Federal Court of Appeal  Cour d'appel fédérale

Date: 20220210

Docket: A-329-19

Citation: 2022 FCA 20

CORAM: **BOIVIN J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JIM SHOT BOTH SIDES AND ROY FOX, CHARLES FOX, STEVEN FOX, THERESA FOX, LESTER TAILFEATHERS, GILBERT EAGLE BEAR, PHILLIP MISTAKEN CHIEF, PETE STANDING ALONE, ROSE YELLOW FEET, RUFUS GOODSTRIKER, AND LESLIE HEALY, COUNCILLORS OF THE BLOOD BAND, FOR THEMSELVES AND ON BEHALF OF THE INDIANS OF BLOOD BAND RESERVE NUMBER 148; AND THE BLOOD RESERVE NUMBER 148

Respondents

Heard by online video conference hosted by the Registry on April 13 and 14, 2021.

Judgment delivered at Ottawa, Ontario, on February 10, 2022.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: BOIVIN J.A.
WOODS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220210

Docket: A-329-19

Citation: 2022 FCA 20

CORAM: **BOIVIN J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JIM SHOT BOTH SIDES AND ROY FOX, CHARLES FOX, STEVEN FOX, THERESA FOX, LESTER TAILFEATHERS, GILBERT EAGLE BEAR, PHILLIP MISTAKEN CHIEF, PETE STANDING ALONE, ROSE YELLOW FEET, RUFUS GOODSTRIKER, AND LESLIE HEALY, COUNCILLORS OF THE BLOOD BAND, FOR THEMSELVES AND ON BEHALF OF THE INDIANS OF BLOOD BAND RESERVE NUMBER 148; AND THE BLOOD RESERVE NUMBER 148

Respondents

REASONS FOR JUDGMENT

TABLE OF CONTENTS

RENNIE J.A.

I. Introduction

Overview

[1] This appeal raises the single question whether the terms of Treaty 7 were enforceable in a Canadian court prior to the coming into force of section 35 of the *Constitution Act, 1982,* Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [*Constitution Act, 1982*]. The entitlement, or not, of the Blood Tribe to 162.5 square miles of land in south-western Alberta pivots on the answer to this question.

[2] The Blackfoot Confederacy and the Crown executed Treaty 7 on September 22, 1877. The Treaty established Blood Tribe Reserve No. 148. Encompassing 547.5 square miles, it is the largest reserve in Canada and home of the Kainai, or Blood Tribe.

[3] Treaty 7 established the size of the reserve through a formula promising "one square mile for each family of five persons, or in that proportion for larger and smaller families" (Treaty and Supplementary Treaty 7, September 22 and December 4, 1877, at p. 4, Appendix D of the Decision under appeal, 2019 FC 789, *per* Zinn J.). The Blood Tribe has long claimed that the size of the reserve did not accord with that promised by the Treaty and, in 1980, commenced an action in the Federal Court. The statement of claim asserted that in establishing a reserve less than that provided for by the Treaty, Canada breached its obligations both under the terms of the Treaty and as a fiduciary. The Blood Tribe sought declarations to that effect, an order directing

that Canada procure lands from the province of Alberta for addition to the Reserve and monetary compensation for lost use, mineral royalties and rents since 1877.

[4] For decades the action for the breach of treaty land entitlement (the TLE claim) sat in abeyance. What transpired during the 40 years before the 1980 action came to trial in the Federal Court in 2019 is not pertinent to the disposition of this appeal; it does, however, provide necessary context and will be discussed later in these reasons.

[5] The Federal Court found that Canada was in breach of its Treaty commitment. The size of the reserve was understated by 162.5 square miles.

[6] The Federal Court also found that the breach of the treaty land entitlement was discoverable as early as 1971. It rejected all allegations of concealment, lulling or deception on the part of Canada, finding that they were not established in the evidence. In the result, the TLE claim was barred by paragraphs 5(1)*(e)* and *(g)* of *The Limitation of Actions Act*, R.S.A. 1970, c. 209 [*The Limitation of Actions Act, 1970*] and subsection 39(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Combined, these provisions required the Blood Tribe to bring its claim within 6 years of its discoverability date. As the claim was discoverable in 1971 and the action not commenced until 1980, it was barred by the prescription period.

[7] The judge also held, however, that an action for breach of a treaty commitment could not be pursued in a Canadian court prior to 1982. Relying on *R. v. Sundown*, [1999] 1 S.C.R. 393, [1999] 2 C.N.L.R. 289 at para. 24 and *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58,

[2017] 2 S.C.R. 576 [*First Nation of Nacho Nyak Dun v. Yukon*] at para. 37, the judge reasoned that as treaties are not contracts and as the 1980 action was pled in contract, no cause of action existed by which the Blood Tribe could have enforced the Treaty commitment.

[8] After reviewing decisions of the Judicial Committee of the Privy Council [JCPC] in 1899 (*Secretary of State for India v. Sahaba*, [1859] U.K.P.C. 18) and 1941 (*Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, 1941 A.C. 308), the judge adopted the act of state doctrine, a principle of international law that provides that unless incorporated into a domestic law which confers a right of action, treaties are not enforceable in national courts. The judge reasoned that "[t]here is nothing in the *Indian Act* permitting a First Nation to bring an action to enforce the TLE under a Treaty" (*Reasons* at para. 500). As Treaty 7 was not incorporated into Canadian law, it was not enforceable in Canadian courts.

[9] In the judge's opinion, this changed on April 17, 1982, with the advent of section 35 of the *Constitution Act, 1982*. Section 35 created a right to sue: "Canada is the one who created the new cause of action when it enshrined existing treaty rights into the Canadian constitution" (*Reasons* at para. 475). Therefore, for the purposes of the Alberta *Limitation of Actions Act, 1970*, time only began to run in 1982. In effect, the judge found that the Blood Tribe had commenced an action before it had a cause of action.

[10] The Attorney General appeals, contending that a cause of action for breach of a treaty right existed at common law prior to 1982, and that the judge misunderstood the law in this regard. The Attorney General contends that the judge erred in construing the Treaty as an

international agreement and relying on the act of state doctrine to require that Treaty 7 be ratified by Parliament to be enforceable. Finally, the Attorney General contends that the judge misunderstood the effect of section 35, arguing that section 35 did not create a new cause of action, but gave constitutional protection to existing treaty rights.

[11] The response of the Blood Tribe, at the highest level, is the judge made no error. Treaties did not create enforceable obligations. Like international treaties, they were unenforceable in the absence of legislative ratification. Treaties were simply political commitments dependent on the good grace and will of the Sovereign to respect as it chose. The Blood Tribe had no recourse or remedy for the breach of its treaty until 1982 when section 35 came into force. The Blood Tribe also relies on the political trust doctrine, a concept in the jurisprudence which holds that Aboriginal rights were not justiciable.

[12] I have concluded that there were reversible errors in the reasons given by the Federal Court and that the appeal should be allowed. I reach this conclusion for three reasons.

[13] First, the reasons are not consistent with the guidance of the Supreme Court of Canada. The Supreme Court has rejected the characterization of treaties as international agreements, as well as the application of international law principles to Canadian law. The Federal Court erred in characterizing Treaty 7 as if it were an international treaty and applying the act of state doctrine to conclude that its terms were unenforceable in a Canadian court. It was only by ignoring the governing jurisprudence that holds that treaties are enforceable agreements under

Canadian law that the judge was able to open the door to the act of state doctrine, a principle of public international law.

[14] Second, there is an unbroken line of decisions over 120 years recognizing the enforceability of the commitments made in the numbered treaties. This jurisprudence has consistently taught that the numbered treaties created binding obligations, both legal and moral, on the Crown. Their terms were enforceable in Canadian courts because a foundational, robust legal principle compelled compliance – the honour of the Crown. The conclusion of the Federal Court renders that principle empty and hollow.

[15] The Supreme Court, indeed all courts, have eschewed pigeon-holing treaties and the breach of the commitments made therein, into a particular cause of action. Indeed, there are two unifying themes across a century of jurisprudence: the first is that the treaties created binding legal obligations, and the second is the studied indifference or agnosticism of the courts to the form in which, or the manner by which, a breach of a treaty commitment is framed or pled.

[16] The question before the Federal Court was not whether the treaties were contracts – it is clear that they are not – rather the question before the Court was whether a court, having found that the land entitlement term of Treaty 7 had been breached, could have provided a remedy. The evolution in the language used to describe the nature of treaty obligations or the means of their enforcement; whether through declaratory actions, breach of contract, breach of treaty or breach of a constitutional obligation, does not change the question of whether a cause of action exists.

While the legal characterization of the treaties has changed, the readiness of the courts to provide a remedy has not.

[17] Third, the judge misunderstood the effect of section 35 in relation to treaties. Section 35 did not create new treaty rights – the Supreme Court has settled that question – rather, section 35 gave constitutional protection to existing treaty rights. The inquiry that ought to have been undertaken by the Federal Court was to determine whether, as of the eve of the expiry of the limitation period, a Canadian court would have provided a remedy at common law for breach of the TLE term. As I will explain, the reasoning of the Federal Court with respect to section 35 also circumvents and nullifies unequivocal jurisprudence of the Supreme Court with respect to limitations legislation and section 35.

[18] Much of the argument before this Court failed to distinguish between Aboriginal rights and treaty rights. Treaty rights and Aboriginal rights are not the same; they differ in provenance and scope, and, importantly for the disposition of the issue in this appeal, when they first came to be recognized in Canadian courts. Any conclusion as to whether a treaty right was enforceable at common law as opposed to whether an Aboriginal right was enforceable at common law must proceed on an understanding of the distinction, prior to 1982, between the two. The Federal Court erred in conflating the two.

[19] The answer to the question as to the enforceability or not of Treaty 7 lies much closer to home than an 1859 decision of the JCPC concerning a dispute under an international treaty between Britain and the Raja of Tanjore, then an independent, sovereign state. It is not necessary

to look so far afield in circumstances where Canadian courts have considered the question that was before the Federal Court. This jurisprudence, rooted in the common law, the Canadian constitutional framework and now reoriented to the north star of reconciliation, supplies the answer to the question raised in this appeal.

The historical context

[20] In the ordinary course, I would not trace the procedural history of a case where the issue with which the Court is seized is a question of law. Here, however, an understanding of how the issues between Canada and the Blood Tribe came before the Federal Court provides context and is pertinent to the over-arching objective of reconciliation.

[21] In 1882, five years after execution of the Treaty, surveyors set the boundaries of the Blood Reserve. The survey described the Blood Reserve as an area of roughly 650 square miles in south-western Alberta, extending north from an east-west line 9 miles north of the Canada-US border. Also in 1882, the Canadian government, by Order in Council, granted two grazing leases on lands south of the reserve. The northern boundaries of the grazing leases extended 3 miles north of the southern boundary of the reserve lands described in the 1882 survey, overlapping the Blood Tribe's lands (*Reasons* at para. 193; see also Appendix G).

[22] The discrepancy in the boundaries between the 1882 survey of Blood Tribe lands and the grazing leases was quickly recognized by Canadian officials. Although the Surveyor General advised the leases would have to be amended to avoid encroaching on the Blood Tribe lands, the Lieutenant Governor of the North-West Territories, Edgar Dewdney, instead instructed John

Nelson, the surveyor who conducted the 1882 survey, to change the boundaries of the Blood Reserve. The terms of Treaty 7 provided that the boundaries could be revised by agreement of the Blood Tribe and Canada, and the Blood Tribe was asked to agree to the new boundary.

[23] In 1883 the new boundary agreement was signed by members of the Blood Tribe and the Lieutenant Governor. It defined the southern boundary of the reserve by a latitudinal description, 49°12’16”. Under the agreement, the southern boundary of the reserve was moved north of the boundaries of the grazing leases, a distance of approximately 5-6 miles. The southern boundary of the reserve was now 14-15 miles north of the international boundary and the overlap with the leases was eliminated. This change in the southern boundary reduced the size of the Blood Reserve from 650 square miles to its current size of 547.5 square miles.

[24] Five years later, in 1888, members of the Blood Tribe, including its Chief, Red Crow, met with officials of the Indian Department. The Tribe members expressed their view that the size of the reserve was not as large as they had thought it would be when they signed Treaty 7. They also expressed uncertainty and confusion as to the precise location of the southern boundary.

[25] As a result of these discussions, John Nelson, along with Red Crow and other members of the Tribe, travelled to the southern boundary of the Blood Reserve as described in the 1883 agreement. Nelson showed Red Crow and other members of the Blood Tribe the location of the new southern boundary. This was the first time that the members of the Tribe had seen the location of the new boundary. Nelson placed iron posts along the southern boundary of the Blood

Reserve, from the south-east corner to south-west corner. In his report of the visit, Nelson recorded that “Red Crow was asked if he was satisfied, and he answered in the affirmative.”

[26] Nearly a century passed.

[27] On August 5, 1969, Leroy Little Bear, a Blackfoot researcher, presented the Blood Tribe Council a report on the 1882 and 1883 surveys. The report detailed the differences between the 1882 and 1883 surveys and the reduction in the size of the reserve. The report was made available to all members of the Blood Tribe on November 4, 1969.

[28] Leroy Little Bear then travelled to Ottawa in August 1971 to gather information from the Department of Indian and Northern Affairs as to the total number of people in the Blood Tribe for the years 1879 to 1884. The Department responded within a few days, providing Little Bear information extracted from the yearly annuity payments made to the members of the Tribe for the years 1881 and 1882. Based on this information, Little Bear confirmed the discrepancy between the size of the reserve owed under the original TLE calculation and existing reserve boundaries.

[29] On February 27, 1976, the Blood Tribe tabled its position that the Treaty had been breached with the Minister of Indian Affairs. In addition to the TLE claim, the Tribe submitted what came to be known as “the Big Claim”, an entitlement to the lands extending south to the US border, west to include Waterton National Park and north to the confluence of the Belly and Waterton Rivers. Two years later, on June 20, 1978, the Minister rejected both claims.

[30] Having been unsuccessful in their negotiations with the Minister, the Blood Tribe commenced an action in the Federal Court on January 10, 1980.

[31] The statement of claim alleged breaches of Canada's fiduciary duty arising from the 1883 survey, fraudulent concealment, and negligence. Importantly, it sought a declaration and damages for breach of contract arising from the failure to fulfill the treaty land entitlement (TLE) according to the formulae prescribed by section 7 of Treaty 7:

> In the alternative, the Plaintiffs claim that the said Treaty Number 7 and the said amendment to Treaty Number 7 entered into on or about the 2nd day of July, A.D. 1883, constitute contracts between the Blood Band and the Defendant. The Plaintiffs claim that the Defendant, its predecessors in title and agents and/or servants for the time being have committed and continue to commit breaches of the said contracts in that they failed to accurately calculate the size of the said Reserve Number 148 as per the said contract in that the size of the said Reserve 148 did not correspond to previously existing population figures as shown in the 1881 and 1882 Treaty pay lists and was not substantiated by an official census or other accounting taken at the time of the execution of the said amended Treaty or at the time of the 1883 survey.

[32] With the agreement of both the Blood Tribe and Canada, the Federal Court action was put into abeyance pending an assessment under the Specific Claims Policy of the Department of Indian Affairs and Northern Development. Given the glacial speed with which the Specific Claim was being addressed by the Department, on August 7, 1996 the Blood Tribe moved to reactivate the Federal Court action, confirming that the action would continue at the same time the Blood Tribe advanced the TLE claim under the Specific Claims Policy.

[33] Three years later, on February 24, 1999, the Blood Tribe amended the 1980 statement of claim to include section 35 of the *Constitution Act, 1982*. The amendment read in part as follows:

"[t]he members of the Blood Tribe have Aboriginal and Treaty rights which are constitutionally protected by section 35 of the *Constitution Act, 1982*" and, "Treaty Number 7 was made between the Blood Tribe and the Defendant as a sacred peace agreement between two Nations."

[34] In November 2003, the TLE claim was rejected under the Specific Claims Policy on the basis that Canada had no outstanding legal obligation. The Blood Tribe then requested that the Indian Claims Commission (ICC) conduct an inquiry into the claims advanced in the Federal Court action. The ICC issued its recommendations to the Minister on March 30, 2007; that the Big Claim not be accepted, and, secondly, that as the effect of the 1883 boundary change was to remove lands from a reserve, a surrender was required. It recommended that the Minister negotiate a resolution.

[35] Canada declined to negotiate, and the action proceeded to trial.

[36] The case-managed action was divided into three phases. Phase I was heard on the Blood Reserve in May 2016 for the purpose of receiving oral history evidence from members of the Blood Tribe. Phase II, dealing with liability, fact and expert witness evidence, was held at the Federal Court in Calgary, 2018. Phase III was to address remedy.

Preliminary issue

[37] Well prior to the hearing of this appeal, the Attorney General filed a motion for leave to file a reply memorandum. The motion was prompted by what the Attorney General asserted was an attempt by the Blood Tribe to raise new issues that were not considered by the trial judge and

to reverse the judgment of the Federal Court with respect to separate and legally distinct issues (and in respect of which the Blood Tribe was unsuccessful) from those raised by the notice of appeal. The Attorney General asserts that the Blood Tribe is recasting its case, putting it on a different basis than it did at trial and that a notice of cross-appeal was required.

[38] In response, the Blood Tribe contends that no cross-appeal was required, as it does not seek a different disposition or judgment than that under appeal. It argues that a party may offer any reasons in support of the judgment under appeal (*Kligman v. M.N.R. (C.A.)*, 2004 FCA 152, [2004] 4 F.C.R. 477) and may provide "a new angle" on the existing issues (*Smith v. St. Albert (City)*, 2014 ABCA 76, 370 D.L.R. (4th) 514 at para. 18). It points to portions of the trial record that allude to the arguments which the Blood Tribe now further develops in its memorandum, and says that it is offering additional reasons why the judgment should be maintained. The Blood Tribe states that its arguments are "closely related" to the issue on appeal which is whether a remedy for breach of a treaty existed prior to 1982. Its defence to the limitation period has not changed, namely as no cause of action existed at common law, the prescription period did not run. Its position, simply put, is that "treaties were not actionable" (Blood Tribe's reply memorandum on Attorney General's motion for leave, at paras. 21, 30).

[39] This motion raises both procedural and substantive considerations.

[40] A notice of cross-appeal must be filed when a different disposition of the decision under appeal is sought (*Miller Thomson LLP v. Hilton Worldwide Holding LLP*, 2019 FCA 156 [*Hilton*]). As I will explain, the arguments that the Blood Tribe advance are alternative

arguments. A notice of cross-appeal is required "where the alternative argument is made in support not of the judgment appealed from but of a claim for a different judgment" (*Hilton* at para. 12), or, where the alternative argument, or the new angle would result in a different judgment, a notice of cross-appeal is required. The general rule is that the Court will not hear a ground of appeal that was not raised in the notice of appeal or cross-appeal. This ensures that the parties know at an early stage of the appeal what is in issue and can make legal, tactical and policy decisions accordingly.

[41] A new issue on appeal is one that is factually and legally distinct from those raised at trial (*Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712 [*Quan*]). The test as to whether it should be entertained is stringent and the onus is on the party seeking to raise the issue to establish that the court can hear the issue without prejudice (*Guidon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at paras. 22-23). The discretion is to be exercised sparingly and is an exception to the general rule that the Court will not hear grounds of appeal that were not raised in the notice of appeal or cross-appeal.

[42] The Federal Court judge, in thoughtful and thorough reasons, held that limitation periods apply to claims for breach of treaty. In a separate section of the reasons for judgment, entitled "Application of Provincial Limitation Acts to Treaty and Aboriginal Rights" he concluded, "I reject the submission of the Blood Tribe that provincial limitations legislation can have no application to the claims in this action …" (*Reasons* at para. 392). I note, parenthetically, that the provincial limitation period applies by reason of section 39 of the *Federal Courts Act*.

[43] Then, after an exhaustive and detailed review of the evidence, the judge concluded that the Big Claim was discoverable or discovered by 1890, the 1882 reserve claim by 1969 and the TLE claim by 1971. He found that the assertions of lulling, concealment or abuse of process where not made out on the evidence. He then considered, and rejected, the argument that he could, on the basis of *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 [*Manitoba Metis*] and in furtherance of the objective of reconciliation, waive the limitation period. Consequently, paras. 2 and 3 of the judgment read:

> 2. Canada, having provided the Blood Tribe with a Reserve of 547.5 square miles in area, is in breach of the Treaty Land Entitlement provisions of Treaty 7;
>
> 3. All claims of the Blood Tribe, other than the Treaty Land Entitlement claim arising from Canada's breach of Treaty 7, are time-barred by operation of *The Limitation of Actions Act*, RSA 1970, c 209, made applicable to this action by section 38 of the Federal Courts Act, RSC 1985 c F-7.

[44] All claims were statute barred, subject only to the singular question whether an action for breach of treaty could be pursued in a Canadian court prior to 1982.

[45] The Blood Tribe is advancing an alternative argument on a basis for upholding the judgment and, therefore, no notice of cross-appeal is required (*Hilton* at para. 12). What is engaged, however, is whether a new argument should be heard on appeal (*Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689).

[46] I turn to the new issues and arguments said to be outside the scope of the appeal.

[47] The political trust doctrine was not advanced at trial and not considered by the Federal Court. It is a new argument and, as the Attorney General points out, the Blood Tribe makes no attempt to link the argument to the reasons of the Federal Court. The Attorney General contends, and I believe is right to do so, that the assertion of a political rights doctrine is an attempt to argue that the judge reached the right conclusion, but on a basis that the judge did not consider. The Attorney General says that he has not had an opportunity to state his position on the issue.

[48] The second argument objected to is whether the *Indian Act* is a complete code, which ousts the common law right of Aboriginal Canadians to sue.

[49] The argument made at trial and which found favour with the judge was that as Treaty 7 had not been incorporated into legislation, and, as there was nothing in the *Indian Act* that permitted the Blood Tribe to sue on the treaty, the terms of Treaty 7 were unenforceable. This argument has been recast by the Blood Tribe to say that the *Indian Act* is a complete code which displaced all common law right of action. It is made on the necessary admission that there was, in fact, a right to sue at common law – otherwise there would be nothing to displace.

[50] This is a new argument, one which would require much more than has been put before this Court to be considered – the text, the context and purpose of the various provisions would have to be assessed as would the legislative history of the *Indian Act* and how it stood prior to 1982. None of this was argued at trial and the argument is not developed in any way in this Court – provisions of the Act are neither identified nor explained and there is no legislative history. It

would be impossible for a court to conduct the statutory interpretation analysis necessary to conclude that the *Indian Act* prohibited the right of Aboriginal Canadians to sue.

[51] The Attorney General also objects to language in the Blood Tribe's memorandum of fact and law which raises whether there were practical and legal obstacles that prevented it from bringing its claim. He contends that this is a covert attempt to challenge the judge's factual findings with respect to discoverability.

[52] The Blood Tribe denies that it seeks to reverse the findings with respect to discoverability. Paragraph 12 of the Blood Tribe's memorandum in reply to the motion makes clear that the argument which underlies the Attorney General's concerns is simply a reprise of the argument that there was no cause of action until 1982, relying again on *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181 [*Ravndahl*] and the judge's reasons at paras. 499-501.

[53] If successful, challenges to the discoverability and limitations findings, whether factual or legal, would fundamentally alter the scope of the appeal and the terms of the judgment itself. Put otherwise, these arguments, if successful, would have consequences for other factually and legally discrete elements of the reasons and would, of necessity, require the variation of other parts of the judgment of the Federal Court (*Quan* at para. 39).

[54] A respondent cannot use its discretion to raise "any argument" in support of a decision challenged on appeal as justification to unwind other parts of the judgment in respect of which a

notice of cross-appeal ought to have been filed. In those circumstances, fairness requires that notice of that intention be signaled early in the form of a notice of cross-appeal. Memoranda of fact and law on the cross-appeal would be exchanged and the legal and factual record before this Court would look much different than that currently before the Court.

[55] The fourth argument pertains to the limitation period. At trial the Blood Tribe argued that the Court had a discretion to waive the limitation period, an argument rejected by the judge. While the Blood Tribe uses, in its memorandum, language which may suggest an attempt to undo the judge's findings of fact on discoverability, paras. 41-42 of the reply memorandum, again, allay that concern. The Blood Tribe is simply re-arguing that *Manitoba Metis* allows a court to waive a limitation period. Again, while not expressed as such, the argument that the judge has a discretion to waive the limitation period is an alternative argument. It is only applicable if there is a cause of action.

[56] I appreciate the concern that language in the Blood Tribe memorandum can be read as an impermissible effort to vary the judgment and to collaterally challenge findings of fact and determinations of law in respect of which a notice of cross-appeal ought to have been filed. This concern however, is put to rest when both the Blood Tribe's memoranda on appeal and in reply to the motion are read. They leave no doubt that there is only one issue on appeal:

- Paragraph 1 of the Blood Tribe's appeal memorandum states that the Trial Judge correctly understood and interpreted limitation periods in the Aboriginal context;

- Paragraph 5 of the memorandum, confirms that the issue on appeal is narrow:

> [W]hether treaty land entitlements under treaties between Canada and Indigenous Tribes were civilly actionable for a claim of 'breach of treaty' in Canadian courts before the advent of s. 35(1) of the *Constitution Act, 1982* on April 17, 1982. As the Trial Judge correctly held, they were not and therefore no statutory limitation period for a cause of action in breach of treaty under s. 35(1) could begin to run until 1982.

- Paragraph 4 of the memorandum reinforces that the appeal only concerns "the one claim which was allowed";

- Paragraph 35 acknowledges that paragraph 5(1)(*g*) of the Alberta *Limitation of Actions Act, 1970* applies and "would capture 'breach of treaty'";

- Paragraph 37 acknowledges the adverse finding of discoverability, but flags that this is of no consequence as there was no cause of action;

- Paragraph 106, in its claim for relief, simply asks that "the appeal be dismissed in its entirety".

[57] Turning to the Blood Tribe's reply to the Crown motion to file a reply memorandum;

- Paragraph 22 states that "[t]he Respondents are not seeking to overturn <u>any</u> parts of the judgment under appeal and are not seeking a different disposition of the case" [Emphasis added]

- Paragraphs 21, 30 indicate that its defence to the limitations period, simply put, is that treaties are not actionable.

[58] In oral argument before this Court, counsel for the Blood Tribe did not stray outside the issues as framed by the notice of appeal or seek a different outcome other than the dismissal of the appeal.

[59] I therefore conclude that the Blood Tribe's memorandum is within the guardrails of the issues as framed by the notice of appeal. I would grant the Crown's motion to file a reply, but only to the extent that it responds to the political trust issue. Whether breaches of treaty could not be pursued because they were non-justiciable, political issues is a legal question which bears directly on the question in issue and requires no further evidence or fact finding.

II. **Treaties and the act of state doctrine**

[60] The parties read the reasons of the Federal Court judge differently. They do not agree as to whether the judge, in fact, concluded that the historic treaties are international agreements. The Attorney General argues that it is the only reasonable inference to be drawn from the judge's silence as to how treaties were to be characterized, his heavy reliance on international treaty cases and his application of the act of state doctrine. The Blood Tribe, for its part, notes that the judge recognized that the Supreme Court has consistently rejected the application of international law principles to the historic treaties.

[61] Reading the reasons as a whole and having regard to the extensive reliance on international law cases to support the conclusion that treaties were not enforceable, my view is that the judge, in fact, concluded that the historic treaties were international treaties. That said, I

agree that the reasons are ambiguous, but it is an ambiguity that need not be resolved. It is a debate of no consequence.

[62] Even if the judge stopped short of finding that the treaties were international agreements, he erred in deciding the question of whether they were enforceable through the lens of public international law principles and applying the act of state doctrine. The Federal Court decision pivots on the conclusion that the historical treaties were either international treaties or analogous to international treaties and, as such, were unenforceable unless incorporated into Canadian law. This conclusion is contrary to established Supreme Court guidance on the legal characterization of treaties and the rejection of the application of international law principles into Canadian law.

[63] The judge supported his conclusion by noting that the Supreme Court of Canada adopted the act of state doctrine in *Francis v. The Queen*, [1956] S.C.R. 618, 1956 CanLII 79 (SCC) at p. 621 [*Francis*]. There, the Supreme Court stated that "it is clear that in Canada such rights and privileges as were here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation" (*Reasons* at para. 497). The judge also observed that the principle expressed in *Francis* was restated in the Ontario Court of Appeal decision of *R. v. Agawa* (1988), 53 D.L.R. (4th) 101, 65 O.R. (2d) 505 at 509 [*Agawa*] (*Reasons* at para. 498). There, Blair J.A. wrote:

> Indian treaties are, however, similar in one respect to Canada's international treaties. They are not self-executing and <u>can acquire the force of law in Canada only to the extent that they are protected by the Constitution or by statute.</u> [Emphasis added by Federal Court Judge]

[64] I will address these cases later in these reasons, but it is sufficient to say at this point that these cases do not support the conclusion reached by the Federal Court.

[65] The judge did much more than look to international law by analogy, he adopted substantive principles of international law. To be precise, the judge applied the act of state doctrine, a substantive component of international law to Treaty 7. The doctrine holds that unless domestic legislation provides a right of recourse, municipal or domestic courts do not have the competence to consider treaties between two foreign and sovereign countries. This conclusion comes as a surprise, given the extent to which Canadian courts recognized the enforceability of treaties since Confederation and the consistent and unequivocal jurisprudence of the Supreme Court that treaties are not international agreements.

Supreme Court of Canada decisions

[66] In the 1985 decision of *Simon v. The Queen*, [1985] 2 S.C.R. 387, 1985 CanLII 11 (SCC) at para. 33 [*Simon*], the Court considered a pre-Confederation friendship treaty and concluded:

> In considering the impact of subsequent hostilities on the peace Treaty of 1752, the parties looked to international law on treaty termination. While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law. *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at pp. 617-18, aff'd [1965] S.C.R. vi, 52 D.L.R. (2d) 481; *Francis v. The Queen*, [1956] S.C.R. 618, at p. 631; *Pawis v. The Queen*, [1980] 2 F.C. 18, (1979), 102 D.L.R. (3d) 602, at p. 607.

[67] A year later, in *R. v. Horse*, [1988] 1 S.C.R. 187, 1988 CanLII 91 (SCC) [*Horse*] at paras. 35-37, the Court reiterated the conclusion in *Simon*. The question in *Horse* was whether a pre-

Confederation friendship agreement was a formal treaty for the purposes of the *Indian Act*. The Court rejected the proposition that it should have regard to principles of international law in deciding that question.

[68] In *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 [*Sioui*], the Supreme Court again considered whether a pre-Confederation treaty was a treaty within the meaning of section 88 of the *Indian Act*. The appellant argued that the British Crown could not validly enter a treaty with the Hurons as it was not sovereign in Canada in 1760. The appellant based this argument on international law, as stated by eighteenth and nineteenth century jurists, which required that a state should be sovereign in a territory before it could alienate that territory.

[69] The Court rejected the argument, noting that it was not even necessary to consider the substance of the point of international law. It noted that at the time with which the Court was concerned "relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens." In concluding that the 1760 treaty between Governor Murray and the Hurons was a treaty within the meaning of the *Indian Act*, the Court noted the *Simon* decision was clear that "an Indian treaty is an agreement *sui generis* which is neither created nor terminated according to the rules of international law" (*Sioui* at p. 1038).

[70] I will return to *Sioui* later in these reasons when I consider whether the numbered treaties were enforceable, but pause here to note that the Supreme Court considered a treaty entered into in 1760 to create binding legal obligations. Consequently, the treaty was given legal effect and

the right to cut wood, fish and hunt was protected from provincial regulatory restrictions. This raises the obvious question as to why a treaty executed 117 years later did not create binding obligations.

Jurisprudence prevailing on the expiry of the limitation period

[71] The trilogy of Supreme Court cases in the 1990's, *Simon*, *Horse* and *Sioui*, did not change the law. They are consistent with the jurisprudence governing the legal characterization of treaties prevailing at the expiry of the limitation period in 1978.

[72] In *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder*], Hall J., dissenting in the result but not on this point, discussed, and rejected, the application of the act of state doctrine as a bar to recognizing Aboriginal title (at pp. 404-406). The act of state doctrine only applies where the sovereign has acquired land from another sovereign, which can only be done through a treaty of cession.

[73] In *Pawis v. Canada*, [1980] 2 F.C. 18, 102 D.L.R. (3d) 602 (T.D.) [*Pawis*] at para. 9, Marceau J. wrote:

> …
>
> (i) It is obvious that the Lake-Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibway's did not then constitute an "independent power", they were subjects of the Queen. Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the "principal men of the Ojibewa[y] Indians" were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a

> contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.
>
> …
>
> [Emphasis added]

[74] So too, in *Hay River (Town) v. Canada* (1979), [1980] 1 F.C. 262, 101 D.L.R. (3d) 184 [*Hay River*] at para. 5, was the proposition that a treaty was an international agreement rejected:

> It is not necessary, for this purpose, to attempt a comprehensive definition of the legal nature of Treaty No. 8. Clearly, it is not a concurrent executive act of two or more Sovereign States. Neither, however, is it simply a contract between those who actually subscribed to it. It does impose and confer continuing obligations and rights on the successors of the Indians who entered into it, provided those successors are themselves Indians, as well as on Her Majesty in right of Canada.

[75] On the eve of the enactment of the *Constitution Act, 1982*, the United Kingdom Court of Appeal considered whether the treaties were enforceable against the Crown in the United Kingdom. The Court of Appeal noted that, "although the relevant agreements with the Indian peoples are known as 'treaties', they are not treaties in the sense of public international law. They were not treaties between sovereign states, … " (*R. v. Secretary of State for Foreign and Commonwealth Affairs*, 1982 WL 221742 (1982)).

[76] In sum, there is no support in the case law on either side of the expiry of the limitation period for the proposition that the historic treaties engage the act of state doctrine and require incorporation into domestic law to be enforceable.

[77] I would add to this that the policy rationale that underlies the act of state doctrine as a principle of public international law is incompatible with the fundamental constructs of Canadian constitutional framework which establishes, through sections 96 and 101 of the *Constitution Act, 1867*, the role of the judiciary in the Canadian federation.

[78] The doctrine of act of state is premised on the view that national or domestic courts do not have all the information, evidence, or policy context necessary to decide international treaties, let alone the power of enforcing their decisions (*Secretary of State for India v. Sahaba*, [1859] UKPC 19 at 529; *Cook v. Sprigg*, [1899] A.C. 572 at p. 578). The judge, in adopting the act of state doctrine, necessarily accepted its underlying rationale; the Canadian judiciary is not competent to adjudicate disputes arising under the historic treaties. Importing the principle into Canadian law also begs the question as to which forum would be competent if domestic courts are not competent to adjudicate treaties.

Decisions relied on by the Federal Court

[79] Before leaving this point, I will address the four cases that the judge relied on in support of the view that the treaties were akin to international instruments and not enforceable unless incorporated by domestic legislation. Neither *Agawa*, nor *Francis*, *Vajesingji* and *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, 1941 AC 308 (PC) [*Hoani*] support that conclusion.

(1) *R. v. Agawa*

[80] As noted, the judge relied on *Agawa* at page 106 and the statement that Indian treaties are not self-executing and can acquire the force of law in Canada only to the extent that they are protected by the Constitution or by statute. In argument, the Blood Tribe points out that *Agawa* was cited with approval by the Supreme Court on three occasions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at p. 1091[*Sparrow*], 1107; *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 [*Badger*]; *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658.

[81] *Agawa* merits a closer reading.

[82] *Agawa* arose in the context of a regulatory prosecution under the *Ontario Fishery Regulations*, a delegated authority under the federal *Fisheries Act*. Section 88 of the *Indian Act* provided that all provincial laws of general application applied to Aboriginal treaties except to the extent that they were inconsistent with federal laws or the terms of treaties. The issue in *Agawa*, therefore, was whether the *Ontario Fishery Regulations*, made by Ontario under a delegated power, fell within section 88 and were provincial law and inconsistent with a right to fish granted by the Robinson-Huron Treaty of 1850.

[83] The Court of Appeal determined that the Regulations prevailed, noting that, unless codified in legislation, "[i]n practical terms, … the only effective protection of Indian treaty rights until 1982 was provided by [section 88 of] the *Indian Act*, R.S.C. 1970, c. I-6 … inserted in the Act in 1951 (S.C. 1951, c. 29, s. 87)" (at p. 106).

[84] The broad sweep of the statement in *Agawa* attracted the attention of the Federal Court. However, when read in its context, it is simply a statement of an uncontroverted principle, that treaty rights were, prior to 1982, subject to legislative constraint or extinguished by Parliament but not by provincial legislatures.

[85] Professor Grammond, (now Grammond J.), explains in *Terms of Coexistence: Indigenous People and Canadian Law*, 2013 (Thomson Reuters Canada Limited), at p. 307 that when a treaty contains provisions incompatible with existing federal legislation, it does not acquire legal force unless it is implemented or protected by legislation. Professor Grammond's analysis of the interaction between treaty rights and legislation speaks precisely to factual and legal issue considered by the Ontario Court of Appeal in *Agawa*. A treaty right conflicted with legislation and at issue was which was to prevail – the federal *Fisheries Act* or the right to fish accorded by the treaty. In the case of a conflict between a treaty and federal legislation, the federal legislation prevailed.

[86] In sum, prior to 1982, unless incorporated into law, treaties could not displace or override federal legislation (Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing, 2001) at p. 52 [Mainville]). The judge inverted this principle and established a new one – that a treaty was not enforceable in the absence of parliamentary ratification – and in so doing erred.

(2) *Francis v. The Queen*

[87] As mentioned, the judge relied on *Francis* to support the conclusion that the act of state doctrine applied.

[88] The November 19, 1794 Jay Treaty was a pre-Confederation treaty between the United States of America and the United Kingdom (*Francis* at pp. 620-621, 629-630), and an issue arose whether Aboriginal Canadians could enforce or claim the protection of the Treaty. The Supreme Court held that they could not, as the treaty was an international treaty and had not been incorporated into a domestic law which provided recourse by the citizens of either Canada or the United States. Although in dissent on a different issue, Kellock J. observed (at p. 631), that the historic treaties (which would include Treaty 7) were not treaties like the Jay Treaty. The majority did not disagree with this statement, and the reasoning of the Court proceeds on that basis. The judge erred in considering *Francis* as authority for the proposition that Treaty 7 was not enforceable in Canadian courts.

(3) *Vajesingji*

[89] The judge relied on the decision of the JCPC in *Nayak Vajesingji Joravarsingji and others v. The Secretary of State for India in Council*, [1924] UKPC 51 (BAILII), (1924) L.R. 51 Ind. App. 357 (P.C.) (*Reasons* at paras. 473-479) in support of the conclusion that Treaty 7 was not enforceable.

[90] Here, again, context is critical. The treaty in question was between two acknowledged sovereign states, India, and Scindia. It was a treaty between two “High Contracting Parties” whereby Scindia relinquished land in exchange for other lands. Citizens or subjects of the state of Scindia sued India, seeking a declaration of interest in the newly acquired lands. The JCPC rejected the claim, noting that until India acknowledged the claims or ownership interests of the subjects of the former state, it had no jurisdiction to consider the matter.

[91] *Vajesingji* does not support the conclusion reached by the Federal Court. It arises in patently different factual and legal context. Further, as the JCPC stressed, the citizens of Scindia were not parties to the treaty (at paragraph 495). Here, in contrast, the Blood Tribe was party to Treaty 7.

(4) *Hoani*

[92] The judge placed considerable emphasis on the JCPC decision in *Hoani*, relying on it again for the proposition that treaty rights cannot be enforced in the absence of implementing legislation giving a domestic court jurisdiction to do so.

[93] Care must be taken in the development of Canadian law when importing conclusions from decisions rendered in entirely different historical and legal contexts. The 1840 Treaty of Waitangi is the only treaty between the British Crown and the Maori Chiefs. It was a treaty of cession, executed before the British asserted sovereignty in New Zealand. Article 1 of the Treaty makes this clear:

> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

[94] Consistent with the historical and legal characterization of the treaty as a treaty of cession, it required implementing legislation (*The Treaty of Waitangi Act 1975*: (1975 No. 114) (New Zealand) at p. 825).

[95] Canadian history is different. Sovereignty had been asserted long before Treaty 7 was executed in 1877. The Royal Proclamation of 1763 itself notes that the "nation" and "tribes" are under British "Sovereignty, Protection and Dominion" (at para. 5), a fact reflected in the preamble to Treaty 7:

> And whereas the said Indians have been informed by Her Majesty's Commissioners that it is the desire of Her Majesty to open up for settlement, and such other purposes as to Her Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a Treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty, and between them and Her Majesty's other subjects; and that Her Indian people may know and feel assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

[96] The differences between the facts of *Hoani* and Canadian constitutional history are many and stark. Canadian courts have never suggested that they had no jurisdiction to consider treaties on the basis that they were between independent sovereign countries, let alone on the basis that they had no jurisdiction to enforce their terms.

[97] As Professor Burrows points out, nation to nation development can take place within the construct of a single sovereign state. That has been the legal, historical, and constitutional experience of Canada in its relationship with indigenous Canadians (John Borrows and Leonard Rotman, *The Sui Generis Nature of Aboriginal Rights*, Alta. Law Review, Vol. 36(1), 1997, at pp. 23-25, 29-30, 44). A nation-to-nation relationship, one that recognizes elements of self-governance but within an existing constitutional framework, is markedly different than a relationship between two sovereign states.

III. **Whether the terms of Treaty 7 were enforceable at common law**

Overview

[98] The conclusion of the Federal Court that no cause of action could be brought in respect of a breach of treaty right prior to 1982 is inconsistent with established jurisprudence and academic commentary. It is also inconsistent with the basic tenant underpinning all Aboriginal law in Canada – the honour of the Crown. Neither the honour of the Crown nor the jurisprudence which holds treaties to create binding legal obligations are displaced simply by reason of the fact that the action was framed in contract.

[99] By way of overview, three errors underlie the Federal Court's conclusion.

[100] First, Canadian jurisprudence recognizes the enforceability of treaty terms. Although the judge was correct to note the Supreme Court has said that treaties are not contracts, he erred in concluding that because they are not contracts they were not enforceable. Treaties are more than

contracts, not less. Treaties were entered into with the intention to create legal obligations and how that obligation is characterized is of no consequence to the question whether their terms are enforceable.

[101] Second, the judge erred in discounting jurisprudence that established the enforceability of treaties on the basis that the treaty rights were used defensively and not on a positive basis to assert a treaty right. The categorization of cases into sword or shield is not helpful. There is no logical reason to conclude that the use of a treaty to defend conduct has no bearing on the question whether a treaty is enforceable, whereas an action to assert a treaty term, does. The Supreme Court recognized the analytical limitations of this approach in *R. v. Desautel*, 2021 SCC 17, 456 D.L.R. (4th) 1 [*Desautel*] noting that criminal, regulatory and civil proceedings are all legitimate forums in which Aboriginal interests may be expressed (*Desautel* at paras. 89-90, 92). The sword/shield paradigm masks the true inquiry, which is, whether this specific term of Treaty 7 would be given positive legal effect.

[102] Third, as I noted at the outset, Aboriginal rights and treaty rights are not the same. While treaty rights are encompassed within the broader concept of Aboriginal rights and now have co-extensive constitutional protection, their provenance and scope are different. Any conclusion as to whether a treaty right was enforceable as opposed to whether an Aboriginal right was enforceable must proceed on an understanding of the distinction between the two. Prior to 1982, they were conceptually, historically and jurisprudentially different, and the fact that an action to enforce an Aboriginal right may not have been recognized prior to 1982 does not mean that a treaty right would suffer the same fate.

[103] Conflating or merging the two streams of law, one addressing Aboriginal rights, the other addressing treaty rights, is an error. This error is best reflected in reliance on cases such as *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CanLII 216 (SCC) [*Van der Peet*], which concerned Aboriginal *rights*, and transposing the reasoning in that case to a treaty case. In the same vein, the political trust doctrine, conceived and applied in the context of Aboriginal *title* cases, cannot be transplanted to treaty cases. I do not agree with the appellant that the specific obligation in Treaty 7 with which we are concerned is governed by the political trust doctrine.

[104] Put more simply, prior to 1982, Aboriginal interests arose in a diversity of legal proceedings: actions to recognize and establish Aboriginal title, (as in *Calder* and *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin*]); to exercise an Aboriginal right to hunt and fish, (as in *Simon*; *Sioui*; *R. v. Moses*, 13 D.L.R. (3d) 50, [1970] 3 O.R. 314; *R. v. Taylor*, 34 O.R. (2d) 360, 1981 CarswellOnt 641 [*Taylor*]); or to enforce a specific treaty term (as in *The Province of Ontario v. The Dominion of Canada and the Province of Quebec* (1895), 25 S.C.R. 434, 1895 CanLII 112 (SCC) [*Annuities Case (SCC)*], *Henry v. R.*, 1905 CarswellNat 19, 9 Ex. C.R. 417 [*Henry*], and *Dreaver v. The King* (1935), 5 CNLC 92 (Exch. Ct.) [*Dreaver*]). The failure to situate the issue before the Court in the context of the applicable jurisprudence led the Federal Court to reach two conclusions; one anomalous and the other remarkable.

[105] The anomalous conclusion is that, if correct, inchoate Aboriginal rights, which were absorbed into the common law and existed prior to 1982, were enforceable (*Desautel* at paras. 34, 68), but specific, tangible and quantifiable commitments memorialized in solemn, public agreement, were not. The remarkable conclusion is that, if correct, the honour of the Crown, the

motivating principle of jurisprudence and which compels the Crown to honour its commitments to Aboriginal Canadians are simply empty words.

Treaty rights and Aboriginal rights

[106] Treaty rights are different from Aboriginal rights (*Desautel* at paras. 34, 68; *Van der Peet* at paras. 27-29). In *Badger*, Sopinka J. observed that there was "no doubt that aboriginal and treaty rights differ in both origin and structure" (at para. 76). Aboriginal rights stem from the fact that Indigenous peoples were in Canada prior to colonialization. Aboriginal rights are pre-existing and evolving (*Simon* at paras. 18-24, 30; *Sioui* at pp. 1043-1045, 1054, and flow from the customs and traditions of native peoples. As Sopinka J. paraphrased from Judson J. in *Calder* (at p. 328), "they embody the right of native people to continue living as their forefathers lived."

[107] A treaty right, while held by Indigenous peoples, stems from an agreement between Aboriginal Canadians and the Crown. Sometimes treaties confirm or regulate a pre-existing Aboriginal right, such as a right to hunt and fish, sometimes they establish a reserve out of lands subject to Aboriginal title, or out of lands that are not subject to a title claim, and sometimes they create a new obligation.

[108] Treaties "are analogous to contracts, albeit of a very solemn and special, public nature" (*Badger* at p. 76). A treaty right is grounded in its terms, as interpreted according to the principles described in *Marshall*. As Robert Mainville (now Mainville J.A., Que. C.A.) writes, "... they are very special contracts of a *sui generis* nature and they are governed by public law rules" and their terms "clearly bind the Crown" (Mainville at p. 35).

[109] Historically, claims to an Aboriginal right or interest in lands were not recognised, neither by courts nor government. Prior to 1982, an Aboriginal interest, whether grounded in the common law or in a treaty, was constrained to the extent that it was inconsistent with a statute which demonstrated a legislative intention to limit or extinguish the right. The point was made in *Sparrow* at p. 1098 where the Court adopted the reasoning of Mahoney J. in *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs & Northern Development)*, [1980] 1 F.C. 518, 107 D.L.R. (3d) 513 at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the Courts must give it. That is as true of an aboriginal title as of any other common law right.

[110] While I will elaborate on this later in these reasons, it is sufficient to observe at this point that prior 1951, treaty rights could be eroded by provincial and federal legislation and regulations, and between 1951 and 1982, by federal legislation. Consequently, pre-1982 jurisprudence concerning Aboriginal title and non-treaty Aboriginal rights (which were not recognized until *Guerin*) and treaty rights (which could be eroded by legislation) is not predictive of how treaty violations such as the TLE claim before us would have been decided prior to 1982 (*Sparrow* at pp. 1103-1105).

[111] The question before this Court is whether a court would have given legal effect to Treaty 7 on the eve of the expiry of the limitation period pursuant to the Alberta *Limitations of Actions Act, 1970*. To answer that question, a historical review of the jurisprudence is necessary. But the jurisprudence after 1982 is also informative. Looking through the rear-view mirror reveals our contemporary understanding of the law as it then existed. And what we see in the mirror is that a

treaty right in the nature of the TLE commitment in Treaty 7 would have been enforceable prior to 1982

Governing law

[112] At the time Treaty 7 was concluded in 1877, Canada had asserted *de jure* and *de facto* sovereignty over the lands in question (*The Royal Charter for Incorporating the Hudson's Bay Company: Granted by His Majesty the King Charles the Second, in the Twenty-Second Year of His Reign, A.D. 1670* (H.K. Causton, 1865); *Convention between His Britannic Majesty and the United States of America*, signed at London, October 20, 1818, at Article II; *Constitution Act*, 1867 (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5, s. 91(24) at p. 25 and s. 146 at p. 42; *Rupert's Land Order*; Treaty 7).

[113] English common law was the governing law at the time and place that Treaty 7 was executed in 1877. The *Northwest Territories Act*, R.S.C. 1886, c. 50, s. 11 deemed the laws of England, including the common law, as it existed on July 15, 1870, to be in force in the Northwest Territories (which at the time included what is now the Province of Alberta). This was the date on which the Hudson's Bay Company surrendered its lands to Canada. From that point forward, limitations of action legislation applied (*Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2004 ABQB 655, [2004] 4 C.N.L.R. 110 at para. 112). With the creation of the province of Alberta in 1905, the common law as it had existed in the Northwest Territories continued (*Alberta Act, 1905*, 4-5 Edw. VII, c. 3, s. 16).

[114] The ability to bring an action in the Exchequer Court to enforce the terms of an agreement or contract with the Crown had been in place since 1875 (*Petition of Right Act*, S.C. 1875, c. 12; *Supreme Court and Exchequer Court Act*, S.C. 1875, c. 11, s. 58; *Supreme Court and Exchequer Court Act*, R.S.C. 1886, c. 135, s. 73(2)). Sections 2, 3, 19(3) and 21 of the *Petition of Right Act*, S.C. 1876, c. 27 specifically contemplated that an action could be brought against the Crown in respect of a claim to land or damages by way of a *fiat* granted by the Attorney General. When a claim of that type was made, the doctrine of Crown immunity did not prevent the suit, nor did it substantially hinder suits against the Crown (*Reasons* at paras. 70-71). When a *fiat* was required to initiate a suit under the *Petition of Right Act*, it was granted as a matter of course (*Re Nathan* (1884) 12 Q.B.D. 461 at p. 479). The requirement for the Attorney General's *fiat* was, in any event, abolished in 1951 with amendments to the *Petition of Right Act* and was therefore not a bar to the Blood Tribe bringing a suit.

[115] In 1971, the Federal Court was established as the successor court to the Exchequer Court (*Federal Court Act*, S.C. 1970, I-2, C. 1). As the Federal Court found, nothing would bar the Blood Tribe from commencing an action in either the Exchequer Court or its successor, the Federal Court, a conclusion with which I agree.

Jurisprudence prior to 1982

[116] I begin with *St. Catharines Milling & Lumber co. v. R.*, [1888] U.K.P.C. 70, 1888 CarswellOnt 22 [*St. Catharines Milling (JCPC)*].

[117] In 1873 the Salteaux tribe of the Ojibway signed Treaty 3 with Canada in exchange for the promises set forth in the treaty. The St. Catharines Milling Company obtained a lease from Canada to cut timber on surrendered non-treaty lands. Ontario asserted that the leases were invalid as the title to the lands was vested in the province under section 109 of the *Constitution Act, 1867*. It sued for a declaration to that effect. Canada argued that the lands were under the jurisdiction of Parliament, relying on Head 91(24) of the *Constitution Act, 1867*.

[118] In the Supreme Court of Canada, five of the six judges wrote separate or concurring reasons. Two of the justices (Chief Justice Ritchie and Fournier J.) held that underlying title was vested in the province; another two (Henry and Taschereau JJ.) also held that title rested with Ontario, but for different reasons. They held that Aboriginal title was not recognized at common law and that any rights to the land in question arising from the Royal Proclamation of 1763 were extinguished by the 1873 treaty. They also held that questions of Aboriginal title claims fell into the political not the judicial realm. Finally, two of the justices (Strong and Gwyne JJ.) found that the rights that the Salteaux had to the land had not been extinguished by the Treaty and flowed from both the common law and the Royal Proclamation.

[119] In sum, a majority of four of the six Supreme Court justices found that an Aboriginal right to land existed, but were divided on the source, origin, nature and extent of the right, and two of the justices were silent on these points.

[120] The JCPC (*per* Lord Watson) found in favour of the province; as the underlying title was vested in the Crown in right of Ontario, the leases were of no effect. Lord Watson recognized

that Aboriginal land rights existed, but he ascribed their existence to the *Royal Proclamation.* He declined to discuss their recognition at common law, since this issue did not appear to him relevant to the resolution of the dispute at hand. Lord Watson did, however, state that the rights of Aboriginal people in land were in any event less than fee simple. For Lord Watson, the tenure of Aboriginal people under the Royal Proclamation was "a personal and usufructuary right" that could be surrendered only to the Crown and, since the passing of the *Constitution Act, 1867*, only to the Crown in right of Canada (Mainville at pp. 19-20).

[121] Much ink has been spilled on *St. Catharines Milling*. It is significant, at least in this context, for four points.

[122] First, I agree with the Blood Tribe that the ratio of *St. Catharines Milling* was not that the Ojibway had a right to enforce a treaty right against Canada, but merely that if such right existed, was personal and usufructuary and existed at the pleasure of the Crown. As the Blood Tribe observes in its memorandum of argument, "[n]othing was said about the enforceability of treaty rights by a First Nation."

[123] Second, *St. Catharines Milling* is the foundation of the Blood Tribe's new argument on appeal that Aboriginal rights were political in nature and not legally enforceable. Taschereau J.'s description of the Crown's obligation to the Aboriginal peoples as "a sacred political obligation, in the execution of which the state must be free from judicial control" was subscribed to by one other judge and not commented on by the JCPC (*St. Catharines Milling and Lumber Co. v. R.,* 13 S.C.R. 577, 13 O.A.R. 148 at p. 649 [*St. Catharines Milling (SCC)*]). I will return to this

argument later in these reasons, but simply highlight, at this point, that the Federal Court judge relied on this statement to conclude that the terms of Treaty 7 were not legally enforceable.

[124] Third, the contest in *St. Catharines Milling* was between Ontario and Canada. It was not between the Salteaux and either government, but had the Salteaux's "rights" under the Treaty been in question, the Court would have viewed them as enforceable obligations.

[125] The Supreme Court understood treaties as creating enforceable obligations, and in so doing, foreshadowed the *Marshall* decision a century later and the principles by which treaties were to be interpreted.

[126] The final and most important aspect of *St. Catharines Milling* is what it actually decided. The ratio of the case is that the limited Aboriginal right found to exist was insufficient to support the claim by Canada that it had authority to grant timber leases that were enforceable against Ontario. In reaching this conclusion, the JCPC had to characterize the Treaty. Lord Watson found that the agreement was recorded "by a formal contract, duly ratified in a meeting of the their chiefs or headmen convened for that purpose," and that "the natural import of the language of the treaty … purports to be from beginning to end a transaction between the Indians and the Crown" (*St. Catharines Milling (JCPC)* at paras. 2, 7, 16).

[127] To conclude, while the ratio of *St. Catharines Milling* does not address the enforceability, or not, of the Treaty, the decision does stand for the proposition, that as early as 1896, the JCPC viewed treaties as a formal contract.

[128] A decade later, in 1895, the Supreme Court of Canada and the JCPC considered whether a treaty created an enforceable legal obligation (*Annuities Case (SCC)*, aff'd *Canada (Attorney General) v. Ontario (Attorney General)*, [1897] A.C. 199, 1896 CarswellNat 44 [*Annuities Case (JCPC)*]. There, the Ojibway in the Lake Huron district of the Robinson-Huron Treaty claimed that Canada had not adhered to its obligation in the treaty to provide an annual increase in their annuities.

[129] There was no doubt, in either Court, whether the specific term of the treaties in question were enforceable. The Supreme Court noted that "the Indians are of right, under the treaties, entitled to the payment of the arrears" (*Annuities Case (SCC)* at p. 498). Were there a dispute, for example, as to the increase in the annuities promised under the Treaty, giving rise to "some difficult question of construction or upon some ambiguity of language – courts should make every possible intendment in their favour and to that end" (at p. 535 *per* Sedgewick J., concurring majority reasons). The only question was which level of government, Ontario or Canada, was obligated to satisfy the Treaty commitment.

[130] The JCPC noted that "[t]he Indians do not seem to have become aware of the full extent of the rights secured to them by treaty, until the year 1873, when they for the first time preferred against the Dominion a claim for an annual increase of their respective annuities from and after the date of the treaties" (*Annuities Case (JCPC)* at para. 7). The JCPC characterized the question as one of "contract liability for a pecuniary obligation" (at para. 18) and that the annuities payable under the 1850 treaty were "debts or liabilities" the Crown was liable to pay to the Ojibway (at para. 3).

[131] The *Annuities Case* was not discussed by the Federal Court.

[132] The Blood Tribe contends that the *Annuities Case* does not support the view a treaty creates an enforceable obligation. It points to the fact that the Band was not a party to the litigation.

[133] With respect, I cannot agree. It is true that the Ojibway was not a party – there was no need for it to be as the only question was which Crown – Ontario or Canada, would honour the Treaty term. Canada had, in the pending resolution of the litigation, "graciously assumed" the debt (at p. 512). In other words, Canada had made the Band whole. The language of the Supreme Court and JCPC is unequivocal that the Ojibway had the capacity to prefer the claim against the Dominion and that the treaty created an enforceable debt obligation (*Annuities Case (JCPC)* at para. 7):

> The Indians do not seem to have become aware of the full extent of the rights secured to them by treaty, until the year 1873, when they for the first time preferred against the Dominion a claim for an annual increase of their respective annuities from and after the date of the treaties[.]

[134] The 1905 case of *Henry* also demonstrates the enforceability of specific treaty commitments. There, the Mississaugas filed a petition in the Exchequer Court seeking a declaration that certain medical and educational expenses, which under the treaty were to be borne by Canada, had been charged to the Band's trust account. The Band brought a claim for damages corresponding to the amount improperly charged, interest and an order that the amount be remitted to its account.

[135] A preliminary issue arose as to whether the Exchequer Court had jurisdiction to entertain the claim and grant a remedy. After reviewing section 15 of *The Exchequer Court Act,* 50-51 Vict. c. 16, which granted authority to hear claims against the Crown for a claim "aris[ing] out of contract entered into by or on behalf of the Crown" the Court concluded that "… as their right thereto rests upon the treaty or contract between the Crown and them, and upon *The British North America Act*, 1867, the court has, I think, jurisdiction so to declare" (*Henry* at para. 13). Judgment was entered for the Mississaugas, requiring the payment of the annuities demanded in the claim. In finding in favour of the Mississaugas, the Court characterized the treaty as an agreement or treaty based on an agreement and consideration (*Henry* at paras. 6, 11-15, 19).

[136] The Federal Court examined *Henry* and conceded that it was a case where a breach of treaty was successfully pursued in contract. However, beyond that acknowledgement, the Federal Court did not take the case into consideration, stating simply that no party made an argument that the treaty was not a contract (*Reasons* at para. 487).

[137] In the course of it reasons, the Federal Court suggested that *Henry* might be decided differently today, and if the Court is saying that the terms of the Treaty would *not* be given legal effect, I do not agree (*Reasons* at para. 488). In both *Henry* and the *Annuities Case*, the treaty was enforced. The right to have certain expenses paid by the Crown in the case of *Henry,* or to the annuities in the case of the *Annuities Case,* rested on the treaty or contract between the Crown and band. The fact that the treaty was enforced is more important than the label assigned to the obligation.

[138] In the 1928 decision of *R. v. Syliboy* (1928), [1929] 1 D.L.R. 307, 1928 CanLII 352 (NS SC) [*Syliboy*], the Nova Scotia County Court found that the Mi'kmaq lacked the capacity to enter into binding agreements, in this case a pre-Confederation friendship treaty. The treaty was at best a "mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual" (at pp. 313-314). The Nova Scotia County Court concluded that the Mi'kmaq were incapable of entering into formal agreements.

[139] The decision was roundly criticized in its time by academics of the day (see N.A.M MacKenzie, "Indians and Treaties in Law" (1929), 7 Can Bar Rev 561 at 565 (N.A.M. Mackenzie)) and later by the Supreme Court (*Simon* at paras. 18-19). I therefore treat this decision as an outlier that runs contrary to the jurisprudence prevailing at that time. However, before leaving *Syliboy,* I will open a parenthesis to make an observation about the academic literature which the Blood Tribe relies on in support of its argument that treaties are unenforceable.

[140] At paragraph 97 of its memorandum, the Blood Tribe cites the Oxford Handbook of the Canadian Constitution (Oxford University Press, 2017, at p. 327) for the statement that the courts regarded treaty promises as unenforceable. *Syliboy* is the sole authority cited in support of this statement. *Syliboy* was incorrectly decided in its time, and remains so today. It is support for nothing.

[141] In *R. v. Wesley*, [1932] 4 D.L.R. 774, 1932 CanLII 269 (AB CA) [*Wesley*], the Crown appealed acquittals by the Alberta Supreme Court Appellate Division of members of the Stoney Band charged for hunting for food on unoccupied Crown land. The judge held that there was no dispute that the accused were "entitled to the benefits of the Articles of Treaty" which allowed them to hunt on unoccupied Crown land (*Wesley* at p. 780). The judge held that "the Game Act of this province … has no application to Indians hunting for food in the places mentioned in this section" (*Wesley* at p. 790). The judge convicted a third member of the Band who also appealed.

[142] After reviewing the *Annuities Case* the Alberta Supreme Court, Appellate Division, dismissed the Crown appeals and set aside the conviction based on the terms of the treaty. In the course of it reasons, the Court stated that "treaties with Indians are on no higher plane than other formal agreements" (*Wesley* at p. 788). Taken at face value, this would suggest that a treaty is the same as "other formal agreements", no more, no less. Regardless of the ambiguity of the phrase, what the Court said immediately following put any question as to whether the Treaty was enforceable to rest; "… this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate."

[143] Thus, rather than being an authority for the proposition that treaties are not enforceable, *Wesley* is a prescient recognition of the point made 90 years later in *Desautel*, that the focus is not on the label ascribed to the treaties, or the forum, whether civil, regulatory or criminal in which a treaty right is engaged, rather it is on the outcome. It is also a recognition of the then

well entrenched principle that the enforceability of treaties is underpinned by the honour of the Crown.

[144] In the 1935 case of *Dreaver* the Exchequer Court considered a petition of right filed by the Mistawasis Band in Saskatchewan for an order that Canada pay $2,030,929.00 in respect of amounts improperly charged against the band's trust account. The Band plead that the terms of Treaty 6 provided for free education and medicine and that charges to the band's account for similar expenses breached the terms of the treaty. The petition was founded "not on simple contract, but by treaty on a specialty contract and a deed under seal" (at p. 97). The Court in turn described the petition as one "for the recovery of monies received by the trustee and retained by him." In granting the petition for the band, the Court examined the terms of Treaty 6 and concluded that the charges were improper as they were not authorized by the treaty (at pp. 114-119, 122).

[145] The Federal Court distinguished *Dreaver* on the basis that it was "a suit to recover from Canada funds taken improperly by Canada from the Band's trust account" and not an "action to enforce a treaty right" (*Reasons* at para. 481). This is not a valid distinction.

[146] The petition was brought by various band members, including George Dreaver, the Band's chief. They were acting both for themselves and "on behalf of the Indians of the Mistawasis Reserve" (at p. 92) and asserted the Band's treaty right to be supplied free medicine and supplies. The Court interpreted the terms of Treaty 6 to determine whether the charges were consistent with the treaty. The treaty obligation had legal effect, and the Band's chief used the

treaty obligation to assert, on the Band's behalf, a treaty right (at pp. 92-95, 97, 100, 104, 106-111, 114-119, 122). The Federal Court's reading of the case is incorrect.

[147] The 1964 decision of the British Columbia Court of Appeal in *R. v. White and Bob*, 50 D.L.R. (2d) 613, 52 W.W.R. 193, aff'd [1965] S.C.R. vi (note), 52 D.L.R. (2d) 481 [*White and Bob*], is a post-war consideration of the enforceability of the treaties. Two members of the Saalequun Tribe on Vancouver Island were charged with the possession of deer carcass contrary to provincial wildlife legislation. In their defence, the band members asserted an Aboriginal right to hunt deer, predicated on an 1854 agreement between their ancestors and Governor Douglas and the Royal Proclamation of 1763.

[148] The Crown argued that the treaty was not an enforceable treaty as it was signed by the Governor, at that time a representative of the Hudson's Bay Company, and not the Crown. In giving effect to the right to hunt and dismissing the charges, the Court gave a broad interpretation to what constitutes a treaty within the meaning of the *Indian Act*.

[149] *White and Bob* is pertinent as it reflects, as of 1964, the view of the BCCA as to the legal status of treaties and the obligations they confer. Despite the absence of the formalities accompanying other historical treaties, Norris J.A. said, "Parliament recognized the fact that Indian treaties would have been completed in degrees of formality varying with the circumstances of each case" (at p. 657). In considering whether a specific document was a valid treaty or not, he added that it was "particularly important [to Parliament] for the maintenance of law and order that Indian rights be respected and interpreted broadly in favour of the Indians" (at

p.657). As “Indian rights [including treaty rights] had been recognized by the colonial government” (at p. 662), Norris J.A. concluded that “the document (ex. 8) is a Treaty within the meaning of s. 87 of the *Indian Act*” (at p. 663).

[150] The 1974 case of *R. v. Dennis*, 56 D.L.R. (3d) 379, 1974 CanLII 1185 (BC PC) [*Dennis*] considered treaty rights as a defence to a wildlife contravention. The BC Provincial Court stated that Treaty 8 was “similar to an agreement or contract” (at p. 382). However, the Court also ultimately found that because the defendant’s particular band was not a signatory to Treaty 8, members of that band could not benefit from the treaty.

[151] In *Pawis* (1980), four members of the Ojibway alleged that Canada had, in enacting the Ontario Fishing Regulations, “breached and contravened treaty and contractual obligations which were solemnly undertaken and entered into in the Lake Huron Treaty of 1850” (at subpara. 5(15)). The band members asserted that the Regulations were of no force or effect, given the covenant in the Lake Huron Treaty (*Pawis* at subpara. 5(3)) granting “full and free privilege” to hunt and fish.

[152] In dismissing the action, the Court concluded that the regulations, as valid federal legislation, constrained the commitment in the treaty. In this regard, the result is no different than any other case prior to section 35. Parliament could abrogate and interfere with treaties in the exercise of its supremacy. What is significant, however, is it was necessary for the Federal Court to characterize the legal nature of the treaty, the promises it contained and the means of their enforcement (*Pawis* at para. 9):

> The promises made [in the Treaty] … were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.

[153] In *Hay River* (1980), the Federal Court considered a declaratory action against Canada for including, within the lands set aside under Treaty 8, land within the municipal boundaries of the Town of Hay River. The Town contended that Canada breached the terms of Treaty 8 which excluded municipal lands from selection. The Federal Court concluded that the Town had no standing to interfere in the implementation of the Treaty obligations and rejected the argument the benefits of the Treaty could not be enjoyed by successors. The Court noted that Treaty 8 was not "simply a contract between those who actually subscribed to it. It does impose and confer continuing obligations and rights on the successors of the Indians who entered into [the Treaty]" (at para. 5).

[154] *Taylor* (1981) is a further example of a Band enforcing its treaty rights prior to 1982. At issue was whether the terms of Treaty 20 preserved or granted the right to fish and hunt on Crown lands despite the provincial regulatory limitations. The Ontario Court of Appeal looked to the minutes accompanying the execution of Treaty 20 and held that the treaty preserved the historic rights of the Chippewa to hunt and fish on Crown lands. By virtue of section 88 of the *Indian Act*, the provincial regulations did not extinguish the Chippewa's treaty right to hunt and fish.

[155] The Federal Court misunderstood the Ontario Court of Appeal's reasons in *Taylor* when it concluded that "[t]he Court of Appeal held that provincial laws of general application dealing

with hunting and fishing had no application to Indians because those rights had been preserved by the Royal Proclamation of 1763, independent of the *Indian Act*" (*Reasons* at para. 489).

[156] This is not so. The Ontario Court of Appeal did not accept the Divisional Court's reasons regarding the Royal Proclamation, noting that it had "serious reservations as to the correctness" of the Divisional Court's reasons as they related to the Royal Proclamation as the source of the continued right to hunt and fish (*Taylor* at paras. 25-26). The Treaty right to hunt and fish was protected from provincial encroachment by section 88 of the *Indian Act.*

[157] In support of the conclusion that treaties were unenforceable prior to 1982, the judge relied on two cases: *R. v. Sundown*, [1999] 1 S.C.R. 393, 1999 CanLII 673 (SCC) at para. 24 [*Sundown*], and *First Nation of Nacho Nyak Dun v. Yukon* at para. 37. Neither of these cases support that conclusion; rather they stand for the point, which I take to be uncontroverted, that treaties are more than contracts and have a unique, *sui generis* status. This does not lead to the conclusion that the TLE claim was unenforceable.

[158] While hunting, Mr. Sundown, a member of a band that was a signatory to Treaty 6, cut down trees in a provincial park to build a cabin. He was charged with a provincial regulatory offence of cutting down trees and constructing a dwelling in a provincial park. The issue was whether these acts were, applying the test in *Simon,* "reasonably incidental" to the exercise of the treaty right to hunt and fish guaranteed by Treaty 6. The Supreme Court held that they were, noting that treaty rights must be given a broad interpretation, one which avoids the strictures and assumptions of traditional common law concepts.

[159] Nothing in the reasons in *Sundown* can be read as guidance to interpret treaties in a manner which undermines their enforceability or suggesting that, prior to 1982, a court would not recognize the TLE claim; to the contrary, the Supreme Court reinforces their unique, *sui generis* character and the imperative that their terms be interpreted in accordance with their underlying purposes.

[160] There are elements of treaties that do not fit into traditional common law concepts; they are binding in perpetuity and grant rights not only the original signatories but whole Aboriginal peoples and their descendants. The rights given are held by the collective of the band or tribe, and not particular individuals. *Sundown* is not, therefore, authority for the proposition that treaties are to be restricted or constrained by the common law, rather, it stands for the opposite, that the common law works to acknowledge and reinforce their terms and purposes. The reasons of the Federal Court do not explain how holding treaties to be unenforceable furthers the underlying purposes of treaties, let alone the objective of reconciliation.

[161] The second case relied on by the judge for the conclusion that treaties are not enforceable is *First Nation of Nacho Nyak Dun v. Yukon*. Here, the Court was asked to consider whether amendments by the Yukon government to territorial land use plans conformed to the comprehensive land use agreement reached between Canada, Yukon and the Aboriginal peoples of Yukon. The Court considered the appropriate degree of judicial intervention in the implementation of modern treaties, noting that courts should generally leave space for the parties to govern together and work out their differences. In the final analysis, however, under section

35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine.

[162] *First Nation of Nacho Nyak Dun v. Yukon* does not stand for the proposition that pre-1982 treaties were not enforceable. Again, simply because treaties that were characterized as *sui generis*, solemn agreements that were "more than contracts" and were granted constitutional protection in 1982 does not lead to the conclusion that they were unenforceable prior to that date. *Sparrow* makes clear that they were, and the effect of section 35 was to prevent their erosion by legislation (*Sparrow* at pp. 406-408, 409-410, 415-416; *Badger* at paras. 76-77, 79, 82).

[163] In conclusion, I will breach my own counsel with respect to the demarcation between treaty and Aboriginal rights cases and make a detour into two Aboriginal title cases – *Calder* and *Guerin*.

[164] As is well known, the 1973 decision of *Calder* did not decide the question of which of two competing views prevailed: the view of Judson J. (Martland and Ritchie JJ. concurring), that Aboriginal rights were not recognized at common law and were not enforceable, or the view of Hall J. that, "[t]here is a wealth of jurisprudence affirming common-law recognition of aboriginal rights to possession and enjoyment of lands of aborigines" (at p. 376 (Laskin and Spence JJ., concurring)).The Court was evenly divided and the issue was not decided. *Calder* ultimately turned on the view of Pigeon J. who dismissed the appeal on procedural grounds. A decade later, in *Guerin*, the Supreme Court adopted the view of Hall J.

[165] *Calder* and *Guerin* were both Aboriginal title cases – they were not treaty cases. However, we know that while in 1973 the court was divided on the question of the existence of Aboriginal title, by 1983, those same Aboriginal rights were unquestionably enforceable. The fact that the concept of Aboriginal title achieved recognition at common law by 1983 reinforces the conclusion that choate, precise treaty rights such as the TLE claim in issue here were enforceable on the expiry of the limitation period. As I mentioned at the outset of these reasons, it would be a highly anomalous, if not incoherent, result to conclude otherwise.

Post section 35 jurisprudence

[166] As I mentioned earlier, the Court is being asked to take a picture of the state of the law as of the expiry of the limitation period and determine whether the claim for a breach of the TLE would have been recognized. The jurisprudence that follows the limitation date confirms the conclusion that Treaties create enforceable obligations – on this, the guidance of the Supreme Court has been consistent.

[167] In the 1985 decision of *Simon*, the Supreme Court considered the interplay between the Treaty of 1752 and Nova Scotia's wildlife legislation, the *Lands and Forests Act*, R.S.N.S. 1967, c. 163, s. 150(1). Under that legislation, a band member was charged with possession of a shotgun and rifle during a closed hunting season. In finding that the provincial law conflicted with the treaty-protected hunting rights, Dickson C.J.C. observed at para. 33: "An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law." The Chief Justice continued, noting at para. 51:

> Finally, it should be noted that several cases have considered the Treaty of 1752 to be a valid "treaty" within the meaning of s. 88 of the *Indian Act* (for example, *R. v. Paul, supra*; and *R. v. Atwin and Sacobie, supra*). The Treaty was an exchange to solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the *Indian Act*. [Emphasis added]

[168] In the 1996 decision of *Badger*, the defendants were charged with violations under the Alberta *Wildlife Act*, S.A. 1984, c. W-9.1. In their defence, they relied on a term in Treaty 8 which granted a right to hunt for food on private lands. In upholding the convictions against two of the three accused, the Supreme Court concluded the treaty rights were restricted where the land was put to visible use. The appeal of the third was allowed, and new trial directed on whether the infringement of the right to hunt on unoccupied lands was justified.

[169] The focus of the Supreme Court's reason was on the extent to which paragraph 12 of the *Natural Resources Transfer Agreement*, *Constitution Act*, *1930*, 20-21 George V, c. 26 (U.K.) [NRTA], affected the right to hunt granted in Treaty 8. This engaged the question of how treaty rights, when affected by legislation, are to be interpreted. In addition to setting out basic principles of interpretation (*Badger* at pp. 793-794) and concluding that the *Sparrow* test, applicable to the infringement of Aboriginal rights, should apply to the NRTA (thereby extending the test to include treaty rights), the Court concluded that a Treaty represents an exchange of solemn promises between the Crown and Indians, whose agreement is "sacred" (Badger at p. 793). Treaties create "enforceable obligations based on the mutual consent of the parties" (*Badger* at p. 812).

[170] In 1999, the Supreme Court set forth the principles governing the interpretation of treaties (*R. v. Marshall*, [1999] 3 S.C.R. 456, 177 DLR (4th) 513 at para. 78). They are worthwhile describing in full:

> 78. This Court has set out the principles governing treaty interpretation on many occasions. They include the following.
>
> > 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.
> >
> > 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favor of the aboriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.
> >
> > 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.
> >
> > 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41.
> >
> > 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901 at p. 907.
> >
> > 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, *supra*, at paras. 53 *et seq.*; *Nowegijick v.The Queen*, [1983] 1 S.C.R. 29, at p. 36.
> >
> > 7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, *supra*; *Horseman*, *supra*; *Nowegijick supra*.

> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger*, *supra*, at para. 76; *Sioui*, *supra*, at p. 1069; *Horseman*, *supra*, at p. 908.
>
> 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon*, *supra*, at p. 402.

[171] While it is perhaps too obvious to state, none of these principles have meaning or utility unless the treaty terms were enforceable – they would be mere academic meanderings of no practical importance whatsoever. I do not believe that to be the case. When the Supreme Court speaks, as did in *Marshall*, it does so in light of the long history of jurisprudence that gave legal effect to treaties.

[172] A second point arises from *Marshall*. While the Supreme Court was quite conscious of the *sui generis* nature of treaties, it did not hesitate to analogize the obligations to those of a contract. After reviewing the law with respect to when the court will supply a term to remedy a deficiency in a contract, Binnie J. wrote at para. 43:

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

[173] Put otherwise, the honour and dignity of the Crown ensures the efficacy of treaty commitments.

[174] In *Manitoba Metis* the Supreme Court considered the relationship between treaty commitments to the Metis and section 31 of the *Manitoba Act*. Citing *Sioui,* the Court observed that treaties can be analogized to constitutional commitments that were entered into with the intention to create "legal obligations" which were "of the highest order" and that "a certain measure of solemnity" attach to both (at paras. 71, 92). While the Federal Court considered *Manitoba Metis* in the context of whether it could waive a limitation period, it did not consider the clear guidance of the Supreme Court that the historic treaties created legally enforceable obligations.

[175] Canadian courts have been agnostic to how treaties are legally classified and as to the means or "form" by which their terms are enforced. Treaties have evolved from "solemn agreements" to "contracts", to instruments protected from provincial encroachment under section 88 of the *Indian Act* in 1951, to *sui generis* agreements, to constitutionally protected agreements. Regardless of the label applied, there is a unifying theme – that treaty rights were legally enforceable (*Badger* at para. 76; see also *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at p. 575; *Annuities Case (SCC)*; *Marshall* at para. 50; *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 (B.C.S.C) at para. 84; B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at pp. 209-210). I do not agree, therefore, with the Federal Court when it concluded that because the Supreme Court has said treaties "are not contracts" that an action pled in contract for breach of the TLE term, was not cognizable (*Reasons* at paras. 488, 508).

Academic commentary

[176] The academic writing in the area of treaty rights must be read carefully. Some of it is aspirational or policy based, while some of it is rooted in the law. When it is rooted in the jurisprudence, it reflects the view that treaties were enforceable. Careful reading of the academic literature, as with jurisprudence, is required because language to the effect that treaties were "unenforceable" reflect an undisputed fact – that prior to 1951 treaty rights for hunting and fishing could be restricted by provincial and federal legislation, and from 1951 to 1982, by federal legislation. However, there is nothing in the literature that indicates that a determinable treaty term, promising a set amount of land, would not be enforceable at the eve of the expiry of the limitation period. To the contrary, the academic literature supports the interpretation that treaties were enforceable prior to 1982.

[177] Professor Grammond (now Grammond J.) wrote in *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Thomson Reuters Canada, 2013) that a treaty can be enforced, independent of a legislative or constitutional provision that ensures the protection of the treaty:

> This means that the parties to a treaty could, if they so desire, base themselves on contract law in order to have it enforced. Two decisions of the Exchequer Court, as well as a recent decision involving the Nunavut Land Claims Agreement, granted monetary claims based on the State's breach of treaty obligations. In such cases, it is possible to enforce a treaty independently of the laws or constitutional provisions that ensure its protection (at p. 306).

[178] Similarly in *The Aboriginal Rights Provisions in the Constitution Act, 1982*, (Saskatoon: Native Law Center (1987)), W.F. Pentney (now Pentney J.), concluded, after reviewing the legal

nature of numbered treaties, that, "[t]he fact that treaties are placed in a category by themselves does not detract from their legal status or enforceability" (at p. 137).

[179] In their seminal work Borrows and Rotman write that "where the Crown's treaty obligations were viewed as binding, they remained subject to abrogation or elimination by the Crown" (at p. 11), and later that "the Crown's obligations under such treaties were considered to be entirely political rather than legal" (at p. 17). Read in its context, however, they were referring to the political obligation to forebear regulatory or legislative interference. The authors were also addressing a different question, whether treaty rights were viewed by Canadian courts as bridging Indigenous laws and the common law tradition.

[180] Douglas Sanders concludes that, "[t]he courts enforced treaty promises involving the payment of moneys, either annuity payments or moneys for medicines, on the basis of contract law" ("Pre-existing Rights: The Aboriginal Peoples of Canada" in Beaudoin & Ratushy, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., (Toronto: Carswell, 1989) at p. 728). However, he also noted the difficulty of asserting certain treaty rights prior to 1982, such as the right to hunt and fish, in the face of countervailing legislation, noting that the contract law basis did not "work for other treaty promises when they came into conflict with legislation, such as federal and provincial hunting laws" (at p. 728).

[181] Finally, in *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach*, at page 50, Robert Mainville wrote:

> An Aboriginal treaty does not normally require parliamentary legislation in order to come into effect, unless the provisions of the treaty so provide. Treaties bind

> the Crown, and if the Crown does not execute the promises it made in the treaty, redress can be sought against the Crown irrespective of any parliamentary approval. Treaties thus "create enforceable obligations based on the mutual consent of the parties."

[182] I conclude this review of the academic literature by referring to the late Professor Peter Hogg, in *Constitutional Law of Canada*, 5th ed. Vol. 1 (Toronto: Thomson Carswell, 2007). After reviewing the jurisprudence, he notes that one of the defining characteristics of the numbered Treaties is "the intention to create legally binding obligations" (at p. 790). He also identifies four "infirmities" in both treaty and aboriginal rights. The first, and only one applicable here was (at p. 794):

> One was the uncertainty as to the precise legal status of the rights. Both the relationship of the aboriginal peoples to the land and the treaties between the Crown and the aboriginal peoples lacked close analogies in the common law. This uncertainty has been partially lifted by recent decisions recognizing aboriginal and treaty rights, but uncertainties persist, especially as to the definition of aboriginal rights.

The uncertainty related to how treaties were categorized, a point resolved by the Supreme Court in *Simon* in recognizing their *sui generis* nature. At no point does Professor Hogg suggest a treaty right in the nature of the TLE claim, is unenforceable.

Statutory authority to sue

[183] The Federal Court judge offered a third reason for concluding that there was no right of action at common law to sue on a treaty. The judge found that the *Indian Act* was a statutory impediment to a suit to enforce a treaty. After reviewing section 88 of the *Indian Act*, the judge concluded that "[t]here is nothing in the *Indian Act* permitting a First Nation to bring an action to

enforce the TLE under a Treaty" (at paras. 499-500). Absent a legislative authority to sue, there was no ability by a band to enforce a treaty.

[184] This conclusion cannot be sustained. There has never been a requirement that the *Indian Act* permit or grant an authority to sue to enforce a treaty. In any event, this is not the effect of section 88 of the *Indian Act*. Section 88 does not bar a right of action by a band at common law; to the contrary section 88 provides protection to treaty rights from interference or erosion by provincial legislation. Not one of the many cases that have considered section 88 have concluded, or suggested, that its purpose was to bar Aboriginal Canadians the right to pursue actions in the civil courts to enforce a treaty commitment.

[185] Aboriginal rights survived the assertion of sovereignty and were absorbed into the common law as rights *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at paras. 10-11). Those were not empty rights. The common law has driven the growth of Aboriginal rights from *Calder* to *Guerin* to *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302 (SCC) [*Delgamuukw*]; to *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*]. The point is made expressly in *Roberts v. Canada*, [1989] 1 S.C.R. 322, 1989 CanLII 122 (SCC) where Wilson J. observes that the *Indian Act* is "not constitutive of the obligations owed to the Indians by the Crown" (at p. 337). On the Federal Court's understanding, none of these landmark cases, whether for breach of a treaty, breach of an Aboriginal right or for declaration of title were properly before the courts because the *Indian Act* did not authorize a band to sue.

[186] In *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 FC 48, 1998 CarswellNat 2201 at para. 66, after considering subsection 31(3) of the *Indian Act*, Rothstein J., then of the Federal Court, concluded that that section "preserves for an Indian or Indian band the opportunity to bring an action against anyone interfering with their rights," noting that " … Indians may sue for negligence, trespass, or I think, any other interference with their interest in their land or any other rights recognized by statute, common law or, indeed, the *Constitution*." [Emphasis added] (I note, parenthetically, that section 31 was motivated by the collective nature of ownership on a reserve. Indeed, subsection 31(3) expressly provides that nothing in the section "impair[s], abridge[s] or otherwise affect[s] any right or remedy" otherwise available to an Indian or a band.)

[187] This was not new law in 1998 when Rothstein J. penned his reasons. The conclusion had an antecedence in the decision in *Apsassin v. Canada*, [1988] 3 F.C. 20, 1987 CarswellNat 229, where, in dealing with an argument that the *Indian Act* limited the band's capacity to sue, Addy J. concluded that "[t]hey [the band] are fully entitled to avail themselves of federal and provincial laws and of our judicial system as a whole to enforce their rights, as they are indeed doing in the case at bar" (at para. 53).

[188] The conclusion reached by the Federal Court is also inconsistent with the presumption of statutory interpretation that, absent express language, legislation does not intend to interfere with or displace common law rights (Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016) at p. 315 [Sullivan]). To this I would add that the argument advanced is, presumptively, offensive of section 15 of the Charter. Courts are to eschew interpretations which

offend the Charter (Sullivan, at p. 307; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 33; *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, 448 D.L.R. (4th) 714 at para. 46).

[189] Finally, I note that none of the case law surveyed which recognized a cause of action for a breach of a treaty commitment relied on the provisions of the *Indian Act* as the basis or foundation on which the claim could proceed.

[190] No more need be said about this argument.

The political trust doctrine

[191] The Blood Tribe bolsters the judge's conclusion that treaties were unenforceable by reference to what is known as "the political trust" doctrine, a view for a period of time in the evolution of Crown/Indigenous jurisprudence that the Crown's obligations in respect of Indigenous Canadians were viewed as political and not legal, obligations. As noted earlier, this argument was neither argued before the Federal Court nor relied on by the judge in his Reasons. The Attorney General objects on the basis that Blood Tribe is attempting to defend the result on an entirely new argument. I agree with these objections, but nevertheless as the question is related to the question whether treaties were enforceable at common law, and was responded to by the Attorney General in his reply memorandum, there is no prejudice in it being addressed.

[192] I do not agree that the doctrine supports the conclusion that treaty rights, as opposed to Aboriginal rights, were unenforceable as of the expiry of the limitation period. The doctrine, applicable to Aboriginal rights, cannot be transported into the law of treaties.

[193] *St. Catharines Milling* is the foundation of the political trust doctrine. There, Taschereau J. referred to "a sacred political obligation, in the execution of which the state must be free from judicial control" (*St. Catharines Milling (SCC)* at p. 649). In *Wewaykum* at para. 73, Binnie J. observed that "[p]rior to its watershed decision in Guerin, this Court had generally characterized the relationship between the Crown and Indian peoples as a 'political trust' or 'trust in the higher sense'", citing Tashereau J.'s observation.

[194] As Mainville points out, the political trust doctrine is a reflection of two principles (at p. 50). The first is that the original decision to enter into the treaties was an exercise of the royal prerogative, and secondly, prior to 1982, treaty rights could be abrogated or constrained by legislation. The decision to enact legislation which constrained or extinguished was also a political choice from which the Crown should generally forebear. However, the decision to enter into a treaty, and the decision whether to enact legislation that constrained its terms are entirely different questions from the question whether a treaty right was enforceable. Not only is it a different question, in this case it is an irrelevant question to the disposition of the issue on appeal as there is no constraining legislation.

[195] I agree with the view of the Blood Tribe that *St. Catharines Milling* says nothing about the enforceability of treaties (RMFL at para. 60). But the Blood Tribe asserts that the "sacred

political obligation" was how the Court characterized treaty commitments (RMFL at paras. 13 and 58). I do not agree. Taschereau J., in dissent, found that there was no Aboriginal interest in the lands occupied at the time of the Royal Proclamation, that only the Crown in right of Ontario had title and that the administration of the lands was "a sacred political obligation". I have already explained that the JCPC did not see treaties in that light.

[196] The political trust doctrine does not apply to the question whether a treaty right is enforceable. Where the political rights doctrine is applicable, however, is in respect of Aboriginal rights.

[197] Prior to 1982, assertions of Aboriginal rights were viewed as a political issue between Indigenous Canadians and the federal and provincial governments. For example, the *Statement of the Government of Canada on Indian Policy* (1969) contained assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community." There are subsequent iterations of that position in 1971 and 1981. All of those policy papers are equally clear, however, that the Government of Canada considered treaties as lawful obligations (Statement of the Government of Canada on Indian Policy, Department of Indian and Northern Affairs, 1969, at p. 11).

[198] The political trust doctrine reflected the position of governments, federal and provincial, prior to the watershed decision in *Guerin,* that inchoate assertions of Aboriginal rights, Aboriginal title or non-treaty rights were a matter of political dialogue. It is well known that up

until *Guerin* the Attorney General resisted such claims on the basis that they were not justiciable (see *R. v. Guerin*, [1983] 2 F.C. 656, 143 DLR (3d) 416, *per* Le Dain J.A.; *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3, 148 DLR (4th) 523 [*Semiahmoo*] *per* Isaac C.J.). As McLachlin C.J.C. wrote in *Mitchell*, "[t]he common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were 'dependent upon the good will of the Sovereign'" (at para. 11). Pointedly, McLachlin C.J.C. cited *St. Catharines Milling (JCPC)* (at para. 7) as authority, making clear the link between the political or policy based question of Aboriginal rights and the political rights doctrine.

[199] The argument before us transposes the language, designed to explain the position of governments with respect to non-treaty rights, into the law of treaties. To the contrary, the enforceability of treaty rights does not depend on a discretionary political trust. Cases such as *Guerin* and *Semiahmoo* concerned fiduciary obligations arising from Canada's administration of band affairs and finances. They were not treaty cases and do not inform the question whether a treaty was actionable at common law; indeed, the application of the political trust doctrine in the context of a treaty claim has been rejected by this Court (*Peepeekisis First Nation v. Canada*, 2013 FCA 191, 448 N.R. 202 at para. 50 [*Peepeekisis*]).

IV. **Section 35(1) of the *Constitution Act, 1982***

[200] Subsection 35(1) of the *Constitution Act* provides that "[t]he existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed".

[201] Section 35 recognizes the prior occupation of Canada by organized, autonomous societies and seeks to reconcile their modern-day existence with the Crown's sovereignty over them (*Desautel*). Section 35 must be read with section 25(a) of the Charter, which guarantees that the Charter will not abrogate or derogate from any "aboriginal, treaty or other rights", including "any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763."

[202] The crux of the Blood Tribe's position is that the claim for breach of the TLE term of Treaty 7 only became actionable with the enactment of subsection 35(1). It submits that in enshrining existing treaty rights into the *Constitution Act, 1982*, a new cause of action was created, with the result that the limitation period only began to run with the enactment of subsection 35(1). This argument found favour with the Federal Court judge, who concluded that "Canada is the one who created the new cause of action when it enshrined existing treaty rights into the Canadian constitution" (*Reasons* at para. 475).

[203] The Attorney General's position is that section 35 recognized and affirmed Aboriginal and treaty rights that had not been extinguished before April 17, 1982 when the *Constitution Act, 1982*, came into force.

[204] The effect of subsection 35(1) was to constitutionalize existing rights such that treaty rights, and other Aboriginal rights could no longer be unilaterally modified by federal legislation. The point was first made in *Delgamuukw* at paras. 38-39, 133-134 and later in *Mitchell* at para. 11:

> The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the

> Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: *Constitution Act, 1982*, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723, and *Delgamuukw*, supra.

[205] Subsection 35(1) is not the source of treaty rights. Treaty rights flow from the treaty, not the Constitution. While treaty rights are protected by the constitution, their amplitude is determined by the terms of the treaty as interpreted according to the *Marshall* principles. The same may be said about Aboriginal rights; section 35 did not create the legal doctrine of Aboriginal rights – Aboriginal rights existed and were recognized at common law. By the enactment of section 35 "a pre-existing legal doctrine was elevated to constitutional status" (*R. v. Van der Peet* at paras. 28-29).

[206] By its express and unambiguous terms, the scope of section 35 requires, in each case, an inquiry into whether the treaty right was existing as of April 17, 1982. Not all treaty rights were given protection as of that date; were that the case, the word "existing" would not have been required. Every word in a statute, and constitutional statutes in particular, must be given meaning; words are not included for aesthetic or rhetorical effect, nor does the legislature make the same point twice. Tautology is to be avoided and, "it is presumed that every feature of a legislative text has a particular role to play in the legislative design" (*Sullivan* at pp. 43-47).

Regardless of the subjective perceptions of the fairness of the result, section 35 did not resuscitate previously barred actions.

[207] To accept the argument that the effect of section 35 is to resuscitate claims that were barred by law is to effectively erase the word from the *Constitution Act, 1982* or render it redundant. It would be redundant because the same result could have been achieved without the word being included. The Federal Court's reasons give no content to the word "existing" in section 35.

[208] The Blood Tribe contends that there is a parallel to be drawn between section 35 of the Constitution and section 15 of the Charter. Prior to 1985, Canadian courts had rejected actions for breaches of equality at common law and consequently, plaintiffs asserting a claim based in tort or seeking declaratory relief had no cause of action. Section 15 changed that, creating a remedy where none had previously existed.

[209] In support of this argument the Blood Tribe analogizes the TLE claim to those in *Ravndahl*. There, the Court found that an action for breach of equality arose for the first time on April 17, 1985, when section 15 of the Charter came into effect. However, unlike Ms. Ravndahl who had no cause of action prior to section 15 coming into force, the Blood Tribe had a cause of action prior to the enactment of subsection 35(1). In light of my conclusion that a Canadian court could have granted a remedy for the breach of the TLE prior to 1982, the analogy to *Ravndahl* fails. Section 15 and section 35 do not operate in a similar fashion, and the limitation period for breach of Treaty 7 began to run before the enactment of section 35.

V. Section 35 of the *Constitution Act* and limitations legislation

[210] The Federal Court found that the claim for breach of treaty was discoverable as early as 1971 and that the band was well equipped to pursue its action; consequently, had a cause of action for breach of a treaty commitment been available, the six-year limitation period in paragraph 5(g) of *The Limitation of Actions Act, 1970* would have barred the action. These findings are not contested and no issue is raised before us as to whether, as a matter of statutory interpretation or constitutionality, paragraph 5(g) barred the action had a cause of action existed.

[211] The argument advanced before us, and which found favour with the Federal Court, was that section 35 created a new cause of action and gave the Blood Tribe a right to pursue the TLE claim. On this understanding of section 35, the issues whether a cause of action existed and the application or not of the limitation period and waiver, which occupied a large portion of the reasons below and the argument before us, are entirely irrelevant. The effect of section 35 is to allow past claims to arise, phoenix-like, from the past.

[212] The flaw in this reasoning is revealed if examined in the light of the jurisprudence on limitation periods. Limitation periods have been consistently applied to treaty claims regardless of whether they arose before or after 1982. The Federal Court's understanding of section 35 cannot be reconciled with this jurisprudence.

Supreme Court of Canada guidance

[213] The Supreme Court, other appellate courts, and the Federal Court, have consistently applied limitations legislation to both Aboriginal rights and treaty claims.

[214] In *Wewaykum*, the Court held that the Crown owed a fiduciary duty but that the claim would have been barred by equitable defences and a limitation period. The Court found that the causes of action arose in 1938 and 1888, and that even if the running of the limitation period was initially postponed because of a lack of pertinent information, the relevant limitation period expired no later than the end of 1957 (at paras. 111, 129).

[215] In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 [*Lameman*], the Band alleged breach of fiduciary duty, fraudulent and malicious behaviour and breach of treaty (at para. 4). As in this case, the claim rested on the assertion that the government breached its treaty obligations by not granting the Band lands to which it was entitled under the treaty. The federal Crown brought a motion for summary judgement asking that the claim be dismissed for various reasons, including that the claims were barred by the statutes of limitations.

[216] The Supreme Court held that the treaty breach was discoverable in the 1970s and was barred by the Alberta *Limitation of Actions Act, 1970*. The Supreme Court dismissed the plaintiffs' action for all claims except for a continuing claim for an accounting for funds received from the sale of reserve lands. In holding the action barred, the Supreme Court stated, at para. 13:

> This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims …

[217] In drawing the conclusion that the breach of treaty claim was not captured by the Alberta *Limitation of Actions Act, 1970* because the cause of action arose with the enactment of section 35 of the Constitution, the Federal Court judge failed to apply this binding Supreme Court jurisprudence.

Application of Lameman and Wewaykum in other courts

[218] Other courts have applied prescription periods to both Aboriginal and treaty right claims.

[219] *Peepeekisis* arose in a similar factual and legal context to the case at bar. There, Treaty 4 granted the band an entitlement to land based on a formula as in Treaty 7. The band sued for an asserted deficiency in the land accorded under the formula. The breach of treaty claim and breach of fiduciary duty claim were caught by the Saskatchewan limitations legislation (*Limitation of Actions Act*, paragraph 3(1)(j)) of which applied to "any other action not in this Act or any other Act specifically provided for". The Saskatchewan statute mirrors that of the Alberta *Limitation of Actions Act, 1970*, in issue here and also in *Wewaykum* (at para. 131). In finding the action barred by the prescription period, Mainville J.A. applied *Lameman* and *Wewaykum*, noting that as limitation periods apply to a claim from the discovery of the material facts underlying it, the claim was barred by statutory limitation periods (at para. 52).

[220] In *Samson First Nation v. Canada*, 2015 FC 836 (aff'd *sub nom. Buffalo v. Canada*, 2016 FCA 223 (lv to appeal denied [2016] S.C.C.A. No. 473), the Federal Court applied *Wewaykum*, noting that "limitations legislation, as well as the principles of laches and acquiescence, are applicable to claims against Canada even where the rights at stake are constitutionally-protected treaty and Aboriginal rights" (at para. 112). The Federal Court rejected arguments that limitation periods could not run against actions to enforce constitutionally protected treaty rights, noting that, in effect, the plaintiffs were arguing for a constitutionally protected right to commence litigation whenever it was convenient or advantageous to do so, effectively asserting an immunity from limitation periods (at para. 240).

[221] The argument that a limitation period extinguishes the treaty right has a fundamental flaw; limitation periods speak only to when a right might be enforced. The point was also made by Russell J. in *Samson* at para. 129:

> Samson's second argument is that the application of a limitation period effectively expunges or infringes constitutionally-enshrined Aboriginal and treaty rights. In my view, Samson is simply asking the Court to ignore clear authorities that tell us that limitation periods do not expunge rights, they bar remedies based upon those rights. As *Chippewas*, above, makes clear, the seeking of a remedy is not an Aboriginal or treaty right, and limitations periods merely bar the remedy. Samson ignores the line of cases that makes a distinction between substantive and procedural law in the context of limitations and relies upon *Tolofson*, above, a conflict of law case, for the motion now before the Court where we have an established line of authority on point, where the Supreme Court of Canada has told us that limitation periods do apply to this kind of case. [Emphasis added]

[222] In *Goodswimmer v. Canada (A.G.)*, 2017 ABCA 365, 418 D.L.R. (4th) 157 the Alberta Court of Appeal relied on *Wewaykum* and *Lameman* to conclude that limitation periods applied to bar a claim which sought to re-ligate a dispute over land entitlement under Treaty 8. As in this

case, the claim had a long history of negotiation, and in 1990 the Band entered into a Treaty Land Entitlement Settlement Agreement with Canada resolving, apparently, the issue. But in 1997 the appellants commenced an action for breach of the settlement and breach of the Treaty.

[223] Canada and Alberta responded saying that the claims in the action had been previously settled and were, in any event, statute barred. While the Court dismissed the claim on the basis that the matter had been settled, it commented on the applicability of the limitations provision in so far as it applied to bar the claim based on the terms of the Treaty:

> The primarily relevant claims are the claims that existed prior to the 1987 action being commenced, and prior to the Treaty Land Entitlement Settlement Agreement being entered into in 1990. On the face of it, any such claims have long since been barred by the passage of time. The facts that made those claims discoverable were well known at the time that the Treaty Land Entitlement Settlement Agreement was negotiated.
>
> Even claims that arise out of the Treaty Land Entitlement Settlement Agreement itself, such as alleged irregularities in the negotiations or with the referendum process, occurred seven years before the Statement of Claim was issued (at paras. 113-114).

[224] The Alberta Court of Appeal also observed that limitation periods can extinguish claims with a constitutional or Charter basis, citing the Supreme Court's decisions in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 at para. 59 and *Ravndahl* at paras. 16-17. In considering the underlying policy objectives served by limitations legislation, the Court noted that the longer the passage of time, the higher the chance that vested rights will be disturbed, with collateral affect on the legal interests of third parties. The Court also considered the application of *Manitoba Metis* and concluded that limitation periods could not be finessed by asking for a declaration and then describing any remedial relief

as being ancillary to that declaration, noting that a court should be hesitant to grant declaratory relief about past grievances for which remedial relief is now barred by the passage of time.

Discretion to waive

[225] The Blood Tribe argued before the Federal Court, and renewed its argument before us, that there exists a discretion to waive the limitation period. The judge rejected this argument, and correctly so (*Reasons* at para. 396).

[226] The jurisprudential underpinning of this argument is *Manitoba Metis* and the discussion of the Supreme Court that many of the policy rationales that justify limitation periods do not have the same resonance in the context of Aboriginal claims.

[227] *Manitoba Metis* dealt with a failure by government to implement section 31 of the *Manitoba Act*, a constitutional instrument. The Court stressed the unique nature of the grievance, noting that the failure to implement section 31 created an "ongoing rift in the national fabric" and unless remedied "constitutional harmony" would remain unachieved, as the matter was "of national and constitutional import" (at para. 140). At paragraph 143 of *Manitoba Metis* the Court noted that the Métis "seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honorably" (at para. 137). The relief sought was purely declaratory to assist in extra-judicial negotiation and no third party interests were engaged (at para. 142).

[228] This case stands in marked contrast to *Manitoba Metis*. As the Federal Court judge noted, "Manitoba Métis dealt with a very different matter than that before this Court in this action" (Reasons at para. 399). I agree with his conclusion that *Manitoba Metis* does not stand for the proposition that limitations may be waived in a claim where the plaintiff seeks land or damages in lieu, as it does here.

[229] I do not understand *Manitoba Metis* to be establishing a new doctrine of law allowing judges to waive limitation periods, or for the Supreme Court to be departing from its prior jurisprudence by implication. To the contrary, in *Manitoba Metis*, the Supreme Court confirms the application of *Lameman* (at para. 138). A court would be on very uncertain, if not arbitrary ground, if it appropriated to itself the authority to override the clear choice of Parliament in respect of prescription legislation. If the discretion to waive existed, how would it be exercised? How would claims that were filed three years late, as here, be distinguished from claims that are 13 or 30 years too late? While reconciliation is the over-arching objective, and serves as the lens through which judges are to view the law, it does not allow a court to disregard the law expressed by the Legislatures or Parliament. However meritorious the objective may be (*Canada (Attorney General) v. Utah*, 2020 FCA 224), judges cannot skew their reasons to avoid binding jurisprudence.

VI. **Conclusion**

[230] The basis of the Federal Court's reasoning is that as treaties are not contracts, no remedy for breach of a treaty would be recognized in a Canadian court. While the narrow parsing of the law and statement of claim conducted in the Federal Court produced a result that fulfilled the

TLE commitment, it did so at the expense of coherence in the law. It was also rails against the foundational principle which motivates all Crown-Aboriginal jurisprudence – the honour of the Crown.

[231] By 1983, with the decision in *Guerin*, the common law had evolved to recognize Aboriginal rights to an underlying title to land; in contrast, the Federal Court decision holds that, at the same point in the evolution of Canadian jurisprudence, the common law did not recognize, or give effect to the solemn commitment to give land in a treaty. This was not how Aboriginal jurisprudence has evolved; to the contrary, while there was doubt, ambiguity and lack of legal recognition in respect of Aboriginal rights, the readiness of the courts to supply a remedy for the breach of a treaty has never been in doubt. Pointedly, the Blood Tribe has not identified a single case where an action to enforce a treaty commitment, unencumbered by legislative restriction, has been dismissed on the basis that treaties are not enforceable. A claim might fail on its facts, but not on the basis treaties are not enforceable.

[232] The honour of the Crown is the motivating principle of Aboriginal jurisprudence and compels the conclusion that the treaties were intended to create enforceable legal obligations. While the honour of the Crown is not a cause of action in and of itself, the doctrine frames, and largely answers the question of whether treaties created legally enforceable obligations. As fully explained in *Manitoba Metis* at para. 79, the relationship between the honour of the Crown and treaty commitments is deep and intertwined:

> This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn

> promises, including constitutional obligations: *Badger*; *Haida Nation*, at para. 20. At a minimum, sharp dealing is not permitted: *Badger*. Or, as this Court put it in *Mikisew Cree First Nation*, "the honour of the Crown [is] pledged to the fulfilment of its obligations to the Indians": para. 51. But the duty goes further: if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled.

[233] It is self-evident that the position of the Blood Tribe is inconsistent with the position taken by other Aboriginal bands in prior cases where it was been argued that the terms of a treaty were enforceable. The Blood Tribe is unquestionably entitled to take that position, but a trial judge is obligated to follow the jurisprudence. The Federal Court may have been motivated by a perception of unfairness in the result, prompting it to reach the conclusion that it did. While this is understandable, remedying an injustice in this case creates a broader injustice, one which requires the Court to reject the well established principle that the honour of the Crown compels compliance.

[234] There are circumstances, and this is one of them, where the law itself cannot provide the needed reconciliation. A court does not have a discretion to deem treaty rights enforceable or not depending on how it perceives the equities of a case. As Binnie J. observed in *R. v. Marshall*, [1999] 3 S.C.R. 533 (at para. 45), it would be plainly wrong to deny a valid claim (in that case to an Aboriginal right) simply because the outcome might be troublesome to others. The converse is necessarily true – it is required by the integrity of judicial reasoning.

[235] The result, in this case, does not foreclose remedies to the Blood Tribe. There exists an alternative effective recourse for giving effect to the honour of the Crown and advancing the goal of reconciliation. Parliament established the Specific Claims Tribunal through the *Specific*

Claims Tribunal Act, S.C. 2008, c. 22. This Tribunal is designed to address historical treaty grievances. The Blood Tribe claim for the TLE would not face a limitations issue in that Tribunal. Section 19 of the *Specific Claims Tribunal Act* provides that:

> In deciding the issue of the validity of a specific claim, the Tribunal shall not consider any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown because of the passage of time or delay.

[236] For these reasons I would allow the appeal with costs. I would vary paragraph 3 of the Judgment of the Federal Court to delete the words “other than the Treaty Land Entitlement claim arising from Canada's breach of Treaty 7”.

“Donald J. Rennie”
J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-329-19
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. JIM SHOT BOTH SIDES ET AL.
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	APRIL 13 AND 14, 2021
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	BOIVIN J.A. WOODS J.A.
DATED:	FEBRUARY 10, 2022

APPEARANCES:

Bruce Hughson / Amy Martin-LeBlanc / Marianne Panenka	FOR THE APPELLANT
Eugene Meehan, Q.C. / Thomas Slade Gary A. Befus / Joanne F. Crook / Paul Reid Brendan M. Miller	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPELLANT
Supreme Advocacy LLP Ottawa, Ontario Walsh LLP Calgary, Alberta Foster LLP Calgary, Alberta	FOR THE RESPONDENTS