Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

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

APPLICANTS
(Respondents)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(JIM SHOT BOTH SIDES AND ROY FOX *et al.*, APPLICANTS)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985, c S-26
and Rule 25 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW & STATEMENT OF FACTS

Issue of Public Importance

1. The test-case-issue in this appeal is the meaning and impact of s. 35 of the *Constitution Act, 1982* on the ability of First Nations to meaningfully deal with treaty rights in Canadian courts.

2. By way of treaty in 1877, Canada promised land to the Blood Tribe and a reserve was established. The Blood Tribe long claimed that the size of the reserve did not accord with that promised by the treaty. With confirmation that the reserve size was indeed wrong, and Canadian courts beginning to offer more robust protection for treaty rights, the Blood Tribe commenced an action in 1980 in Federal Court.

3. While the Blood Tribe initially framed its claim as a breach of contract, they amended the Statement of Claim after the passage of s. 35 to include specific reference to s. 35. The action came to trial in 2019 and the Blood Tribe's claim allowed in part. The Federal Court barred claims on limitation grounds, except for the treaty land entitlement claim ("TLE"). The trial judge found, as a fact, that Canada breached the treaty by providing 162.5 square miles (or 23%) less than promised.

4. Canada did not appeal the finding of breach of treaty (they could not easily appeal a finding of fact after all), but instead devised a flank attack by saying the finding of fact (the TLE claim) was barred by limitation. The Federal Court of Appeal agreed with Canada, saying the claim was discoverable in 1971 and ought to have been commenced by 1977. In other words, the Blood Tribe was three years too late (over the space of a period spanning three centuries, the treaty being 1877) – not recognizing that s. 35 gave substantive rights and a substantive cause of action.

5. The thrust of the Court of Appeal decision is that s. 35 does nothing to the enforceability of treaties. The result: this Court of Appeal relieves the Crown of an egregious breach of treaty, but at the same time somehow faults the Federal Court below for rendering the principle of the

honour of the Crown "empty and hollow".[1] Exactly what the Court of Appeal below is itself doing.

6. The Court of Appeal below neglects monumental developments in Aboriginal law over the past many decades. For example, this Honourable Court only established the honour of the Crown doctrine with its ruling in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 that the government has a fiduciary duty towards First Nations. Practically speaking, until April 17, 1982 breach of treaty claims were not justiciable in civil courts in Canada, were primarily considered to be purely political in nature, or otherwise treated as simple contracts. To speak plainly, not effectively enforceable. Section 35 meant to change that. Did change that. But not herein. To speak further plainly, the Court of Appeal did not get the memo: from this Honourable Court, from the Supreme Court of Canada.

7. The Court of Appeal below pointedly downplays and weakens s. 35. It recognizes s. 35 "gave constitutional protection to existing treaty rights",[2] but then goes on to say those rights were nonetheless fully enforceable prior to the constitutional protection being in place. This runs contrary to the fact that s. 35 is a substantive guarantee of aboriginal and treaty rights.[3]

8. As this Honourable Court has recognized, s. 35 "constitutionalized" rights of Indigenous peoples.[4] The significance of this elevated constitutional status is emphasized by the placement of the provision: s. 35 is outside of the *Charter,* meaning that it is not qualified by s. 1 and not subject to legislative override under s. 33.

9. The Ontario Superior Court recently applied the Trial Judge's ruling in the present case to find that the cause of action of breach of treaty was first created by s. 35.[5] That finding was not disturbed on appeal by a five-judge panel of the Ontario Court of Appeal.[6] As such, lawyers and

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[1] *Canada v. Jim Shot Both Sides*, 2022 FCA 20 at para. 14 ("Court of Appeal Decision").
[2] *Court of Appeal Decision* at para. 17.
[3] William Pentney (now Federal Court, Trial Division), "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II -- Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev*. 207.
[4] Most recently in *R. v. Desautel*, 2021 SCC 17.
[5] *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 at para. 118.
[6] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 at para. 91.

judges in different parts of Canada will be unable to reconcile these decisions absent this Honourable Court's intervention.

10. Furthermore, this Honourable Court has already found that a cause of action for a breach of a s. 15 *Charter* right did not arise until s. 15 of the *Charter* came into effect.[7] Can the same be said for treaty rights regarding land guaranteed by s. 35 or are claims for relief for breach of treaty under s. 35 to be found statute-barred before the *Constitution Act, 1982* was even enacted?

Background

Treaty 7; surveys downsize the reserve

11. The Blackfoot Confederacy and the Crown signed Treaty 7 on September 22, 1877; even though the Indian "signatories" did not read or write English. Treaty 7 established the size of the reserve promising "one square mile for each family of five persons, or in that proportion for larger and smaller families".[8] Referred to as a treaty land entitlement, or "TLE".

12. In 1882 Surveyors set the boundaries of the Blood Reserve at area of roughly 650 square miles in south-western Alberta ("1882 Survey"), which equates to the membership of the Blood Tribe being 650 families or 3,250 persons.[9]

13. But the next year they reduced it down to 547.5 square miles[10].

Reserve size problems discovered

14. In 1971, Leroy Little Bear travelled to Ottawa 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 size of the reserve owed under the original TLE calculation and the reserve boundaries was off, did not match.[11] The actual membership of the Blood Tribe meant the promised reserve under the TLE should be larger than either survey.

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[7] *Ravndahl v. Saskatchewan*, 2009 SCC 7.
[8] *Court of Appeal Decision* at paras. 2-3.
[9] *Court of Appeal Decision* at para. 21; *Jim Shot Both Sides v. Canada*, 2019 FC 789 at para. 7 ("Trial Decision").
[10] Court of Appeal Decision at paras. 22-23; Trial Decision at para. 7.
[11] Court of Appeal Decision at para. 28.

Blood Tribe tries to negotiate with Minister

15. In 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 ancestral entitlement to land extending south to the US border, west to include Waterton National Park and north to the confluence of the Belly and Waterton Rivers. The Minister rejected both claims.[12]

Negotiations fail

16. As negotiations with the Minister failed, the Blood Tribe commenced an action in the Federal Court on January 10, 1980. The statement of claim alleged breaches of Canada's fiduciary duty arising from the 1883 survey, fraudulent concealment, and negligence. Also a declaration and damages for breach of contract arising from failure to fulfill the treaty land entitlement according to the Treaty 7 formula.[13]

Another failed attempt to negotiate

17. 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" of the Specific Claims Policy process (as the Federal Court of Appeal described it), the Blood Tribe activated the Federal Court action in 1996 to run concurrently.[14]

18. In 1999, the Blood Tribe amended its Statement of Claim specifically to include s. 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" …
> Treaty Number 7 was made between the Blood Tribe and the Defendant as a sacred peace agreement between two Nations.[15]

Indian Claims Commission recommends parties negotiate again

19. In 2003, the TLE claim was rejected under the Specific Claims Policy. The Blood Tribe then requested that the Indian Claims Commission ("ICC") conduct an inquiry into the claims

[12] Court of Appeal Decision at para. 29.
[13] Court of Appeal Decision at para. 31.
[14] Court of Appeal Decision at para. 32.
[15] Court of Appeal Decision at para. 33.

advanced in the Federal Court action. In 2007, the ICC recommended to the Minister that the 1882 Survey Claim be accepted and that the Minister negotiate a resolution.

Canada continues to refuse to negotiate

20. The Minister did not, not negotiate, and the action proceeded to trial.

Procedural History

Federal Court finds Canada breached treaty

21. The action was divided into three phases:

a. Phase I heard on the Blood Reserve in May 2016 over the course of 13 days for the purpose of receiving oral history evidence.
b. Phase II, dealing with liability, fact and expert witness evidence, was held at the Federal Court in Calgary, 2018 sitting seven weeks over the course of 27 days.
c. Phase III has yet to have been heard and will address remedy.[16]

22. Following Phase II, on June 12, 2019, the Trial Judge released judgment and reasons: *Jim Shot Both Sides v. Canada*, 2019 FC 789. The Trial Judge allowed the Blood Tribe's claim in part, by finding Canada in breach of the TLE provisions of Treaty, thereby resulting in a shortfall of 162.5 square miles in the size of the Blood Reserve:

> The Court finds that Canada is in breach of the TLE formula in Treaty 7 in regards to the size of the Blood Reserve. The Plaintiffs were entitled under the TLE formula to a reserve of 710 square miles, whereas the current Reserve is 547.5 square miles. Canada is liable to the Blood Tribe for this breach of Treaty.

23. The Trial Judge dismissed all other claims as time-barred by operation of a provincial limitation period.

24. With respect to the application of the limitation period to the TLE claim, the trial judge found that First Nations were denied the ability to make claims against the Crown for breach of treaty outside the statutory scheme of the *Indian Act*. He further found that while prior to 1982, a properly instructed Canadian court could not entertain a claim that Canada had breached a TLE

[16] Court of Appeal Decision at para. 36.

treaty promise, such a claim did become actionable with the passage of section 35 of the *Constitution Act, 1982*.[17]

25. Finally, the trial judge found that while the initial claim was for breach of contract, all the material facts were included in the Statement of Claim such that it could support a claim for breach of treaty pursuant to s. 35 once it was enacted.[18]

But Federal Court of Appeal finds claim statute barred

26. While there was "doubt, ambiguity and lack of legal recognition in respect of Aboriginal rights", there was no doubt that courts could supply a remedy for breach of treaty. It faulted the Trial Judge for conflating the effect of s. 35 on Aboriginal rights with that on treaty rights. The basis for the enforceability of treaties is the honour of the Crown which has required the Crown to fulfil treaty obligations.[19]

27. In attempting to rationalize the Trial Judge's decision, the Court of Appeal says the Federal Court "may have been motivated by a perception of unfairness in the result, prompting it to reach the conclusion that it did" and that "the law itself cannot provide the needed reconciliation."[20] They (the Court of Appeal) yet again suggested the Blood Tribe consider seeking recourse by way of the Specific Claims Tribunal[21] (even while they note, at the outset of the decision, that the government has already rejected the Blood Tribe's TLE claim under the Specific Claims Policy on the basis that Canada had no outstanding legal obligation.)[22][23]

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[17] Trial Decision at paras. 500-501.
[18] Trial Decision at para. 508.
[19] Court of Appeal at paras. 14, 102-105, 231-232.
[20] Court of Appeal at paras. 233-234.
[21] Court of Appeal at para. 235.
[22] Court of Appeal at para. 34.
[23] The Federal Government has capped the jurisdiction of the Specific Claims Tribunal at $150 million, roughly 1/10 of the instant claim.

PART II – QUESTIONS IN ISSUE

28. This Application for Leave to Appeal raises the following closely related issues of national and public importance:

> **Issue No. 1:** Did limitation periods for breach of treaty claims begin to run prior to the passage of s. 35 of the *Constitution Act, 1982*?
>
> **Issue No. 2:** Was breach of treaty actionable in Canadian courts prior to the coming into force of s. 35 of the *Constitution Act, 1982*?

PART III – STATEMENT OF ARGUMENT

Issue No. 1: Did limitation periods for breach of treaty claims begin to run prior to the passage of s. 35 of the *Constitution Act, 1982*?

Limitation periods are designed to run only against claims that can be asserted in a court

29. Traditional rationales for limitation periods – certainty, evidentiary and diligence – centre on the defendant. This Honourable Court has come to adopt a more contextual approach which included balancing the need to treat plaintiffs fairly having regard to their actual circumstances.[24]

30. The balance continues to evolve, and be finely tuned. In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, this Honourable Court endorsed an approach to discovering a claim which requires only a plausible inference of liability rather than requiring certainty of liability.[25] While this approach makes it easier for claims to be considered discovered, the Court stated that it accords with principles underlying discoverability which recognize "it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists."[26] It is a variation of this principle which is engaged in the present case.

31. The Court of Appeal's decision below means that the Blood Tribe's claim regarding a constitutionally protected right is statute-barred even prior to the government acknowledging that the constitutional right exists and prior to the Blood Tribe being aware it had judicial redress.

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[24] *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 at para. 59; *Novak v. Bond*, [1999] 1 SCR 808 at 1080.
[25] *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 47.
[26] *Ibid*. at para. 46. See also *Kamloops v. Nielsen* [1984] 2 S.C.R. 2; *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (FCA), [1998] 1 FC 3.

Does this run contrary to the principles whereby it is unfair for a law to statute-bar a claim before the plaintiff is even aware of its existence?[27]

32. The trial judge was alert to this very concern and begins his analysis regarding breach of treaty as an actionable cause of action addressing the principle that "no limitation or prescription can run until a plaintiff has a cause of action which he or she can immediately assert in a court, and that is so even if the facts underlying that cause of action occurred and were discovered at an earlier date."[28] The trial judge notes that Canadian courts, including this Honourable Court and the Court of Appeal of Alberta have endorsed this view. He cites two cases that arise in the statutory pre-condition context: *Méthot c Commission de transport de Montréal*, [1972] SCR 387 and *Costello v Calgary (City)*, 1989 ABCA 194, leave to appeal dismissed.[29]

33. In *Costello*, the Court stated: "So time does not run when the chance to sue is inaccessible. *A fortiori* if it is illegal or impossible."[30] Justice Hall in concurring reasons in *Méthot* found that a right of action does not originate until a plaintiff has an immediate right to institute and maintain his suit.[31] Neither *Méthot* nor *Costello* is addressed by the Court of Appeal below.

34. A similar principle was also found in the insurance context in *Morin v. Can. Home Assce. Co.*, [1970] S.C.R. 561 where this Honourable Court stated, "Obviously the prescription of an action cannot begin to run before the right to institute it originates."[32]

35. This Honourable Court has asserted that for a proper understanding of s. 35(1) "it is essential to remember that the *Guerin* case was decided after the commencement of the

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[27] *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 46; *Kamloops v. Nielsen* [1984] 2 S.C.R. 2; *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (FCA), [1998] 1 FC 3.
[28] Trial Decision at para. 469 referring to the plaintiffs' argument and the decision in *Musurus Bey v Gadban & Others*, [1894] 2 QB 352 (Court of Appeal of England and Wales).
[29] Trial Decision at para. 470 citing *Méthot c Commission de transport de Montréal* (1971), 1971 CanLII 173 (SCC), [1972] SCR 387, 25 DLR (3d) 324; *Costello v Calgary (City)*, 60 DLR (4th) 732, 1989 ABCA 194 (CanLII), leave to appeal dismissed (1990) 65 DLR (4th) viii (SCC), at para. 21.
[30] *Costello v Calgary (City)*, 60 DLR (4th) 732, 1989 ABCA 194 (CanLII) at para. 21.
[31] *Méthot c Commission de transport de Montréal* (1971), 1971 CanLII 173 (SCC), [1972] SCR 387 at 398
[32] *Morin v. Can. Home Assce. Co.* 1970 CanLII 9 (SCC), [1970] S.C.R. 561 at 565

Constitution Act, 1982".[33] This is immensely important, as after April 17, 1982 "there can be no doubt" that s. 35(1) of the *Constitution Act, 1982* applied to the development of the common law, and the judiciary was required "to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution".[34] That is what this Court did in 1984 with its decision *Guerin,* by evolving the common law cause of action of breach of fiduciary to reflect the values underlying s. 35(1). The 1984 release of *Guerin* did not "restart" a limitation period for the common law cause of action in breach of fiduciary duty. But prior to *Guerin*, this Honourable Court affirmed in 2002 that it "had generally characterized the relationship between the Crown and Indian peoples as a 'political trust' or 'trust in the higher sense'" and specifically regarded treaties as only "sacred political obligation, in the execution of which the state must be free from judicial control".[35] However, on April 17, 1982 with the advent of constitutionally entrenching treaty rights in s. 35(1), a cognizable cause of action in breach of treaty came to exist for the first time. The classification of breaches of treaty being the breach of sacred political obligation free from judicial control, changed to a matter of constitutional supremacy, both permitting and requiring the Courts to adjudicate treaty breaches.

36. This test case provides an opportunity to address this issue and the balancing of rights in the law of limitations as it relates to s. 35.

Limitation periods applied to Aboriginal and treaty right claims

37. The Trial Judge in the present case specifically found that provincial limitations legislation can have application to the claims in this action.[36] He also specifically cited *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 and noted that it stands for the proposition that limitation periods apply to Aboriginal claims.[37]

38. The Federal Court of Appeal stated that the Blood Tribe renewed its argument on appeal that there exists a discretion to waive the limitation period.[38] However, the Blood Tribe's argument was more nuanced than that. The Blood Tribe referred to *Manitoba Métis* to the extent

[33] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1105.
[34] *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573 at 592 & 602 (paras. 25 and 39).
[35] *Wewaykum Indian Band v. Canada,* 2002 SCC 79 at para. 73 [Emphasis in original].
[36] Trial Decision at para. 392.
[37] Trial Decision at para. 398.
[38] Court of Appel at para. 225.

it discussed the rationales of limitation statutes in the Aboriginal claims context. However, its position, which it continues to maintain, was not that limitation periods don't apply to Aboriginal claims or that courts can waive them, but that a plaintiff's claim ought not to be barred prior to there being a recognized wrong in law.[39]

Issue No. 2: Was breach of treaty actionable in Canadian courts prior to the coming into force of s. 35 of the *Constitution Act, 1982*?

Section 35 creates a new cause of action

39. Much of the disagreement in the courts below turned on the effect of the passage of s. 35. Can it be said that plaintiffs were aware of the existence of a claim under s. 35 before it was even enacted? The Trial Judge found that certain facts could have been discovered in 1971 regarding the TLE claim. However, those facts could not form the basis for any claim for relief. In other words, there was no wrong in law. The facts only provided a right to judicial redress or relief with the passage of s. 35, at which point the Blood Tribe's breach of treaty claim become actionable.[40]

40. Section 35, provides as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

41. Section 35 refers to recognizing and affirming existing aboriginal and treaty rights. The Blood Tribe agrees that treaty rights at issue in the present case were established by way of Treaty 7 in 1877. Therefore, those treaty rights were in existence prior to 1982 and were "recognized and affirmed" by s. 35. However, as the trial judge found, they were not cognizable or actionable before 1982 and the passage of s. 35.[41]

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[39] Respondent's Factum for the Federal Court of Appeal, at para. 52.
[40] Trial Decision at paras. 464, 469-510.
[41] Trial Decision at paras. 474, 501.

42. The Court of Appeal confirms that the effect of s. 35 was to constitutionalize existing rights. It frames the protection flowing from this constitutionalization as being limited to the fact that treaty rights, and other Aboriginal rights, could no longer be unilaterally modified (extinguished, abrogated, etc.) by federal legislation.[42]

43. The Court of Appeal focuses on the word "existing" in s. 35 and notes that tautology is to be avoided. Yet engages in it fully. It notes the Federal Court's reasons "give no content" to the word "existing" in s. 35.[43] The Trial Judge, however, does recognize in several places that s. 35 had the effect of recognizing "existing" rights.[44] Where the two actually part ways is with respect to the consequences of s. 35 recognizing existing rights:

a. The Court of Appeal finding, effectively, that s. 35 operates as only to prevent unilateral modification of treaty rights;[45]
b. The Trial Judge finding that s. 35 provides a more substantive and meaningful protection of treaty rights and creates an actionable right aimed at fulfilment of sacred treaty obligations.[46]

Section 35 as a substantive guarantee

44. Professor Kent McNeil, opines that the *Constitution Act, 1982* goes further than previous constitutional instruments by providing additional guarantees for the rights of aboriginal peoples.[47] These guarantees have been described as substantive ones and this Honourable Court stated that academic commentators have noted that s. 35(1) is a "solemn commitment that must be given meaningful content".[48]

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[42] Court of Appeal at paras. 204-205.
[43] Court of Appeal at para. 207.
[44] Trial Decision at paras. 471, 475. 477.
[45] Court of Appeal at para. 204.
[46] Trial Decision at para. 475.
[47] Kent McNeil, "The *Constitution Act, 1982*, Sections 25 and 35" [1988] 1 C.N.L.R. 1 at 1.
[48] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95; William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II -- Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev*. 207; Bryan Schwartz, "Unstarted Business: Two Approaches to Defining s. 35 -- 'What's in the Box?' and 'What Kind of Box?'", Chapter XXIV, in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian*

45. Being outside the *Charter*, the remedial s. 24 does not apply to remedy breaches of s. 35, and neither does the limitation of s. 1. However, section 52(1) of the *Constitution Act, 1982* does apply, and by incorporating treaty rights into s. 35 they became the "supreme law of Canada" like the other provisions in the Constitution of Canada

46. Apart from the remedy afforded by s. 52, s. 35 on its own places a heavy onus on the Crown to justify interference with the enjoyment of s. 35 rights.[49] The correlation to this additional protection would be that a party seeking to enforce their rights would have additional avenues to pursue that courts would not recognize prior to 1982.

Conflict in the Case Law

47. A similar issue arose in Ontario with respect to the 1850 Robinson Huron & Robinson Superior Treaties, the precursors to the numbered treaties like Treaty 7. In *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932, the Ontario Superior Court of Justice ruled:

> "It can be said that the cause of action of breach of treaty was first created by s. 35 of the *Constitution Act, 1982*, being Schedule B. to the Canada Act 1982 (UK), 1982, c. 11."[50] [Emphasis added]

48. The Trial Judge in *Restoule* cited the Federal Court decision in the present case in support of the above statement.[51] On appeal in *Restoule*, a five-judge panel of the Ontario Court of Appeal was unanimous in upholding the Trial Judge's finding that the breach of treaty claim in that case was not statute-barred.[52] (The Court was split on various other issues; Ontario is seeking leave to appeal to the SCC and the plaintiffs filed leave to cross-appeal.)[53]

Statecraft; Brian Slattery, *op. cit.*; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. of Comp. Law 361.

[49] See for example *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 in which the Court considered the Crown's approval of a winter road and whether it breached Treaty 8.

[50] *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 at para. 118.

[51] *Sides v. Canada*, 2019 FC 789, at para. 475.

[52] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 at para. 91.

[53] SCC File No. 40024.

Treaty is not a contract

49. The Court of Appeal herein agreed with the Blood Tribe and Trial Judge that treaties are not contracts. However, the Court of Appeal then faulted the Trial Judge for focusing on that question rather than on whether there was a remedy regardless of the legal characterization.[54]

50. The Court of Appeal's approach in this regard skates over the fact the distinction has significance. The Court of Appeal accepts that it is "uncontroverted, that treaties are more than contracts and have a unique, *sui generis* status", yet somehow also says this does not bear on enforceability. Really? A right, but not really, not enforceable?[55]

51. To accept that treaties are more than contracts, but then say that it does not matter ignores the change brought about by the *Constitution Act, 1982*. Indeed, it was not until *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 SCR 387 that treaties were referred to as unique and *sui generis* agreements. The importance of the distinction was also confirmed recently by the Ontario Court of Appeal:

> Thus, the weight of the jurisprudence is to the effect that, while Aboriginal treaties are comparable to contracts and may share similar features, they are different legal instruments. Treaties share with contracts the mutual exchange of consideration and obligations. Yet, the nature of the obligations that flow from these agreements are much different from a contract. *Aboriginal treaties include concepts that are foreign to the law of contract, including the honour of the Crown and the protections contained in s. 35* of the *Constitution Act, 1982*, *both of which create unique substantive legal obligations* towards Indigenous peoples.[56]

Distinction between Aboriginal rights and treaty rights

52. The Court of Appeal says one of the errors of the trial judge was "conflating or merging" Aboriginal rights and treaty rights.[57] Dubious criticism given the trial judge focused almost exclusively on treaty rights and, in any event, much of the jurisprudence regarding Aboriginal rights is in fact applicable to treaty rights. Furthermore, and importantly, s. 35 does not separate Aboriginal and treaty rights in subsection (1) and does not separate them with respect to the qualification imposed upon those rights by subsection (4).

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[54] Court of Appeal at para. 16.
[55] Court of Appeal at paras. 157, 175.
[56] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 at para. 652 (the Court was unanimous on this issue). [Emphasis added]
[57] Court of Appeal at para. 103.

53. This Honourable Court in *Sparrow* established the test requiring the Crown to justify any infringement of Aboriginal and treaty rights. *Sparrow* only dealt with Aboriginal rights, but not long after, this Honourable Court extended the justification test to treaty rights in *Badger*:

> This said, there are also significant aspects of similarity between aboriginal and treaty rights. Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged. … It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.
> …
> The wording of s. 35(1) of the *Constitution Act, 1982* supports a common approach to infringements of aboriginal and treaty rights.
> …
> In summary, it is clear that a statute or regulation which constitutes a *prima facie* infringement of aboriginal rights must be justified. In my view, it is equally if not more important to justify *prima facie* infringements of treaty rights.[58] [Emphasis added]

54. In *Sparrow*, this Honourable Court recognized that s. 35 gave aboriginal rights constitutional status and priority and that by doing so, the government-sanctioned challenges to the extent that aboriginal rights are affected.[59] In other words, this justificatory test only emerged as a result of the enshrinement of Aboriginal rights and treaty rights in s. 35. In light of cases like *Badger* making it clear that *Sparrow* also applies to treaty rights, is it fair to say that s. 35 provided a new avenue to deal with infringements of both? The Court of Appeal's decision would suggest no, while the Trial Judge's decision, yes.

55. The Court in *Sparrow* states: "In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2nd ed., especially at p. 730)." [60] Page 730 of the cited Sanders article states, *"Section 35 is the only logical basis for now holding that treaties, as such, are legally enforceable in Canadian law."*[61]

56. The Federal Court in *Makivik Corp. v. Canada (Minister of Canadian Heritage)*, in quoting that same passage from *Sparrow* above, stated that "the significance of s. 35(1) extends

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[58] *R. v. Badger*, [1996] 1 S.C.R. 771 at paras. 77, 79, 82
[59] *Sparrow* at 1110.
[60] *Sparrow* at 1105.
[61] Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Rathushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., especially at p. 730.

beyond these fundamental effects". It further quoted academic commentary in support of the same principle:

> . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[62]

Lack of remedy for breach of treaty

57. Another conflict between the Trial Judge and the Court of Appeal's reasons is about whether there was a meaningful remedy for breach of treaty prior to s. 35. This conflict mirrors a larger dispute in case law and academic commentary.

58. Author Michael Coyle describes how until the latter half of the 20th-century, Aboriginal access to the courts was impeded by a number of obstacles. In particular, the spending of band funds was controlled by the federal government. From 1927 to 1951 federal control on spending extended to the First Nations' ability to engage legal counsel and it was even a summary conviction offence for a lawyer to take money from an Indian band for the advancement of any claim, unless the federal government consented in advance.[63]

59. Other obstacles, not addressed by Coyle, include that the Crown was protected by immunity from suit, except with the consent of government (petition of right), until the *Crown Proceedings Act* was enacted and came into full effect. That occurred in stages from 1951 to 1971 when the petition of right was finally abolished.[64]

60. The cumulative result of these restrictions is that treaty rights were determined in the context of criminal cases as individual First Nation members were being prosecuted. Section 35 changed this and finally "governments that had ratified the protection of treaty rights might now

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[62] *Makivik Corp. v. Canada (Minister of Canadian Heritage)*, 1998 CanLII 9086 (FC), [1999] 1 FC 38 citing Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at p. 100.

[63] *Indian Act*, R.S.C. 1927, s. 141. See also Chief Joe Mathias and Gary R. Yabsley, "Conspiracy of Legislation: The Suppression of Indian Rights in Canada" (1991) B.C. Studies 89 (Spring 1991) at 38.

[64] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (looseleaf), Toronto, Thomson Reuters, at 10.3; See also Hogg & Monahan, *Liability of the Crown*, 3rd ed. (2000) Toronto, Carswell, pp. 4 – 5.

be inclined to address First Nation concerns that the Crown had failed to honour the spirit and intent of the treaties".[65]

61. Similar descriptions of the state of the law pre-1982 and the ability of First Nations to pursue breach of treaty claims are made by other academics as well. In *The Sui Generis Nature of Aboriginal Rights* Professors John Borrows and Leonard Rotman describe the status of treaty rights as follows:

> First Nations' treaty rights were also not viewed by Canadian courts as bridging indigenous laws and the common law tradition. Indeed, the Crown's obligations under such treaties were considered to be entirely political rather than legal. They were seen as existing only at the sufferance of the Crown, and were often trivialized to the point of extinction.[66]

62. Professor Rotman later wrote specifically with respect to s. 35 the following:

> *[U]ntil the passage of section 35(1)* of the *Constitution Act, 1982*, *Aboriginal rights*, if they were recognized at all, *were deemed to exist at the pleasure of the Crown and could be unilaterally extinguished*. Meanwhile, *treaty promises* were regarded by the courts as moral obligations that were *not legally enforceable until the entrenchment of treaty rights in section 35(1)*.[67]

63. The Court of Appeal below goes through a number of pre-1982 decisions addressed by the Trial Judge and recasts them to support its view that breach of treaty claims were enforceable prior to s. 35. But, the problem for the Court of Appeal is that these cases do not involve clear breach of treaty claims and instead are generally examples of Aboriginal persons or a Band using protections related to a treaty as a shield instead of a sword. The Court of Appeal states, "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."[68]

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[65] Michael Coyle, "Respect for Treaty Rights in Ontario: The Law of the Land?", 2008 39-2 Ottawa Law Review 405 at 423. See also Michael Coyle, *Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future - Part 2* (2006). Queen's Law Journal, Vol. 31, 2006, p. 22.
[66] John Borrows and Leonard Rotman, "The *Sui Generis* Nature of Aboriginal Rights", Alta. Law Review, Vol. 36(1), 1997, p. 17.
[67] Leonard I. Rotman, "Crown-Native Relations as Fiduciary: Reflections almost Twenty Years after Guerin" (2003) 22 Windsor YB Access Just 363 at 371 [Footnote omitted].
[68] Court of Appeal at para. 101.

64. But, the Trial Judge found the sword/shield distinction is meaningful.[69] One permits a First Nation to proactively pursue a breach of treaty claim, while the other puts them solely in a defensive position. It is s. 35 that ensured that First Nations had an actionable claim with respect to whether a specific term of a treaty would be given positive legal effect.

65. The Court of Appeal also points to past cases where claims for breach of treaty have been advanced:

> 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.[70]

66. Simply because parties in other cases have taken the position before that a treaty was enforceable does not mean that it was actually enforced. Anyone can attempt to obtain a particular remedy, but until that remedy is available in law, can it be said to exist?

Some causes of action arose when the Constitution Act, 1982 came into effect

67. The only comparable example in the constitutional context is *Ravndahl v Saskatchewan*, 2009 SCC 7. Prior to 1985, Canadian courts had rejected actions for breaches of equality at common law. Plaintiffs asserting a claim based in tort or seeking declaratory relief had no cause of action. Section 15 of the *Charter* changed that by creating a remedy.

68. In *Ravndahl*, the plaintiff brought a civil claim seeking damages for a benefit being cut off in violation of the *Charter* by legislation that came into effect before the *Charter* came into effect. Chief Justice McLachlin, writing for the Court stated that the cause of action arose only when the *Charter* came into effect:

> In order to determine whether the appellant's personal claims are statute-barred, it is necessary to pinpoint when her cause of action arose. In my view, ***her cause of action arose*** on April 17, 1985 ***when s. 15 of the Charter came into effect***. The appellant was denied benefits pursuant to the operation of s. 68(1) of the 1978 Act. However, she had ***no cognizable legal right upon which to base her claim until s. 15 of the Charter came into force.***[71]

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[69] Trial Decision at para. 490.
[70] Court of Appeal at para. 233.
[71] *Ravndahl v. Saskatchewan*, 2009 SCC 7 at para. 18. [Emphasis added]

69. Is there any sound reason to treat s. 35 different than s. 15 for the purpose of statutes of limitation? The grand purpose of s. 35 is reconciliation, which includes addressing grievances over land claims.[72] Just as Ms. Ravndahl could not succeed in a claim for breach of equality rights prior to s.15 coming into force, neither could the Blood Tribe obtain a remedy for breach of the TLE provision contained in Treaty 7 prior to s. 35(1) coming into force. The Trial Judge referred to *Ravndahl* favourably. The Court of Appeal did not.[73] The Trial Judge's decision abides by the purposive approach to constitutional interpretation. The Court of Appeal's decision does not.

Conclusion, & Honour of the Crown

70. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, this Honourable Court recognized that "the honour of the Crown infuses every treaty and the performance of every treaty obligation".[74] The Court went on to state that "*Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances.

71. The Court of Appeal herein says the Federal Court's conclusion in this case is "remarkable" because "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."[75] In the present case, and seemingly in many cases prior to 1982, that was certainly the case. Both can be true: the honour of the Crown can predate s. 35, while treaty promises were not enforceable prior to s. 35.[76]

72. In 2004 in the context of treaties that have not yet been negotiated, the Court in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 underscored the high burden imposed by s. 35 on the Crown, saying that the honour of the Crown is "not a mere incantation"

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[72] *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53 at para. 10.
[73] Trial Decision at para. 472; Court of Appeal at para. 209.
[74] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388 at para. 57.
[75] Court of Appeal at para. 105.
[76] D'Arcy G. Vermette, "Beyond Doctrines of Dominance: Conceptualizing a Path to Legal Recognition and Affirmation of the Manitoba Métis Treaty", Thesis submitted for Doctor of Laws, Faculty of Law, University of Ottawa, 2012, p. 212.

but requires concrete, diligent applications to be met.[77] The Court goes on to recognize the close tie between the honour of the Crown and s. 35: "It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests."[78]

73. One author has suggested that the implication from *Haida* as it relates to s. 35 is equally clear when dealing with treaties that have been negotiated in the past:

> [T]he government must act honourably in taking steps to identify, define and recognize the rights created by these historical treaties. This obligation is particularly significant where governments are aware that the scope of rights created by a treaty is the subject of longstanding dispute between the Crown and the Aboriginal signatory. And that, in turn, makes it important to review the efforts by the Crown to identify and define the rights created by historical treaties.[79]

74. The Federal Court's decision does not neglect the honour of the Crown. Indeed, the Trial Judge specifically refers to Canada's duty to fulfill its treaty promises with honour and integrity and indicates the source of that duty is the principle of the honour of the Crown,[80] concluding Canada acted dishonourably and that it failed to fulfill its treaty obligations as required by the honour of the Crown.[81]

75. The present case provides a key opportunity for this Honourable Court to consider both: the significance and impact of s. 35 on treaty rights; the inability of First Nations to pursue actions specifically for breach of treaty prior to 1982. How can the Court of Appeal's answer be premised primarily on the fact that "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", but then, ignore the fact that prior to 1982 the Crown was as often in breach of its treaty obligations and steadfastly maintained treaty obligations were of a "higher political order" and not justiciable in the Court?

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[77] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 16.
[78] *Haida* at para. 20.
[79] Michael Coyle, "Respect for Treaty Rights in Ontario: The Law of the Land?", 2008 39-2 Ottawa Law Review 405, 2008 CanLIIDocs 112 at 409.
[80] Trial Decision at para. 369.
[81] Trial Decision at paras. 369-373, 377.

76. Does the existence of the foundational principle of the honour of the Crown mean that nothing meaningfully changes with the passage of s. 35? Or, is it as the Trial Judge found, that s. 35 means a claim for breach of treaty is now actionable? It is one, or the other.

PART IV – SUBMISSIONS CONCERNING COSTS

77. The Applicant requests costs in the cause.

PART V – ORDERS SOUGHT

78. The Applicant requests that the application for leave to appeal be allowed with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2022

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Gary Befus
Brendan Miller
Joanne Crook
Paul Reid

PART VI – TABLE OF AUTHORITIES

Para.

Cases

Secondary Sources

Statutory Provisions

Indian Act, R.S.C. 1927, s. 141

Loi sur les indiens (Établissement de soldats), RSC 1927, c 98, a. 141

STATUTES, REGULATIONS, RULES, ETC.

Indian Act, R.S.C. 1927, s. 141 (Prohibition on raising money and prosecuting claims to land or retaining a lawyer)

141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from an Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.