Court File No. 40153

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)

REPLY
(JIM SHOT BOTH SIDES AND ROY FOX *et al.*, APPLICANTS)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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Overview & Issues of Public Importance

1. The questions in issue in this proposed appeal, regardless of how they are resolved, are questions of public importance that warrant this Honourable Court's intervention. The fact the Court of Appeal intervened to overturn the trial judge on a point of law that could affect so many other section 35 breach of treaty claims highlights these matters of public importance and reinforces the need for judicial guidance.

2. At its core, this case is about the ability of Indigenous peoples to pursue breach of treaty claims in court. The Crown wants the Blood Tribe's breach of treaty claim statute-barred prior to the government acknowledging that the corresponding constitutional right exists, and prior to there being any meaningful judicial redress.

3. That the Crown cannot point to a single case that definitively resolves the effect of the passage of s. 35 on the running of limitation periods and whether breach of treaty on its own was actionable prior to the coming into force of s. 35 speak to the public importance of these issues. Even post-1982, little guidance can be found in the authorities on breach of treaty as a cause of action in its own right.

4. The Crown and Court of Appeal rely upon a patchwork of cases going back over a hundred years in a paint-by-numbers attempt to sketch a pleasant picture of settled law. It is not settled. Nor is the history pleasant. The Court of Appeal and Crown refer to *Annuities Case*, *Henry*, *Dreaver*, and *Pawis* as examples of "Indigenous peoples asserting positive claims against the Crown for breaches of treaty obligations" and *St. Catharines Milling* as an example of a case showing that "treaties were enforceable from the time they were entered into".[1]

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[1] Respondent's Response at para. 25 citing *Province of Ontario v The Dominion of Canada and Province of Quebec In re Indian Claims*, 1895 CanLII 112 (SCC), [1895] 25 S.C.R. 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; *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).
Reasons of the Federal Court of Appeal, *Canada v Jim Shot Both Sides*, 2022 FCA 20 at paras 37-59 [FCA Reasons] at paras. 104, 121-127, 151-153.

5. However, scratching the surface on any one of these decisions (some over a century and a quarter old) reveals that the law is anything but settled and that it was open to the trial judge to rule as he did. For example, how is the *Annuities Case* an example of "Indigenous peoples asserting positive claims against the Crown for breaches of treaty obligations" when the affected First Nations in that case were not even parties to the proceedings and had no involvement (and no ability to become involved) whatsoever in the litigation?[2] Likewise, the First Nation was not a party to the *St. Catharine's Milling* proceeding.

6. The *Henry* matter was about remedying accounting errors under s.79 of the *Indian Act* rather than the failure to discharge obligations under treaty. In *Pawis*, the Court only made some comments in *obiter* that the agreement was tantamount to a contract but never ruled on the issue. *Dreaver* was decided at a time when this Honourable Court had ruled that the *Indian Act* was an exclusive code governing the rights and privileges of Indigenous peoples and therefore excluded common law causes of action and limited relief to statutory rights. Nowhere in this patchy history is there any judicial acknowledgment of a civil remedy being available based on an independent right arising from breach of treaty at the instance of Indigenous peoples. In *Calder*[3] the Supreme Court said none existed for land matters (both treaty land and aboriginal title claims). It is not coincidental that despite widespread failure of the Crown to honour its treaty land obligations under the numbered treaties, not a single action came forth prior to 1982.

7. The only common thread amongst these decisions, and the body of Aboriginal jurisprudence prior to the *Charter*, is that the enforceability of the commitments made in the numbered treaties was limited, highly technical, and uncertain. There was no redress for breaches of treaty land obligations. It is far from being, as the Court of Appeal below states, "an unbroken line of decisions over 120 years".[4] It was not until the advent of s. 35 that Indigenous peoples were able to meaningfully deal with treaty rights in Canadian courts. The Crown acknowledges the practical and legal obstacles faced by Indigenous peoples in trying to enforce their treaty rights and calls them "regrettable"[5], but then goes on to say they "did not prevent, or even substantially

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[2] *Annuities Case*, [1895] 25 S.C.R. 434 at 534-35.
[3] *Calder et al. v. Attorney General of British Columbia* [1973] SCR 313 per: Judson J.
[4] FCA Reasons at para. 14.
[5] Respondent's Response at para. 52.

hinder, suits against the Crown."[6] It is hard to imagine how, for example, limiting the ability of First Nations to retain legal counsel for decades did not hinder access to justice.

The Need for Judicial Resolution

8. It is ironic that Canada in this case says that "[a]dversarial litigation cannot and should not be a central forum for achieving reconciliation", when that is demonstrably what Canada does herein.[7] The Blood Tribe agrees with the sentiment, but this case is an example of why Canada makes litigation the only viable route for many First Nations and why clarity on the questions in issue in this appeal are necessary.

9. The Blood Tribe first raised its concerns that its treaty had been breached with the Minister of Indian Affairs in 1976. Those negotiations failed, resulting in the commencement of these proceedings in 1980. Court proceedings were paused as the Blood Tribe worked its way through the Specific Claims Policy process and only reactivated court proceedings in 1996 to run concurrently when the non-judicial route was at a crawl. It was not until 2003 that its TLE claim was rejected under the Specific Claims Policy. The Blood Tribe then asked the Indian Claims Commission ("ICC") to conduct an inquiry into the claims and in 2007 the ICC recommended the Minister accept the claim and negotiate a resolution. The Minister did not negotiate necessitating this court proceeding.

10. Finally, the trial judge below ruled that Canada breached its treaty with the Blood Tribe. It was not until Canada was in the process of appealing that ruling that it accepted, for the first time since these proceedings were commenced in 1980, that it breached the treaty land entitlement promise. It took 39 years just to get to this point. If the Blood Tribe had not commenced or continued to pursue adversarial litigation, would it have ever even gotten to the point of Canada accepting that it breached the treaty? Furthermore, the present litigation is only prolonged further by virtue of Canada choosing to appeal on a limitation period issue.

11. The Court of Appeal, in a similar vein, stated that there "are circumstances, and this is one of them, where the law itself cannot provide the needed reconciliation" and then it goes on to note

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[6] Respondent's Response at para. 53.
[7] Respondent's Response at para. 21.

the "alternative effective recourse" of the Specific Claims Tribunal.[8] But the Court of Appeal forgets that the parties have already been through two federal claims processes and it was only through a court proceeding that Canada finally accepted that they breached a treaty.

Giving Meaning to Section 35

12. The Blood Tribe recognizes that s. 35(1) did not create rights *per se*, but rather was intended to give constitutional protection to existing common law aboriginal and treaty rights. However, this case squarely raises the issue of what it means to give constitutional protection to rights. Is s. 35 limited to meaning that federal legislation can no longer override treaty rights or does some additional recognition and protection flow from the constitutionalization of a right? If the latter, how can the Blood Tribe's claim be statute-barred prior to the date that the government itself acknowledged Aboriginal and Treaty rights were constitutionally protected? The Crown states that "[a]sserting a claim is conclusive proof of discovery and discoverability".[9] But how does one assert a claim that does not yet exist or is recognized in law?

13. An interpretation of s. 35 that the constitutionalization of Aboriginal rights brings with it an enhanced ability to protect those rights is consistent with Aboriginal jurisprudence evolving in light of meaningful reconciliation. The alternative is an approach that essentially makes compensation of treaty rights a matter of governmental "grace" and renders s. 35 of the Constitution a right without a remedy. This would be returning Canada's legal system to what existed prior to 1982 when treaties such as the Blackfoot Treaty were viewed as political obligations free from judicial control.

Restoule

14. The Ontario Superior Court in *Restoule v. Canada* held that "the cause of action of breach of treaty was first created by s. 35 of the *Constitution Act, 1982*" and cited the Trial Decision herein below in support.[10] On June 23, 2022, this Honourable Court granted leave to appeal and leave to cross-appeal from the decision of the Court of Appeal for Ontario in *Restoule v. Canada (Attorney*

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[8] FCA Reasons at para. 234.
[9] Respondent's Response at para. 41.
[10] *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 at para. 118.

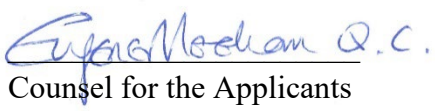
General), 2021 ONCA 779.[11] Although split on various other issues, the Court of Appeal unanimously dismissed the ground of appeal regarding the limitations defence, saying treaties were not contracts for limitations purposes.[12] The Court rejected the Crown's interpretation of *Pawis*.[13]

15. The Crown in the present case in its Response states that *Restoule* is consistent with the Federal Court of Appeal's decision and also distinguishable on its facts.[14] This however downplays that case's significance and ignores the actual language of the decision. First, the Court of Appeal for Ontario never states that the trial judge was wrong in holding that the cause of action of breach of treaty was first created by s. 35 and by dismissing the related ground of appeal, the trial judge's decision remains good law in that respect. Second, the Court of Appeal for Ontario states:

> …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….

16. In other words, a unanimous Court of Appeal for Ontario explicitly endorses at a minimum that s. 35 contains protections that "create" unique substantive legal obligations. Now there is a disagreement on this point by virtue of the decisions of the Federal Court of Appeal below and the Court of Appeal for Ontario in *Restoule*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2022



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[11] SCC File No. 40024.
[12] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779 at para. 652.
[13] *Restoule v. Canada (Attorney General)* 2020 ONSC 3932, para. 132-138, affirmed 2021 ONCA 779, para. 650-652 and footnote 528 referencing *Pawis*.
[14] Respondent's Response at para. 37.

TABLE OF AUTHORITIES

APPLICANT'S AUTHORITIES	CITED AT PARAGRAPH NO.
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LEGISLATION	**SECTION(S)**
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11	35
Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 1	35