supreme Court of Canada said the Augmentation Clause constituted a promise that the Crown would share in the wealth of the land if it proved profitable.[3] It is not a promise to pay a certain sum of money.[4] Nor is it strictly speaking a promise to pay a "fair share".[5] The Supreme Court of Canada stated that where the economic conditions allow the Crown to increase the annuity

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[1] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 ("*Restoule SCC*"), at paras. 46-62.
[2] *Restoule SCC*, at para. 197.
[3] *Restoule SCC*, at para. 271.
[4] *Restoule SCC*, at para. 290.
[5] *Restoule SCC*, at para. 181.

beyond $4 without incurring a loss, the Crown *must* exercise its discretion and determine whether to increase the annuities and, if so, by how much. The amount by which the Crown might increase the annuity is a polycentric and discretionary determination. The Crown's exercise of discretion is not unfettered and is subject to review by the courts.[6]

[17] The Augmentation Clause requires the Crown to exercise its discretion diligently, honourably, liberally and justly.[7] The Crown must engage in an ongoing relationship with the Anishinaabe based on the values which underpin the Treaty promise: respect, responsibility, reciprocity and renewal.[8]

[18] Finally, the Supreme Court underlined, as did the courts below, that the Robinson Treaties are not merely "transactional instruments about the exchange of money for a tract of land".[9] Rather, they are living agreements embodying a longstanding relationship that requires ongoing renewal into the future.[10] It follows that the Crown cannot fulfill its duty without engaging with its Treaty partner.

The Supreme Court of Canada Directions

[19] The Supreme Court directed the Crown to engage and negotiate honourably with the Superior plaintiffs concerning compensation for past breaches of the Augmentation Clause. Absent a settlement, the Crown would be required – within six months of the Supreme Court's judgment – to exercise its discretion under the Augmentation Clause and set an amount to compensate the Superior plaintiffs for past breaches. This exercise of discretion was subject to review, where both the *process* the Crown has undertaken, and the *amount* determined as compensation were reviewable. The review was not "an open-ended judicial assessment or quantification of damages"[11] but a review of the process and the justification for the decision. The reviewing court should allow the Crown a degree of deference in relation to its exercise of discretion.

The Negotiation and Engagement Process

[20] The negotiation and engagement process between the Crown and the Superior plaintiffs took place between August 13, 2024 and January 23, 2025.

[21] On December 20, 2024, Canada and Ontario made their first on-the-record settlement offers of $1.5 billion each. Each offer was made contingent on the other Crown entity making an offer that matched or exceeded that amount. Canada provided reasons supporting its offer on the same day. Ontario provided its reasons on December 27, 2024. On January 7, 2025, the Superior plaintiffs made an on-the-record counteroffer for $35.696 billion, exclusive of costs. On January 22 and 23, 2025, the parties participated in an off-the-record mediation, with Ministers in attendance, either personally or available virtually. No settlement was reached.

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[6] *Restoule SCC*, at para. 196.
[7] *Restoule SCC*, at para. 197.
[8] *Restoule SCC*, at para. 197.
[9] *Restoule SCC*, at para. 13.
[10] *Restoule SCC*, at para. 13.
[11] *Restoule SCC*, at para. 310.

[22] On January 27, 2025, having failed to reach a settlement with the Superior plaintiffs, the Crown exercised its discretion to determine an amount to compensate the Superior plaintiffs for past breaches. The Crown provided a total of $3.6 billion (with Ontario and Canada contributing equally). In addition, Canada and Ontario each committed to pay an additional $20 million in costs to the Superior plaintiffs, for a total of $40 million.

[23] Ontario and Canada submit that they each arrived at their determinations independently of the other. Canada's decision letter is signed by the Minister for Crown-Indigenous Relations and Northern Affairs ("Canada Decision Letter"). Ontario's decision letter is signed by the Minister of Indigenous Affairs and First Nations Economic Reconciliation ("Ontario Decision Letter").

The Evidence from Stage Three Trial

[24] The Stage Three trial focused primarily on an assessment of compensation for the longstanding and egregious Treaty breach. The plaintiffs and Ontario each commissioned teams of renowned and accomplished economists to conduct a deep analysis of the historic data to determine actual net Crown resource revenues ("NCRR") that the Crown had captured from the Treaty territory since 1850. The economists presented their theories, findings and interpretations over months of hearing. No decision was rendered following the end of the trial, because of the Stay Order from the Supreme Court of Canada.

[25] The parties returned to this evidence during the engagement and decision-making process in 2025-2026 and relied on the evidence in their justifications for their decisions.

II. ISSUES

[26] The parties request that this court determine the following issues:

1. What standard of review applies in reviewing both the process the Crown has undertaken and the amount it has determined to compensate the Superior plaintiffs for the breach of the Treaty promise?

2. Did the Crown meet the test for constitutional compliance during the engagement and negotiation process and does the justification for the Crown decision to set compensation at $3.6 billion plus costs restore the honour of the Crown and advance reconciliation?

3. What interest rate if any should the court attach to the compensation amounts apportioned to the Contingent Interest First Nations?

4. How, if at all, should this court apportion liability between Ontario and Canada for the Crown's past breaches of the augmentation promise?

5. Outstanding questions regarding costs for Stage Three and for this review.

III. STANDARD OF REVIEW

Introduction

[27] This review is a case of first impression. The review is triggered by a specific direction from the Supreme Court of Canada to the Crown to conduct an engagement and negotiation process and to exercise its discretion if necessary to set the past compensation for a Treaty breach. The Crown was directed to conduct itself in accordance with its Treaty obligations and the constitutional principle of the honour of the Crown. The Supreme Court specifically granted the Superior plaintiffs the right to seek a review of the process and the determination.[12] This court's jurisdiction does not arise from statute. Some counsel called this review a *sui generis* review process designed by the Supreme Court.

[28] Although there are strong similarities with this review and judicial review, it is not a review of an administrative decision maker pursuant to statute.

Positions of the parties

Position of the Superior plaintiffs

[29] The Superior plaintiffs submit that both the engagement process and the Crown's determination should be assessed on a standard of correctness. They submit that both the engagement process and the quantification decision, engage at its core, constitutional rights, values and duties. The Superior plaintiffs contend that where the constitutionality of a decision is at issue, a constitutional analysis is required, not an administrative law analysis. In their view, the Crown's decisions are unsustainable under any standard.

Position of the Contingent Interest First Nations

[30] The Contingent Interest First Nations ("CIFN") consider this proceeding to be a *sui generis* review. They say that if the Supreme Court intended to mirror a judicial review under administrative law, it could have specifically said as much. The CIFN submit that the Crown's exercise of discretion is unsustainable on any standard.

[31] The CIFN submit that the correctness standard applies to the Crown's understanding of the scope of the Treaty right. The reviewing court cannot defer to the Crown on the scope of a treaty right or the obligations demanded by the honour of the Crown in this case. The CIFN submit that had the Crown correctly recognized the scope of the Treaty right and requirements of the honour of the Crown, it would be entitled to a degree of deference in the exercise of its discretion that engages complex polycentric considerations and where its decision falls within the range of honourable results.

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[12] *Restoule SCC*, at paras. 304-307.

Position of the Crown

[32] Canada submits that the court is performing a *sui generis* task, analogous to a judicial review. Canada submits that the adequacy of how the Crown's obligations are discharged is assessed on a standard of reasonableness. Any matter requiring a correctness review was settled by the Supreme Court in its interpretation of the Augmentation Clause.

[33] Ontario submits that there is nothing novel about Superior Courts reviewing the exercise of executive power. Ontario submits that this court has inherent jurisdiction to review the exercise of executive power, grounded in s. 96 of the *Constitution Act, 1867.*

[34] Ontario submits that the standard to be applied is reasonableness. A reasonable decision must be consistent with the honour of the Crown. The decision must bear the hallmarks of reasonableness — justification, transparency, and intelligibility — and must be justified in relation to the constraints bearing on the decision. Ontario submits that in this case, the constraints bearing on the decision include the Supreme Court's interpretation of the Augmentation Clause, and the requirement that the Crown's discretion must be exercised diligently, honourably, liberally, justly, and consistently with the duty of diligent implementation and other obligations under the honour of the Crown. In doing so, this court must review the decision maker's reasons "holistically and contextually."

Huron Interveners

[35] The Huron Intervenors submit that this is a *sui generis* review. In their submission, the principles around standard of review in the administrative context do not apply. The Huron Intervenors submit that in an alliance of equals, it makes no sense for this court to show deference to the Crown's determination of what is required by the duty of diligent implementation or the honour of the Crown. Nor can this court defer to the Crown's analysis of the content of Anishinaabe legal principles or what they require.

[36] The Huron Intervenors submit that of the five factors listed by the Supreme Court, only the needs of other Indigenous and non-Indigenous peoples could give rise to any deference. However, deference is only owed *after* the court is satisfied that the Crown's decision is liberal, honourable and just. Even in that case, however, the Crown's decision must be consistent with the applicable principles, although a measure of deference within that zone of acceptable outcomes may be appropriate.

[37] The Huron Intervenors submit that the standard for the Crown' actions is whether they were honourable, not reasonable. In their submission, the court must ultimately decide if the Crown's actions are those of an honourable Treaty partner. The range of honourable outcomes is defined by the principles the parties agreed would govern their relationship, including the Anishinaabe principles of respect, responsibility, reciprocity and renewal, as well as what is just, liberal and consistent with the honour of the Crown and the duty of diligent implementation. In their submission, there is no reason to defer to the Crowns on this assessment.

Teme-Augama Anishnabai and Temagami First Nation ("TAA") Intervenors

[38] TAA Intervenors submit that the Crown's exercise of discretion must be reviewed on a standard of correctness. Whether the Crown's discretion was exercised in accordance with its Treaty obligations and the honour of the Crown are constitutional issues. The TAA Intervenors submit that a determination of past compensation based on an incorrect interpretation of the Crown's obligation to implement its Treaty promises - and honourably rectify past breaches - cannot be constitutionally compliant and should not be afforded deference.

[39] The TAA Intervenors submit that the Crown is entitled to only a narrow window through which to exercise its discretion and that it would not repair the Treaty relationship nor restore the honour of the Crown if the Crown were allowed wide discretionary latitude to determine past compensation in these circumstances. While the Supreme Court acknowledged that the Crown's exercise of discretion may permit a range of honourable results, the process itself must ultimately provide a remedy which rectifies the harms done to the Treaty beneficiaries as a consequence of the Crown's breach.

Discussion on Standard of Review

The standard of correctness

[40] The Crown's interpretation of the Robinson Treaties, including the Augmentation Clause, is a question of law which is reviewable on a standard of correctness.[13] Correctness review is required for treaty interpretation because of the precedential and constitutionally protected nature of treaty rights and because treaties engage the honour of the Crown.[14] If the Crown misapprehends the established interpretation of Treaty promise, no deference is owed to the extent of the misapprehension.

The standard of reasonableness

The role of courts

[41] In traditional administrative law, judicial review is a process through which courts supervise the processes and decisions of administrative decision makers to ensure that they do not overstep their legal authority.[15] Since *Vavilov* the standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases.[16] A reasonableness review finds its starting point in judicial restraint and respects the role of administrative decision makers.[17] Courts have a role to ensure that decision makers appreciate the constraints on their authority, in this case, the overarching obligations arising from the Treaty and the constitutional principle of

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[13] *Restoule SCC*, at para. 10.
[14] *Restoule SCC*, at para. 10.
[15] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), at para. 28.
[16] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 ("*Vavilov*"), at para. 23.
[17] *Vavilov*, at para. 75.

the honour of the Crown. On the other hand, courts must be sensitive to avoid telling the Crown how to exercise its discretion.[18]

[42] In the present case, the Supreme Court explained that the Crown's "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" is "well within the expertise of the executive branch, but is much less within the expertise of the courts".[19] Courts should therefore exercise considerable caution before intervening and should accord the Crown a "degree of deference".[20] Even so, the Supreme Court noted that it is well within the business of the courts to ensure that the Crown's exercise of discretion accords with its Treaty obligations and the constitutional principle of the honour of the Crown.[21]

Constraints of the Crown

[43] Despite according deference to the decision-maker, reasonableness review remains a robust form of review.[22] It is a single standard which takes its "colour from the context".[23] As the majority explained in *Vavilov* at para. 90:

> [W]hat is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.

[44] In this case, the Supreme Court did not specify exactly how the negotiation and engagement process should unfold or how the Crown should exercise its discretion. However, the Crown's conduct is subject to the constraints set out in the Treaty promise and the constitutional imperative of the honour of the Crown. The Crown must engage and negotiate *meaningfully* and *honourably* with the Superior plaintiffs about compensation for past breaches.[24] The Crown must exercise its discretion honourably, liberally and justly, while engaging with the Superior plaintiffs based on values which underpin the Treaty promise: respect, responsibility, reciprocity and renewal.[25]

Focus on the justification

[45] Under the reasonableness standard, the reviewing court is to focus on the decision itself, including the justification offered, rather than the conclusion the court would have reached in the decision maker's place. A court is tasked with considering the outcome of the decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible

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[18] *Restoule SCC*, at para. 299.
[19] *Restoule SCC*, at para. 296.
[20] *Restoule SCC*, at paras. 294, 308.
[21] *Restoule SCC*, at para. 299.
[22] *Vavilov*, at para. 13.
[23] *Vavilov*, at para. 89, citing *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59.
[24] *Restoule SCC*, at para. 305.
[25] *Restoule SCC*, at para. 197.

and justified.[26] The reviewing court must focus on the decision actually made, including the justification offered for it.[27] It is meant to ensure that courts intervene in administrative matters only where it is truly necessary to safeguard the legality, rationality and fairness of the process.[28]

[46] In this case, the Supreme Court directed that the Crown must "explain to the Superior plaintiffs and the court how it reached its determination and why".[29] The Supreme Court explained that the reviewing court should focus on the justification of the Crown's determination, having regard to the honour of the Crown and recognizing that it may fall within a range of honourable results.[30] If the Crown has exercised its discretion, liberally, honourably and justly, the courts should not intervene. But if the court finds that the Crown's process or determination was not honourable, it may consider the appropriate remedy.

Conclusion: Standard of Review

[47] The review directed by the Supreme Court is a robust form of review, and I am mindful that the honour of the Crown imposes "a high standard of conduct on the State".[31] The Crown must exercise its discretion based on the Anishinaabe principles which underpin the Treaty promise.

[48] The established principles underlying the standard of reasonableness provide guideposts for this court to conduct this review. Given the relative expertise of the Crown to make polycentric decisions, the Crown must be accorded a degree of deference in how it exercises its discretion. This court should focus on the justification of the Crown's determination, having regard to the honour of the Crown. A process or determination which fails to restore the honour of the Crown and advance reconciliation is neither honourable nor reasonable.

[49] A reasonableness review allows the court to assess the reasons to assess intelligibility, transparency and justification.[32] It is focused on the reasons, the context and the constraints and is a substantial and dynamic review. A reasonableness analysis permits this court to assess whether the decision and reasons advance reconciliation and restore the honour of the Crown, which includes respect for the Treaty promise, and the history, laws, and culture of the Anishinaabek of the Treaty territory, and with the best available evidence. Deference to the Crown's determination is assessed against and within these constraints. A decision would be unreasonable if it is untenable considering the relevant factual and legal constraints that bear on it.

[50] I am satisfied that a review under the reasonableness standard can comply with the directions of the Supreme Court of Canada. The honour of the Crown is, among other things, a principle by which the court may hold the Crown accountable for its conduct.

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[26] *Vavilov*, at para. 15.
[27] *Vavilov*, at para. 15.
[28] *Vavilov*, at para. 13.
[29] *Restoule SCC*, at para. 290.
[30] *Restoule SCC*, at para. 308.
[31] *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan,* 2024 SCC 39, at para. 12.
[32] *Vavilov*, at para. 100.

IV. THE NEGOTIATION AND ENGAGEMENT PROCESS

[51] The Supreme Court of Canada clarified that a declaration of breach, standing alone, would be insufficient in the circumstances of "the egregious and longstanding nature of the breaches."[33] The Crown was directed to negotiate with and compensate the First Nations in order to repair the Treaty relationship, restore the honour of the Crown in the context of the history of the Covenant Chain alliance, and to advance reconciliation.

[52] With respect to negotiations, the Crown was to engage meaningfully and honourably with the Superior plaintiffs in a time-bound process in an attempt to arrive at a just settlement for past breaches of the Treaty, in a manner consistent with the goal of reconciliation.[34] If the parties could not come to a resolution, the Crown was to exercise its discretion to set an amount for past compensation.[35] This engagement and negotiation process is the subject of the present review.

Positions of the parties

The Superior plaintiffs' position

[53] The Superior plaintiffs submit that the Crown's approach to the engagement and negotiation process was dishonourable and not conducted in a manner consistent with the goal of reconciliation. They say that the Crown did not and could not meaningfully engage during the process because Crown representatives did not have sufficient authority. Instead, they were only there to "listen". In particular the Superior plaintiffs state that Crown representatives took the position that they were there to learn the Anishinaabe perspective and to take proposals back to the "decision makers".[36]

[54] The Superior plaintiffs submit that the Crown did not seriously consider the Anishinaabe's proposal to jointly develop an approach to quantify past compensation. Early in the engagement process, the First Nations proposed that the parties agree on how the five factors identified by the Supreme Court would be implemented, and the weight that the Crown would place on various elements in exercising its discretion. The Superior plaintiffs submit that the Crown unreasonably refused to adopt the approach proposed, claiming that to do so would fetter the Crown's discretion.

[55] A more specific complaint by the plaintiffs was the refusal or inability of the Crown representatives to clarify and engage with their position on the relevance of the RHT Settlement. I will deal with the RHT Settlement issue separately from the other issues raised by the Superior plaintiffs with respect to the engagement and negotiation process.

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[33] *Restoule SCC* at para. 283.
[34] *Restoule SCC* at para. 271.
[35] *Restoule SCC* at para. 305.
[36] See October 8, 2024 meeting minutes; RR p.3722, 3754, 3755, 3758. "What First Nations need is more than just eyes and ears, they need the mouth."

The Contingent Interest First Nations' position

[56] The CIFN submit that the engagement and negotiation process that the Crown employed was not liberal, just, honourable or in compliance with the Crown's constitutional obligations. The CIFN contend that the Crown representatives did not meaningfully negotiate but instead took the position that to "formalize agreements on particular issues or make compromises would 'fetter the discretion' of the Ministers".[37] The CIFN further state that Crown representatives often expressed that they did not have the authority to take formal positions but could simply report to the decision makers and seek instructions.[38]

Ontario's position

[57] Ontario submits that the process was meaningful and honourable. Ontario says that its representatives actively participated in discussions and responded to the positions shared by the Superior plaintiffs. Although an agreement was not reached, the process returned the parties to the Council Fire, provided the means to exchange information, and restored a practice of honest, forthright communication about the factors which the Crown must take into account when considering augmentations of annuities.

[58] The Ontario Decision Letter states that Ontario learned a great deal about the Superior plaintiffs' perspective during the engagement and negotiation process and that it carefully considered the perspectives of the Superior plaintiffs in reaching its determination.

[59] Ontario contends that it agreed to a number of proposals made by the Superior plaintiffs including: (a) providing capacity funding; (b) exchanging information in advance of meetings; (c) having Ministers of the Crown attend a Council Fire in Treaty territory; (d) holding a mediation; and (e) accepting the Superior plaintiffs' choice of meeting facilitator.

Canada position

[60] The Canada Decision Letter asserts that Canada engaged with the Superior plaintiffs with open ears and open hearts.[39] During this review, Canada submits that the engagement and negotiation process was multi-faceted, collaboratively developed and undertaken by all parties in good faith. Canada submits that it listened to the perspectives of the First Nations and remained open-minded. In Canada's view, the process involved hard work and commitment by all of the parties.

[61] Canada submits that it did agree, where possible, on certain substantive issues raised by the Superior plaintiffs. For example, Canada agreed to engage in with prejudice and without prejudice discussions; negotiate compensation using only the population figures proposed by the Superior plaintiffs and determine compensation for the time period of 1850 and onward (despite the Supreme Court's direction to determine compensation from 1875 onward). However, Canada submits that it could not commit to all the proposals made by the Superior plaintiffs, such as the

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[37] RR p.3716, Tab 95, October 4, 2024 meeting minutes.
[38] RR p. 3692, Tab 92, September 29, 2024 meeting minutes;
[39] Canada Decision Letter at p. 17.

appropriate way to quantify Crown benefits or the method to measure the Superior plaintiffs' needs.[40]

[62] Canada submits that the issues were complex and significant. Canada's negotiators could not make certain concessions or binding commitments at the negotiation table given that certain commitments needed to be considered holistically or required consultation or authorization from the Minister or Cabinet.

Discussion

The Supreme Court of Canada direction

[63] The Supreme Court of Canada directed the Crown to negotiate *meaningfully* and *honourably* with the Superior plaintiffs in an attempt to arrive at a just settlement regarding past breaches. The court further directed the Crown to set an amount for compensation should the negotiation process be unsuccessful. In doing so, the Supreme Court underscored that negotiation and agreement outside of court have a better potential to renew the Treaty relationship, advance reconciliation, and restore the honour of the Crown.[41] Without such an engagement process, the Superior plaintiffs would be deprived of the relational aspect of the Treaty.[42] As the Supreme Court noted, the details of a treaty relationship "must be the object of permanent negotiations, in view of fleshing out the general principles governing the relations between the two peoples".[43]

[64] Critically, the engagement process was not simply meant to *inform* the Crown's exercise of discretion. Rather, it was aimed at providing the parties a meaningful opportunity to *reach an agreement together* to settle this historic claim, thereby restoring the Treaty relationship and the honour of the Crown. It should therefore be apparent that the Crown was obligated to do more than simply listen to the Superior plaintiffs' perspectives.

[65] The direction to engage highlights the overriding benefits of negotiated settlements on title and treaty matters. The honour of the Crown facilitates reconciliation by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes.[44] As the Supreme Court said in *Delgamuukw*: "[i]t 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 section 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".[45] True reconciliation is rarely, if ever, achieved in courtrooms.[46]

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[40] Book of Transcripts (Stage Three Review), Oral submissions of G. Evans, p. 1173 at line 5 to p. 1174 at line 13.
[41] *Restoule SCC* at para. 303.
[42] *Restoule SCC* at para. 300.
[43] *Restoule SCC* at para. 303, citing Sebastien Grammond, "Terms of Coexistence: Indigenous Peoples and Canadian Law" (2013) at p.286.
[44] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, ("*Mikisew Cree*") at para. 22.
[45] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186, citing *R. v. Van Der Peet*, [1996] 2 S.C.R. 507, at para. 31.
[46] *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24.

[66] The Supreme Court of Canada further noted that the Treaty reflected a commitment to an ongoing relationship with both procedural and substantive aspects.[47] From the Anishinaabe perspective, "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".[48] Inherently linked to the substantive promise was the corresponding commitment to engage in an ongoing relationship with the Anishinaabe based on the values of respect, responsibility, reciprocity and renewal.[49] Unilateral action is contrary to the Treaty relationship.

[67] The above observations from the Supreme Court of Canada form part of the context in which the negotiations took place. The process was directed as an alternative to the adversarial route with a goal to achieve a complete resolution of the claim for compensation. This process was a reminder that the Treaty was originally conceived as a means to renew the historic relationship between the Anishinaabek and the Crown and was the product of negotiations around a Council Fire.[50]

The duty to negotiate

[68] While many cases have considered negotiations in the context of the duty to consult and accommodate, the content of those principles can apply in this context.[51] Honourable negotiation requires the Crown to act collaboratively and in good faith. The Crown must avoid taking advantage of the imbalance in its relationship with Indigenous peoples.[52] The Crown must avoid even the appearance of sharp dealing.[53] This duty to negotiate does not create an obligation to reach an agreement or negotiate endlessly.[54] However, negotiations will be fruitless if the Crown representatives are not provided with sufficient authority to genuinely engage in the give and take of true negotiations.

[69] In addition to the jurisprudence on the duty to consult there has also been scholarly comment on the necessity of the Crown to make adequate attempts to reach agreements. In his article "The Duty to Negotiate and the Ethos of Reconciliation", Felix Hoehn has observed that "the Crown [must] ensure that it consistently provides its negotiators with appropriate mandates to permit progress…and the ability to table concrete options for discussion at the table within

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[47] *Restoule* at para. 300.
[48] *Restoule SCC* at para. 300, citing *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at para. 423.
[49] *Restoule SCC* at para. 197.
[50] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at paras. 412-414.
[51] See *Haida Nation*; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 [*Tsilhqot'in*].
[52] *Restoule SCC* at para. 192.
[53] *Restoule SCC* at para. 221, citing *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.
[54] Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation", Saskatchewan Law Review, (2020), 83 Sask L Rev 1 – 44, citing *Ross River Dena Council v Canada (Attorney General)*, 2017 YKSC 59 at para. 350.

reasonable timeframes".[55] The Crown must bear in mind that the governing ethos of the duty to negotiate is "not one of competing interests but of reconciliation".[56]

[70] The Crown is required to act with honesty, transparency and integrity.[57] Honourable negotiation should be suitably transparent to foster a fair and collaborative process.[58] Where negotiations are conducted with good faith and integrity, negotiating partners build trust, strengthen their relationship and as a result, future dealings are more predictable, consistent and disputes are prevented or minimized.

[71] In *Takuhikan*, the Supreme Court of Canada noted that honourable negotiation requires the Crown to meaningfully engage in a manner conducive to maintaining a relationship that can support the ongoing process of reconciliation between the Crown and Indigenous peoples.[59] The Crown must come to the negotiating table with an open mind and with the goal of engaging in genuine negotiations with a view to entering into an agreement.[60]

[72] The Crown must engage with the views and opinions of their Treaty partners. A failure to engage and negotiate honourably will reflect poorly on the honour of the Crown and will also miss opportunities for accommodation and reconciliation between the Crown and Indigenous peoples.[61]

[73] Finally, the Crown should make a genuine effort to learn, understand and give effect to Anishinaabe principles and protocols. As the Huron Anishinabek submit, honourable negotiation requires more than listening. It requires "learning, engaging with an open heart, and a spirit of humility".[62]

Review of the negotiation and engagement process

[74] As discussed in the above section on standard of review, a review of the reasonableness of Crown conduct begins with a look at the constraints on the decision maker, in this case, those imposed by the legal and factual context, the Supreme Court's direction, and the constitutional duties flowing from the honour of the Crown and the Treaty.

[75] From the early days in the negotiations, the Crown's approach did not meet the expectations of the Superior plaintiffs. The Chiefs and Councillors representing the Superior plaintiffs repeatedly expressed frustration that the Crown was not meaningfully negotiating. The Crown was not willing to formalize agreements on certain issues or make compromises which the

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[55] Michael Coyle, "Loyalty and Distinctiveness: A New Approach for the Crown's Fiduciary Duty Toward Aboriginal Peoples" (2003) 40:4 Alta L Rev 841 at 862.
[56] Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1 at 3, citing *Tsilhqot'in* at para. 17.
[57] Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation", Sask L Rev (2020), 83:1 1 at 44, citing *Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 59, at para. 349.
[58] *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 [UNDRIP], art 27.
[59] *Takuhikan* at para. 190.
[60] *Takuhikan* at para. 190.
[61] *Haida Nation* at paras. 38, 45.
[62] Book of Transcripts (Stage Three Review), Oral submissions of C. Boies-Parker, p. 858 at line 23 to 25.

Crown claimed would fetter the discretion of the Ministers. Representatives attending on behalf of the Crown often expressed that they did not have the authority to take formal positions and would need to report to decision-makers.

[76] The Superior plaintiffs were understandably frustrated when the Crown repeatedly declined to take formal positions at the negotiating table. It was a surprise and disappointment to the Superior plaintiffs that the engagement process lacked a back-and-forth exchange with the Crown. Regrettably, several Chiefs found that the process amounted simply to an opportunity to "blow off steam".[63]

[77] At the same time, the Crown representatives expressed that they understood that the goal of the negotiations was an honourable settlement and that they were committed to a genuine relationship with the Superior Anishinaabe based on the principles of respect, responsibility, reciprocity and renewal. The parties spent some of their early time discussing a set of proposals from the Superior Anishinaabe that would serve as "foundational elements of the process". Some progress was made on this. The Superior plaintiffs also proposed a written agreement on the decision-making criteria for the five factors. The Crown representatives could not or would not agree to decision-making criteria, taking the position that the delegated representatives were appointed to discuss the process and the issues, but substantive decision-making would require consultation with other authorities. The Crown took the position that they needed to consider all of the five factors holistically and certain commitments required Cabinet authority. Hence they could not make commitments on one factor in isolation.

[78] On the whole, the Crown was responsive to the positions brought forward by the Superior plaintiffs, (other than the relevance of the RHT settlement, which I discuss below) despite frequently requiring more time to consider each position. My view would certainly have been different if the Crown had consistently allowed concerns from the Superior plaintiffs to go unanswered. Crown responses, however, did not take the form of commitments or concessions.

[79] The Crown contention that to make agreements or commitments would improperly fetter the Minister's discretion continues to be confounding. Fettering occurs where a decision-maker does not exercise her discretion in a matter but instead follows a guideline or policy that she views as mandatory or binding.[64] We usually associate fettering with a top-down impact, meaning a policy that impacts a lower-level decision-maker who is required to exercise discretion.

[80] When negotiators, properly provided with authority make commitments and concessions in the course of bargaining, their actions are aligned with and authorized by the decision maker. Negotiators do not act on their own impulse or initiative. Decision-makers can revise, withhold or grant negotiating authority throughout the dynamic course of the negotiations. The authority granted to negotiators at the end of negotiations rarely resembles the initial authority provided. All of this to say, it is the Crown from beginning to end which decides the scope of authority to provide to the negotiators. The Crown negotiators' explanation for their very narrow authority was not

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[63] Transcript, Oral Submissions of H. Schachter, p. 397 at lines 1-7.

[64] Colleen Flood, Paul Daly, *Administrative Law in Context*, 4th Ed. (Toronto: Emond, 2021), at pp. 124-125; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385, at para. 62.

rational and caused early and continuing frustration. The honour of the Crown and the intention to advance reconciliation were meant to shape the process. Instead, the blurring of the lines between process and substantive decision-making caused confusion and eroded goodwill.

[81] However, the plaintiffs' proposals were often challenging and unwieldy.

[82] Ultimately, the Treaty partners were not aligned on how the process would unfold. They had different expectations and were not able to pivot or resolve these differences as the negotiations continued.

[83] The plaintiffs do not allege sharp dealing, dishonesty, or bad faith in the Crown conduct. Both teams were experienced, well-resourced and supported. They came to the table with very different expectations and mandates. The Crown teams were unreasonably limited by the level of authority accorded to them. The plaintiffs expected a dynamic where teams with delegated authority would work their way through issues, making commitments and concessions throughout, subject to an overall agreement ratified by the principals.

[84] I do not attribute bad faith, lack of integrity or dishonourable conduct to the Crown or its representatives. Their expressions of intent, their written memorandums and debate were respectful and responsive to the issues. The Ministers, when they attended in the last days of the six-month process, engaged and negotiated meaningfully to resolve the claim.

[85] The limited authority of the Crown negotiators, the fundamental differences of opinion on the theories behind accounting for NCRR, and the short runway for negotiations ultimately made it impossible to reach an agreement. The Crown representatives conducted themselves respectfully within their limited authority. The inability of the parties to reach a settlement cannot be attributed solely to any one of the parties.

[86] The duty to meaningfully engage with the Superior Anishnaabe was specifically directed by the Supreme Court of Canada as part of its reconciliatory justice remedy. The Crown was not responsive to this duty when it did not provide its negotiators with appropriate mandates to initiate and respond to the issues that could drive progress.

[87] There is much to learn from this process. In the context of the strong preference for negotiated settlements, Crown representatives must have sufficient authority to engage in genuine give and take negotiations. These lessons must not be forgotten going forward. Bureaucratic and legalistic barriers must not be unnecessarily inserted into the process. The Crown must be respectful of the significant personal cost to community leaders who attend multiple meetings away from their homes and communities. Every attendance must be meaningful. As the Supreme Court said in *Coldwater First Nation v. Canada (Attorney General),* 2020 F.C.A. 34 at para. 48, although reconciliation must "begin by looking back and developing a deep understanding of the neglect and disrespect toward Indigenous peoples, reconciliation must also look forward and is meant to be transformative, to create conditions that will prevent recurrence of harm and dysfunctionality but also to promote a constructive relationship."

[88] The engagement and negotiation process provided an opportunity for the parties to make progress toward a renewed and restored relationship, even if they did not ultimately come to a resolution. From the view point of the Superior Anishinaabe, this was a lost opportunity. From the Crown's perspective, it was a successful learning process.

[89] I turn now to a discussion of how the parties managed the discussion of the relevance of the RHT Settlement during the negotiation process and decision-making.

V. THE ROLE OF THE RHT SETTLEMENT IN THE NEGOTIATION PROCESS AND THE EXERCISE OF DISCRETION

[90] The RHT Settlement played a significant role in the negotiations, the Crown decisions and justifications and on this review. In the decision letters, the Crown specifically noted that the per capita compensation for the RST First Nations should be reasonably comparable to the per capita compensation for the RHT First Nations under their settlement and the decision reflects that there was per capita parity between the compensation to the two Treaty beneficiaries.

[91] The $3.6 billion that the Crown provided as compensation to the RST First Nations amounts to a roughly equivalent per capita amount when compared with the RHT Settlement amount of $10 billion.

[92] The Superior Anishinaabe contend that the conduct and approach of the Crown to the subject of the RHT First Nation deal was problematic from the start, characterized by lack of transparency, a refusal to waive privilege, and a refusal to disclose how they were taking into consideration the RHT Settlement.

[93] The Superior Anishinaabe contend that the Crown unfairly sought to bind them to a confidential settlement to which they were not a party and for which the Crown would not disclose the terms or waive privilege. They say that the Crown approached the negotiations and the decision with what they called a reasonable apprehension of a preordained outcome – that the RST First Nation plaintiffs should receive an amount that was substantially equal or broadly comparable to the per capita amount the RHT First Nation plaintiffs received in their 2023 settlement. The term parity was also used during oral submissions. I will use the term parity when I refer to the Crown positions of substantially equal, broadly comparable or reasonably consistent.

[94] The Crown denies that they approached the negotiations or the decision with a predetermined outcome.

[95] The concerns that there was a reasonable apprehension that the outcome had been predetermined, began in the negotiation process and continued once the decision was announced. These concerns deserve close review.

The Role of the RHT Settlement in the Negotiation Process

[96] The Superior plaintiffs raised the issue of the relevance of the RHT Settlement from the earliest meetings of the negotiating teams. They wanted assurance that the RHT Settlement would be irrelevant to the Crown in their attempt to achieve a settlement. The Crown repeatedly said that

they had no position on the relevance of the RHT Settlement. Over the course of the negotiations the Crown refused to clarify what if any relevance the RHT Settlement had to the negotiations.

[97] The discussions on the relevance of the RHT Settlement arose early and often and was the subject of the plaintiffs' questions and comments in many of their letters and memos to the Crown.[65] By November 1, 2024, the Superior Anishinaabe were concerned that the Crown was considering per capita parity with the RHT beneficiaries.[66] The plaintiffs rejected the RHT Settlement as a meaningful benchmark for determining compensation. They pointed out that a meaningful comparison would be the amount of money required to close the income gap experienced by each group of First Nations to a comparable measure. The Superior plaintiffs calculated that $6.06 billion would be required in order to close the income gap experienced by the RHT First Nations to a comparable amount by which the income gap experienced by the Hurons was closed by their $10 billion settlement.[67]

[98] On November 6, 2024, Ontario stated, that it had not yet taken a position on whether the RHT Settlement was relevant.[68] On November 13, 2024 Ontario went further and stated that "Ontario has not yet taken a position at this time, whether, and if so in what manner and to what extent the RHT Settlement may be relevant".[69] Canada took the position that it could "not agree that the settlement …will not be a relevant consideration…"[70]

[99] As the negotiations went on, the Crowns observed that there was some historic precedence for the Crown to consider per capita equality in respect of annuity augmentations in 1899 and in 1850 where population-based differences between the Treaty territories triggered different annuity amounts.[71] The Crown did not provide any clear response or position to their Treaty partner besides these bare "observations".

[100] The refusal of the Crown to fully disclose its position became an ongoing irritant and source of frustrations in the negotiations.

[101] The plaintiffs found this refusal of the Crowns to articulate their position to be untenable and left the appearance of prejudgment. In a letter dated November 21, 2025, the Superior plaintiffs noted the following:

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[65] Record, Tab 99, "*Draft Meeting Minutes*, October 9, 2024 (WSRR)", at p. 3784.
[66] Record, Tab 29, "Schachter, H., *RST Annuity Engagement Process – Factor 2: The number of Superior Anishinaabe and their needs; Factor 4: A consideration of the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada*, dated November 1, 2024", at pp. 2027, 2031.
[67] Record, Tab 29, "Schachter, H., *RST Annuity Engagement Process – Factor 2 and Factor 4*, dated November 1, 2024", at p. 2032.
[68] Record, Tab 30, "Ontario, *Robinson Superior Treaty Implementation of Supreme Court Decision, dated November 6, 2024*", at pp. 2462-2463.
[69] Record, Tab 34, "Ontario, *Principles and Requirements of the Honour of the Crown*, dated November 13, 2024", at p. 2521.
[70] Record, Tab 8, "Canada, *Process for Renewing the Robinson Superior Treaty Relationship*, dated September 10, 2024", at p.1212.
[71] Record, Tab 34, "Ontario, *Principles and Requirements of the Honour of the Crown (para. 309(e))*, dated November 13, 2024", at pp. 2521-2522.

> "Both Crowns have refused to take a position on whether the RHT settlement is relevant, instead suggesting that it may be relevant. However, neither Crown has provided any insight into how or why the RHT settlement of $10 billion could logically be relevant to the determination of past compensation for the RST First Nation. This is not acceptable."[72]

[102] The Superior plaintiffs found themselves in the position of mounting arguments in support of their own views without the benefit of the Crown articulating its view or theory of why the RHT Settlement could be factored into an assessment of past compensation.[73]

[103] The Crown maintained that all relevant matters would be considered holistically.

[104] The Crown's conduct vis-à-vis their approach to the RHT First Nation settlement is important, especially when looking at the decision letters where ultimately, both Ontario and Canada place heavy reliance on the RHT Settlement, contending either that parity was a way to advance reconciliation or a way to benchmark the set amount of compensation.

Crown Decision Letters

[105] The per capita amount of the RHT Settlement figured prominently in the Crowns' justifications, for their offers in December and their decisions in January 2025. Each Crown entity justified, on different grounds, their view that per capita parity with the RHT settlement was a relevant consideration.

[106] Ontario relied on per capita parity with the RHT Settlement.in its ultimate determination of the amount.

Ontario Decision Letter with respect to its consideration of the RHT settlement

[107] Ontario contended that a substantial difference between the *per capita* amount paid to the RHT First Nations and the RST First Nations "would not advance reconciliation".[74] Ontario reasoned that reducing the collective amount of compensation to a per capita amount allowed for a meaningful comparison. Ontario then compared the two Treaty groups on the basis of population, productivity and needs. In Ontario's view, the compensation amount for the Superior Anishinaabe should be "reasonably consistent so that the relationship between the RSFN and the Crown is adequately repaired, and to ensure that any effect on the Crown relationship with the RHFN is adequately considered".[75]

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[72] Record, Tab 36, "Schachter, H., *Response to Canada and Ontario's correspondence regarding Factor 5: the honour of the Crown,* dated November 21, 2025", at p. 2532.
[73] Record, Tab 36, "Schachter, H., *Response to Canada and Ontario's correspondence regarding Factor 5: the honour of the Crown,* dated November 21, 2025", at p. 2534.
[74] Ontario Decision Letter at para. 240, Record at p. 421.
[75] Ontario Decision Letter at para. 243, Record at p. 422.

[108] The Crown contends that historically, it considered its relationship with both Treaty groups when making and implementing the Treaties.[76]

[109] Ontario rejects the allegation that *per capita* parity was a "ceiling" or a "pre-ordained result" or that the Crown approached the engagement with a "closed mind".

Canada Decision Letter with respect to its consideration of RHT settlement

[110] Canada submits that the RHT Settlement is exemplary of the honour of the Crown and a useful and appropriate benchmark for the purpose of validation of the amount it determined to pay. Canada also says that its assessment and determination of compensation was undertaken independently of the RHT Settlement[77]. Canada noted that its determination was based on its assessment of an appropriate value of NCRR, brought forward at an appropriate rate of return, and shared with the First Nations on the basis of an appropriate percentage, all of which arose from the expert evidence which was common to both groups prior to the Stage Three trial.[78]

[111] Canada justified its determination of the amount of compensation by reasoning that the amount it determined to pay the Superior plaintiffs should be reasonably comparable on a per capita basis to the RHT Settlement, taking into account their needs and the productivity of the territory.[79] However, it also stated that the productivity of the particular Treaty lands should be the more relevant consideration and the Robinson-Superior territory was only a fraction of the productivity of the Robinson-Huron territory.[80]

[112] Canada stated that its determination of the amount for compensation is honourable regardless of how it compares with the RHT Settlement.

The Superior plaintiffs' Response to the Crown Decisions

[113] The Superior plaintiffs, including the CIFN, submit that the Crown's reliance on the RHT Settlement is fundamentally unjust and dishonourable. They say that the Crown seeks to bind the Superior Anishinaabe to the outcome of a confidential settlement process to which they were not privy. The Crown refused to waive privilege of the settlement terms.

[114] The Superior plaintiffs say the Crown's exercise of discretion must be grounded in the Superior plaintiffs' history, harms and needs.[81] The CIFN submits that the Crown's reasons bear the hallmarks of a closed mind approach to the negotiation process which is antithetical to the honour of the Crown and reconciliation. They say that there are serious concerns that the Crown

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[76] Ontario Decision Letter at para. 247, Record at p. 423.
[77] Canada Decision Letter at p. 32, Record at p. 44.
[78] Canada Decision Letter at p. 34, Record at p. 46.
[79] Canada Decision Letter at pp. 32, 36, Record at pp. 44, 48.
[80] Canada Decision Letter at pp. 35, 36, Record at pp. 47, 48.
[81] See Record, Tab 29, "Schachter, H., *RST Annuity Engagement Process – Factor 2: The number of Superior Anishinaabe and their needs; Factor 4: A consideration of the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada*, dated November 1, 2024"; Record, Tab 36. "Schachter, H., *Response to Canada and Ontario's correspondence regarding Factor 5: the honour of the Crown*, dated November 21, 2024."

appears to have set the RHT Settlement as a *de facto* cap to its exercise of discretion, before it even started the engagement process.

[115] The Superior plaintiffs claim that the Crown's reliance on the RHT Settlement, without a genuine effort to address the issue in negotiations, leaves the reasonable impression that the engagement and negotiation process and the ultimate setting of the compensation amount was pre-determined, based on a per capita basis substantially the same as in the RHT Settlement.[82]

The Huron Anishnaabek position

[116] The Huron Anishinaabek submit that the Crown improperly refers to content purportedly found in the expert reports related to the Huron claim in the Stage Three trial, which remain subject to litigation and settlement privilege. Neither the reports nor their contents were put into evidence in the Stage Three trial.

TAA's position

[117] TAA submit that the Supreme Court did *not* direct the Crown to pay the Superior plaintiffs an amount that was approximately equal per capita to the RHT settlement and therefore the RHT settlement is not relevant to this review.

[118] TAA note that a settlement is a compromise that reflects the risks, delays and expense of continuing litigation. In TAA's view, "the Crown cannot bind other parties to a settlement they were not party to and occurred in a fundamentally different context".

Did the Crown reasonably and meaningfully engage on the relevance of the RHT settlement?

[119] There was minimal meaningful discussion between the parties during the engagement and negotiation process regarding the role of the RHT Settlement. Essentially the Superior plaintiffs were repeatedly frustrated in their attempts to engage the Crown in any sincere discussions on this issue.

[120] The direction to engage in a negotiation process invokes the honour of the Crown. The point of directing the parties to negotiate over a six-month period was as an alternative to a unilateral Crown determination of compensation.

[121] The Superior plaintiffs identified the issue of the RHT Settlement as one of relevance. They wanted to know if and how the Crown considered that the RHT Settlement was relevant. They could not get a clear answer to this straightforward question. The Superior plaintiffs repeatedly telegraphed their concern that the Crown was going to rely on the RHT Settlement in the ultimate determination of the compensation amount without giving them an opportunity to genuinely engage on the issue. The plaintiffs implored the Crown representatives to let them know how they were considering the RHT Settlement. However, as is clear from an examination of the record, the Crown continued to put off, defer, and delay any reasonable or meaningful discussion of the

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[82] Record, Tab 36, "Schachter, H., *Response to Canada and Ontario's correspondence regarding Factor 5: the honour of the Crown*, dated November 21, 2024" at p. 2532.

relevance of the RHT Settlement throughout the negotiations. For many months, when specifically asked by the Superior plaintiffs what relevance the RHT Settlement could or would play, the Crown remained opaque and repeated that they had not yet taken a position,[83] in fact they had not even taken a position on whether it was relevant.[84]

[122] It was only in the offer letters at the end of December that the Crowns each disclosed that the RHT Settlement was indeed a relevant consideration. The decision-making process, outlined in the letters of both Canada and Ontario, clearly show that the RHT Settlement was highly relevant to both Crown entities.

[123] To the extent that the Crown did not disclose their concerns about diverging significantly from a per capita comparison with the Hurons, the Superior plaintiffs were not afforded the opportunity to fully respond in a persuasive way. After all the Crown had to accept the possibility of some degree of disparity of outcomes as between the RHT Settlement and the RST First Nation process, so that it could sincerely engage with the Superior Anishinaabe.[85]

[124] It is evident from the offer and decision letters that the Crown seriously considered the importance of a per capita comparison between the two Treaty groups including the impact on the relationship with the RHT First Nations. It was such a serious issue for the Crown that early in the engagement process, it was considered an honour of the Crown issue. In the circumstances, the Crown was obliged to provide timely and clear instructions to their representatives so they could engage in a genuine, open, transparent and meaningful discussion on this issue. It was disrespectful not to do so.

[125] It is in this context, refusing to meaningfully engage on this critical issue, identified as a top priority concern by their Treaty partners, that the conduct of both Ontario and Canada must be assessed.

[126] The Crown simply refused to take a position or engage on an issue that ultimately figured into their consideration. No matter how you look at it, the refusal or incapacity to engage on this very relevant issue brings no honour to the Crown.

[127] Meaningful engagement was not optional. It was explicitly ordered by the Supreme Court of Canada and in any event, it is a constitutional obligation. It is for this reason that the Crown representatives were required to be open and transparent throughout the engagement process.

[128] Only an open-minded and sincerely engaged Crown can hope to achieve reconciliation through negotiation.

[129] The Crown conduct during the engagement and negotiation process with respect to the consideration to be given to the RHT Settlement did not advance reconciliation or build trust. This

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[83] Record, Tab 34, "Ontario, *Principles and Requirements of the Honour of the Crown (para. 309(e))*, dated November 13, 2024" at pp. 2521-22.
[84] Record, Tab 30, "Ontario, *Robinson Superior Treaty Implementation of Supreme Court Decision*, dated November 6, 2024"at pp. 2462-63.
[85] *Cold Lake First Nations v. Canada (Attorney General)*, 2024 FC 925 at para. 40.

is particularly regrettable since the parties will likely be faced with this or similar issues as they negotiate in the future.

Privilege

[130] Canada would not disclose the underlying reasons for the RHT Settlement, claiming privilege and Cabinet confidentiality requirements. The Superior plaintiffs assert that the Crown cannot use the RHT Settlement as a benchmark and simultaneously withhold the details that would be necessary for the Superior Anishinaabe to assess whether it is in fact a fair comparator.

[131] It is not apparent how and if the privilege over the detailed terms of the RHT Settlement prejudiced the Superior plaintiffs. Canada says that its approach to the determination of the amount of compensation is rooted in the expert evidence of all of the experts, which was common to both the Superior First Nations and the RHT First Nations. Even had the Crown waived privilege, the RHT First Nations did not.

[132] The Superior Anishinaabe argued that the RHT Settlement could not be binding upon them. I agree. However, the Crown did not seek a declaration that the RHT Settlement was binding upon the Superior Anishinaabe, nor did it articulate that it sought to impose the settlement on the Superior Anishinaabe. I note that the court on this review draws no inference from the facts of the RHT Settlement.

Discussion

[133] There is an obvious mirroring of the per capita amounts for the two Treaty groups. The two decision letters refer specifically to the relative populations of the two Treaty groups. The population of the Superior Anishinaabe was generally agreed to be approximately 37% of the Huron Anishinaabe. The amount of $3.6 billion, for past compensation, (plus costs), is generally agreed to be roughly 36% of the RHT Settlement amount. The per capita amounts are very close. This is an implausible coincidence in the face of a massive record of economic data that was heavily challenged and debated during the Stage Three trial, if parity with the RHT Settlement was not the pre-ordained ceiling. The decision reinforced a view held by the Superior plaintiffs that the result was simply predetermined to mirror the RHT Settlement and that the calculations and various adjustments were an exercise in reverse engineering to arrive at a pre-determined result of parity.

[134] The Superior plaintiffs understandably saw the Crown's exercise of discretion to achieve parity as taking precedence over trial-tested evidence that should have also informed the Crown's polycentric decision-making.

[135] Canada argued that it approached the assessment and determination of compensation for the Superior Anishinaabe following a methodology developed before the Huron settlement and that it adjusted its position upwards after taking into account the other factors, including the difference in need among the Superior First Nation communities. Canada says that it assessed the amount for the Superior Anishinaabe independently of the Huron settlement, and only after its independent assessment, did it benchmark this amount against the Huron settlement. While this may be the case, the engagement process would have unfolded differently, had it disclosed from

the outset, its intention to benchmark any proposed or bargained amount against the RHT Settlement.

[136] As for Ontario, it says that the RHT Settlement was a relevant factor, a position not disclosed throughout the months of engagement, with the serious relational consequences I have described above.

Crown Justification for the Reliance on the RHT Settlement

[137] Ontario and Canada explained their consideration of the RHT Settlement in different ways. Both Crown entities used it for comparison or benchmark purposes. They also expressed that they factored in the needs of the RST First Nations and the other intangible factors including nature and severity of the breach and wider needs to determine a final amount for past compensation. They also stated that a comparison to the RHT Settlement amount demonstrated that that on the per capita basis, the amounts for the two Treaty groups were substantially equal, notwithstanding lower productivity of the Superior territory, offset by higher needs of the RST First Nations. When the amounts were compared, Canada says, its independent assessment "is comparable to the only precedent Canada has for honourable compensation in similar circumstances".

[138] In addition to the obligation to meaningfully engage on the RHT Settlement issue, the Crown was also obliged to provide justification for its use of the RHT Settlement in coming to its determination of an amount for compensation.[86]

[139] Ontario offered a number of reasons for relying on comparisons with the RHT Settlement. Some of these reasons do not actually justify its reliance on the RHT Settlement as a relevant factor and in my view are unnecessary distractions from the actual reasoning. The scant references in the decision letters to historical precedence are not persuasive. The consideration of the relationship impact of their decision on the RHT First Nations is not rooted in any evidence. The fact that a freely negotiated settlement with the RHT First Nation is honourable in itself is not justification for an exercise of discretion in broadly similar or substantially equal terms.

[140] There is no explanation for why the Crown did not engage openly and sincerely on their views of the significance of a per capita comparison, and how they could "benchmark" a compensation amount with the RHT Settlement until very late in the engagement process.

[141] As a Treaty partner, the Crown is entitled to consider their relationship with the RHT First Nations, and it is entitled to manage its relationships with its Treaty partners in a responsible, respectful and honourable way. These become polycentric policy considerations. These polycentric considerations do not in any way diminish the equally important Anishinaabe principles of respect, responsibility, renewal and reciprocity, that the Crown accepted when it entered into this Treaty.

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[86] *Vavilov,* at para. 15.

Was the reliance on the RTH Settlement justified and reasonable?

[142] The reasonableness and honourableness review of the determination of the amount for compensation is not a factor-by-factor review. It is a review of the reasons, viewed holistically. The per capita comparison with the RHT Settlement is not an independent factor to be considered alone as determinative of the Crown's decision. I see it as part of the polycentric factors which the Crown has taken into consideration.

[143] Ultimately, the actions of the Crown, their refusal to articulate their position on relevance of the RHT Settlement during the negotiation process, through to the decision-making had a severe negative impact on the Crown relationship with the Superior Anishinaabe. I do not focus here on the dissatisfaction the Superior Anishinaabe had with the amount of $3.6 billion for compensation, but on the six-month process that was not open and collaborative on this key issue of parity.

VI. REVIEW OF THE CROWN'S EXERCISE OF DISCRETION: FACTORS 1, 2, 4, 5

Review of the Exercise of Discretion

Who is the Crown in this Review?

[144] The Supreme Court of Canada provided direction to *the Crown* in the singular. The court did not distinguish between Canada and Ontario although each was separately represented before the court and made separate submissions. Nor did the Supreme Court refer to the *Crowns* in the plural.

[145] From the outset of this litigation, Canada and Ontario have acted as separate parties, represented by separate counsel teams through three stages of the Trial, and in the negotiation process. They proposed different theories of treaty interpretation and assessment of compensation. Ontario appealed the decisions from Stage One and Two. Canada did not. During the engagement and negotiation process, Ontario and Canada justified the assessment of Crown benefits very differently, although on some issues they presented a unified position.

[146] Consequently, the Superior plaintiffs were forced to respond to Crown theories, arguments and submissions that, at times, were at odds with one another, for example: the relevance of the RHT Settlement, and analysis of Crown benefits, including the treatment of expenses and the treatment of indirect revenues.

[147] This presumption that each of Canada and Ontario owed separate and distinct duties vis-à-vis the question of compensation for the past breach, continued through to issuing of separate decisions and reasons. However, it is obvious that the Crowns cooperated in some manner in arriving at their final determination for an amount of compensation, which was a total of $3.6 billion plus $40 million in costs, to be split equally between them.

[148] For the purposes of this review of Crown discretion, I will not conduct two separate reviews. It will be a single review of the Crown exercise of discretion. However, I will comment on the justification and reasoning provided in the two decision letters where appropriate.

What is the threshold for this Review?

[149] This review is directed by the Supreme Court and explained more fully above. The question is whether the Crown exercise of discretion in setting the amount for compensation is reasonable in the circumstances, the legal and factual context, and within the constraints imposed upon it, including the goal of advancing reconciliatory justice, and restoring the Crown's honour.

[150] This review must allow a degree of deference to the Crown's decision-making, bearing in mind that the exercise of discretion may permit a range of honourable results.[87]

The Five Factors

[151] In the decision letters, the Crown focused on the five factors articulated by the Supreme Court:

- Factor 1, the nature and severity of the breaches;
- Factor 2, the number of treaty beneficiaries and their needs;
- Factor 3, the benefits the Crown has received from the ceded territories and its expenses over time;
- Factor 4, wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada; and
- Factor 5, 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.[88]

[152] The Crown determined compensation by estimating the Crown benefits to be shared, based on the evidence and submissions from the Stage Three trial and by taking into account the other four factors, the RHT Settlement and other relevant polycentric policy issues.[89]

[153] Understandably, the issues arising from and the discussions on these factors often overlapped. I begin with a brief review of the positions of the parties on Factors 1 and 2 and follow with a discussion of Factor 4 and Factor 5. Factor 3 is fully discussed in a section on Crown benefits and is followed by a review of the ultimate determination of the amount for compensation.

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[87] *Restoule SCC* at para. 308.
[88] *Restoule SCC*, at paras. 271, 309.
[89] Record, Tab 1, "Letter from Minister Anandasangaree, G., *Canada's determination of compensation in respect of past breaches of the Robinson Superior Treaty augmentation promise,* dated January 27, 2025" ("Canada Decision Letter") at p. 2, Record at p.14; Record, Tab 2, "Letter from Minister Rickford, G., *Past Compensation for the Superior Anishinaabe,* dated January 27, 2025" ("Ontario Decision Letter") at p. 3, Record at p. 357.

[154] In their exercise of discretion both Ontario and Canada stated that they took into account all of the factors holistically. I took that to mean that Factors 1, 2, 4 and 5, which were not quantified, informed the Crown when setting the amount of compensation beginning with an estimate of Crown benefits which were quantifiable.

Factors 1 & 2: The nature and severity of the Crown's breaches; the number of Superior Anishinaabe and their needs

[155] The evidence on Factors 1 and 2 is overlapping and uncontroversial. I will discuss the evidence on these factors together. The Supreme Court of Canada directed the reviewing court to consider the nature and severity of the Crown's breaches, the number of Anishinaabe and their needs, and the wider needs of other Indigenous and the non-Indigenous populations of Ontario and Canada. In their respective decision letters, Ontario and Canada rely on the evidence from the Stage Three trial and the information exchanged during the negotiation and engagement process. The Crown takes into account both of these factors in their exercise of discretion.

The Crown's Breach

[156] There is no controversy on the nature and severity of the Crown's breach. The Crown, in both decision letters, acknowledges the longstanding and egregious breach of the Robinson-Superior Treaty and the Crown's failure to diligently implement the Augmentation Clause for over a century and a half.[90] The nature and severity of the Treaty breach calls for compensation for many losses that are not quantifiable but nevertheless flow from the breach.[91]

[157] Importantly for the exercise of discretion, the Crown recognizes the role of the nature and severity of the breach when it said: "[A]ppropriately considering the nature and severity of the breach requires that breaches with moral turpitude be remedied by more generous compensation…"[92]

[158] The Supreme Court described the nature and severity of the breach, which the Crown accepted: "For over a century and a half, the Anishinaabe have been left with an empty shell of a treaty promise".[93] The Court described the $4 annuity as "a mockery of the Crown's treaty promise".[94] It went on to say, "[f]or 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'".[95] Canada and Ontario "have failed to uphold the honour of the Crown",[96] and have "severely undermined both the spirit and the substance of the Robinson Treaties".[97]

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[90] Ontario Decision Letter at p.1, Record at p.352, paras. 2, 68, Record at p. 355, p.372; Canada Decision Letter at p.2, Record at p.14.
[91] Canada Decision Letter at p. 16, Record at p. 28.
[92] Canada Decision Letter at p. 15, Record at p. 27.
[93] *Restoule SCC*, at para. 11; Ontario Decision Letter at para. 69, Record at p. 372.
[94] *Restoule SCC*, at para. 2.
[95] *Restoule SCC*, at para. 262.
[96] *Restoule SCC*, at para. 263.
[97] *Restoule SCC*, at para. 286.

[159] Canada agrees that in order to advance reconciliation, compensation that properly addresses the nature and severity of the Treaty breach should go beyond simply quantifying annuity augmentations.[98]

Number of Superior Anishinaabe

[160] Dr. Simona Bignami, a specialist in Indigenous demography, considered the population of bands residing in the Robinson-Superior Treaty territory from 1850 to present. Dr. Bignami estimated that the number of Superior Anishinaabe (as of July 2024) was 16,259 persons. Ontario and Canada accept Dr. Bignami's evidence. While the plaintiffs do not necessarily agree with Prof Bignami's population numbers, they do accept them for the purpose of the discussion.

Needs of the Superior Anishinaabe

[161] It is beyond any controversy that the needs of the Superior Anishinaabek are great and that there is a great disparity of wealth and living conditions between the RST First Nation and other Ontarians.[99] The evidence on the needs of the RST First Nation came from Chiefs and community leaders and from experts retained by the parties. The question is whether the Crown justified how it took into account the needs of the Superior Anishinaabe.

Evidence of the Chiefs and Elders

[162] This court had the privilege of hearing from Chiefs and First Nation representatives at the Stage Three trial with respect to the severity of the Crown's breach and the needs of their Nations. Through the engagement and negotiation process, Chiefs and First Nations leaders attended personally and spoke directly and with great dignity to Crown representatives and to the Ministers. These narratives were stark and disturbing. They described growing up in dire poverty, the intergenerational losses and harms.

[163] At trial, Chief Duncan Michano testified that he served as Chief of Biigtigong Nishnaabeg (formerly Pic River First Nation) for ten years, before which he served as a councillor for the First Nation for 24 years. Chief Michano testified to the disparity between Biigtigong Nishnaabeg First Nation and neighbouring communities during his childhood: "We had nothing. We had no electricity, no water, we used outside toilets…We had to get water, take water from the creek". Only a short walk away, the town of Heron Bay South had running water and a power plant on the Black River.

[164] Elder Raymond Goodchild, a member of Pawgwasheeng (Pays Plat First Nation), was one of seven siblings who grew up in Rossport, Ontario. Elder Goodchild testified that his family endured hardship during his early life: "We were [in] poverty. We lived in a tar paper shack, wooden logs, sawdust house. Sometimes we would have to use cardboard to put up for windows". The home had no indoor plumbing and was insulated with sawdust. His family slept on the floor with old jackets or blankets. Food was often scarce for the family. He testified that "when we were

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[98] Canada Decision Letter at p. 16, Record at p. 28.
[99] Canada Decision Letter p. 20, Record at p. 32.

little kids, we would walk to Pays Plat and we'd find those highway picnic tables, right, and we'd go look in the garbage can, and we would find food in there".

[165] Chief Wilfred King of Gull Bay First Nation testified that the Anishinaabe people from Whitesand, Gull Bay and other First Nation communities "were living in abject poverty, living in squalor". Having spent his early years living off-reserve in Armstrong, he noted that in contrast, the non-Indigenous population in Armstrong "fared much better, they had all the amenities of life."

[166] During the engagement process, the Crown representatives heard from Chief Judy Desmoulin that across the river or down the highway, non-Indigenous communities lived in stark contrast to the living conditions on the reserve.[100] Chief Michele Solomon noted that the community remained economically marginalized.[101] Chief Duncan Michano observed that millions of pounds of copper, zinc, nickel and gold were extracted over a 40 year period, for which they did not receive any compensation.[102]

The Anishinaabe concept of mino-bimaadiziwin

[167] The Superior plaintiffs explained the Anishinaabe concept of *mino-bimaadiziwin* as a lens through which to understand the notion of "need". From the outset of these proceedings, it has been clear that the concept of *mino-bimaadiziwin* is a central value at the core of the Anishinaabe worldview. The term is difficult to translate directly into English. However, Elder Marcel Donio testified that *mino-bimaadiziwin* means "good life or good living". To pursue *mino-bimaadiziwin,* Elder Donio explained that: "[w]e work hard; we share; we live a good life; we offer a hand when we see that help is needed; we offer care when we feel someone is in need of care". He explained that *mino-bimaadiziwin* is "something that you work for on a daily basis all the time".

[168] Dr. Paul Driben, an ethnologist and ethnohistorian with expertise in Anishinaabe cultural traditions, explained that *mino-bimaadiziwin* is "the way of a good life". It means "life in its fullest sense, based on a personal foundation of emotional, physical, mental, and spiritual health". He explained that while the quest for *mino-bimaadiziwin* is an individual undertaking, the benefits are communal. It is a "selfless journey undertaken to make a better society".

[169] *Mino-bimaadiziwin* does not require the accumulation of wealth for its own sake. But as Dr. Driben explained, adequate material resources are necessary to attain "the emotional, physical, mental, and spiritual health" that is necessary in the quest for *mino-bimaadiziwin.* It is necessary, for example, to be able to take care of one's own family, especially children and Elders. *Mino-bimaadiziwin* means more than simply living at a basic level of subsistence.

[170] The CIFN submit that the Crown treated *mino-bimaadiziwin* as a peripheral concept and minimized its importance to the Treaty promise. In their view, *mino-bimaadiziwin* is not merely a symbolic or secondary value. Rather, it is the very essence of how the Superior Anishinaabe viewed the Treaty.

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[100] Record, Tab-110, "*Meeting Minutes, January 6, 2025*", at p. 3926.
[101] Record, Tab-113, "*Meeting Minutes, January 15, 2025*", at p. 3976.
[102] Record, Tab-113, "*Meeting Minutes, January 15, 2025*", at p. 3977

[171] Ontario acknowledged that *mino-bimaadiziwin* has a role in the honourable implementation of the augmentation promise, however, the Augmentation Clause is not a guarantee of *mino-bimaadiziwin* or the sole means of advancing it.[103] Similarly, Canada reasoned that numerous factors, aside from the Crown's breach of the Augmentation Clause, have contributed to the income disparity between the Superior plaintiffs and non-Indigenous Canadians. These factors include the legacy of residential schools, discrimination, and barriers to labour force participation,[104] many of which will be addressed through measures other than annuities-related compensation.[105] Canada says that it already addresses some of the First Nations' needs through discretionary spending and government transfers, acknowledging that discretionary government transfers cannot take the place of Treaty annuity augmentations.

Evidence of the economic experts

[172] Ontario commissioned a report to provide a statistical explanation of the social, economic and other needs of the Superior plaintiffs.[106] Profs. Gillezeau and Jones compared the well-being of Robinson-Superior communities to comparator communities, including Robinson-Huron communities, other First Nation communities, and other non-Indigenous communities.

[173] The Gillezeau and Jones report analyzed multiple indicators of social need and found that when compared to non-Indigenous populations, the Robinson-Superior First Nations: (1) have substantially higher poverty rates;[107] (2) have substantially higher unemployment rates[108] and substantially lower labour force participation;[109] (3) have a far larger share of their population without a high school degree;[110] (4) are located further from hospitals, health care providers and long-term care homes;[111] (5) demonstrate a substantially higher rate of incarceration.[112] The story is clear. Robinson-Superior communities see weaker outcomes in the overwhelming majority of variables analyzed with only a small number of exceptions.[113]

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[103] Ontario Decision Letter at para. 123; Canada Decision Letter at p. 22. Record at p. 34
[104] Canada Decision Letter at p. 22, Record at p. 34.
[105] Canada Decision Letter at p. 22, Record at p. 34.
[106] Ontario Decision Letter at para. 110, Record at p. 384, citing Record, Tab-41A, "Gillezeau, R., and Jones, M., *Contemporary Well-Being in Robinson-Superior First Nations: A Social, Economic and Demographic Comparison to Other Communities Post-2011*, dated December 4, 2024" ("Gillezeau and Jones Report").
[107] Ontario Decision Letter at para. 115, Record at p. 386, citing Gillezeau and Jones Report at p. 42, Record at p.2801.
[108] Ontario Decision Letter at para. 116, Record at p. 386, citing Gillezeau and Jones Report at p. 44, Record at p. 2803.
[109] Ontario Decision Letter at para. 116, Record at p. 386, citing Gillezeau and Jones Report at p. 46, Record at p. 2805.
[110] Ontario Decision Letter at para. 116, Record at p. 386, citing Gillezeau and Jones Report at p. 47, Record at p. 2806.
[111] Ontario Decision Letter at para. 117, Record at p. 386, citing Gillezeau and Jones Report at pp. 60-66, Record at pp. 2819-2825.
[112] Ontario Decision Letter at para. 119, Record at p. 387, citing Gillezeau and Jones Report at p. 85, Record at p. 2844.
[113] Ontario Decision Letter at para. 110, citing Gillezeau and Jones Report at pp. 110-111, Record at pp. 2869-2870.

Discussion on Needs of the Superior Anishinaabe

[174] The parties agree that there is substantial need among the Superior Anishinaabe arising from the long-standing failure to share the wealth of the Treaty territory. These needs were demonstrated in lay and expert evidence. The parties diverge on how these needs should be defined and addressed in the assessment of past compensation.

[175] The Superior plaintiffs approach the factor of need by a comparison to the RHT First Nations, saying that their need is significantly greater than the needs of the RHT First Nations.

[176] During the Stage Three trial, the plaintiffs' expert economists testified that a significant gap exists in the relative wealth of the RHT First Nations compared to non-Indigenous Canadians. Prof. Stiglitz testified that deprivations of the magnitude and persistence experienced by the Superior plaintiffs will take a long time and large expenditure to undo. Mr. Hutchings estimated that this relative disparity or "income gap" is between at least $153 billion to $194 billion depending on the population estimate used.[114]

[177] The Superior plaintiffs rely on the income gap analysis evidence and state that they would need $1.53 *per capita* for every $1.00 expended on the RHT First Nations in order to be brought to the same level as the RHT First Nations. The Superior plaintiffs submit that they would require at least $6.06 billion in compensation in order to achieve parity with the RHT Settlement.[115]

[178] The Crown rejects the income gap approach.[116] Ontario states that most of the income gap arises from the period before 1950, reflecting "relative income levels of RSFN beneficiaries who are no longer alive".[117] Canada reasoned that using annuity augmentations to equalize incomes is not the appropriate way to remedy the breach of the Augmentation Clause.[118]

[179] The Contingent Interest First Nations submit that limiting compensation to present needs today ignores the historical value extracted from the land over 175 years and fails to reciprocate for the generations who gave up their land and received nothing in return. The CIFN disputed what it calls the Crown's "presentist" approach to needs, ignoring those of the Superior Anishinaabek ancestors who lived their lives in poverty. They say that Canada provides no meaningful explanation as to how the needs of the Superior Anishinaabek of the past can be addressed through the present value of the unpaid annuities or by increasing their initial compensation amount by $300 million. They submit that the long-standing nature of the breach requires greater

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[114] Stage Three Trial, Exh. 8, Expert report for Whitesand and Red Rock First Nations of David J. Hutchings at paras. 16(e), 170.
[115] Record, Tab-29, "Schachter, H., *RST Annuity Engagement Process – Factor 2: The number of Superior Anishinaabe and their needs; Factor 4: A consideration of the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada*, dated November 1, 2024", at pp. 2031-2032.
[116] Ontario Decision Letter at para. 105; Canada Decision Letter at pp.21-22, Record at pp.33-34.
[117] Ontario Decision Letter at para. 107, citing Stage Three Trial, Exh. 61, "Value of the Augmentation Promise in the Robinson Treaties" at para. 174.
[118] Canada Decision Letter at pp. 21-22, Record at pp. 33-34.

compensation, not less. Ontario maintains that the needs analysis is a "present-focused inquiry".[119]

[180] Both Crowns agree that the Superior plaintiffs have demonstrated substantial need;[120] a wide range of social, economic, and other indicators show the Superior plaintiffs are well behind other Ontarians and Canadians. The Superior plaintiffs require more resources to address immediate and pressing community needs, including those arising from inadequate infrastructure, scarce land bases and housing.[121]

[181] Ontario says that it took into account the significant needs of the Superior Anishinaabe in their decision to allot the full amount of Crown benefits, which amount was based on their expert reports, as adjusted post the Stage Three trial.[122]

[182] Canada considers "need" to be a "less tangible factor",[123] and references factors 1 and 2 as an explanation for their exercise of discretion. In particular, it points to the increase of $300 million as an adjustment after estimating Crown benefits.[124]

Factor 4: The Wider Needs of other Communities

[183] The Supreme Court also directed the Crown to consider the wider needs of other Indigenous and non-Indigenous populations. Much of the discussion of Factor 4, the wider needs, was interrelated to the above discussion of needs of the Superior Anishinaabek under Factor 2.

[184] The debate on Factor 4 centered largely on the Crown's justification for its consideration of the wider needs of impoverished Indigenous and non-Indigenous communities across the country as a polycentric policy consideration when addressing this factor.

[185] Canada acknowledged that "overall, all First Nation communities, whether in the Robinson-Superior Treaty territory, Ontario, or Canada as a whole, have lower well-being scores than Canada's non-Indigenous communities".[125] It reasons that it has determined its compensation in light of the undisputed fact that there are hundreds of other impoverished First Nation communities across the country that rely on discretionary funding from Canada to assist in meeting their needs, settling Indigenous claims and investing in Indigenous priorities.[126]

[186] Ontario explains that it considered the wider needs of other Canadian communities as part of its polycentric consideration, noting that the payment of money to one group has direct implications on the amount of money available to the other group. Ontario asserts that wider needs are a relevant consideration in the context of polycentric decision-making.[127] Although Canada

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[119] Ontario Decision Letter at para. 121, Record at p. 387.
[120] Ontario Decision Letter at para. 112, Record at p. 385; Canada Decision Letter at p.20, Record at p.32.
[121] Ontario Decision Letter at para. 124; Canada Decision Letter at p.20, Record at p.32.
[122] Ontario Decision Letter at para. 262, Record at p. 426.
[123] Canada Decision letter at p. 15, Record at p. 27.
[124] Canada Decision Letter at p. 3, Record p. 15.
[125] Canada Decision Letter at p.22, Record at p. 34.
[126] Canada Decision Letter at pp.23-24, Record at pp. 35-36.
[127] Ontario Decision Letter at para. 204, Record at p. 409.

and Ontario identified that there were pressing wider needs across the country, the Crown does not specifically state that it would be prevented from meeting the needs of other populations if it met its obligations pursuant to the Treaty.

[187] The Superior Anishinaabek, the CIFN and the TAA note that the solemn promise to share the wealth cannot be diminished by considering the needs of others, that is, this factor cannot be used to override the core of the Treaty promise. They say that the direction to consider wider needs should not be interpreted as equating the Crown's constitutional obligations to its Treaty partners with the interests of other non-Indigenous residents of Ontario. Rather, the overarching objective of reconciliation and restoring the honour of the Crown should be a priority consideration in the polycentric decision-making process. The CIFN say that it is dishonourable for the Crown to "offset" its obligations to the Superior Anishinaabe because of the significant needs of other Indigenous groups.

[188] In *Chippewas of Nawash* the court accepted that competing Crown obligations can be considered in evaluating how to fulfil a treaty.[128] The scope of that discretionary consideration depends on the facts and nature of the Treaty obligation.

[189] The direction from the Supreme Court of Canada that the Crown may take into account a consideration of the wider needs of Indigenous and non-Indigenous communities is mirrored in the direction to this court. The direction finds its reference in the text of the Treaty itself which specifically reflects the intention of the Crown who "desires to deal liberally and justly with all Her subjects", and as the Supreme Court of Canada said, "to do justice to the Anishinaabe treaty partners and Her Majesty's other "subjects".[129] Looking at both the text of the Treaty and the Supreme Court direction, this consideration of the needs of other communities in Ontario and Canada, Indigenous and non-Indigenous alike is firmly within the discretion of the Crown.

[190] The Crown's determination of compensation was largely based on its assessment of the Crown benefits received over the decades, a percentage share to be allocated to the Superior Anishinaabe and certain additional amounts to account for the intangible factors. The Crown does not suggest that it has decreased the amount it otherwise would have assessed for appropriate compensation but for the wider needs of other Indigenous and non-Indigenous communities across Canada. If that were the case, understandably the Crown would be expected to identify more specifically the wider needs that prevented it from paying the full amount it had otherwise determined. The Crowns' explanations suggested that the unquantified factors, including needs, were considered holistically and were the basis for the additional amounts considered to increase the compensation.

[191] The Crown's consideration of the needs of other communities was part the overall complex policy consideration applying to the whole of the exercise of Crown discretion, which is entitled to judicial deference. I find that the consideration of wider needs was reasonably justified and informed the exercise of discretion.

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[128] *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565, at para. 153.
[129] *Restoule SCC*, at para. 296.

Factor 5: Principles and requirements flowing from the honour of the Crown

The honour of the Crown

[192] The Supreme Court directed the reviewing court to consider 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.[130]

[193] The Superior plaintiffs say that, in its exercise of discretion, the Crown failed its duty to restore honour to the Crown.

[194] For its part, Canada states that it considered the honour of the Crown in concert with these four factors in the overall exercise of discretion.[131]

[195] Ontario says that the honour of the Crown requires that its exercise of discretion be led by "the shared goals, expectations and understandings" of the RST First Nations and the Crown at Treaty formation.[132]

[196] The principles and requirements flowing from the honour of the Crown is not a distinct factor which the Crowns considered independently and nor does this court on review. These principles act as an overarching factor, imposing duties on the Crown throughout. The Crown's task in the engagement process, decision-making and justification process was to conduct itself throughout with the goal of restoring the Crown's honour and advancing reconciliation. When this litigation began, the Crown's honour, vis-à-vis its Treaty obligations, was in tatters.[133]

[197] I agree with the position expressed by Canada. The restoration of the honour of the Crown should be the animating principle for the determination of the amount of compensation. This goal should be at the forefront in consideration of the other four factors and any consideration of polycentric policy issues. Canada states that this factor, overarches Factors 1-4.

[198] I will first review the principles flowing from the honour of the Crown and the duty of diligent implementation of the Treaty.

The principles flowing from the honour of the Crown

[199] The principles and requirements flowing from the honour of the Crown are well established. The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples,[134] and the Crown is required to act honourably in all of its dealings with Aboriginal peoples.[135] It is a constitutional principle,[136] the

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[130] *Restoule SCC*, at para. 309.
[131] Canada Decision Letter at p. 31, Record at p. 43.
[132] Ontario Decision Letter at para. 222, Record at p. 414.
[133] See *Restoule SCC*, at paras. 2, 262, 286.
[134] *Mikisew Cree*, at para. 21.
[135] *Mikisew Cree*, at para. 23, citing *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis*, at paras. 68-72.
[136] *Mikisew Cree*, at para. 24, citing *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42.

purpose of which is reconciliation, remediating past injustice and facilitating future relationships.[137] The honour of the Crown advances the goal of reconciliation by "promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes".[138]

[200] The honour of the Crown is a core precept that gives rise to different duties in different situations. [139] It is applied in concrete practices,[140] in this case the honourable, diligent and purposive fulfilment of the Treaty promise.[141]

The duty of diligent implementation

[201] The Supreme Court specifically identified the contents of the duty of diligent implementation of the Robinson-Superior Treaty.

[202] The duty to diligently implement a treaty promise holds the Crown responsible for making good on its Treaty promise[142] that the Crown would share in the wealth of the land if it proved profitable.[143] The duty of diligent implementation does not mandate a particular result but instead speaks to *how* Crown obligations must be fulfilled.[144]

[203] Specifically, where the economic conditions allow the Crown to increase the annuity beyond $4 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 and is subject to review by the courts.[145]

[204] The amount by which the Crown might increase the annuity is a polycentric and discretionary determination that will reflect many social, economic and policy considerations that may change over time.[146] For its part, the Crown must exercise its discretion diligently, honourably, liberally, and justly, while engaging in an ongoing relationship with the Superior Anishinaabe based on the values of respect, responsibility, reciprocity and renewal.[147]

Reconciliatory justice

[205] The underlying purpose of the principle of the honour of the Crown is to facilitate the reconciliation of the Crown's interests and those of Indigenous peoples.[148] The Supreme Court of Canada crafted this unique remedy of mandated engagement and negotiation, followed by an

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[137] *Takuhikan,* at para. 148.
[138] *Takuhikan*, at para. 168, citing *Mikisew Cree*, at para. 22, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 ("*Taku River*"), at para. 24.
[139] *Mikisew Cree*, at para. 24, citing *Haida Nation*, at paras. 16, 18.
[140] *Haida Nation*, at para. 16.
[141] See *Restoule SCC*, at para. 302.
[142] *Restoule SCC*, at para. 254.
[143] *Restoule SCC*, at paras. 271, 296.
[144] *Restoule SCC*, at para. 261.
[145] *Restoule SCC*, at para. 196.
[146] *Restoule SCC*, at para. 294.
[147] *Restoule SCC*, at para. 197.
[148] *Takuhikan*, at para. 148.

exercise of discretion within defined constraints, to provide an opportunity for the Crown to repair its relationship and restore its honour, after a century and a half of dishonourably ignoring its Treaty promise.

[206] The Supreme Court remedy is based on the concept that reconciliation is a long-term project[149] which requires a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist.[150] It requires the Crown to nurture and build respectful relationships with the RST First Nations' leaders and communities and to "work together to reconcile their interests".[151] The justification for the compensation amount, must be respectful of the Superior Anishinaabe, their perspectives and the evidence.

[207] In *Takuhikan* the Supreme Court discussed the concept of "reconciliatory justice" which serves to restore and improve the relationship between the Crown and Indigenous peoples and place them back on the path towards reconciliation.[152] By requiring that the Crown engage and negotiate with the RST First Nations, the Supreme Court reminded the Crown that this exercise was about much more than unilaterally deciding on an amount for compensation. It was a requirement that addressed the important principle of renewal that is at the foundation of the Treaty.

[208] It is therefore important that the Crown take steps to appreciate the perspectives of the RST First Nations on the manner in which the relationship can be restored.[153] This does not mean that the RST First Nations can decide in the court's place what remedy is appropriate, but "the more reasonable the Indigenous perspective is, the greater the likelihood that the court will accede to it."[154]

The Anishinaabe perspective

[209] The Augmentation Clause promise reflected the common intention of the Treaty partners. It was developed through a cross-cultural or intersocietal process, designed to renew their longstanding Covenant Chain relationship. By concluding the Treaty with this promise, the Crown was able to achieve its goal of acquiring immediate access to the ceded territories and opening the territory to settlement and economic development.[155] In return, the Anishinaabe were promised that their lands and waters would continue to sustain them; there was a mechanism to share in the wealth should the territory prove profitable. The Augmentation Clause was built upon and infused with core Anishinaabe principles of respect, responsibility, reciprocity and renewal.[156] These principles were foundational to the Treaty-making relationship and continue in the enduring

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[149] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, 488 D.L.R. (4th) 189, at para. 90.
[150] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families,* 2024 SCC 5 at para. 90.
[151] *R. v. Desautel*, 2021 SCC 17 at para. 88, citing *Rio Tinto*, at para. 34; *Nacho Nyak Dun*, at para. 1.
[152] *Takuhikan*, at para. 210.
[153] *Takuhikan*, at para. 211.
[154] *Takuhikan*, at para. 211.
[155] *Restoule SCC*, at para. 179.
[156] *Restoule SCC*, at para. 180.

relationship promised by the Treaties. These principles give rise to both procedural and substantive obligations.

[210] As the Supreme Court described, 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".[157] Those principles must continue to animate the Treaty partners, the responsibility to consider and address the needs of the First Nations, the respect for the perspectives of the Treaty partner, the reciprocal exchange and the constant "polishing of the chain" which binds the Treaty partners in relationship. The breach of this Treaty must be repaired by the Crown, recognizing that it entered this relationship and received the land cession it sought, based on a promise founded on the Anishinaabe principles.

[211] In many respects, the disagreement over the duties flowing from the honour of the Crown in this case is expressed in disagreements over the discretionary decisions, including the decision with respect to the interest rate, to bring past losses forward to present values as well as the method to account for Crown revenues.

[212] The Superior plaintiffs submit that they incurred historic losses as well as the lost opportunity to influence Crown decision-making in the past. They submit that Ontario has inappropriately constructed a Crown-centric view of reconciliatory justice. At the very least, reconciliatory justice requires the Crown to restore what was lost as a result of the long-standing breach. They accept that mathematical precision is neither possible nor necessary. However, they submit that some assessment of the Superior plaintiffs' losses from the Crown's misconduct is required to assure them that they have a reliable and trustworthy partner. The Superior Anishinaabe claimed that the duty of honour imposed on the Crown required it to compensate their Treaty partner for what it had lost by reason of the breach of the Treaty. This debate was central to the issue of how to calculate present value of past unpaid annuities and whether indirect revenues were relevant.

Discussion

[213] While the requirements flowing from the principle of the honour of the Crown may appear sometimes to be imprecise and vague, in this case they act as a restraint upon the Crown's exercise of discretion. The Crown's discretion on certain aspects of the determination of an amount of compensation is not unfettered. And going forward, the Crown's discretion whether or by how much to increase the annuity is not unfettered. The principles and requirements flowing from the honour of the Crown may not provide a precise measuring stick for the Crown to set the amount of compensation, but the requirement that the justification is honourable, liberal and just, and based on the Anishinaabe values of respect, responsibility, reciprocity and renewal, remains.

[214] The Crown decision letters are lengthy and complex documents covering a great deal of economic evidence and the arguments made by the parties. For the most part, the Crown letters

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[157] *Restoule SCC*, at para. 195.

seek to explain how they came to the many levels of decision that justify the final amount for compensation.

[215] There are some instances where a Crown assertion seems to misinterpret the obligation to interpret the Treaty "liberally, honourably and justly".

[216] Ontario's assertion that the interest rate debate should be considered as a question of Crown benefit[158] and that the essence of the Treaty promise is an exercise of discretion[159] appears to miss the point. The essence of the Treaty promise is to share in the wealth of the land should it prove profitable.

[217] Canada's decision letter fulfils its duty to provide clear, transparent and logical reasons that are responsive to the actual promise and aligned with Anishinaabe principles.

[218] The Crown decision letters do demonstrate a serious engagement with the evidence and the Anishinaabe perspective on all four factors and provided transparent consideration of the four factors in their exercise of discretion on the amount of compensation. The decision letters demonstrate an understanding of the Crown obligations to conduct itself in a manner to restore the Crown's honour with its Treaty partner and to take steps to advance reconciliation.

VII. THE CROWN'S DETERMINATION OF CROWN BENEFITS AND COMPENSATION

One Decision – Two Justifications

[219] Although the Supreme Court of Canada gave specific directions to the "Crown",[160] Ontario and Canada approached the process and exercise of discretion as two separate entities and ultimately followed separate paths of reasoning to justify their determinations of Crown benefits and past compensation. By some unexplained coincidence, these two separate and often conflicting reasoning paths lead to the same result.

[220] It would have been preferable had there been a single decision letter, a single justification for the Crown decision to fix compensation at $3.6 billion. Since Ontario and Canada each issued their own separate justifications for the determination to pay, it is necessary to consider both sets of reasons.

Introduction

[221] The central focus of the Crown's determination of compensation was its estimate of the benefits the Crown received and its expenses over time. This was an exercise the Crown had neglected to conduct for over 175 years. The Supreme Court of Canada has already noted that the Crown has derived an enormous economic benefit from the Treaty territories.[161]

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[158] Ontario Decision Letter at para. 134.
[159] Ontario Decision Letter at para. 215, Record at p. 413.
[160] *Restoule SCC*, at paras. 304-310.
[161] *Restoule SCC*, at para. 285.

[222] The Crown determination of past compensation began as an estimate of the Crown benefits, based on the revenues and expenses from the territory from 1850-2024, brought up to present value and a share for the Superior Anishinaabe. The two decision letters outline different reasoning paths to arrive at an amount for the shareable wealth that the Crown collected during the post-Treaty period. I begin with a look at the justifications offered for the estimate of Crown benefits, based on the three inputs: Crown revenue and expenses, an interest rate to protect the dollar value over time and a share to be allocated to the Superior Anishinaabe.

[223] The in-depth examination and analysis of those revenues and expenses was first undertaken by economists retained by Ontario and the plaintiffs. Their reports were admitted into evidence in the Stage Three trial and were again the subject of discussion and debate through the negotiation process and the review process. All parties relied on a common data set.

[224] As directed by the Supreme Court, this review did not begin with an "open-ended judicial assessment or quantification of damages for past breaches".[162] Rather, it was conducted as a review of the process and substantive amount the Crown determined as compensation.[163]

[225] The plaintiffs contend that the Crown's estimation of Crown benefits is unreasonable and is based on an incorrect appreciation of the historical facts. The plaintiffs say that the quantification of those benefits remains a core part of the court's work on this review. However, the Supreme Court of Canada specifically directs that this review not begin as an open-ended judicial assessment or quantification of the damages for past breaches.[164] This review of the Crown's explanation looks at the intelligibility, transparency and justification of the decisions, and whether the Crown exercised its discretion honourably, liberally and justly, while engaging with the Superior plaintiffs based on values of respect, responsibility, reciprocity and renewal.[165]

[226] Although the Supreme Court of Canada determined that the assessment of compensation is not a calculation the Crown began with, and this review will look at the estimates of Crown benefits based on the Crown's calculations of the net Crown resource revenue ("NCRR") realized by the Crown from the territory over the historical period.

[227] The data set was primarily from the Public Accounts of Ontario ("PAO") and the Irving Papers.[166] The PAO data did not track the expenses by resource nor distinguish revenues and expenses within the Treaty territory, with the result that there is much room for interpretation and debate. This may be explained perhaps by the fact that until very recently, Ontario, which has received the bulk of revenue at issue, has not acknowledged any obligation to measure or share the wealth generated in the Treaty territory. Consequently, to show a meaningful picture of the economic activity in the territory, the economists had to allocate province-wide data to the Treaty territory and attribute reasonable percentages of provincial expenses to resource activity in the territory, an exercise described as herculean. The experts often took different approaches and made

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[162] *Restoule SCC*, at para. 310.
[163] *Restoule SCC*, at para. 310.
[164] *Restoule SCC*, at para. 310.
[165] *Restoule SCC*, at para. 197.
[166] Canada also included revenue and expense data regarding radiofrequency spectrum.

different interpretations of the data, particularly on the relevance of certain categories of revenues and expenses.

[228] While the NCRR estimates are based on data and the interpretation of the data, the share allocated to the Superior Anishinaabe is a matter of discretion to be exercised and justified according to the parties' shared goals, expectations, and understandings, taking into account the Anishinaabe perspective of respect, responsibility, reciprocity and renewal.[167] The interest rate to be applied to the net benefits for the purpose of determining a justifiable compensation amount is similarly a matter of Crown discretion to be exercised reflecting a broad purposive approach to the Treaty promise, that is: liberally, honourably and justly.

[229] In all cases and on all issues when exercising Crown discretion, the honour of the Crown is at stake and therefore must be aimed at the restoration of the Crown-Indigenous relationship and the advancement of reconciliation.

[230] There is no "correct" calculation or estimate of the NCRR received from the Treaty territory. What the Crown must show is that their estimate is reasonable, meeting the threshold described in the section on Standard of Review. What can be justified is a rational and principled explanation for its interpretation of the data and an estimate that aims to achieve the purpose behind the Treaty, a liberal, just and honourable sharing of the wealth of the territory, taking into account the Anishinaabe perspective of respect, responsibility, reciprocity and renewal.

[231] The plaintiffs say that the Crown's estimate of net benefits to be shared remains unjustified and unjustifiable. They say that because the determination of past compensation relies so heavily on the Crown estimate of net Crown wealth, it is unfair and unreasonable and must be declared constitutionally non-compliant.

[232] The estimate of NCRR considered the revenues from mining, forestry, hydroelectric generation and land sales. All those revenues were collected by Ontario.[168] Ontario and the Superior plaintiffs arrived at vastly different estimates of NCRR. In gross terms, it is fair to say that in arriving at their estimates of NCRR, the plaintiffs included a broader definition of revenues and Ontario included a broader definition of expenses.

The Crown's determination

[233] The first step and the building block of an estimate of Crown benefits is based on an analysis of Crown revenue and expenses in the resource sector since 1850. The parties agree that the Stage Three evidence on NCRR from the Treaty territory provides a helpful objective starting point for the Crown to estimate compensation.

[234] Canada decided to develop its compensation offer based on the plaintiffs' estimate of NCRR for reasons which I set out below.

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[167] *Restoule SCC*, at para. 180.
[168] Revenues from radiofrequency spectrum were collected by Canada.

[235] Canada arrived at its determination to pay $1.8 billion, being one half of $3.6 billion as follows:

- NCRR of $11.152 billion, inclusive of interest at the BTA rate of 5.3%.[169]
- Canada then determined to apportion a 27% share of this amount to its Treaty partner, thus arriving at $3 billion for compensation, or $1.5 billion for Canada's share. Canada says that this share reflects the less tangible factors and responds to the egregiousness of the breach.
- Canada then proposed to increase its contribution to compensation by $300 million, for a total contribution of $1.8 billion, in response to further information and perspectives Canada heard regarding the nature and severity of the breach, the needs of the First Nations, and Canada's broader social, economic and policy considerations.[170]
- Canada then benchmarks this amount against the RHT Settlement. Canada says that the total amount should be reasonably comparable to the RHT settlement on a per capita basis to account for the Superior plaintiffs' needs, despite Canada's view that the productivity of the Superior Territory lands was lower.

[236] Ontario arrived at its determination to pay one half of $3.6 billion as follows:

- NCRR estimated at $2.7 billion inclusive of interest at the long-term bond rate of 4.9%[171]
- Ontario determined to share 100% of NCRR with its Treaty partner to reflect the needs of the communities, and the impact of longstanding and egregious breach;
- Ontario adds $675 million, explained as being 25% of NCRR to reflect the indirect benefit the Crown receives captured through taxes;
- Ontario adds $225 million, in a spirit of generosity, explained as an amount to ensure the ends of reconciliatory justice are met, and to assure that vindication and deterrence are achieved.[172]
- Ontario compares $3.6 billion against the RHT Settlement on a per capita basis.[173] Ontario considers the amount of the RHT Settlement to be a relevant consideration,

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[169] Canada Decision Letter at pp. 13-14, Record at pp. 25-26.
[170] Canada Decision Letter at p. 15, Record at p. 27.
[171] Ontario Decision Letter at para. 261, Record at p. 426; Ontario used also used the term "adjusted shareable wealth"'.
[172] Ontario Decision Letter at para. 264, Record at p. 427.
[173] Ontario Decision Letter at para. 16.

> after considering all of the factors. Ontario notes that the Superior territory was 25% as productive as the Huron territory and currently has 38% of the population.[174]

[237] The Stage Three trial process provided an opportunity for in-depth and granular testing of the experts' opinions, analysis and interpretative choices. Ontario's approach to relevant expenses was the subject of rigorous and effective challenge. Since the trial, Ontario has acknowledged that its experts had been over-inclusive of expenses and under-inclusive of revenues and adjusted its position on shareable wealth upward from -$4.2 billion to $2.7 billion, a net increase in their estimate of Crown benefits by some $6.9 billion.

[238] Canada explained in its decision letter that Ontario's adjustments were not enough for them to adopt Ontario's approach or estimate of NCRR. Canada rejected Ontario's over-inclusive approach to expenses. Therefore, Canada relied on the plaintiffs' analysis and applied the plaintiffs' estimate of NCRR of approximately $11.152 billion, notwithstanding the criticisms of this approach by Ontario's experts.

[239] The position of the plaintiffs also evolved over time. At the Stage Three trial, the Superior plaintiffs submitted that the Territory produced $56.895 billion in NCRR directly captured by the Crown; and $20.8 billion in benefits indirectly captured by the Crown through taxation. On this review the Superior plaintiffs submitted that the Crown should pay an amount between $20.1 billion and $46.9 billion. These amounts are based on a 50% share of NCRR plus 25% of rents in excess of NCRR brought forward at either the Canada Life Benchmark rate or the 60/40 portfolio rate. Note also that the difference in the applied interest rate explains much of the difference between $11.152 billion and $56.895 billion. The first figure is roughly equivalent to the RST First Nations' NCRR estimate brought forward at the Band Trust Account rate of 5.3%. The second figure is the RST First Nations' NCRR estimate brought forward at the 60/40 mixed portfolio rate of 7.2%.

[240] The sections that follow outline some of the revenue and expense issues on which the parties and their experts remain divided.

Crown Revenues as part of NCRR estimate

Economic rent as a measure of Crown Benefits

[241] Resource rents is a concept which captures the profit that remains after deducting the cost of inputs used in production. All of the parties relied on the theory of *economic rent* to support their approach to estimating net benefits from the Treaty territory.

[242] The economic experts agreed that different actors capture a portion of resource rents. The Crown captures a portion of resource rents, both directly and indirectly. For example, the Crown *directly* captures a portion of resource rent by levying stumpage fees, water rental charges or mining profit taxes. The Crown *indirectly* captures a portion of resource rent by charging income tax and corporate tax on economic actors in the resource sector. A significant difference between

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[174] Ontario Decision Letter at paras. 249-251, Record at p. 423.

the Superior plaintiffs and Canada is based on the inclusion or exclusion of resource rents other than direct Crown resource revenues.

[243] On a conceptual level, the Crown insisted that resource rents could not be accurately or reliably measured and thus should be excluded as relevant revenues.[175] The plaintiffs' witness, Prof. Stiglitz explained, "Using resource rents to estimate the value of land and resources to Indigenous peoples is not a novel idea. The Canadian Royal Commission on Aboriginal Peoples commissioned such a report in 1991 that lays out the same economic principles we rely on here".

As that report states:

> The concept of economic rent has assumed a central role in discussions of aboriginal rights in Canada. Large-scale resource development has generated significant economic benefits, but also enormous social and environmental costs. Economic rent is defined as the net social benefit accruing from the exploitation of natural resources and, therefore, the potential income accruing to the owner of the land. The distribution of rents between private firms, governments and aboriginal peoples, however, has been highly unequal. In particular, aboriginal people have shared few of the benefits and borne an inordinate share of the costs.[176]

[244] Ontario ultimately adjusted its estimate of shareable wealth by $675 million to represent indirect revenues from taxes. Canada did not include any indirect revenue in its estimate of NCRR. I note here, that even without including indirect revenue in its estimate, Canada still estimated a much higher amount of NCRR than Ontario.

Ontario's Issues on Revenues

[245] From the outset, there was broad agreement amongst the parties on the relevant revenues, other than the dispute over the relevance of resource rents. Some other examples of less significant revenue disputes were the 1935 Mining Profit Tax revenues ($258 nominally in 1935); provincial logging tax revenues (1951-1980) ($1.5 billion at the government long-term bond rate)[177], and revenues from the auction and sale of radiofrequency spectrum licenses. These differences do not have a significant impact on the final estimates of adjusted shareable wealth. I use these examples to show the level of scrutiny brought to each line item of revenues.

Provincial Logging Tax Revenue (1951-1980)

[246] The parties disagreed on the treatment of the logging tax (1951-1980). The Superior plaintiffs contend that the logging tax was a relevant revenue because economically it was a tax on the profits from exploiting resources and because Ontario classified the Logging Taxes separate

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[175] Canada Decision Letter at p. 26, Record at p. 38, see also Ontario Decision Letter at paras. 158-161, Record pp. 398-399.

[176] Stage Three Trial, Exh. 3, "Expert Report for Whitesand and Red Rock First Nations of Joseph E. Stiglitz & David J. Hutchings", January 24, 2023, citing Robert S. Pindyck and Daniel L. Rubinfeld, *Microeconomics*, (Pearson, 2013): 305.

[177] Stage Three Trial, Exh. 60, "Net Crown Resource-Based Revenues in the Robinson Huron and Robinson Superior Treaty Territories".

from all other corporate and income taxes.[178] Conversely, Ontario asserts that logging tax was a tax on capital and production, rather than a tax on resource revenues.

Radiofrequency spectrum

[247] Radiofrequency spectrum is a new source of revenue. Canada collected approximately $57 million in revenues from spectrum primarily through the sale and auctioning of licenses. Ontario does not include spectrum revenue in its NCRR calculation.[179] The Superior plaintiffs submit that spectrum revenues should be included in the calculation of NCRR because they are inextricably linked to the land over which the auction for spectrum rights applies.

[248] Although Canada does not concede that revenues from spectrum sales and auctions are resource-based revenues connected to the Treaty territory, Canada still applies the plaintiffs' estimate of NCRR which include the amount attributable to spectrum related revenues.[180] However, Canada makes clear that this is not a concession on the relevance of spectrum revenues from sales and auctions. Canada notes that it accepts the plaintiffs' full NCRR amount "as a gesture of compromise".[181]

[249] The debate over the relevance of spectrum revenue is no longer necessary for this review. By applying the plaintiffs' NCRR estimate, which includes spectrum, Canada engages in a process that will never yield an exact or correct result. Whether spectrum will be considered a relevant revenue for estimating the future shareable wealth of the territory can be addressed in negotiations going forward between the Treaty partners.

Indirect Crown Revenue through Taxation

[250] The Crown receives revenues from the Treaty territory *indirectly*, through its general taxation powers. The Superior plaintiffs submit that the shareable Crown benefits include taxes levied on actors in the resource sector. Over time, direct provincial revenues from mining, forestry, land and water have declined in Ontario as a percentage of the province's total revenues from 30% in 1913 to less than 1% in 2020.[182] This decline is due in part to the introduction of income taxes from which the Crown captured a portion of resource rents *indirectly* and in part due to the diversification of the economy.

[251] It is generally agreed that it is a highly complicated task to reliably estimate the indirect revenues captured from the resource sector. The plaintiff witnesses did not provide an estimate. However, relying on an OECD study, the plaintiffs say the Crown captures approximately 25-33% of resource rents through taxes.[183]

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[178] Stage Three Trial, Exh. 10, Expert reply report of David J. Hutchings, October 31, 2022, at para. 49.
[179] Ontario Decision Letter at paras. 272-274, Record at p. 429.
[180] Canada Decision Letter at p. 29, Record at p. 41.
[181] Canada Decision Letter at p. 29, Record at p. 41.
[182] Stage Three Trial, Exh. 10, Expert reply report of David J. Hutchings, dated October 31, 2022, at para. 28.
[183] In support of this submission, the Superior plaintiffs rely on a study from the Organisation for Economic Co-Operation and Development (OECD) suggesting that Canada's average tax rate is between 25-33% of Gross Domestic Product (GDP), a measure of the total output of an economy.

[252] The decision letters acknowledge that the Crown receives an indirect benefit from the Treaty territory through taxes.[184,185] Canada, however, explained its position to exclude indirect revenues from its estimate of Crown benefits, which it says are not directly or closely related to the productivity of the land and do not logically flow from the Treaty promise.[186] Canada notes that NCRR is the measure that best reflects what the territory actually produced and is consistent with the language and intent of the Treaty.

[253] Ontario maintains its criticism of the Superior plaintiffs' position that the Crown captures 25-30% of economic rents through taxes, in part because rents "can only be estimated using theoretical constructs and assumptions".[187] However, Ontario determined that it would be just and honourable to "gross up" its NCRR estimate by 25% ($675 million) as a rough estimate of benefits the Crown receives from the Treaty territory through taxes.[188] Ontario noted that this amount should be assessed qualitatively as part of the Crown's discretion.[189] In light of the fundamental disagreements at the conceptual level, it is difficult to discern Ontario's rationale for the amount of this "gross-up" or adjustment.

Conclusion on Revenue Disagreements

[254] The most significant disagreement on Crown revenues arises from the plaintiffs' theory that, in addition to direct resource-based revenues, the Crown benefits from resource rents including indirect revenues, some of which are collected in the form of taxes. The plaintiffs continue to claim that some portion of resource rents should be considered in the estimate of Crown benefits.

[255] The Superior plaintiffs submit that resource rents provide a useful lens through which to understand the losses to the Anishinabek from the Crown's failure to "periodically engage in a process with the First Nations Treaty parties to determine the amount of the net Crown resource-based revenues".[190] Had an engagement process taken place, the plaintiffs submitted that (a) more resource rents may have been generated by the Treaty territory; and (b) the Crown may have captured a greater portion of resource rents – to ultimately share with the Anishinaabe. The Superior plaintiffs submitted that an award for compensation must take into account the Anishinaabe's lost opportunity to participate in an engagement process since 1850.

[256] The Superior plaintiffs emphasized that the Crown receives benefits that go far beyond direct revenues from forestry, mining, hydroelectricity and other resources. While the Superior plaintiffs' position remains compelling, in light of the complex difficulties in estimating those benefits at this time, it is not dishonourable for the Crown to have concerns about applying the theory of resource rents to the Treaty promise.

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[184] Ontario Decision Letter at para. 14, Record at p. 358.
[185] Canada Decision Letter at p. 27, Record at p. 39.
[186] Canada Decision Letter at p. 27, Record at p. 39
[187] Ontario Decision Letter at para. 159, Record at p. 398.
[188] Ontario Decision Letter at paras. 14, 155-157, 264, Record at pp. 358, 397, 427.
[189] Ontario Decision Letter at paras. 155-156, Record at p. 397.
[190] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 1, at para. 593.

[257] Ontario's adjustment of $675 million in present dollars to reflect some Crown revenue from taxation is based on a percentage of its estimate of NCRR. The impact of this adjustment remains limited given Ontario's relatively lower estimate of NCRR.

Crown Expenses as part of NCRR estimate

[258] Ontario and the plaintiffs took fundamentally different approaches to their analysis of relevant expenses which led to a wide gulf between their final estimates of Crown benefits. Practically speaking, the approach proposed by Ontario captures a much broader set of expenses than the approach proposed by the plaintiffs. Ultimately, Canada applied the plaintiffs' approach to estimate NCRR and rejected Ontario's estimate based on its over-inclusive approach, which included expenses incurred to generate revenue for other economic actors in the resource sector.

[259] Ontario's over-inclusive approach to expenses in the estimate of NCRR cannot be justified in view of the thorough and successful challenges to its evidence during the Stage Three trial. In the explanation for its decision, Ontario did retreat from some of its more extreme inclusions but maintained its position on others. The trial testing of Ontario's evidence, which took place long before the negotiation process, gave Ontario ample opportunity to consider a more honourable, less litigious approach during the engagement process and the determination. I review below a few of the areas on which the parties disagreed on how to allocate, apportion or count expenses.

Methodology

[260] The disagreement between the parties on the relevance of certain expenses concerned three time periods: (1) post-1945; (2) 1898-1945; and (3) 1850-1897.

[261] The Superior plaintiffs view relevant expenses as those which are reasonably expected to generate a positive Crown revenue. The plaintiffs' approach to classification of expenses was based on the "matching" principle; a match had to exist between the revenues and related expenses. The Superior plaintiffs therefore exclude expenses which they say cannot or will not generate a net benefit in favour of the Crown.

[262] Conversely, Ontario defines expenses more broadly and includes expenses which it says will increase resource rents to be captured by not only the Crown, but also many different economic actors.[191] During the Stage Three trial, Ontario took the position that an expense may still be relevant even if the Crown does not recoup its expense in full, and that economists do not typically require governments to "run on a for-profit basis".

[263] The Superior plaintiffs contend that Ontario's method inevitably leads to a vast underestimate of NCRR.[192]

Crown Expenses: 1850-1897

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[191] Ontario Decision Letter at para. 278, Record at p. 430.
[192] Stage Three Trial, Exh. 10, Expert Reply Report of David J. Hutchings dated October 31, 2022, at para. 4.

[264] The parties disagreed on two sets of expenses for the period 1850-1897; expenses related to transportation and land agents.

[265] The Superior plaintiffs say that expenses related to railway aid and colonization roads should be excluded because the construction was undertaken with a view to diverse economic and political goals, including the provision of transportation for all Canadians and Canadian businesses. Colonization roads were constructed for the purpose of settling and colonizing the province. They contend that the inclusion of colonization road and railway expenses is equivalent to requiring Treaty beneficiaries to subsidize the Crown's investments in supporting colonization. Ontario states that a portion of railway aid and colonization road expenses should be included because by investing in railways and colonization roads, the Crown lowered transportation costs for companies looking to bring resources to market.[193]

[266] Land agents' work included both selling land and granting land to settlers. The parties disagreed over whether 50% or 100% of land agent salaries should be included as relevant expenses based on the extent land agents gave away land for free versus the extent land agents were collecting revenue.

[267] These two expense items are examples of Ontario's over-inclusive approach to expenses. It is next to impossible to attribute these expenses to related Crown resource revenues, given their broad support of non-Treaty related resource revenues.

Crown Expenses: 1898-1945

[268] The parties disagreed on expenses relating to forestry, fire and mining related activities during the period 1898-1945. In their decision letter, Ontario recalculated its NCRR estimate by making adjustments from its initial position on these expenses.

[269] With respect to fire expenses, the evidence showed that fire ranging is undertaken for multiple purposes, including both the protection of commercial timber stocks and the protection of communities and people. Ontario responded to the challenges to its evidence by adjusting their position on inclusion of fire management expenses from 100% to 80% ($765 million) incurred in this period.[194,195]

[270] Ontario also took into account the challenges to their position on reforestation expenses where the evidence showed that reforestation activities were not occurring in the Robinson-Superior territory pre-1945.[196] Ontario reduced the expenses calculated by their experts by $850 million.[197]

[271] The parties also disagreed on whether research related to forestry and mining was a relevant expense. Ontario maintained its position that this research contributed to increased production and

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[193] Ontario Decision Letter at para. 282, Record at p. 431.
[194] Ontario Decision Letter at para. 292, Record at p. 434.
[195] Ontario Decision Letter at para. 292, Record at p. 434.
[196] Stage Three Trial, Exh. 10, Expert Reply Report of David J. Hutchings dated October 31, 2022 at para. 73.
[197] Ontario Decision Letter at para. 297, Record at p. 435.

was therefore a relevant expense. Ontario also maintained its inclusion of mine rehabilitation expenses.

[272] Although Ontario adjusted its position on NCRR by making adjustments on certain expenses for reforestation and fire management during this period, as we shall see, their over-inclusive approach remained unjustified in light of the evidence.

Crown Expenses: Post-1945

[273] The treatment of post-1945 expenses accounts for the biggest difference between the experts' respective estimates of expenses for the purpose of estimating NCRR.

[274] In the years after 1945 the data in the public accounts had become more and more aggregated. Head office expenses at the branch and department levels continued to expand even though the programs they delivered did not change. It became more difficult to identify relevant expenses and the public accounts were therefore less reliable for the task of allocation (to a geographic area) and attribution (as a percentage of a total expense). The plaintiffs' experts found the data after 1945 to be unreliable for the calculation of NCRR. Ontario acknowledged the lack of detail in the PAO and the fact that expenses were harder to tie to revenues in the Treaty territory.

[275] To address this data issue, the experts for the Superior plaintiffs apply an "expense ratio" of 31.9% for the post-1945 period. This ratio was based on the average of expenses in the pre-1945 period and based on their view that the pre-1945 data was "very reliable, granular data on revenues and expenses". Ontario criticizes this approach and asserts that the Superior plaintiffs' reliance on an expense ratio is inconsistent with the Treaty promise.[198] Ontario reasoned that the Treaty explicitly says the Crown does not need to consider increasing annuities if it cannot do so "without incurring loss".[199]

[276] Ontario maintained this view but also responded to the strong criticism to their approach to forestry expenses after 1945 by making certain adjustments including: applying a 50% discount to the included expenses and removing negative annual amounts of Crown revenue after 1945. Even with these adjustments, Ontario states that there were no positive NCRR years arising from the Treaty territory after 1963.[200] In Ontario's view, treating post-1945 negative years as zero revenue years deals justly with the Superior plaintiffs because it is a reasonable response to the high level of evidentiary uncertainty.

[277] The plaintiffs' experts proposed a valid, evidence-based means of addressing a data-based problem. It is clear that the data presents a serious challenge for the task of estimating Crown revenue and expenses after 1945. Ontario has always been fully responsible for the collection and organization of the data and therefore for all its deficiencies. All data problems stem from the Crown's Treaty breach; it did not account for the wealth generated by the territory. However, to address this problem, Ontario rejects the plaintiffs' evidence-based solution, imperfect though it

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[198] Ontario Decision Letter at para. 315, Record at p. 441.
[199] Ontario Decision Letter at para. 314, Record at p. 441.
[200] Ontario Decision Letter at para. 87, Record at p. 376; see also Ontario Decision Letter at Appendix B.

may be, and contends that the problem is remedied by making piecemeal adjustments in present day dollars that make little to no actual difference on the final estimate of NCRR.

[278] The task for the Crown was to estimate the benefits the Crown realized from the territory, according to a broad purposive reading of the Treaty promise. The purpose behind the promise was to share the wealth, liberally, justly and honourably. Ontario's approach for the period after 1960 takes into account "massive and unbelievable forestry expenses" that were discredited by the plaintiffs' experts. It brings no honour to the Crown to maintain positions that were largely discredited through the trial process.

[279] This is hardly an approach consistent with the Treaty promise or consistent with the duties flowing from the honour of the Crown. As the Supreme Court said in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para.10, "...the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract."

Conclusion on Expenses as part of NCRR estimate

[280] Canada made its determination by applying the NCRR as estimated by the plaintiffs (brought forward at the band trust account rate). This was an honourable approach in consideration of all of the trial tested expert evidence and in fulfilling the Treaty promise and the obligations to conduct itself as an honourable Treaty partner. Canada's choice reflected that the plaintiffs' evidence on NCRR, by and large, remained clear and convincing through the trial process.

[281] Ontario's approach to expenses had a significant impact on the NCRR estimate. Note, the difference between Ontario's $2.7 billion estimate and Canada's $11.125 billion estimate is largely attributable to expenses, the parties largely agreed on revenues. It is not necessary to fully engage with the plaintiffs' criticism of this over-inclusive approach to expenses in light of Canada's ultimate rejection of this position, even with the adjustments.

[282] Notably, Ontario's over- inclusion of expenses, and the resulting low estimate of wealth to be shared, was effectively challenged during the trial. This was the factual context in which the discretion was exercised and which constrained the Crown. The Anishinaabe principle, adopted by the Crown at the time of Treaty-making, required the Crown to consider a respectful engagement with the evidence, and the imperative of decision-making that could prompt and sustain a renewal of the relationship through this exercise. Ontario is obligated to interpret the Treaty promise purposively. It ill-suits the Crown to pursue an unreasonable approach in light of its long-standing and egregious breach over this historical period.

Conclusion on NCRR

[283] The Crown's determination of compensation was built around the estimate of NCRR. The NCRR estimate is based on historical revenues and expenses from the territory. The plaintiffs and the Crown approached revenues from different conceptual frameworks. With respect to expenses, Canada adopted the plaintiffs' approach. Ontario maintained its own approach, which was conceptually different than the plaintiffs' approach.

[284] Whether to include rents in the estimate of revenue was a central issue. The concept of rents, admittedly a difficult concept to teach and advance in a trial process, explains part of the great difference between the parties on the estimate of Crown benefits. The Crown presented persuasive and cogent reasons for rejecting this concept at this time, based on the many challenges to the accounting for and collection of resource rents. In my view, the debate over this rather complex economic theory and accounting is better suited to future negotiations where the parties can take the time with their experts to explore the full and long-term consequences of a new approach to accounting for the for the benefits flowing from the Treaty territory. On the other hand, the expert economists were able to interpret the data to trace direct resource revenues and expenses related to the territory.

[285] The debate over expenses also accounts for a large portion of the difference in NCRR estimates. Included in that breach was the failure to keep reliable records of the resource economy. That failure resulted in innumerable opportunities to disagree. The Crown's task was to look at the big picture, without maintaining extreme and unreasonable positions.

[286] Having studied the economic reports and having heard all of the evidence, including the adept and well-founded cross-examinations of all of the economic experts, Canada chose an honourable approach when it accepted the plaintiffs' estimate of NCRR.

The time value of money: The Interest Rate

[287] All the parties agree that it is necessary to apply an interest rate to "bring forward" the nominal value of past sums, i.e., the amounts of net benefits in any given year. One cannot estimate revenues and expenses over time without accounting for the time value of money. Two important debates arose from the task of setting an interest rate. The parties disagreed on the purpose of accounting for the time value of money and disagreed on the appropriate interest rate to apply.

[288] The Superior plaintiffs contend the rate should compensate them for the lost opportunity to use the annuities for the benefit of their communities over the past 175 years. They rely on evidence that the RST First Nations would have used the annuities to invest in the long-term benefit of their communities, including investments in infrastructure, healthcare and education.

[289] During the Stage Three trial, the court heard evidence about three methods to account for the time value of money: (1) the Government of Canada long-term bond rate (5% average rate of return); endorsed by both Canada and Ontario (2) the Band Trust Account rate (5.3% average rate of return); which was used to make calculations of NCRR in the Superior plaintiffs' expert reports; and (3) a portfolio consisting of 60% stocks and 40% government long-term bonds (7.2% average rate of return) as proposed by the Superior plaintiffs. During the engagement and negotiation process, the Superior plaintiffs introduced a fourth method, the "Canada Life Benchmark" (5.77% average rate of return). Although the differences in these rates appear small, the consequence of these small rate differences on 170 years of revenues has an enormous impact.

[290] The Crown decision to apply either the long-term government bond rate or the Band Trust Account rate and to reject the Canada Life Benchmark rate and the 60/40 investment portfolio rate for either the whole or part of the period, is a matter of discretion, which engages a review of the

justification, transparency and intelligibility of the decision, which justification is subject to the constraints and duties imposed upon the Crown.

Crown Justification of Choice of Present Value Rate

[291] Both Ontario and Canada rejected the proposed 60/40 portfolio rate. They say it is inappropriate because it does not adequately consider risk or depreciation.[201] The Crown justified its adoption of the long-term government bond rate, fully compounded on an annual basis by reasoning that the time value of money is best accounted for by the risk free rate of return, being government bonds that have no default risk.[202] Unlike government long-term bonds, both the 60/40 portfolio and the Canada Life Benchmark carry a "risk premium". The Crown says that the First Nations would not actually have invested in a 60/40 investment portfolio given the inherent risk and volatility.[203] In Ontario's view, long-term bond rates are most consistent with the value money had across time, rather than the value it might have had to a small group if they invested in a particular way.[204]

[292] It is a historical fact that few mechanisms existed until the 1970s to achieve market-wide equity returns.[205] The choice of investing in a portfolio of stocks and bonds was only available to the First Nations after 1951, when s. 68 of the *Indian Act* was revised.[206] In any event, Canada says that not all annuity augmentations would have even been invested. Some would have been spent on infrastructure, business, and human capital, all of which depreciate over time.[207]

[293] The Crown also rejected the Band Trust Account rate which was applied to accounts administered by Canada for First Nations. However, the amounts to be paid pursuant to the Augmentation Clause were intended to flow directly from the Crown to the First Nations and not be held by Canada. Therefore, it was unlikely that the Band Trust Account rate would have applied to these monies.[208]

[294] Notwithstanding Canada's view that the Band Trust Account rate was not the most appropriate, it did rely on the Band Trust Account rate for its estimate of the NCRR to be shared. This appears to be because the Band Trust Account rate was the only bring forward rate calculated on the NCRR that Canada relied upon.[209]

[295] The parties also disagree on the purpose of a bring forward rate and therefore the rate to be assigned.

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[201] Canada Decision Letter at p. 28, Record at p. 40; see also Ontario Decision Letter at para. 137, Record at p. 392.
[202] Ontario Decision Letter at para. 137, Record at p. 392.
[203] Canada Decision Letter at p. 28, Record at p. 40.
[204] Ontario Decision Letter at para. 136, Record at p. 391.
[205] Ontario Decision Letter at para. 146, Record at p. 392.
[206] Stage Three Trial, Exh. 87, Expert Report of Dr. Eric Angel, dated June 30, 2022, revised January 3, 2023 at para. 91.
[207] Record, Tab 46, "Morrison, J., *Canada's settlement offer to the Robinson Superior Treaty First Nations,* dated December 20, 2024," at p. 3003.
[208] Ontario Decision Letter at para. 141, Record at p. 393.
[209] Canada Decision Letter at p. 28, Record at p. 40.

[296] Ontario asserted that the purpose of accounting for the time value of money was to "measure the benefit to [the] Crown". It referenced the Supreme Court's direction that the Crown should take into account "the benefits the Crown has received from the ceded territories and its expenses over time".[210] For Ontario, the purpose of accounting for the time value of money is to measure the *Crown's* benefit, not to determine how the Superior plaintiffs might have used the money in a "counterfactual history".[211] The Contingent Interest First Nations fundamentally disagree with Ontario's view that the "benefit to the Crown" is the sole focus of the present value assessment. Reconciliatory justice cannot be directed at putting the *Crown* in the position it would have been in but for its breach.

[297] The Contingent Interest First Nations say that the purpose of compensation – whether in law or in equity – is to put the wronged party in the position it would have been in, but for the wrongful conduct. They say that the Crown's choice of a rate addresses only the time value of money, and "doesn't tell us anything about putting the Anishinaabeg in the position that they would have been in but for the Crown's conduct in withholding the annuities". They submit that the long-term bond rate ignores the lost opportunity of the First Nations to invest and spend augmented annuities for the benefit of their communities.

[298] There was evidence that certain First Nations had a history of putting their revenues into infrastructure and investments. Chiefs of the First Nations, including Chief Tangie and Chief Michano, testified that First Nations would have made investments in healthcare, infrastructure and education had resources been available and that these investments have a far higher rate of return than any of the bring forward rates under consideration. The First Nations repeated this position throughout the engagement and negotiation process.

[299] The Crown submitted that some of the annuity augmentations that should have been paid would likely have been distributed to individuals, and used for spending and investments in infrastructure, business, and human capital and that the depreciation on those investments must also be taken into account. There is no agreed upon methodology to measure this depreciation.

The Superior plaintiffs' alternative position

[300] The Superior plaintiffs submitted an alternate argument that the Canada Life Benchmark provides evidence of rates of return that have historically been available to investors in low-risk, long-term investments. This proposal was only made close to the end of the engagement process. There is very little in the way of response submissions on this proposal. With respect to the Canada Life proposal, Ontario raises the risk premium issue, i.e., that investors must bear the costs of higher rate of return.

Conclusion on interest rate

[301] The Crown decision to apply the government long-term bond rate is a reasonable approach to finding a rate which protects the value of the actual net revenues generated by the territory over time. Both the long-term bond rate and the Band Trust Account rate protect the value of money

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[210] *Restoule SCC*, at para. 271.
[211] Ontario Decision Letter at para. 136, Record at p. 391.

over time. Although Chief Tangie and Chief Michano provided compelling evidence that some First Nations invest for the long-term and accept a level of risk, this evidence was limited to their experience in more recent time periods.

[302] The Crown's reliance on the long-term bond rate and the Band Trust Account rate is a clear and coherent justification for the Crown decision.[212] The Crown's concerns about the 60/40 interest rate are entitled to a degree of deference. Viewed as a whole, I do not find the Crown's approach on the appropriate bring-forward rate to be unreasonable.

[303] The plaintiffs also submitted that choosing a higher rate of return could compensate in part for the intangible losses suffered by the Superior Anishinaabe and the nature and severity of the breach. The Crown chose to consider those unquantified factors in their estimate of Crown benefits and their ultimate determination of compensation. Canada explains that its reliance on the plaintiffs' NCRR estimate and its sharing allocation are in part based on the unquantified factors other than a mathematical analysis of the historical data. That choice has been reasonably justified.

Summary on Crown Benefits

[304] The focus of this review remains on the decision that was actually made and the justification for it, and not on the conclusion the court would have reached on an open-ended assessment or quantification of damages for past breaches.[213] The Crown benefit estimate, while one of five factors identified by the Supreme Court to be considered in a determination of compensation, is the building block for the Crown's calculation of compensation and therefore attracts a robust review.

[305] The stark differences between Canada and Ontario's reasoning presents some difficulties on this review. The differences include:

- Vastly different estimates of NCRR or shareable wealth: $11.152 billion vs. $2.7 billion
- Vastly different sharing percentage: 27% vs. 100%
- Present dollar adjustments for indirect revenues from taxation: $0 vs. $675 million
- Use of the RHT settlement: as a benchmark to validate an independent assessment vs. as a relevant factor to consider in order to among other things to ensure that the relationship with the RHT First Nations is adequately considered.

The court is left with discordant reasoning upon which to conduct a review.

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[212] Canada Decision Letter at p. 28, Record at p. 40; see also Ontario Decision Letter at p. 38, Record p. 393.
[213] *Restoule SCC*, at para. 308, 310.

Conclusion on the Crown Decision to fix Compensation at $3.6 Billion

[306] The estimate of Crown benefits is the core of the determination of past compensation. The Crown first estimated NCRR, a quantifiable measure brought forward to present day dollars, then assigned a share to be allotted to the RST First Nations and then made certain adjustments to take into account, the non-quantified factors and the RHT Settlement.

[307] With respect to the sharing percentage, the two Crown entities take incompatible approaches to this exercise of discretion. Ontario's position is that 100% of its estimate of shareable wealth is to be allocated to the Superior plaintiffs. Ontario explained this position as also reflecting a consideration of its long-standing and egregious nature of the breach of the promise (Factor One).[214] In its decision letter, Canada initially justified a share of 20% for the Superior Anishinaabe on the basis that the RST Anishinaabe represented about 6% of the population in the Treaty territory. Ultimately Canada adjusts their position to a 27% share of the NCRR estimate saying that this percentage share is also meant to take into account the less tangible factors and the egregiousness of the breach, and presumably to reach the amount of $3 billion for compensation. The Crown determinations of an honourable share for their Treaty partner are not aligned with one another. One might say, they reflect incompatible concepts of honourableness or the sharing obligation.

[308] There is no "correct" percentage share. Indeed the Court of Appeal for Ontario says that share should not be expressed as a percentage. But we are once again left with an imperfect way to fix compensation. It is for the Crown to justify how it exercised its discretion. As for Ontario's explanation, one is left to speculate that its choice to allocate a 100% share of the "shareable wealth" was the only way to justify an otherwise unjustifiable assessment of shareable wealth.

[309] Canada identified an additional $300 million as part of its determination to represent "Canada's reconsideration of the nature and severity of the breach, the needs of the Superior plaintiff communities, and Canada's broader social, economic, and policy considerations".[215] Canada notes that compensation that properly addresses the nature and severity of the breach must go beyond simply quantifying annuity augmentations, in order to advance reconciliation.[216]

[310] Ontario included two additional amounts after its determination of present value NCRR. First it added $675 million, (being 25% of adjusted shareable wealth as estimated by Ontario) to reflect the indirect benefit the Crown receives from the territory through taxes; second, it increased the amount by an additional $225 million, "in a spirit of generosity" and to ensure the ends of reconciliatory justice are met, that vindication and deterrence are achieved and the Crown's commitment to its Treaty relationship is underscored.[217]

[311] The Crown contends that its determination of the amount of compensation was based on a holistic view of all of the factors listed by the Supreme Court of Canada, and in addition, by their

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[214] Ontario Decision Letter at para. 260, Record at p. 426.
[215] Canada Decision Letter at p. 15.
[216] Record, Tab 46, "Letter from Morrison, J., *Canada's settlement offer to the Robinson Superior Treaty First Nations,* dated December 20, 2024" at p. 2987.
[217] Ontario Decision Letter at para. 264, Record at p. 427.

comparison of the RST First Nation territory with the RHT territory in terms of population and productivity. The Crown determination achieved per capita parity with the RHT Settlement. Each Crown entity reasonably explained why this parity of outcomes was meaningful and honourable in terms of their own relationships and their polycentric concerns.

[312] What is reasonable and honourable in this determination of compensation is heavily dependent on the interpretation and application of massive amounts of historical data on which economic experts disagreed. The Crown approach to and determination of Crown benefits did not meet the high expectations of the Superior plaintiffs, particularly with respect to the measure of revenues captured by the Crown and the interest rate. Nonetheless, Canada's approach to the contentious items included in the NCRR estimate were justified with reasonable, rational and principled explanations.

[313] The fact that the two Crown entities provided contradictory reasoning to arrive at the exact the same determination of compensation, $3.6 billion, does not make this review straightforward. It complicates the work of the Superior Anishinaabe and the court, in attempting to decipher the reasonableness of the justification for the exercise of discretion.

[314] Multiple dimensions and considerations of the Crown decision are at the centre of this review. While the Crown falls short in some respects, Canada has provided a justification that allows me to find that the compensation of $3.6 billion determined as an exercise of discretion falls within a range of honourable results.[218]

[315] The Supreme Court's direction provided that this court, on review, could intervene and consider an appropriate remedy if the court found that the process or determination was not honourable. There is no cause to intervene.

VIII. CROWN ALLOCATION

Introduction

[316] In addition to the claim against the Crown for breaching the Treaty promise to consider annuity increases, there was also a dispute between Canada and Ontario over which Crown entity bore the responsibility for fulfilling this promise and the liability for any compensation flowing from the breach.

[317] The matter was fully argued in the Stage Three trial. However, before a decision on the question was released, the Supreme Court stayed Stage Three pending the appeal of Stages One and Two. Notwithstanding the stay, Ontario requested a ruling on the question of Crown allocation. Ontario contended that a decision was necessary to clarify legal relationships between Canada and Ontario and for the precedential value of the decision. During the review, Canada no longer sought a ruling that Ontario was responsible but sought only a declaration that Crown liability was not joint and several. Ontario seeks a declaration at this time on Canada's claim.

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[218] *Restoule SCC*, at para. 308.

[318] I have considered and referred to the evidence and submissions from the Stage Three trial, which were briefly summarized in this hearing.

[319] Canada claims that Ontario was responsible for the largest portion of the past unpaid annuities, Ontario took the position that it only had procedural obligations to the Anishinaabe to provide information about revenues and expenses generated from the Treaty territory. In Ontario's view, Canada alone is responsible for the substantive promise to increase annuities. Both defendants relied on the *Constitution Act, 1867* to support their positions.

[320] The issue of responsibility for implementing the Treaty promise is governed by the *Constitution Act*. Canada focused its arguments on s. 109 and s. 91(24) of the *Constitution Act*. Ontario focused its arguments on the decisions of the Supreme Court of Canada affirmed by the Judicial Committee of the Privy Council ("JCPC") interpreting s. 109 and ss. 111-112 of the *Constitution Act*.

[321] The plaintiffs assert that Canada and Ontario had substantive obligations flowing from the Treaty under the theory of joint and several liability.

[322] During the Stage Three trial, the court heard from four constitutional historians as expert witnesses, called by the Crowns, who set out a detailed record of the annuity payments and practices beginning in 1850, as well as of the financial arrangements and disputes between the province and the Dominion before and after Confederation.

[323] At this review, Canada now submits that the issue of Crown allocation is moot as it pertains to past compensation for unpaid annuities. Canada and Ontario resolved the claim of the Huron plaintiffs on the basis of 50-50 allocation. As for the Superior claim, each of Ontario and Canada agreed and exercised their discretion to pay 50% of the amount of compensation they each determined was honourable.

[324] Ontario stated that it has paid amounts for past compensation without prejudice to its position that Canada is the Crown entity responsible for setting and paying annuities. Hence Ontario still seeks a ruling on the question of Crown allocation for future annuities.

[325] Notably, the Supreme Court of Canada was silent on what was to be done with the outstanding question of Crown allocation and referred throughout to the "Crown' in the singular.

[326] I find that the apportionment of liability between Ontario and Canada for past compensation is moot. By settling the Huron claim and determining to each pay 50% of the compensation to the Superior plaintiffs, Ontario and Canada have already resolved the issue of allocation for past annuity claims as between themselves. There is no longer a concrete legal dispute for the court to decide, so far as apportioning liability between Ontario and Canada for the Crown's past breaches.

[327] I note that there are instances where "the nature of a moot case makes it worthwhile to apply the necessary resources to resolve it".[219] These situations may arise, for example, where there is an issue of national importance or a case raising a point likely to recur.[220] Critically, there must also be an "additional ingredient of social cost in leaving the matter undecided".[221] During their submissions in this review, the parties did not identify any unique factors or "ingredients" that would require the court to decide this issue.

[328] Because Canada no longer seeks to distinguish the rulings of the Supreme Court of Canada and JCPC with respect the s. 109 trust, I will not deal with this question. The Supreme Court of Canada and the JCPC decisions remain authoritative that the Augmentation Clause does not burden the Treaty territory with a charge, trust or other interest in favour of the Anishinaabe under s. 109 of the *Constitution.*

[329] I find that Ontario and Canada are not jointly and severally liable to the Robinson-Huron and Robinson-Superior plaintiffs in respect of past annuities. Finally, I find that Ontario and Canada each have procedural and substantive obligations to diligently implement the augmentation promise. Importantly, this decision makes no comment on the future allocation of liability between Ontario and Canada. I explain my decision below.

Historical evidence

Debts of the Provinces and Land Allocation at Confederation

[330] The *Constitution Act* was proclaimed on July 1, 1867. At Confederation, the United Province of Canada ("UPC") ceased to exist and was divided into the provinces of Ontario and Quebec. The provinces of Nova Scotia, New Brunswick, Ontario and Quebec united at Confederation to form the Dominion of Canada.

[331] Section 111 of the *Constitution Act* provided that the Dominion of Canada would be liable for the "Debts and Liabilities" of each province existing at the Union.

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

[332] At Confederation, the UPC was in significant debt. Section 112 of the *Constitution Act* provided that Ontario and Quebec would pay interest on any amount by which the UPC's debt exceeded $62.5 million.

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[219] *Taylor v. Newfoundland and Labrador,* 2026 SCC 5 ("*Taylor*"), at para. 54, citing *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 ("*Borowski*"), at p. 360.
[220] *Taylor*, at para. 57, citing *Borowski* at p. 362.
[221] *Taylor*, at para. 57, citing *Borowski* at p. 362.

Debts of Ontario and Quebec

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

[333] Section 109 of the *Constitution Act* provided that the lands, mines, minerals, and royalties of Ontario belong to Ontario, but only to the extent they are not burdened by a trust or other interest.

Property in lands, mines, etc.

109 All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise subject to any trusts existing in respect thereof and to any interest other than that of the province in the same.

[334] A series of arbitrations in the 1870's and 1890's settled various financial accounts between the Dominion, Ontario and Quebec. Post-confederation, the responsibility for the Robinson Treaties' annuities was a key issue of dispute as between Ontario and Canada.

The Dominion-Provincial Arbitration (1890-1900)

[335] In 1890, Canada, Ontario and Quebec agreed to put to arbitration a number of unsettled issues relating to the accounts of the UPC. One of those issues was allocation of responsibility for the Robinson Treaty annuity increases to $4 per person, being paid at the time by Canada. Since 1875, Canada agreed to pay, as an annuity, the amount of $4 per person, on a without prejudice basis, with the issue of which government was legally responsible for the increase to $4, to be resolved through litigation.[222]

[336] Canada submitted to the Arbitrators that Ontario received the Robinson Treaty lands at Confederation subject to a trust and interest pursuant to s. 109 of the *Constitution Act*. As the beneficial owner and recipient of the resource revenues, Ontario was liable to provide the Dominion with the monies to pay the annuities. Ontario, on the other hand, answered that any liability belonged to the UPC and there was no trust or charge on the lands.

[337] The Third Award of the Dominion-Provincial Arbitration dated February 13, 1895 addressed the question as follows: "Does any interest in respect of these Indians attach to the lands belonging to Ontario under the 109th section of British North America Act?".[223]

[338] The Arbitrators ruled that annuity increases due for the years prior to 1867 were the responsibility of the United Province of Canada. Meanwhile, annuity increases due for the years

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[222] Exh. 78, Expert Report of Dr. Barbara Messamore, dated August 8, 2021 at p 95.
[223] Exh. 1, Joint Book of Documents, Tab-2693, *Reasons for Award of 13 February 1895* at para. 19.

after 1867 were the responsibility of Ontario alone, as Ontario had received the ceded lands subject to a trust to pay the increased annuities.[224] The Arbitrators determined that the language of the Treaty implied that augmented annuities would be paid from the proceeds of the lands, because "Ontario has the advantages resulting from the ownership of the lands, and it should bear the burden".[225]

[339] Ontario appealed the Third Award to the Supreme Court of Canada (the "Annuities Case"). A majority of the Supreme Court allowed Ontario's appeal. The Supreme Court determined that the Augmentation Clause did not create a trust or interest of the First Nations in the proceeds of the lands. Instead, liability to pay the augmented annuities was a debt or liability of the UPC which fell primarily to the Dominion under s. 111 of the *Constitution Act.*

[340] In a dissent, Justices Gwynne and King agreed with the Dominion-Provincial Arbitrators that annuity increases promised in the Treaties were to be paid from the proceeds of the ceded lands.[226] Therefore, they were a trust or other interest in the lands pursuant to s. 109 of the *Constitution Act*.

[341] The JCPC affirmed the majority decision of the Supreme Court that liability for increased annuities did not form a charge on the lands under s. 109 of the *Constitution Act*.[227]

[342] Following the decision of the Supreme Court of Canada and the JCPC, the Dominion-Provincial Arbitrators issued Award 15 on August 1, 1900. Award 15 purports to be "in extinguishment forever thereafter of any claims by the Dominion of Canada on behalf of the said Indians for increased annuities under the said treaties".[228] Award 15 charges to the UPC account a capitalized sum sufficient to pay the Robinson-Huron annuitants $4 per person.

Responsibility for Annuities at Confederation

[343] Ontario seeks a declaration that Canada alone has the constitutional authority to implement the augmentation promise under the Treaty. Ontario submits that Canada assumed responsibility for pre-Confederation "debts and liabilities" of the former colonies under s. 111 of the *Constitution Act.*

[344] Canada's theory is that upon Confederation, Ontario took the lands within its boundaries subject to a trust or interest in favour of the First Nations, because the Treaty created a revenue-sharing model. Canada submits that this court is not bound to follow the decisions of the Supreme Court and the JCPC in 1895 and 1897. In Canada's view, those decisions are not *res judicata*, since neither the issues, nor the parties are the same. Canada submits that the courts were only dealing with the question of Crown responsibility for annuity increases up to but not exceeding $4

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[224] Exh. 78, Expert Report of Dr. Barbara Messamore, dated August 8, 2021 at p. 166-168.
[225] Exh. 1, Joint Book of Documents, Tab-2693, *Reasons for Award of 13 February 1895* at para. 24.
[226] Exh. 1, Joint Book of Documents, Tab-2600, *Province of Ontario v. Dominion of Canada,* [1895] 25 S.C.R. 434, at 512.
[227] *Attorney General of Canada v. Attorney General of Ontario,* [1897] A.C. 199 (JCPC).
[228] Exh. 1, Joint Book of Documents, Tab-2043, *Award of the Board of Arbitrators,* dated August 1, 1900 (*The Fifteenth Award*) at p. 5.

per person. In Canada's view, the parties should not be bound by decisions made on a different understanding of the Treaty promise.

[345] In Ontario's view, the Supreme Court's decision in the Annuities Case of 1895 is binding on Canada as *res judicata* and *stare decisis.* Ontario submits that Canada raises the same legal issues under ss. 109, 111 and 112 as it did in the Dominion-Provincial Arbitration. There is no new evidence that fundamentally shifts the parameters of the debate. Ontario submits that there is no reason to believe that the Supreme Court would have reached any different conclusion if the annuity exceeded $4.

Discussion

[346] When the arguments with respect to ss. 109, 111 and 112 were initially made in the Dominion-Provincial Arbitrations, the core issue was whether the ceded territory was burdened with a trust, charge or other interest in respect of the annuities. The Supreme Court in 1895 did not address division of Crown authority or obligation and it did not approach the Treaty obligation as anything other than a pre-Confederation debt that could be capitalized.

[347] Were it necessary to consider the doctrines of *stare decisis* and *res judicata,* it would be necessary to review the changes to the legal and factual landscape existing in 2026 compared to 1895 and 1897, as Canada initially urged this court to do. Since the Annuities Case, there has been the robust development of the doctrine of honour of the Crown, and the Supreme Court's ruling that the promise to increase the annuity is not limited to $4 per person. However, nothing in the *Restoule* decision impacts the s. 109 interpretation of whether the Treaty territory is burdened with a trust.

[348] Sections 111 and 112 only pertain to debts and liabilities of the UPC which existed at the Union and were meant to provide the new governments with a means to organize and account for existing debt. The obligation to pay increased annuities based on a promise to share the wealth of the territory in perpetuity is not captured by these sections. The annuities are not now and never were a matter of bookkeeping at the moment of Confederation. They constitute an integral aspect of the continuing relationship between the Treaty partners, the Superior Anishinaabe and the Crown.

[349] As we now know, the duty of diligent implementation and the honour of the Crown require the Crown to take a broad purposive approach to the interpretation of the promise and to act diligently to fulfil it.[229] As the Supreme Court underscored, the Treaty promise 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".[230]

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[229] *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14, [2013] 1 S.C.R. 623 at para. 75; *Ontario (Attorney General) v. Restoule,* 2024 SCC 27 at para. 256.
[230] *Restoule SCC*, at para. 301.

Division of Powers

[350] Since Confederation, Canada has paid the annuities, increased to $4 per person since 1875.

[351] Ontario submits that the *Constitution Act, 1867* sets out the division of powers which allocates responsibility for administering annuity payments:

- Section 91(24) grants Parliament of Canada exclusive authority to make laws regarding "Indians, and lands reserved for the Indians".
- Section 92(5) assigns exclusive legislative authority to Ontario to make laws in relation to the management and sale of the public lands belonging to the province and of the timber and wood thereon.
- Section 92A assigns exclusive legislative authority to Ontario to make laws in relation to non-renewable natural resources and forestry resources, and to make laws in relation to the taxation of non-renewable natural resources and forestry resources in Ontario.

[352] In Ontario's submission, Canada is the "Treaty paymaster", even if a portion of the annuity cost is reimbursed.

[353] The province of Ontario took a beneficial interest in and exclusive power and authority over the lands and resources within its provincial boundaries: to sell land, to license for mining or timbering, to tax and to develop power dams. Ontario has authority over the very resource revenues which are required to be shared with the RST First Nations as part of the Treaty promise.

[354] Canada submits that while the Dominion has legislative authority over "Indians", Ontario has authority over the resource revenues which are required to be shared as part of the Treaty promise. Canada submits that provinces are equally responsible for fulfilling treaty promises when acting within the division of powers under the Constitution.

[355] Canada acknowledges that it has jurisdictional authority to meet with the First Nations, to discuss net Crown resource revenues, and a responsibility to make diligent efforts to bring Ontario to the table. However, Canada asserts that Ontario is burdened with the Treaty obligation to exercise its discretion with respect to the payment of annuities, after consideration of the Crown resource revenues that flow to Ontario through Ontario's exercise of authority and control over those very resources.

[356] The concept that both federal and provincial governments may each have a duty to First Nations with respect to treaty lands and non-treaty lands has been well developed law since *Haida Nation.*[231]

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[231] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511.

[357] The Supreme Court's decision in *Grassy Narrows* remains the leading case on the division of powers in treaty cases.[232] The Supreme Court in *Grassy Narrows* rejected the idea that only the federal Crown has obligations and powers over matters covered by Treaty 3. It found that "the level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution".[233] The court further determined that both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act*.[234]

[358] With respect to the Robinson-Superior Treaty territory, Ontario has authority over much of the resources and resource revenues to be shared with the RST First Nations as part of the Treaty promise. Canada does not have authority over the timber, minerals, power or land sales, the vast portion of which make up the "benefits" which flow from the Treaty territory and Canada does not collect the direct benefit from the vast portion of resource revenues from the territory. Canada acknowledges, however, that it receives an indirect benefit from the Treaty territory through its authority to levy taxes. I note that this decision makes no comment on whether future indirect revenues should be shared as part of the Treaty promise.

[359] The court in *Grassy Narrows* underscores the finding in *St. Catherine's Milling*, where Lord Watson concluded about Treaty 3, that it was "from beginning to end a transaction between the Indians and the Crown", not an agreement between the Government of Canada and the Ojibway people.[235] The emanation of the Crown which has the control and authority is also burdened by the Treaty obligations related to the wealth which comes from the exercise of that control and authority. "When a *government* – be it the federal or a provincial government – exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question" (emphasis in original).[236]

[360] The obligations of the Crown flow from s. 35 of the *Constitution Act*, the honour of the Crown and the Treaty itself. Upon Confederation, both the Dominion and Ontario became responsible for fulfilling the Treaty obligations. Those responsibilities must align with federal or provincial administration and control of assets and revenues and authority under the Constitution.

[361] The resource wealth (as has been defined for the purpose of determining past compensation) from the Treaty territory flow principally to the province of Ontario. It would not be honourable – let alone logical – for Canada to do all of the Crown's heavy lifting under the Treaty promise.

[362] The duty to act honourably and diligently to implement the terms of the Treaty must, by logic and by law, be borne by both levels of government to the extent that each operates within the

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[232] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447 ('*Grassy Narrows*'); see also *Yahey v. British Columbia*, 2021 BCSC 1287; *George Gordon First Nation v. Saskatchewan*, 2022 SKCA 41.
[233] *Grassy Narrows,* at para. 30.
[234] *Grassy Narrows,* at para. 35.
[235] *Grassy Narrows*, at para. 33, citing *St. Catherine's Milling & Lumber Co. v R.*, [1888] UKPC 70, (1888) 58 L.J.P.C. 54.
[236] *Grassy Narrows*, at para. 50.

division of powers. Contrary to Ontario's position which was rejected by the Supreme Court, the duty of diligent implementation is not restricted to procedural obligations.[237]

Award 15 Release

[363] Ontario submits that Canada released its claims against Ontario as part of Award 15.[238] Ontario submits that Award 15 fully releases Ontario and Quebec from responsibility for any further augmented annuity payments. Ontario submits that if the court determines that Award 15 does not fully release Ontario, then Canada only has a right of indemnification against Ontario under s. 112. But either way, Canada is responsible for paying the annuities directly.

[364] Canada submits that Award 15 does not release Ontario for annuities over $4 per person. In Canada's view, the Dominion would not have agreed to assume responsibility for an unknowable debt. Even Ontario acknowledges that there was a "prevailing view" that annuities could not exceed $4.[239]

[365] In *Corner Brook*, Rowe J. noted that context can serve as a limiting factor to the breadth of wording found in a release.[240] The full legal context today is so obviously and importantly different that the Award 15 release in 1900 has no impact on the obligations of the different levels of government in 2026.

[366] Significantly, the issue of liability for increased annuities is not governed by the findings on s. 109, or ss. 111 and 112 in the Annuities Case of 1895. Canada could not have taken into consideration the altered legal landscape at the time of Award 15 and Award 15 does not impact Ontario's direct obligations under the Treaty.

Joint and Several Liability

[367] The plaintiffs claim that Canada and Ontario are responsible for the payment of annuities on a joint and several basis. Ontario and Canada submit that joint and several liability is a private law concept, applicable to contracts and torts, found in the *Negligence Act* and is not a public law concept relevant to constitutional obligations. I agree.

[368] Joint and several liability may be common in loans and other contracts and in torts by virtue of legislation. However, there is no jurisprudential or statutory support for the proposition that joint and several liability is applicable to the Crown's obligation to diligently implement a treaty promise.

[369] In light of my finding above, that both Ontario and Canada have procedural and substantive obligations flowing from the Treaty and that the division of powers in the Constitution, as explained in *Grassy Narrows*, provides a guide to the division of responsibilities, there is no need

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[237] *Restoule SCC*, at para. 253.

[238] Exh. 1, Joint Book of Documents, TAB-2043, *Award of the Board of Arbitrators,* dated August 1, 1900 (*The Fifteenth Award*).

[239] Transcript (Stage Three Trial), Clos submissions of T. Barclay, Day 64, p. 190, lines 16-21.

[240] *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 36.

to (as Canada said in their submissions), "resort to the ill-fitting private law concept of joint and several liability". The claim for joint and several liability fails.

Conclusion

[370] At the end of the day, *the Crown* is burdened by the obligations flowing from the Treaty which has constitutional status and protection. Ontario cannot continue this debate by relying on ancient jurisprudence that was focused on the financial arrangements between the province and the Dominion in a time when the Treaty promise was being ignored or misunderstood. It was in those years when the egregious breach of the Treaty promise began. We have reached the moment when both Canada and Ontario have a new awareness of their obligations, and they cannot continue to burden the First Nations with their dispute. Both levels of government have procedural and substantive obligations which flow from the Treaty.

[371] The two levels of government have now twice apportioned liability as between them for past compensation. The need for specific answers of percentage allocation of responsibility for past compensation is moot.

[372] How liability should be apportioned between the two levels of government in the future is entirely context dependent. It is for the two entities of the Crown to clarify their relationship going forward. No one knows the landscape and the context in which future annuity negotiations will take place. As the Supreme Court of Canada said in *Borowski*, "[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."[241]

[373] It is for the two entities of the Crown to clarify their relationship going forward, in circumstances not known at this time. The Crown entities must address this question in a timely way and in a way that does not burden their Treaty partners, who have for too long suffered the consequences of this dispute.

IX. CIFN Request to Protect Value of their Allocation

[374] The CIFN asks for post-judgment interest on the share of compensation that is set aside for them if and when they become entitled to it.

[375] At the outset of litigation, seven First Nations identified that they had a contingent interest in the litigation not yet having adhered to the Robinson-Superior Treaty. Since then one of these First Nations has adhered to the Treaty and there are six First Nations who maintain a contingent interest.[242]

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[241] *Borowski*, at p. 362.

[242] Record, Tab 54, "Bass, S., *Addressing the Share of Compensation for the Contingent Interest First Nations*, dated January 22, 2025," at p. 3536; Animbiigoo Zaagi'igan Anishinaabek no longer having a contingent interest.

[376] The Intervention Order of February 17, 2022 set out the contingent share of seven First Nations.[243] The shares of the CIFN are to be distributed on further order of the court.

[377] The six CIFN now have the following contingent share, as set out in the Intervention Order (being 36.87% of the total):

- Long Lake No.58 First Nation: 11.58%
- Pays Plat First Nation: 1.77%
- Biigtigong Nishnaabeg First Nation (Pic River; Pic Heron First Nation): 8.58%
- Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation): 7.38%
- Bingwi Neyaashi Anishinaabek (Sand Point First Nation): 2.08%
- Biinjitiwaabik Zaaging Anishinaabek (Rocky Bay First Nation): 5.48%

[378] Canada proposes that the interest rate should be determined by the court that grants the order that the funds be paid out. Canada notes that the interests of each of the different First Nations are unique and complex and will be negotiated separately to either resolve their Aboriginal title claim or adhere to the Treaty. Canada submits that the issue of interest should be left open to allow for flexibility. Canada submits that it sees value in flexibility for the purpose of renewal of the relationship, that to maintain flexibility is for the benefit of both parties to the negotiation.

[379] Ontario asserts that the rationale for post-judgment interest does not apply to this case, citing *Peleshok Estate .v Peleshok,* 2012 ONSC 4284 at para. 34. If an interest rate is to be set, it should be the prejudgment interest rate under s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*CJA*), since any order for the payment of money to the CIFN will not arise until some point in the future after their status under the Treaty is resolved.

[380] There is no dispute that a dollar today is not likely worth the same amount over time. Persistent inflation is a known phenomenon. In the trial of this matter, we have observed the over-sized impact of interest rate dispute. To set an interest rate now avoids the risk of future litigation on this issue. It is unknown what the terms of bargaining or resolution might be as between the CIFN and the Crown. However, regardless of the details, one party is obviously disadvantaged if the dollar amount is not protected.

[381] I agree that in the circumstances here, where there is no amount yet due the CIFN, an award of post-judgment interest is inappropriate.

[382] Section 128(1) and s.130(1) of the *CJA* provides broad discretion to the judge to award interest. In this case, an award at the rate of pre-judgment interest takes into account that the Crown has now made a determination of honourable compensation to each of the Contingent Interest First

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[243] The intervention order provided 40.49% of the total for the "Group of 7" First Nations.

Nations. It is not known whether this amount will ultimately be paid or whether other means to renew the relationship will be taken. While the parties seek to resolve their outstanding issue, the CIFN should not be unduly prejudiced by any erosion of the value of this determined amount. As the Supreme Court of Canada reminded the Crown, it has lost the moral authority to say "trust us".[244] In any event, the court should not be burdened with up to six other cases to determine an interest rate.

[383] There shall be a Declaration that the contingent shares of each of the CIFN as listed above shall be disbursed to the respective CIFN on further order of this court. The Crown shall pay interest on that amount, calculated as of January 27, 2025, at the pre-judgment interest rate pursuant to the *CJA*, compounded annually. Inasmuch as Canada and Ontario have previously agreed to share equally the Crown liability to pay compensation, the liability for this interest shall also be shared equally.

X. COSTS

For Stage Three Trial and Negotiation Process

[384] The issue for costs for the Stage Three trial and the engagement process was addressed as part of the Crown decisions. The Crown committed to pay reasonable legal fees as agreed upon or assessed. The parties now dispute whether the costs should be the subject of an assessment by the court. The decision letters of Ontario and Canada take identical positions.

[385] The decision letters address the issue of costs as follows.

Canada

[386] With respect to costs, Canada has determined that it will pay $20 million for costs of the Stage Three trial, pending agreement on, or the court's assessment of, further costs.[245]

[387] Canada agrees that the First Nations should receive compensation for their reasonable legal and expert expenses, and acknowledges that, in the absence of an agreement, the court may be called upon to determine the amount of reasonable costs to be paid, through the assessment process. Canada has not agreed to fully indemnify each First Nation for all of its costs, including all of its legal costs as set out in the January 6, 2025 letter.[246]

Ontario

[388] Ontario will pay, along with Canada, reasonable legal costs of the 2023 Stage Three trial and the engagement process in an amount to be agreed upon or assessed by the court. To that end, Ontario will pay $20 million in legal costs pending agreement on, or the court's assessment of, further costs.[247]

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[244] *Restoule SCC* at para. 262
[245] Canada Decision Letter at p. 2, Record at p. 14.
[246] Canada Decision Letter at p. 17, Record at p. 29.
[247] Ontario Decision Letter at para. 252, Record at p. 424.

[389] In the absence of an agreement on costs, the court may be called upon to determine the amount of reasonable costs to be paid through an assessment process under the *Rules of Civil Procedure* and the practices of the Superior Court of Justice. Ontario does not agree to indemnify any amount paid or to be paid by the RST First Nations on a contingency fee or alternative fee arrangement basis.[248]

[390] There has been no agreement on the quantification of costs.

Positions of the Parties

[391] In correspondence with the Crown, the Superior plaintiffs sought $113 million and asserted that each First Nation agreed that the amount sought was reasonable. The Superior plaintiffs contend that in addition to actual fees, there is a claim for $100 million counsel fee of which $73.86 million remains unpaid.

[392] The plaintiffs contend that the Crown must be held to their commitment in the decision letter and should be ordered to pay all reasonable costs to be assessed. The plaintiffs seek a ruling that the Crown is required to fully indemnify the plaintiffs for their fair and reasonable fees (including the counsel fee) assessed on a solicitor and own client basis.

[393] During the negotiation process the Crown requested all counsel and parties to provide information about their costs of the Stage Three trial and the negotiations. The Crown did not receive any information about costs until the last days of the negotiations. Ontario maintains that there is no need for a further assessment of costs as the $40 million will result in all the RST First Nations receiving full indemnity for their costs. Canada takes a similar position, that there is no need for a determination of costs. Canada also says that the use of the term "full indemnity" has the potential to be confusing, especially with regard to the claim for a counsel fee.

[394] The plaintiffs further submit the Crown did not provide reasons or advert to any of the factors under either r. 57.01(1) or the criteria on an assessment between a solicitor and one's own client with respect to setting an amount for fees. In the absence of a justification for this determination, the plaintiffs say that the amount is not sustainable.

[395] Ontario says that the commitment of $40 million was based on an estimate of costs incurred by the First Nations, in the absence of cost breakdowns from the plaintiffs.

Discussion

[396] Both Canada and Ontario made clear commitments in the January decision letters. The letters include a commitment to pay reasonable costs of the Stage Three trial and the negotiation process in an amount to be agreed upon or assessed. There has been no agreement. The plaintiffs seek an order for an assessment.

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[248] Ontario Decision Letter at para. 252, Record at p. 424.

[397] Both Canada and Ontario say there is no need for an assessment now that they have paid out more than actual fees charged, but for the counsel fee.

[398] Ontario submits that the question on this review is whether the Crowns approach to legal fees falls within the range of honourable results. I agree. However, the decision of the Crown, or its "approach" as set out in its decision letter, was to pay full reasonable costs as agreed or assessed. That commitment is honourable and is not contested by the plaintiffs.

[399] There is no ongoing discretion afforded to the Crown to reconsider, change or amend their decision. The Crown seeks to rely on a new position, taken after the decision letters were delivered. that the amount of $40 million for costs is a fair and reasonable amount. However, the decision letters do not limit the costs to $40 million or provide reasons for doing so.

[400] The dispute here is primarily about the counsel fee and whether a fair and reasonable assessment would include "fee arrangements" as it is called by the plaintiffs. The decision letters, which are the focus of this review, make a clear commitment. The plaintiffs are entitled to rely on this commitment. I am not persuaded that the plaintiffs should lose the benefit of this commitment.

[401] If necessary, I will consider the matter of costs in two steps. First on the issue of scale, including the meaning and scope of the terms, full indemnity and fair and reasonable. After the release of a decision on the scale of costs, and if necessary, I will receive submissions on an assessment of fair and reasonable quantum.

[402] On the issue of scale of costs, I request written submissions as follows:

- from the plaintiffs within 30 days of the release of this decision.
- From the defendants within 60 days of the release of these decisions.
- If necessary, the plaintiffs may submit reply submissions within 75 days of the release of this decision.
- Submissions shall be no longer than 7 pages.

Costs of the Review Proceeding

[403] The plaintiffs brought this review as a motion to review the constitutionality of the decision of the Crown. The plaintiffs seek their costs of this review as assessed under r. 57.01(3). The CIFN seek full indemnity costs. Ontario and Canada do not seek costs. TAA also seeks costs.

[404] Although I was not persuaded to interfere with the exercise of discretion of the Crown on the issue of past compensation, this proceeding was a useful and necessary process in the renewal of the Crown-Anishinaabe relationship vis-à-vis annuity obligations through this litigation process. The determination of compensation for the Treaty breach over 175 years was a matter of enormous significance to the Crown and to the Superior Anishinaabe Treaty partners and more generally to the Crown and First Nation's ongoing relationship.

[405] It is possible that a number of difficult issues arising from the engagement, negotiation, decision-making and review process can be attributed to the fact that this was a first-time attempt at complex assessment of a Treaty promise made over 175 years ago. It was a complex review, requiring a review of the full evidence from a trial that took place over eight months. It was further complicated by the fact that "the Crown", as represented by Canada and Ontario, decided to maintain separate teams and provide separate reasoning. It was also complicated by the fact that the Crown had earlier come to a resolution of the RHT First Nations, which terms were persuasive and influential on the Crown, but not binding on the RST First Nation. All of these issues and more were appropriately the subject of this review.

[406] This review proceeding was conducted efficiently and in a timely manner by all parties. It relied on all of evidence and submissions made before the Stage Three trial. No new evidence was called.

[407] In all of the circumstances, it is appropriate that the plaintiffs have their fair and reasonable costs of the review.

[408] As the plaintiffs suggest, there can be some judicial economy that the costs issues from the Stage Three review and engagement process are determined in the same hearing as the costs for the review hearing, post January 27, 2026.

[409] If counsel cannot agree on costs for the review process, they shall file Cost Outlines, any offers made and written submissions on the same schedule as above.

Conclusion

[410] In 1850, in Bawaating, the Crown made a promise to the Superior Anishinaabe, in return for a cession of a vast territory of land along the shores of and north of Lake Superior. The Crown promised to share the wealth of the land, in the form of annuity payments. The promise required the Crown to consider the net benefits from the territory and to increase the annuities, over $4 per person, if economic circumstances warranted. That promise was ignored.

[411] The Supreme Court's response to this "long-standing and egregious" breach of Treaty, included a remedy that would bring the parties back to the "Council Fire", to honourably engage, and attempt to resolve the question of compensation. This remedy was designed to provide the Crown with an opportunity to renew their relationship with the Superior Anishinaabe, to restore honour to the Crown and to advance reconciliation.

[412] In January 2025, when the parties were unable to agree on an amount for compensation, the Crown set and paid $3.6 billion to the Superior Anishinaabe as compensation for the past breach of this promise. This payment was made pursuant to the directions from the Supreme Court of Canada, to do what the Crown had not done for over the 175 years, that is, to consider the net revenues the Crown had received, along with other factors and to set an honourable amount of compensation.

[413] Upon this review and in consideration of the justification the Crown provided for its decision, I have found that the Crown's exercise of discretion to set the amount of compensation

for the past breach of the Robinson-Superior Treaty at $3.6 billion, dated January 27, 2025, falls within the range of honourable results.

[414] The Crown also set costs for the Stage Three trial, however, for reasons explained above, these costs remain outstanding, subject to an assessment or resolution.

Miigwech

[415] Following a practice established many years ago in the Stage One trial and continued in the Stage Three trial, the Superior Anishinaabe First Nations maintained a sacred fire outside of the Thunder Bay Courthouse throughout the review hearing. The sacred fire was tended by dedicated fire keepers and a Sunrise Ceremony was conducted there each morning. I am grateful to the firekeepers, Elders and knowledge keepers who gathered around the fire in the mornings, and shared their teachings, their ceremonies, their sacred medicines and their coffee. I am also grateful to the Crown counsel teams, the lawyers for the Superior First Nations, the intervenor counsel teams, representatives from Ministry of the Attorney General and the Thunder Bay police who also regularly attended these ceremonies. To you all, I say Miigwech.

[416] I also want to highlight the generous invitations we received to Sweat Lodge ceremonies and Feasts in the First Nation communities during our time in their territory. I am grateful again to all counsel teams and court staff who participated in these warm and meaningful gatherings. We were fortunate to receive teachings and hear stories from those who conducted the ceremonies. To them and to those who prepared and shared with us their moose, fish and bannock, I say on behalf of all, Miigwech.

[417] Once again, Anishinaabe ceremony, law and protocol came into the courtroom, at the beginning and end of the hearing. Community leaders and members brought the Eagle Staff into and out of the courtroom, in a dignified procession which included all counsel, court staff, the public and me. There was a sense of coming together to do the important work that the relationship demanded.

[418] Throughout our times around the sacred fire, in the Sweat Lodges, and at the community Feasts, all counsel, court representatives and community leaders expressed their gratitude for opportunity to come together, to learn and to experience the rich protocols, law and traditions of the Superior Anishinaabe.

[419] To all who made this happen in a good way, I say Miigwech Miigwech Miigwech.

P. C. Hennessy J.

The Honourable Madam Justice Patricia C. Hennessy

Released: February 27, 2026

CITATION: Red Rock First Nation v. Canada (Attorney General), 2026 ONSC 1169
COURT FILE NO.: 2001-0673
DATE: 2026-02-27

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

Plaintiffs

- and -

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

Defendants

- and -

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

- and –

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

Added Party Interveners

DECISION ON MOTION FOR CONSTITUTIONAL COMPLIANCE

Hennessy J.

Released: February 27, 2026