PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Federal Court of Appeal's (FCA) application of settled law to the discrete facts of this particular case is not an issue of public importance requiring this Honourable Court's attention. The FCA concluded correctly that Crown-Indigenous treaties have long been enforceable at common law as *sui generis* agreements, consisting of mutually binding obligations. Such treaties have therefore been enforceable in Canadian courts for more than a century, and certainly prior to the passage of section 35 of the *Constitution Act, 1982*. The FCA also properly confirmed that limitation legislation and the policy considerations behind such legislation apply to treaty claims. There is no conflict or inconsistency in the law that requires clarification by this Court.

2. The Applicants (the Blood Tribe) and the Crown always intended that the terms of Treaty 7 were enforeeable from the time the Treaty was signed in 1877. Section 35(1) of the *Constitution Act, 1982* did not create the Blood Tribe's treaty rights or create a new cause of action for breach of treaty; treaty rights are grounded in the solemn agreement that is Treaty 7 and were actionable independently of the coming into force of section 35(1). Section 35(1) of the *Constitution Act, 1982* recognized and affirmed the Blood Tribe's existing treaty rights and gave these rights constitutional protection. This meant that legislation could no longer override treaty rights without justification.

3. In Alberta, a cause of action arises from the discoverability of the material facts. It does not arise from the discoverability of the law or how a cause of action may have evolved in Canadian law over time. A cause of action for breach of a term in Indigenous-Crown treaties – whether characterized as a declaratory action, breach of contract, or breach of treaty – existed at common law prior to 1982, including in 1980 when the Blood Tribe commenced this claim.

4. There are ample authorities from this Court and other appellate courts that outline the purpose and policy rationale for limitation periods and their application to treaty claims. The discrete facts related to the Blood Tribe's claim and the relief sought do not fall within the very limited exceptions to postpone the running of a limitation period.

5. Canada remains committed to reconciliation with the Blood Tribe and to repairing the longstanding relationship.

Statement of Facts

i. Blood Tribe's TLE Claim

6. The Blood Tribe claims that the size of its reserve does not accord with the amount of land that Canada promised in Treaty 7, referred to as the treaty land entitlement (TLE) claim. The Blood Tribe filed its Statement of Claim on January 10, 1980 (1980 Claim), which included the TLE claim. The trial judge summarized the material facts for the TLE claim:

> that the Blood Tribe was a party to Treaty 7, that under the Treaty the Blood Tribe was entitled to a reserve of a size to be determined based on the TLE, that Canada provided a reserve, but that the reserve provided was not of the required size under the TLE. The Blood Tribe sought a declaration that it is entitled to additional lands, or in the alternative, damages.[1]

7. All the assertions and relief sought from the 1980 Claim remained when the Blood Tribe amended its claim in 1999 (the 1999 Amended Claim). The following relevant addition was made: "the members of the Blood Tribe have Aboriginal and treaty rights which are constitutionally protected by section 35 of the *Constitution Act, 1982*".[2]

ii. Trial Judge's Decision

8. The trial judge reviewed the pleadings and held that the 1980 Claim pleaded sufficient material facts to support an action for breach of Treaty 7.[3] He therefore found the Blood Tribe had not added a new cause of action by amending its pleadings in 1999,[4] and there was no requirement for it to be amended in any event.[5]

9. The trial judge concluded that Canada breached the TLE provisions of Treaty 7 by providing the Blood Tribe with a reserve that did not accord with the Blood Tribe's population at

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[1] Judgment and Reasons of the Federal Court, *Jim Shot Both Sides et al v Canada,* 2019 FC 789 at para 506 [Trial Judge's Reasons] (**Application Record [AR], Tab 1A**).
[2] Trial Judge's Reasons at paras 29, 502.
[3] Trial Judge's Reasons at paras 30, 38, 40 and 44.
[4] Trial Judge's Reasons at paras 38, 505.
[5] Trial Judge's Reasons at paras 30 and 505.

that time.[6] He further found that Canada breached its fiduciary duty to the Blood Tribe in implementing Treaty 7 and in its dealings with the Blood Tribe after the creation of the reserve in 1882.[7] The trial judge applied the 1970 Alberta *Limitation of Actions Act*, which provides that these types of claims have to be brought within six years of the discoverability of the material facts underlying the cause of action (fiduciary duty claim) or within six years after the cause of action arose (TLE claim). [8] He held that all of the Blood Tribe's claims were barred by the six-year limitation period, except for the TLE claim.[9]

10. With respect to the TLE claim, the trial judge concluded that it was discoverable by the Blood Tribe by 1971.[10] He also held that, prior to 1982, a properly instructed Canadian court could not entertain a breach of treaty claim and thus the limitation period did not begin to run until the claim became actionable with the passage of section 35 of the *Constitution Act, 1982*.[11] The trial judge concluded that a claim for breach of the TLE provisions of Treaty 7 was not time barred, since the Blood Tribe commenced its action in 1980, prior to the passage of section 35 of the *Constitution Act, 1982*.[12] He recognized the peculiarity of his conclusion:

> It may seem odd, but here the Blood Tribe commenced this action two years before the cause of action arose. It did so because it pleaded the action as if it were a breach of contract claim. As [a] result of the view of the Supreme Court of Canada that treaties are not contracts, it has turned out that the claim of the Blood Tribe is not one for breach of contract but rather is a claim for breach of treaty.[13]

iii. Canada's appeal

11. Canada's appeal addressed the enforceability of treaties prior to the enactment of section 35(1) of the *Constitution Act, 1982*; it was not about the applicability of limitation periods to the TLE claim as suggested by the Blood Tribe.[14] Canada acknowledges, however, that a positive answer to that legal question has the effect of barring the Blood Tribe's TLE claim.

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[6] Trial Judge's Reasons at paras 275-277.
[7] Trial Judge's Reasons at paras 377-379, 467.
[8] Trial Judge's Reasons at paras 409-412.
[9] Trial Judge's Reasons at paras 429, 436, 437-439, 467.
[10] Trial Judge's Reasons at para 464.
[11] Trial Judge's Reasons at para 501.
[12] Trial Judge's Reasons at paras 508 and 510.
[13] Trial Judge's Reasons at para 508.
[14] Applicants' Memorandum of Argument [MOA] at para 4 (**AR, Tab 2**).

12. The Blood Tribe did not file a cross appeal. Thus, the following findings by the trial judge remain undisturbed: (a) the TLE claim was discoverable no later than 1971; (b) the 1980 Statement of Claim pleaded all the material facts necessary to prove a breach of Treaty 7; and (c) the addition of section 35(1) of the *Constitution Act, 1982* to the 1999 Amended Claim did not change the material facts or add a new cause of action.

iv. Federal Court of Appeal's decision

a. Procedural issues

13. Canada filed a motion in the appeal for leave to file a reply brief in response to four new issues raised by the Blood Tribe which, in Canada's view, amounted to new grounds of appeal, alleged new facts not raised at trial and that were not part of the trial record, or arose for the first time on appeal.[15] Those four issues were: (a) breaches of treaty could not be pursued because they were non-justiciable, political issues that fell under the political trust doctrine; (b) the *Indian Act* was a complete code that ousts the common law right of Aboriginal Canadians to sue; (c) there were practical and legal obstacles that prevented the Blood Tribe from bringing its claim; and (d) traditional rationales mitigate against the application of limitation periods to Aboriginal claims such as this one.[16]

14. The FCA granted Canada's motion to file a reply to argument about the political trust doctrine because it was not advanced at trial and not considered by the trial judge, but it was a legal question that bore directly on the question in the appeal and required no further evidence or fact finding.[17] In dismissing the remainder of Canada's motion, the FCA declined to consider new arguments by the Blood Tribe that would challenge the discoverability and limitations findings of the trial judge, and thus fundamentally alter the scope of the appeal and the terms of the judgment itself.[18] The Court therefore did not consider the Blood Tribe's arguments about the *Indian Act* being a complete code or that there were practical and legal obstacles that prevented

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[15] Reasons of the Federal Court of Appeal, *Canada v Jim Shot Both Sides*, 2022 FCA 20 at paras 37-59 [FCA Reasons] (**AR, Tab 1B**).
[16] FCA Reasons at paras 47-59.
[17] FCA Reasons at paras 47, 59.
[18] FCA Reasons at paras 53-54.

the Blood Tribe from bringing its claim.[19] With respect to the Blood Tribe's arguments about limitation periods, the FCA noted that this issue was within the guardrails of the appeal and the Blood Tribe was not seeking to bring a collateral challenge to findings of fact and determinations of law in respect of which a cross-appeal ought to have been filed.[20]

b. Substantive issues

15. The FCA allowed Canada's appeal and confirmed that Indigenous-Crown treaties were enforceable at law, both before and after 1982, and that section 35 of the *Constitution Act, 1982* did not create a new cause of action for breach of treaty.[21] In doing so, the FCA concluded that the trial judge erred in three aspects.

16. First, the trial judge erred in his application of international law to this case. Indigenous-Crown treaties are neither international treaties nor analogous to international treaties.[22] As such, international law principles do not apply to Indigenous-Crown treaties and they do not require enabling domestic legislation to be enforceable.[23]

17. Second, the trial judge erred in finding that treaties were unenforceable at law prior to 1982. There is an unbroken line of decisions over 120 years recognizing the enforceability of the commitments made in treaties.[24] Indigenous-Crown treaties create binding obligations on the Crown.[25] 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 or the readiness of courts to provide a remedy.[26] The treaty terms were enforceable in Canadian courts because the honour of the Crown – a foundational, robust legal principle – compelled compliance.[27] The political trust doctrine had no application because it

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[19] FCA Reasons at paras 48-54.
[20] FCA Reasons at paras 55-59.
[21] FCA Reasons at paras 14-17.
[22] FCA Reasons at paras 13, 62.
[23] FCA Reasons at paras 13, 60-97.
[24] FCA Reasons at paras 14, 98-199.
[25] FCA Reasons at paras 14-15.
[26] FCA Reasons at para 16.
[27] FCA Reasons at paras 14, 98, 105, 143, 230, 232-233.

arose in a non-treaty context.[28]

18. Third, the trial judge erred in concluding that section 35(1) of the *Constitution Act, 1982* created a new cause of action. To the contrary, section 35 did not create new treaty rights; rather, it gave constitutional protection to existing treaty rights.[29] Its effect was to elevate treaty rights to a position where they could no longer be extinguished by legislation.[30] Section 35 did not resurrect limitation periods for causes of action that were previously barred due to the passage of time.[31] A parallel cannot be drawn between section 35 of the *Constitution Act, 1982* and section 15 of the *Charter* in terms of creating a remedy; the two provisions do not operate in a similar fashion.[32]

19. In granting Canada's appeal, the FCA also reaffirmed well-settled law from this Court and other appellate courts that limitations legislation applies to treaty claims.[33] Limitation periods have been applied regardless of whether the treaty claims arose before or after 1982.[34] The FCA agreed with the trial judge's conclusion that *Manitoba Métis Federation (MMF)* did not establish a new doctrine of law allowing judges to waive limitation periods, and that this Court was not departing from its prior jurisprudence by implication; to the contrary, *MMF* confirms *Lameman*.[35] The FCA observed:

> 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.[36]

PART II – QUESTIONS IN ISSUE

20. The sole issue is whether it is of public importance for this Court to reconfirm that

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[28] FCA Reasons at paras 191-199.
[29] FCA Reasons at paras 17, 204-209.
[30] FCA Reasons at para 204.
[31] FCA Reasons at paras 206-207.
[32] FCA Reasons at paras 208-209.
[33] FCA Reasons at paras 212-229.
[34] FCA Reasons at para 212.
[35] FCA Reasons at paras 225-229; *Canada (Attorney General) v Lameman*, 2008 SCC 14 [*Lameman*]; *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 [*MMF*].
[36] FCA Reasons at para 229.

Crown-Indigenous treaties were enforceable and actionable prior to the enactment of section 35(1) of the *Constitution Act, 1982* and that limitation periods apply to breach of treaty claims. Canada submits the answer to this question is no; this Court does not need to reconsider or provide further clarity on these questions.

PART III – ARGUMENT

A. Honour of the Crown and advancing reconciliation outside a court forum

21. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*. Adversarial litigation cannot and should not be a central forum for achieving reconciliation. The FCA acknowledged that this case is one such circumstance where the law itself cannot provide the needed reconciliation.[37]

22. Canada did not appeal the trial judge's finding that it breached the TLE promise. Instead, Canada limited its appeal to a discrete question of law, thus narrowing, simplifying, and expediting the scope of the litigation. Canada has accepted the trial judge's finding that Canada breached the TLE term of Treaty 7 and Canada is prepared to continue ongoing dialogue with the Blood Tribe to resolve this historic claim in a manner that is fair and reasonable for all parties. Contrary to the Blood Tribe's suggestion, the FCA did not "relieve" the Crown of an egregious breach of treaty;[38] the FCA confirmed that such a breach cannot be remedied in a court forum. As noted by the trial judge, "[a] substantial difference exists between a law that extinguishes a right and one that limits when that right can be enforced against another."[39]

23. This Court has encouraged the work of reconciliation to take place through political, economic, and social processes that involve negotiating, building understanding, and finding new ways of working together.[40] In upholding the honour of the Crown, Canada has engaged in such efforts prior to trial and throughout the course of the appeal process, and rejects the Blood

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[37] FCA Reasons at para 234.
[38] Applicants' MOA at para 5.
[39] Trial Judge's Reasons at para 394.
[40] *Delgamuukw v British Columbia,* 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 186 [*Delgamuukw*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 14, 20; *MMF* at para 137; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 22.

Tribe's suggestion that "Canada continues to refuse to negotiate".[41] The Blood Tribe is well aware of Canada's efforts to initiate and engage in negotiations.

24. Additionally, the FCA correctly noted that the Specific Claims Tribunal is an alternative effective recourse for giving effect to the honour of the Crown and advancing the goal of reconciliation.[42] Parliament established the Tribunal to address historical treaty grievances without the application of limitation periods, which was the product of a historic joint initiative with the Assembly of First Nations.[43]

B. More than a century of jurisprudence enforcing Indigenous-Crown treaties

25. The issues raised by the Blood Tribe are not of public importance because there is no inconsistency in the law that requires clarification. Canadian courts have consistently held that Indigenous-Crown treaties are enforceable in a manner akin to a contract from the time they were entered into by the parties. As summarized by the FCA, there are many cases in which Indigenous peoples enforced their treaty rights prior to 1982.[44] *Annuities Case*, *Henry*, *Dreaver*, and *Pawis* are examples of Indigenous peoples asserting positive claims against the Crown for breaches of treaty obligations.[45] *Wesley*, *White and Bob*, *Sikyea*, *Moses*, *Dennis*, *Taylor*, *Tennisco* are examples of Indigenous peoples relying on treaty terms to defend themselves

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[41] Applicants' MOA at the heading before para 20.

[42] FCA Reasons at para 235; Canada acknowledges that the Specific Claims Tribunal can award monetary damages up to a maximum of $150 million.

[43] https://www.sct-trp.ca/en/tribunal/about-tribunal

[44] FCA Reasons at paras 98-165. The one outlier being *Rex v Syliboy*, 1928 CanLII 352 (NS SC), [1929] DLR 307, 50 CCC 389 (NS Co Ct), which was rejected in scathing terms by this Court in *Simon v The Queen*, 1985 CanLII 11 (SCC), [1985] 2 SCR 387 at paras 18-19 [*Simon*]; see FCA Reasons at paras 138-139.

[45] *Province of Ontario v The Dominion of Canada and Province of Quebec In re Indian Claims,* 1895 CanLII 112 (SCC), SCR 434, aff'd *Canada (Attorney General) v Ontario (Attorney General),* [1897] AC 199, CR [11] AC 308 (PC) [*Annuities Case*] (**Responding Record [RR], Tab 11**); *Henry v R*, 1905 CarswellNat 19, 9 Ex CR 417 (**RR, Tab 13**); *Dreaver v The King* (1935), 5 CNLC 92 (Ex Ct) (**RR, Tab 12**); *Pawis v Canada,* 1979 CanLII 2598 (FC), [1980] 2 FC 18.

against regulatory or criminal prosecution.[46] *St. Catharines Milling* and *Hay River* further support the established principle that treaties were enforceable from the time they were entered into.[47] The suggestion that the only treaty rights available to Indigenous peoples before 1982 were political rights is at odds with this jurisprudence.

26. The FCA correctly noted that jurisprudence post-1982 from this Court – *Simon*, *Badger*, *Marshall*, *MMF, Bear Island Foundation* – also strongly confirms that treaty rights have been enforceable from the date they were entered into, not only once section 35 of the *Constitution Act, 1982* came into force.[48] This Court has consistently held that treaties between the Crown and Indigenous peoples are unique and constitute *sui generis* agreements that created mutually binding obligations that are to be solemnly respected.[49]

27. The FCA also correctly noted that Blood Tribe's continued reliance on the sword/shield distinction is at odds with this Court's recent decision in *Desautel*.[50] This Court recognizes that criminal or regulatory proceedings (while not always preferable) and declaratory actions are legitimate forms of legal proceedings in which to adjudicate treaty rights.[51] Thus, this Court acknowledges the legal enforceability of a treaty right is unaltered by the form of action, whether

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[46] *R v Wesley,* 1932 CanLII 267 (AB CA), [1932] 2 WWR 337 (Alta Sup C (AD)); *R v White,* 1964 CanLII 452 (BC CA), 50 DLR (2d) 613 (BCCA), aff'd 1965 CanLII 643 (SCC), 52 DLR (2d) 481; *R v Sikyea,* 1964 CanLII 510 (NWT CA), 46 WWR 65 (NWT CA) [*Sikyea NWTCA*], aff'd 1964 CanLII 62 (SCC), [1964] SCR 642 [*Sikyea SCC*]; *Regina v Moses*, 1969 CanLII 384 (ON SC), [1970] 13 DLR (3d) 50 (Ont Dist Ct); *R v Dennis* (1974), 1974 CanLII 1185 (BC PC), 56 DLR (3d) 379 (BC Prov Ct); *Regina v Taylor and Williams,* 1981 CanLII 1657 (ON CA), 34 OR (2d) 360 (ONCA); *R v Tennisco*, 1981 CanLII 2926 (ON SC), 131 DLR (3d) 96, (Ont HCJ).

[47] *St. Catharines Milling & Lumber Co. v R*, 1887 CanLII 3 (SCC), 13 SCR 577, aff'd [1888] UKPC 70, 1888 CarswellOnt 22 (**RR, Tab 16**); *Hay River (Town) v Canada*, 1979 CanLII 2535 (FC), 101 DLR (3d) 184.

[48] FCA Reasons at paras 166-175, citing *Simon* at paras 33, 51; *R v Badger*, 1996 CanLII 236 (SCC), [1996] 1 SCR 771 at paras 41–42 (pp 793-794), 812; *R v Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456 at paras 43, 50, 78 [*Marshall*]; *MMF* at paras 71, 92; *Ontario (A.G.) v Bear Island Foundation*, 1991 CanLII 75 (SCC), [1991] 2 SCR 570 at p 575 [*Bear Island Foundation*]. See also *Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 10-11 [*Mitchell*].

[49] *Simon* at paras 21, 30, 48; *R v Sioui,* 1990 CanLII 103 (SCC), [1990] 1 SCR 1025 at p 1043 (para C. 1.) and p 1056; *Bear Island Foundation* at p 575; *R v Howard*, 1994 CanLII 86 (SCC), [1994] 2 SCR 299 at p 307.

[50] FCA Reasons at para 101; Applicant's MOA at paras 63-64.

[51] *R v Desautel*, 2021 SCC 17 at paras 89-90, 92 [*Desautel*].

it be a "shield-like" criminal or regulatory proceeding or a "sword-like" declaratory action.

C. Section 35 of the *Constitution Act, 1982* did not create a cause of action

28. The Blood Tribe's position that a claim based on breach of treaty did not exist at law prior to the coming into force of section 35 is not an issue of public importance because it is inconsistent with this Court's jurisprudence and the express language in the *Constitution Act, 1982*. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms aboriginal and treaty rights that had not been clearly extinguished before April 17, 1982 when the *Constitution Act, 1982* came into force. Specifically, section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[52] It is clear from the wording that section 35(1) did not create rights; rather, it was intended to give constitutional protection to "existing" common law aboriginal and treaty rights.[53]

29. As stated by this Court in *Van der Peet*, *Delgamuukw, Mitchell*, and *Desautel*, section 35(1) did not create the legal doctrine of Aboriginal rights; Aboriginal rights existed and were recognized under the common law.[54] Through the enactment of section 35(1), a pre-existing legal doctrine was elevated to constitutional status;[55] in other words, section 35(1) constitutionalized those rights.[56]

30. Section 25 of the *Constitution Act, 1982* recognizes existing treaty rights, guaranteeing that the *Canadian Charter of Rights and Freedoms* will not abrogate or derogate from any "aboriginal, treaty or other rights".[57] There is nothing in the language used in sections 35 or 25 to suggest treaty rights were merely political rights prior to 1982 or that treaty rights only gained legal enforceability upon the coming into force of section 35. The recognition of the rights and obligations under Indigenous-Crown treaties has been part of the legal fabric of what was to

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[52] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) EN | FR [*Constitution Act, 1982*].
[53] *Mitchell* at para 11; *Delgamuukw* at paras 133-134.
[54] *R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507 at para 28 [*Van der Peet*], citing *Calder v Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] SCR 313 [*Calder*]; *Delgamuukw* at para 133; *Mitchell* at paras 10-11; *Desautel* at para 34.
[55] *Delgamuukw* at para 134, citing *Van der Peet* at para 29.
[56] *Delgamuukw* at para 134, citing *Van der Peet* at para 29.
[57] *Constitution Act, 1982*, s 25(a) EN | FR.

become Canada from the time Europeans began asserting sovereignty and establishing relations with Indigenous peoples.[58]

31. In the treaty context, the enactment of section 35 meant that federal legislation could no longer override treaty rights.[59] The introduction of section 35 gave constitutional force to treaty rights, requiring Canada to justify federal statutes that infringe treaty rights pursuant to the test set out in *Sparrow*,[60] whereas prior to 1982, federal statutes with a clear and plain intent to override a treaty right prevailed.[61] Here, the term in Treaty 7 providing for one square mile of reserve land per family of five (the TLE) is not a term which the federal government has ever restricted by legislation. The treaty term is grounded in Treaty 7 and has been enforceable at common law as between the parties since 1877.

32. The Blood Tribe's reliance on this Court's decision in *Ravndahl*[62] is unfounded because section 35 of the *Constitution Act, 1982* and section 15 of the *Charter* are not analogous. The wording used in section 15 and section 35 are distinct on their face; section 15 does not "recognize and affirm" existing equality rights.[63] Prior to the *Charter*, Ms. Ravndahl did not have the right to challenge the provincial legislation under the *Canadian Bill of Rights* because it applied only to matters within the legislative authority of Parliament.[64] Neither could she ground her cause of action under the *Canadian Human Rights Act*, since it only applied to federal entities or federally-regulated industries,[65] nor fit her complaint within the scope of the

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[58] *The Royal Proclamation, 1763 (UK),* reprinted in RSC 1985, Appendix II, No 1, at p 5, paras 1 and 2, and p 6, para 1 (**RR, Tab 7**); *Calder* at para 137; *Rupert's Land and North-Western Territory Order, 1870,* reprinted in RSC 1985, Appendix II, No 9, at p 19, para 14 [*Rupert's Land Order*] (**RR, Tab 8**); *Constitution Act, 1930,* reprinted in RSC 1985, Appendix II, No 26, at p 8 at para 11, pp 18-19 at para 10, and pp 27-28 at para 10 (**RR, Tab 2**); *The British Columbia Indian Reserves Mineral Resources Act,* SC 1943-44, c 19 EN | FR, on p 2 at para 1; *An Act to amend The Dominion Elections Act, 1938,* SC 1948, c 46, s 6(1): 14(2)(f) (**RR, Tab 1**); *The Indian Act,* SC 1951, c 29, s 87 (**RR, Tab 4**).
[59] *Marshall* at para 48, reconsideration refused 1999 CanLII 666 (SCC), [1999] 3 SCR 533.
[60] *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075.
[61] *Sikyea NWTCA* at pp 158-159, aff'd *Sikyea SCC* at p 646.
[62] Applicants' MOA at paras 10, 67-69; *Ravndahl v Saskatchewan*, 2009 SCC 7 at para 18.
[63] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 EN | FR [*Charter*].
[64] *Canadian Bill of Rights*, SC 1960, c 44, ss 1-2 EN | FR , 5(2)(3) EN | FR .
[65] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 3(1) EN | FR, 5-14.1 EN | FR, 66(1) EN | FR.

Saskatchewan Human Rights Code.[66] Section 15 of the *Charter* therefore did create new causes of action against municipal, provincial, and federal governments where none existed previously; in contrast, section 35 did not create a new cause of action.

D. Alberta limitations legislation applies to treaty claims

33. There is ample appellate authority that outlines the purpose and policy rationale for limitation periods and their application to treaty claims, such that this issue does not raise to the level of public importance requiring further clarification from this Court.[67] In *Wewaykum* and again in *Lameman*, this Court provided clear guidance that "limitation periods apply to Aboriginal claims" and the underlying policy rationale "applies as much to Aboriginal claims as to other claims".[68] *MMF* reaffirmed this Court's decisions in *Wewaykum* and *Lameman*, but carved out an exception to the application of limitations in the unique circumstances of that case: the relief sought by the Métis was a declaration only (i.e. no personal relief sought, no damages or land sought) and it related to the implementation of a constitutional obligation.[69] Those unique circumstances are simply not present here; notably, the Blood Tribe seeks a significant parcel of land or $1.5 billion damages in lieu thereof.[70]

34. Contrary to the Blood Tribe's suggestion, *Yugraneft* and *Grant Thornton* do not stand for the proposition that this Court is somehow relaxing its interpretation and application of limitations legislation; [71] to the contrary, this Court has consistently applied the facts of each case to the applicable legislation and confirmed that claims can be time-barred.

35. In *Yugraneft*, this Court held that the scheme of the Alberta limitations act and its legislative history indicate that the Alberta legislature intended to create a comprehensive and exhaustive limitations scheme applicable to all causes of action except those excluded by the act

[66] *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss 2(1)(m.01)(iii), 9-19, 43-44.
[67] *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 121-124; *Lameman* at paras 13, 16-17; *Ermineskin Indian Band and Nation v Canada,* 2006 FCA 415 at para 334*; Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development),* 2013 FCA 191 at paras 49-50 [*Peepeekisis*]. See also *Samson First Nation v Canada,* 2015 FC 836 at paras 22, 168-170; *Watson v Canada,* 2020 FC 129 at paras 370-373.
[68] *Lameman* at para 13.
[69] *MMF* at paras 137-139.
[70] Applicants' MOA, footnote 23.
[71] Applicants' MOA at paras 29-30.

itself or covered by other legislation.[72] Just as this Court held in *Yugraneft* that foreign arbitral awards are not expressly excluded and are therefore subject to the Alberta act, treaty claims are also not expressly excluded and are therefore subject to the Alberta Act.[73]

36. In *Grant Thornton*, this Court considered the application of New Brunswick limitations legislation that codifies the common law rule of discoverability, similar to the Alberta limitation legislation.[74] This Court confirmed that the limitations legislation is triggered when the plaintiff discovers or ought to have discovered, through the exercise of reasonable diligence, the material facts on which the claim is based.[75] This Court rejected the Court of Appeal's more stringent test that resulted in a later discovery date which had not triggered the limitations legislation.[76] This Court restored the motions judge's judgment that the plaintiffs had the requisite knowledge at an earlier date and thus the claim was statute-barred. Similarly, the Blood Tribe had knowledge of the material facts by 1971 at the latest, which in turn triggered the Alberta limitations legislation.

37. The Blood Tribe's reliance on *Restoule* is misplaced for two reasons: (a) it is not actually inconsistent with the FCA's decision here; and (b) it is distinguishable on its facts.[77] *Restoule* is about a novel question related to the interpretation of an ongoing treaty obligation (e.g. a treaty term that has never been interpreted previously) and its diligent implementation, whereas this case is about the enforceability of the TLE term at common law prior to 1982, not its interpretation. Most importantly, *Restoule* dealt with the 1990 Ontario limitations legislation that imposed limitation periods on a discrete, closed-list of enumerated causes of action and, significantly, did not include a "basket clause" like Alberta's legislation.[78] The motions judge and Ontario Court of Appeal (ONCA) determined the breach of treaty claim was not captured by the 1990 Ontario limitations legislation because it could not be characterized as a contract, a specialty, or an account for the purposes of limitations.[79] In contrast, the trial judge in this case

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[72] *Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19 at para 41 [*Yugraneft*].
[73] *Yugraneft* at paras 36, 39.
[74] *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at paras 29-40 [*Grant Thornton*].
[75] *Grant Thornton* at para 40.
[76] *Grant Thornton* at paras 22-24, 47-48.
[77] Applicants' MOA at paras 9, 47-48, 51.
[78] *Restoule v Canada (Attorney General)*, 2020 ONSC 3932 at paras 113-114 [*Restoule* (motions judge)], aff'd 2021 ONCA 779 at paras 643-662 [*Restoule* (ONCA)].
[79] *Restoule* (motions judge) at paras 102-201; *Restoule* (ONCA) at paras 518-519, 632-662.

applied the "basket clause" in Alberta's limitations legislation that imposes a limitation period for all other causes of action not otherwise mentioned in the statute.[80] This distinct feature of Alberta's legislation was specifically mentioned by the motions judge in *Restoule*.[81]

38. Further, the motions judge in *Restoule* did not endorse the trial judge's decision in this case as broadly as suggested by the Blood Tribe.[82] While the motions judge in *Restoule* suggested that a cause of action for breach of treaty was first created by section 35 of the *Constitution Act, 1982*,[83] the comment was not determinative of the limitations analysis and it was noted that this matter was under appeal.[84] The ONCA did not make any reference to this case or to section 35 of the *Constitution Act, 1982*; the ONCA's conclusion that the claim was not statute barred had nothing to do with section 35 of the *Constitution Act, 1982*.[85] The ONCA's reasons in *Restoule* are consistent with the FCA's reasoning in this case: "treaties share with contracts the mutual exchange of consideration and obligations", the extension of which is that they are enforceable from the time they are entered into.[86]

E. Limitation periods in Alberta run from the discoverability of the material facts, not discoverability of the law

39. In any event, it is well-established that limitation periods run from the discoverability of material facts in Alberta, not based on an evolution or discoverability of the law.[87] This Court has repeatedly confirmed that a cause of action arises, for the purposes of a limitation period, when the material facts on which it is based have been discovered or ought to have been

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[80] Trial Judge's Reasons at paras 384-468; *Limitation of Actions Act*, RSA 1970, c 209, s 5(1)(g).
[81] *Restoule* (motions judge) at para 115.
[82] Applicant's MOA at paras 9, 48
[83] *Restoule* (motions judge) at paras 117-118.
[84] *Restoule* (motions judge) at paras 146-148.
[85] *Restoule* (ONCA) at paras 632-662.
[86] *Restoule* (ONCA) at paras 650-652.
[87] *General Securities Limited v Lyons*, 1957 CanLII 608 (BCCA) at p 151; *Markevich v Canada*, 2003 SCC 9 at para 27; *Air Canada v McDonnell Douglas Corp*, 1989 CanLII 54 (SCC), [1989] 1 SCR 1554 at p 1564; *Sherwood Steel Ltd v Odyssey Construction Inc*, 2014 ABCA 320 at paras 23-24. See also *MDI Industrial Sales Ltd. v McLean*, 2000 ABQB 521 at para 7, citing *Fullowka v Whitford (#1)* (1997), 1996 CanLII 10199 (NWT CA), leave to appeal denied [1997] 2 SCR xvi, and citing *Attorney General of Canada v Becker* (1999), 1998 ABCA 283 (CanLII) at at 319 (paras 83-85). See also *Squamish Indian Band v R*, 2001 FCT 480 at para 782 (**RR, Tab 15**).

discovered by the plaintiff through the exercise of reasonable diligence.[88] This discoverability principle was codified in section 5 of the Alberta 1970 *Limitation of Actions Act*.[89]

40. This Court has held there is no principled reason for distinguishing between different causes of action when assessing discoverability of material facts for the purposes of limitation periods.[90] It does not matter how treaties have been characterized in Canadian law over time, whether as an agreement, a contract, or a *sui generis* constitutionally-protected treaty. The FCA correctly concluded that the evolution in the language used to describe the nature of treaty obligations or the means of their enforcement does not change the question of whether a cause of action exists or the readiness of courts to provide a remedy.[91]

41. Asserting a claim is conclusive proof of discovery and discoverability.[92] The trial judge found that the 1980 Statement of Claim contained all of the necessary elements for a cause of action for breach of treaty, and the 1999 amendments that referred to section 35 of the *Constitution Act, 1982* did not change the material facts and did not add a new cause of action.[93]

42. The issue of the date of discoverability of the TLE claim was argued at trial, on evidence presented. The trial judge concluded that the TLE claim was discoverable by 1971 at the latest.[94] The trial judge therefore concluded that the material facts of the TLE claim were discoverable in and around 1971 at the latest, a finding that was not appealed.[95] Accordingly, the cause of action arose no later than 1971. Since the 1980 Statement of Claim was not filed within six years after the cause of action arose,[96] the TLE claim is time-barred.

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[88] *Lameman* at para 16, citing *Central Trust Co. v Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147 at p 224 [*Central Trust*].
[89] *Limitation of Actions Act*, RSA 1970, c 209, s 5.
[90] *Central Trust* at p 224.
[91] FCA Reasons at para 16.
[92] *K.L.B. v British Columbia*, 2003 SCC 51 at paras 55-57; *Sioui v Nation Huronne-Wendat*, 2003 CanLII 629 (QCCS), at para 47.
[93] Trial Judge's Reasons at paras 502-509; *Davis v East Side Mario's Barrie*, 2018 ONCA 410 at paras 36-37 [*Davis*]; see also *Madill v Alexander Consulting Group Ltd*, 1999 ABCA 231 at paras 35-40; *Britton v Manitoba*, 2011 MBCA 77 at paras 13, 32, 34-35, 38-40 for when a new cause of action arises.
[94] Trial Judge's Reasons at paras 452-454, 464.
[95] Trial Judge's Reasons at paras 452-453, 464.
[96] *Limitation of Actions Act*, RSA 1970, c 209, s 5(1)(g); Trial Judge's Reasons at para 508.

43. The Blood Tribe indirectly attack this finding by the trial judge, absent a cross appeal, by arguing that there was an evolution in the law of discoverability such that the limitation period is postponed until the Blood Tribe had awareness of the evolution in the law.[97] Their argument amounts to a request to reconsider the discoverability date of the TLE claim on the basis that a parties' lack of awareness of the law, or a lack of clarity in jurisprudence, postpones a limitation period in accordance with the principles of discoverability. These new questions should not be considered for the first time on appeal.

44. In any event, these arguments have no merit. The Blood Tribe's reliance on this Court's decisions in *Kamloops* and *Novak* to advance an argument that discovery of the law should postpone a limitation period based on the principles of unfairness and injustice is misplaced.[98] This Court's analysis in *M.(K.),*[99] *Kamloops,*[100] and *Novak*[101] are three examples where discovery of the material facts in unique circumstances resulted in this Court postponing the running of limitation periods. Importantly, these decisions did not postpone the running of limitation periods due to the discovery of any change in the law. These decisions are distinguishable on their facts and issues. *M.(K.)* related to an incest victim's discovery, many years later as an adult, of the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries.[102] *Kamloops* related to the plaintiff's discovery of defective construction in a building.[103] *Novak* related to the plaintiff's inability to bring an action due to a year of illness and debilitating cancer treatment, where the applicable limitations legislation allowed for the postponement of the running of the limitation period until the plaintiff "ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action".[104]

45. The Blood Tribe also relies on *Méthot* and *Costello* for the proposition that a limitation period for a cause of action cannot run, even though the facts underlying it have taken place,

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[97] Applicants' MOA at paras 30-36.
[98] Applicants' MOA at paras 30-31.
[99] *M.(K) v M.(H.),* 1992 CanLII 31 (SCC), [1992] 3 SCR 6 at pp 29-31 [*M.(K) v M.(H.)*].
[100] *Kamloops v Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 SCR 2 [*Kamloops*].
[101] *Novak v Bond,* 1999 CanLII 685 (SCC), [1999] 1 SCR 808 [*Novak*].
[102] *M.(K) v M.(H.)* at p 24.
[103] *Kamloops* at pp 39-40.
[104] *Novak* at paras 96-98.

until the plaintiff has a legal right to sue.[105] These cases are distinguishable as they were situations where statutory constraints prevented the right of action from arising. In *Méthot*, the statute prohibited suit until 30 days elapsed under the notice of accident.[106] In *Costello*, the statute delayed the start of time to sue until one month after this Court declared the bylaw void.[107] Similarly, in *Morin*, the prescription of the Quebec action could not begin to run before the date the insurance company made a payment under the insurance policy.[108] These cases are simply not applicable here, as there is no statute or policy displacing the common law that has always enforced treaties as legally binding agreements.

46. The Blood Tribe further urges this Court to consider its decision in *Semiahmoo*[109]as authority for the proposition that claimants should not be deprived from having recourse in law before it is possible for them to bring a claim that is sufficiently recognized in the jurisprudence.[110] However, in *Semiahmoo*, this Court confirmed that the limitation period in that case ran from the date on which the material facts reasonably necessary to found the cause of action for the breach of fiduciary duty were known to the First Nation, not from the date when the law on fiduciary duty became clear in *Guerin*.[111] The argument that developments in the law should effectively reset limitation periods was considered and rejected by the Federal Court of Appeal in *Peepeekisis*.[112]

F. Jurisprudence and academic commentary about non-treaty rights, Aboriginal title, and fiduciary duty is not relevant

47. The development of the law regarding non-treaty rights is neither relevant to the enforcement of treaties as binding agreements nor does it create an issue of public importance requiring this Court's attention. The Blood Tribe relies on jurisprudence and academic commentary about non-treaty rights, Aboriginal title, and fiduciary duty in an attempt to present

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[105] Applicants' MOA at paras 32-33.
[106] *Méthot c Commission de transport de Montreal,* 1971 CanLII 173 (SCC), [1972] SCR 387.
[107] *Costello v Calgary (City),* 1989 ABCA 194.
[108] *Morin v Canadian Home Assurance Co.,* 1970 CanLII 9 (SCC), [1970] SCR 561 at p 565.
[109] *Semiahmoo Indian Band v Canada*, 1997 CanLII 6347 (FCA), [1998] 1 FC 3 [*Semiahmoo*].
[110] Applicants' MOA at paras 30-31.
[111] *Semiahmoo* at para 82.
[112] *Peepeekisis* at para 50.

confusion or inconsistency where there is none.[113] The FCA correctly noted the Blood Tribe's failure to appreciate the distinctions between Aboriginal rights and treaty rights[114] and their attempts to conflate or merge two streams of law,[115] yet they repeat the same errors before this Court. Neither the courts nor the Crown have historically considered treaty promises to be political obligations, or that there has been any evolution in the law governing the enforcement of treaties as binding agreements.

48. This Court's decisions in *Guerin* and *Semiahmoo* concerned the fiduciary obligations associated with the relationship between Canada and a First Nation, not whether a First Nation had enforceable rights under a treaty.[116] The political trust argument exemplified in *Guerin* arises in the context of fiduciary duty law and is not relevant to the enforcement of treaties as binding agreements. While *Guerin* represented a major development in the law of fiduciary duty, it is not determinative of the law of treaty rights.

49. Similarly, *Calder* and *Guerin* were land claims concerning Aboriginal title and the surrender of reserve land, respectively. Prior to 1982, litigants, governments, and the courts were divided on the question of the existence of Aboriginal title.[117] It is in that legal context and time in history that the concept of political, unenforceable rights was advanced; this reasoning was never applied to treaty cases.

50. Canada's historical positions on Aboriginal title and fiduciary duty cannot be equated with Canada's position on the enforceability of treaties. The government policy statements from 1969, 1971 and 1981 make it clear that the government considered treaty rights to be legal obligations at all times.[118] Indeed, prior to 1982, the Crown and various Indigenous groups

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[113] Applicants' MOA at paras 6, 35, 57-66, 75.
[114] FCA Reasons at paras 18, 102-111.
[115] FCA Reasons at para 103.
[116] *Semiahmoo* at paras 1, 84; *Guerin v R*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335 at pp 340 – 341 [*Guerin*].
[117] FCA Reasons at paras 164-165.
[118] Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969*, Catalogue No R32-2469 (Ottawa, Indian Affairs and Northern Development, 1969) at e-pages 7, 18-20, online: http://publications.gc.ca/collections/collection_2014/aadncaandc/R32-2469-eng.pdf; Canada, Department of Indian Affairs and Northern Development, *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and*

negotiated settlement agreements for breaches of treaties on the basis that they were outstanding legal obligations.[119]

51. The Blood Tribe does not acknowledge the distinction in the academic commentary about a party's ability to enforce treaty terms just as any party would enforce a binding agreement, and the ability to enforce treaty terms that conflict with legislation.[120] They conflate commentary on treaty rights with commentary on other Aboriginal rights, like hunting or fishing rights, which at times have been the subject of government restriction by legislation.[121] The sum of the academic literature, when read in its proper context, confirms that treaties were enforceable prior to 1982. The FCA was attuned to this issue and correctly captured what the academic literature states.[122]

G. Practical and legal obstacles that are not grounded in the evidence or the trial judge's findings of fact are not relevant

52. Canada acknowledges that, historically, there were periods where Indigenous peoples faced practical and legal obstacles to enforce their treaty rights.[123] These historical obstacles are regrettable. However, there is no evidence on the record that any of these practical and legal obstacles affected the Blood Tribe's ability to bring their claim in this instance.[124] The trial judge did not consider such arguments, no findings of fact were made in this regard, and these questions should not be considered for the first time on appeal.

53. Even when considered on the merits, these obstacles and the historical rule of Crown immunity did not prevent, or even substantially hinder, suits against the Crown. Far from being immune from suits, claims were brought via petition of right against the Crown because fiats

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Inuit People, August 8, 1973, (Ottawa, Indian and Northern Affairs, 1973) at p 3, online: http://publications.gc.ca/collections/collection_2018/aanc inac/R5-645-1973.pdf; Canada, Department of Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy: Comprehensive Claims* (Ottawa: 1981) at p 11, online: https://www.afn.ca/uploads/files/sc/comp_-_in_all_fairness_-_a_native_claims_policy_-_comprehensive_claims.pdf.

[119] Government of Canada, Reporting Centre on Specific Claims: https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx

[120] Applicants' MOA at paras 61-62.

[121] Applicants' MOA at paras 44, 55, 60.

[122] FCA Reasons at paras 176-182.

[123] Applicants' MOA at paras 57-60.

[124] Trial Judge's Reasons at paras 437-464.

were granted as a matter of course.[125] From 1927 to 1951, the *Indian Act* prohibited fundraising for the purpose of pursuing litigation without the express permission of the Department of Indian Affairs.[126] However, the jurisprudence shows that Canadian courts enforced Indigenous-Crown treaty rights prior to 1982, even when *Indian Act* restrictions were in force that limited the ability to sue without Crown consent.

H. Conclusion

54. The FCA's decision provides a comprehensive summary of this Court's guidance over many years on the enforceability of Canada's solem treaty commitments. Treaties have always been enforceable at common law as between the parties since the time the treaties were entered into, and Alberta's limitation legislation continues to apply to treaty claims. There is simply no confusion or inconsistency in the law that requires this Court's attention.

PART IV – COSTS

55. Canada is not seeking costs in this application.

PART V – ORDER SOUGHT

56. Canada asks that the application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Edmonton, Alberta, this 29th day of June 2022.

Bruce Hughson / Amy Martin-LeBlanc /
Sydney McHugh
Counsel for the Respondent
The Attorney General of Canada

[125] *Re Nathan* (1884) 12 QBD 461 at p 479 (**RR, Tab 14**); *The Petition of Right Act,* SC 1875, c 12, ss 1, 6, 8, 17 (**RR, Tab 5**); *The Petition of Right Act,* SC 1876, c 27, ss 2, 7, 19(3)(a), 21 (**RR, Tab 6**); *The Supreme and Exchequer Courts Act*, SC 1875, c 11, s 58 (**RR, Tab 9**); *The Supreme and Exchequer Courts Act*, RSC 1886, c 135, s 75, 75(2) (**RR, Tab 10**).
[126] *Indian Act,* SC 1926-27, c 32, s 6 (**RR, Tab 3**).