

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**ATTORNEY GENERAL OF ONTARIO and
HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

**APPELLANTS/
RESPONDENTS ON CROSS-APPEAL
(Appellants/Respondents)**

- and -

**MIKE RESTOULE, PATSY CORBIERE, DUKE PELTIER, PETER RECOLLET,
DEAN SAYERS and ROGER DAYBUTCH, ON THEIR OWN BEHALF AND ON
BEHALF OF MEMBERS OF THE OJIBEWA (ANISHINAABE) NATION WHO ARE
BENEFICIARIES OF THE ROBINSON HURON TREATY OF 1850,
RED ROCK FIRST NATION and WHITESAND FIRST NATION**

**RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Respondents)**

[Style of Cause continued on next page]

**FACTUM OF THE INTERVENERS, UNION OF BRITISH COLUMBIA INDIAN
CHIEFS, NLAKA'PAMUX NATION TRIBAL COUNCIL, CHAWATHIL FIRST
NATION, HIGH BAR FIRST NATION, NESKONLITH INDIAN BAND, PENTICTON
INDIAN BAND, SKUPPAH INDIAN BAND, and UPPER NICOLA BAND (Jointly)**
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

**COUNSEL FOR THE INTERVENERS, UNION OF BRITISH COLUMBIA INDIAN
CHIEFS, NLAKA'PAMUX NATION TRIBAL COUNCIL, CHAWATHIL FIRST
NATION, HIGH BAR FIRST NATION, NESKONLITH INDIAN BAND, PENTICTON
INDIAN BAND, SKUPPAH INDIAN BAND, and UPPER NICOLA BAND:**

**Peter Millerd
Brenda Gaertner
Erica Stahl**
MANDELL PINDER LLP
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4
Phone: (604) 566-8556
Fax: (604) 681-0959
Email: peter@mandellpinder.com

Ottawa Agent for Counsel for the Interveners:
D. Lynne Watt
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

[Style of Cause continued]

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant/Respondent)

AND BETWEEN:

**ATTORNEY GENERAL OF ONTARIO and
HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

APPELLANTS/
RESPONDENTS ON CROSS-APPEAL
(Appellants/Respondents)

- and -

**CHIEF AND COUNCIL OF RED ROCK FIRST NATION, ON BEHALF OF THE
RED ROCK FIRST NATION BAND OF INDIANS and CHIEF AND COUNCIL OF THE
WHITESAND FIRST NATION ON BEHALF OF THE WHITESAND FIRST NATION
BAND OF INDIANS**

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Respondents)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant/Respondent)

- and -

**BIIGTIGONG NISHNAABEG FIRST NATION (AKA THE BEGETIKONG
ANISHNABE FIRST NATION OR THE OJIBWAYS OF THE PIC RIVER FIRST
NATION), ATTORNEY GENERAL OF NEW BRUNSWICK, HALFWAY RIVER FIRST
NATION, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS,
ATIKAMEKSHENG ANISHNAWBEK, MANITOBA KEEWATINOWI OKIMAKANAK
INC., CARRY THE KETTLE NAKODA NATION, ASSEMBLY OF MANITOBA
CHIEFS, ANISHINABEK NATION, TEME-AUGAMA ANISHNABAI AND
TEMAGAMI FIRST NATION (jointly), UNION OF BRITISH COLUMBIA INDIAN
CHIEFS, NLAKA'PAMUX NATION TRIBAL COUNCIL, CHAWATHIL FIRST
NATION, HIGH BAR FIRST NATION, NESKONLITH INDIAN BAND, PENTICTON
INDIAN BAND, SKUPPAH INDIAN BAND, and UPPER NICOLA BAND (jointly),
INDIGENOUS BAR ASSOCIATION IN CANADA, WEST MOBERLY FIRST
NATIONS, ATHABASCA TRIBAL COUNCIL LTD., TSAWOUT FIRST NATION, KEE
TAS KEE NOW TRIBAL COUNCIL, SAUGEEN FIRST NATION and CHIPPEWAS OF
NAWASH UNCEDED FIRST NATION (jointly), GRASSY NARROWS FIRST NATION,
ASSEMBLY OF FIRST NATIONS, NAMAYGOOSISAGAGUN COMMUNITY (WHO
REFERS TO THEMSELVES AS THE NAMAYGOOSISAGAGUN OJIBWAY NATION)**

INTERVENERS
(Intervenors)

**COUNSEL FOR THE APPELLANTS/RESPONDENTS ON CROSS-APPEAL,
ATTORNEY GENERAL OF ONTARIO AND HIS MAJESTY THE KING IN RIGHT OF
ONTARIO:**

Peter H. Griffin

Scott Rollwagen

Nina Bombier

Richard Ogden

Julia McRandall

LENCZNER SLAGHT LLP

2600 - 130 Adelaide Street West

Toronto, ON M5H 3P5

Telephone: (416) 865-2921

Fax: (416) 865-9010

Email: pgriffin@litigate.com

Ottawa Agent for Counsel for the
Appellants/Respondents on Cross-Appeal, Attorney
General of Ontario and His Majesty the King in
right of Ontario:

Jonathan Laxer

POWER LAW

1103 - 130 Albert Street

Ottawa, ON K1P 5G4

Telephone: (613) 702-5573

Fax: (613) 702-5573

Email: jlaxer@powerlaw.ca

**COUNSEL FOR THE RESPONDENTS/APPELLANTS ON CROSS-APPEAL, MIKE
RESTOULE et al:**

David C. Nahwegahbow, IPC, LSM

Dianne G. Corbiere, IPC

Christopher E. J. Albinati

Jim Ratis

Catherine Boise Parker, KC

NAHWEGAHBOW CORBIERE

GENOODMAGEJIG

109 - 5884 Rama Road

Rama, ON L3V 6H6

Telephone: (416) 325-0520

Fax: (705) 325-7204

Email: dndaystar@nncfirm.ca

Ottawa Agent for Counsel for the
Respondents/Appellants on Cross Appeal, Mike
Restoule et al.:

Marie-France Major

SUPREME ADVOCACY LLP

100 - 340 Gilmour Street

Ottawa, ON K2P 0R3

Telephone: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE RESPONDENTS/APPELLANTS ON CROSS-APPEAL, RED ROCK FIRST NATION AND WHITESAND FIRST NATION - AND - CHIEF AND COUNCIL OF RED ROCK FIRST NATION, ON BEHALF OF THE RED ROCK FIRST NATION BAND OF INDIANS – AND- CHIEF AND COUNCIL OF THE WHITESAND FIRST NATION ON BEHALF OF THE WHITESAND FIRST NATION BAND OF INDIANS:

Harley I. Schachter
Kaitlyn Lewis
DUBOFF EDWARDS HAIGHT &
SCHACHTER
1900 – 155 Carlton Street
Winnipeg, MB R3C 3H8
Telephone: (204) 942-3361
Fax: (204) 942-3362
Email: schachter@dehslaw.com

Ottawa Agent for Counsel for the
Respondents/Appellants on Cross-Appeal et al:

Patricia Lawrence
FIRST PEOPLES LAW
230 - 55 Murray Street
Ottawa, ON K1N 5M3
Telephone: (613) 722-9091
Fax: (613) 722-9097
Email: plawrence@firstpeopleslaw.com

COUNSEL FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA:

Zoe Oxaal
Glynis Evans
ATTORNEY GENERAL OF CANADA
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8
Telephone: (613) 941-4016
Fax: (613) 954-1920
Email: zoe.oxaal@justice.gc.ca

Ottawa Agent for Counsel for the Respondent,
Attorney General of Canada:

Christopher M. Rupar
ATTORNEY GENERAL OF CANADA
Department of Justice Canada,
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8
Telephone: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

COUNSEL FOR THE INTERVENERS, BIIGTIGONG NISHNAABEG FIRST NATION et al:

Brian Gover
Spencer Bass
STOCKWOODS LLP
TD North Tower, Box 140
4130 - 77 King Street West
Toronto, ON M5K 1H1
Telephone: (416) 593-7200
Fax: (416) 593-9345
Email: briang@stockwoods.ca

Ottawa Agent for Counsel for the Intervener,
Biigtigong Nishnaabeg First Nation et al.:

Marie-France Major
SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER, ATTORNEY GENERAL OF NEW BRUNSWICK:

Josh J.B. McElman, K.C.

COX & PALMER

1 Germain Street, Suite 1500

Saint John, NB E2L 4V1

Telephone: (506) 633-2708

Fax: (506) 632-8809

Email: jmcelman@coxandpalmer.com

Ottawa Agent for the Intervener, Attorney General
of New Brunswick:

D. Lynne Watt

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600

Ottawa ON K1P 1C3

Telephone: (613) 786-8695

Fax: (613) 788-3509

Email: lynne.watt@gowlingwlg.com

COUNSEL FOR THE INTERVENER, HALFWAY RIVER FIRST NATION:

Christopher G. Devlin

DEVLIN GAILUS WATSON

201 - 736 Broughton Street

Victoria, BC V8W 1E1

Telephone: (250) 361-9469

Fax: (250) 361-9429

Email: christopher@dgwlaw.ca

Ottawa Agent for Counsel for the Intervener,
Halfway River First Nation:

Marie-France Major

Supreme Advocacy LLP

100 - 340 Gilmour Street

Ottawa, ON K2P 0R3

Telephone: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS:

Geneviève Boulay

Ron S. Maurice

Steven W. Carey

MAURICE LAW

602 12th Avenue SW, Suite 100

Calgary, AB T2R 1J3

Telephone: (403) 266-1201

Fax: (403) 266-2701

Email: gboulay@mauricelaw.com

COUNSEL FOR THE INTERVENER, ATIKAMEKSHENG ANISHNAWBEK:

Geneviève Boulay

Ryan Lake

MAURICE LAW

602 12th Avenue SW, Suite 100

Calgary, AB T2R 1J3

Telephone: (403) 266-1201

Fax: (403) 266-2701

Email: gboulay@mauricelaw.com

COUNSEL FOR THE INTERVENER, MANITOBA KEEWATINOWI OKIMAKANAK INC.:

Michael Jerch

JERCH LAW

22 Edmonton Street

Winnipeg, MB R3C 1P7

Telephone: (204) 774-8300

Fax: (204) 774-8349

Email: mjerch@jerchlaw.com

COUNSEL FOR THE INTERVENER, CARRY THE KETTLE NAKODA NATION:

Geneviève Boulay

Ryan Lake

MAURICE LAW

602 12th Avenue SW, Suite 100

Calgary, AB T2R 1J3

Telephone: (403) 266-1201

Fax: (403) 266-2701

Email: gboulay@mauricelaw.com

COUNSEL FOR THE INTERVENER, ASSEMBLY OF MANITOBA CHIEFS:

Carly Fox

Emily Guglielmin

FOX FRASER LLP

1120 - 17 Avenue SW

Calgary, AB T2T 0B4

Telephone: (403) 910-5392

Fax: (403) 407-7795

Email: cfox@foxfraserlaw.com

Ottawa Agent for Counsel for the Intervener,
Assembly of Manitoba Chiefs:

Bijon Roy

CHAMP AND ASSOCIATES

3 Florence Street

Ottawa, ON K2P 0W6

Telephone: (613) 237-4740

Fax: (613) 232-2680

Email: broy@champlaw.ca

COUNSEL FOR THE INTERVENER, ANISHINABEK NATION:

M. Patricia Lawrence
K.R. Virginia Lomax
FIRST PEOPLES LAW LLP
230-55 Murray Street
Ottawa, ON K1N 5M3
Telephone: (613) 722-9091
Fax: (613) 722-9097
Email: plawrence@firstpeopleslaw.com

COUNSEL FOR THE INTERVENER, TEME-AUGAMA ANISHNABAU AND TEMAGAMI FIRST NATION:

Bruce McIvor
Kate Gunn
FIRST PEOPLES LAW LLP
73 Water Street, 6th Floor
Vancouver, BC V6A 0A5
Telephone: (604) 688-4272
Fax: (604) 688-4282
Email: bmcivor@firstpeopleslaw.com

Ottawa Agent for Counsel for the Intervener, Teme-Augama Anishnabau and Temagami First Nation:

Alison Porter
FIRST PEOPLES LAW LLP
230-55 Murray Street
Ottawa, ON K1N 5M3
Telephone: (613) 701-6577
Fax: (613) 722-9097
Email: aporter@firstpeopleslaw.com

COUNSEL FOR THE INTERVENER, INDIGENOUS BAR ASSOCIATION IN CANADA:

Jason T. Madden
Alexandria Winterburn
PAPE SALTER TEILLET LLP
546 Euclid Avenue
Toronto, ON M6G 2T2
Telephone: (416) 916-3853
Fax: (416) 916-3726
Email: jmadden@pstlaw.ca

Ottawa Agent for the Intervener, Indigenous Bar Association in Canada:

Matthew Estabrooks
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Telephone: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

COUNSEL FOR THE INTERVENER, WEST MOBERLY FIRST NATION:

Reidar M. Mogerman, K.C.
Katie Duke
CAMP FIORANTE MATTHEWS
MOGERMAN
400-856 Homer Street
Vancouver, BC V6B 2W5
Telephone: (604) 689-7555
Fax: (604) 689-7554
Email: rmogerman@cfmlawyers.ca

Ottawa Agent for Counsel for the Intervener, West Moberly First Nation:

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

COUNSEL FOR THE INTERVENER, ATHABASCA TRIBAL COUNCIL LTD.:

Glenn K. Epp
THOMPSON, LABOUCAN & EPP LLP
Suite 900, Bell Tower
10104 - 103 Avenue
Edmonton, AB T5J 0H8
Telephone: (825) 480-6320
Fax: (825) 480-6325
Email: gepp@tlellp.ca

Ottawa Agent for Counsel for the Intervener, Athabasca Tribal Council Ltd.:

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

COUNSEL FOR THE INTERVENER, TSAWOUT FIRST NATION:

John W. Gailus
Courtenay Jacklin
DGW LAW CORPORATION
2nd Floor, 736 Broughton Street
Victoria, BC V8W 1E1
Telephone: (250) 361-9469
Fax: (250) 361-9429
Email: john@dgwlaw.ca

Ottawa Agent for Counsel for the Intervener, Tsawout First Nation:

Moira Dillon
SUPREME LAW GROUP
1800 - 275 Slater Street
Ottawa, ON K1P 5H9
Tel: (613) 691-1224
Email: mdillon@supremelawgroup.ca

COUNSEL FOR THE INTERVENER, KEE TAS KEE NOW TRIBAL COUNCIL:

Larry Innes
Kevin Hille
Jesse Abell
OLTHIUS, KLEER TOWNSHEND LLP
250 University Ave., 8th Floor
Toronto, ON M5H 3E5
Telephone: (416) 981-9330
Fax: (416) 981-9350
Email: Linnes@oktlaw.com

Ottawa Agent for Counsel for the Intervener, Kee Tas Kee Now Tribal Council:

Marie-France Major
SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER, SAUGEEN FIRST NATION AND CHIPPEWAS OF NAWASH UNCEDED FIRST NATION:

Roger Townshend

Cathy Guirguis

Krista Nerland

Graeme Cook

OLTHIUS, KLEER TOWNSHEND LLP

250 University Ave., 8th Floor

Toronto, ON M5H 3E5

Telephone: (416) 981-9330

Fax: (416) 981-9350

Email: Linnes@oktlaw.com

Ottawa Agent for Counsel for the Intervener,
Saugeen First Nation and Chippewas of Nawash
Unceded First Nation:

Marie-France Major

SUPREME ADVOCACY LLP

100- 340 Gilmour Street

Ottawa, ON K2P 0R3

Telephone: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER, GRASSY NARROWS FIRST NATION:

Adrienne Telford

Lara Koerner-Yeo

Jackie Esmonde

CAVALLUZZO LLP

474 Bathurst Street, Suite 300

Toronto, ON M5T 2S9

Telephone: (416) 964-1115

Fax: (416) 964-5895

Email: atelford@cavalluzzo.com

COUNSEL FOR THE INTERVENER, ASSEMBLY OF FIRST NATIONS:

Stuart Wuttke

Adam Williamson

ASSEMBLY OF FIRST NATIONS

55 Metcalfe Street, Suite 1600

Ottawa, ON K1P 6L5

Telephone: (613) 241-6789 Ext: 228

Fax: (613) 241-5808

Email: swuttke@afn.ca

Ottawa Agent for Counsel for the Intervener,
Assembly of First Nations:

Maira Dillon

SUPREME LAW GROUP

1800 - 275 Slater Street

Ottawa, ON K1P 5H9

Tel: (613) 691-1224

Fax: (613) 691-1338

Email: mdillon@supremelawgroup.ca

**COUNSEL FOR THE INTERVENER, NAMAYGOOSISAGAGUN COMMUNITY
(WHO REFERS TO THEMSELVES AS THE NAMAYGOOSISAGAGUN OJIBWAY
NATION:**

Julian N. Falconer

FALCONERS LLP

10 Alcorn Avenue, Suite 204

Toronto, ON M4V 3A9

Telephone: (416) 964-0495 Ext: 222

Fax: (416) 929-8179

Email: julianf@falconers.ca

Ottawa Agent for Counsel for the Intervener,
Namaygoosisagagun Community (who refers to
themselves as the Namaygoosisagagun Ojibway
Nation:

Marie-France Major

SUPREME ADVOCACY LLP

100- 340 Gilmour Street

Ottawa, ON K2P 0R3

Telephone: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

TABLE OF CONTENTS

	Page
PART I - OVERVIEW AND STATEMENT OF FACTS	1
PART II - POINTS IN ISSUE.....	2
PART III - ARGUMENT	2
1. Indigenous Legal Traditions and Laws.....	2
2. Indigenous Legal Traditions and Laws must be included in the interpretation and implementation of historical Crown promises.....	3
3. How to include Indigenous Legal Traditions and Laws in the interpretation and implementation of historical Crown promises.....	7
4. The trial court properly considered Indigenous Legal Traditions and Laws	8
5. Conclusion	10
PART IV - COSTS	10
PART VII - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS.....	11

PART I - OVERVIEW AND STATEMENT OF FACTS

1. In this appeal, this Court has the opportunity to uphold the meaningful role of Indigenous Legal Traditions and Laws in the interpretation and implementation of historical promises made by the Crown to Indigenous Peoples.

2. In 1850, the Crown promised the Anishinaabe parties to the Robinson-Huron and Robinson-Superior Treaties (“the Treaties”) that it would pay a perpetual annuity in an amount to be augmented if the territory covered by the Treaties proved to be profitable (“the augmentation promise”).¹ The Anishinaabe and the Crown each understood this promise in the context of their respective cultures and legal systems. The Anishinaabe understood the augmentation promise as part of a larger commitment to an ongoing reciprocal relationship in which they agreed to share the land with newcomers, who in return promised to share the wealth the land produced with the Anishinaabe.² The Crown understood the augmentation promise as part of a just and liberal treaty designed to acquire access to Anishinaabe territory at a lower initial cost than previous treaties, with the potential of augmented future annuities.³ However, like many promises of the Crown throughout the history of colonization, the augmentation promise was more honoured in the breach.⁴ The Crown has ignored the augmentation promise since 1875,⁵ to the detriment of the Anishinaabe and the treaty relationship.

3. At stake in this appeal is the integrity and durability of Crown promises to Indigenous Peoples. Indigenous Peoples, and all Canadians, have an interest in knowing that when the Crown makes promises to Indigenous Peoples, whether through a treaty or through a unilateral undertaking to act in an Indigenous People’s best interests, Indigenous Peoples’ understanding of those promises in the context of their Legal Traditions and Laws will be respectfully considered.

4. These interveners are a coalition of the Union of British Columbia Indian Chiefs, the Nlaka’pamux Nation Tribal Council, Chawathil First Nation, High Bar First Nation, Neskonalith Indian Band, Penticton Indian Band, Skuppah Indian Band, and Upper Nicola Band (the

¹ *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 [Trial Reasons] at para 463.

² Trial Reasons at paras 220, 412-423, 453, 466-467.

³ Trial Reasons at paras 424-475.

⁴ *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*] at 1103.

⁵ Trial Reasons at para 1.

“Coalition”). The Coalition members have a long history of seeking legal redress for historical breaches of the Crown’s promises by pursuing specific claims through the settlement processes available under Canada’s Specific Claims Policy⁶ and adjudicative process available under the *Specific Claims Tribunal Act*.⁷ Resolving specific claims raises many of the same challenges as interpreting historical treaty promises, including how to ensure appropriate engagement with Indigenous Legal Traditions and Laws.

PART II - POINTS IN ISSUE

5. The Coalition will address the necessity of respectfully including Indigenous Legal Traditions and Laws in the interpretation and implementation of historical Crown promises to Indigenous Peoples.

PART III - ARGUMENT

6. We begin with a general explanation of Indigenous Legal Traditions and Laws, then turn to the questions of why and how they must be included in the judicial consideration of the Crown’s historical promises to Indigenous Peoples.

1. Indigenous Legal Traditions and Laws

7. The English terms “Indigenous Legal Traditions” and “Indigenous Laws” refer respectively to the diverse legal orders of Indigenous Peoples and to the laws within those legal orders. Indigenous Legal Traditions and Laws arise from the land, cultures, and languages of Indigenous Peoples, and were operating when common and civil law systems were imposed over what is now Canada. Despite the repudiated doctrine of discovery,⁸ colonization, and other Crown efforts to eradicate or suppress Indigenous Legal Traditions and Laws, they continue to operate today and in many places are being revitalized.⁹

⁶ “The Specific Claims Policy and Process Guide” (2021), online: *Government of Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629#chp4>>.

⁷ *Specific Claims Tribunal Act* SC 2008, c 22.

⁸ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [*Canada’s Indigenous Constitution*] at 17.

⁹ Canada, *The Final Report of the Truth and Reconciliation Commission of Canada: Canada’s Residential Schools: Reconciliation*, vol 6 (McGill-Queen’s University Press, 2015) [TRC Vol 6] at 46-47.

8. Indigenous Legal Traditions are not frozen in time. They are living legal orders within cultures that are continually evolving in response to changing circumstances and new challenges. Indigenous Legal Traditions are not uniform; rather, they reflect and sustain Indigenous Peoples' distinct cultures and values.¹⁰ Indigenous Legal Traditions contain rich resources, protocols, guidelines, and frameworks for reasoning, resolving disputes, structuring human relationships, and guiding human relations with the rest of Creation.¹¹

9. Sources of Indigenous Laws include sacred sources, the natural world, deliberative practices, positivistic proclamations, and customary law.¹² Indigenous Laws are often expressed in stories, songs, dances, feasts, ceremonies, oral histories, place names, and other formats that differ from the ways Western legal traditions express law.¹³

10. Canada is, and always has been, a multi-juridical nation.¹⁴ Indigenous Legal Traditions, together with common law and civil law traditions, form the legal foundation of this country.¹⁵

2. Indigenous Legal Traditions and Laws must be included in the interpretation and implementation of historical Crown promises

11. Indigenous Legal Traditions and Laws informed the Indigenous-Crown relationship from the outset, and remain a vital part of the Indigenous-Crown relationship. Indigenous Legal Traditions and Laws must be included when interpreting historical Crown promises,

¹⁰ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [*Recovering Canada*] at 3-4.

¹¹ Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 [*An Inside Job*].

¹² *Canada's Indigenous Constitution* at 23-58; see also Trial Reasons at para 21.

¹³ "A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes" (August 2018), online (pdf): *Union of BC Indian Chiefs Publications* <https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/1440/attachments/original/1571674607/A_New_Way_Forward.pdf?1571674607> [*A New Way Forward*] at 11; "The Work Ahead: Eliminating Canada's Conflict of Interest to Create a Fair, Legitimate Process" (18 December 2019), online (pdf): *Union of BC Indian Chiefs Publications* <https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/1440/attachments/original/1579565279/BC_SCWG_Submission_on_an_Independent_process.pdf?1579565279> [*The Work Ahead*] at 14.

¹⁴ TRC Vol 6 at 45-79; Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper prepared for the Continuing Legal Education Society of British Columbia, November 2012) at para 1.

¹⁵ *Recovering Canada* at c 1.

implementing them in the present, and achieving just and mutually acceptable redress for their breach. This Court's confirmation of the trial judge's findings informed by Anishinaabe perspectives, Laws and Legal Traditions is consistent with applicable jurisprudence, and will promote reconciliation, uphold the honour of the Crown, and comply with Canada's commitment to the *United Nations Declaration on the Rights of Indigenous Peoples*.¹⁶

(a) Indigenous Legal Traditions in Canadian jurisprudence

12. This Court's jurisprudence has confirmed that consideration of the Indigenous perspective is a requirement when adjudicating the rights of Indigenous Peoples,¹⁷ and has long recognized that this exercise includes a consideration of Indigenous Laws.¹⁸ Justice McLachlin described the recognition of Indigenous Laws as a "golden thread" running through the common law.¹⁹ Indigenous Legal Traditions and Laws are vitally relevant in the judicial interpretation of the content of the Crown's historical promises to Indigenous Peoples, including implementing those promises in a modern context and achieving redress for the breach of such obligations.

(b) Indigenous Legal Traditions and reconciliation

13. "Reconciliation" is a commitment to healing the damaged Indigenous-Crown relationship. The Truth and Reconciliation Commission, and this Court, have affirmed that reconciliation seeks to establish and maintain a mutually respectful, evolving relationship between Indigenous Peoples and Canada.²⁰ Reconciliation requires truth telling about the past; acknowledgement of the harm inflicted; apology and atonement for the causes; and action to

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61 295, UNGAOR, 61st Sess, Supp No 49, (2007) [UNDRIP].

¹⁷ *Sparrow* at 1112, *R v Marshall*; *R v Bernard*, 2005 SCC 43 [*Marshall*; *Bernard*] at para 128 citing John Borrows "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 173; *Williams Lake Indian Band v Canada*, 2018 SCC 4 at para 130; *R v Marshall*, [1999] 3 SCR 456 [*Marshall*] at para 19.

¹⁸ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 148, 157; *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at paras 40, 49-50; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 35; *Marshall*; *Bernard* at para 69.

¹⁹ *Van der Peet* at para 263, per McLachlin J., dissenting but not on this point.

²⁰ See *Southwind v Canada*, 2021 SCC 28 [*Southwind*] at para 55, *Beckman v Carmacks/Little Salmon*, 2010 SCC 53 at para 10, Canada, Truth and Reconciliation Commission, *What We Have Learned: Principles of Truth and Reconciliation* (2015) [Principles of Reconciliation] at 3-4; TRC Vol 6 at 3-4.

change behaviour.²¹ This Court has recognized reconciliation as the “fundamental objective of the modern law of aboriginal and treaty rights”.²² It is an “overarching goal”²³ that can be characterized as “righting the relationship” between Indigenous Peoples and Canada.²⁴

14. Ensuring the respectful inclusion of Indigenous Legal Traditions and Laws in all aspects of Indigenous-Crown relations, including the interpretation and implementation of historical Crown promises, is essential to the process of reconciliation.²⁵ Treaties are living obligations which flourish and grow, not legal artifacts that wither on the vine once their initial purpose for the Crown is spent. Treaties must be interpreted with reference to the perspective of the Indigenous treaty partners.²⁶ Indigenous Peoples understand treaty promises (and other historical Crown promises) in the context of their own Legal Traditions and Laws.

15. Righting the Indigenous-Crown relationship requires a radical shift away from the unilateralism and paternalism that has long characterized the Crown’s relations with Indigenous Peoples. The Crown cannot interpret its historical promises unilaterally, without engaging with the Indigenous People who received and relied on its promises in the context of their own Legal Traditions and Laws. Nor can the Crown unilaterally decide how to implement its promises and make redress today. Indigenous Peoples and Canada must together shape the processes through which historical Crown promises are interpreted and implemented, and redress for their breach is achieved.²⁷

16. When a dispute arises between the Crown and Indigenous Peoples regarding whether the Crown has met its legal obligations, an inclusive, respectful dispute resolution process which allows for revitalizing and respecting Indigenous Legal Traditions and Laws will help restore balance to the relationship. If Indigenous Legal Traditions and Laws are included in the interpretation of historical Crown promises and in shaping determinations on how to achieve

²¹ TRC Vol 6 at 3, 16, 19

²² *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.

²³ *Southwind* at para 55.

²⁴ *The Work Ahead* at 15.

²⁵ TRC Vol 6 at 45-55, 67-70; *Principles of Reconciliation* at 4.

²⁶ *Marshall* at para 19.

²⁷ TRC Vol 6 at 48-49.

redress for a breach and implement those promises into the future, the process will gain legitimacy and contribute to reconciliation.

(c) Indigenous Legal Traditions and the honour of the Crown

17. The honour of the Crown is a governing principle of treaty making and implementation.²⁸ It requires the Crown to take a broad, purposive interpretation of the promises it makes to Indigenous Peoples.²⁹ This requires considering the intended purpose of a historical treaty promise, and how the Crown ought to act to fulfill that promise in light of its purpose.³⁰ Such an approach must include a consideration of the promise from the perspective of the Indigenous People to whom the promise was made, which includes understanding the promise in the context of the people's culture, Legal Traditions and Laws. The honour of the Crown requires no less.

(d) Indigenous Legal Traditions and UNDRIP

18. The *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") articulates broadly accepted human rights norms that constitute the minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the world.³¹ The Truth and Reconciliation Commission has affirmed that UNDRIP must be the framework for reconciliation at all levels and across all sectors of Canadian society.³² UNDRIP, which was adopted by the Government of Canada and affirmed by legislation as having application in Canadian law, articulates legal norms that inform treaty interpretation.³³

19. UNDRIP requires that disputes between states and Indigenous Peoples be resolved in a way that considers Indigenous Laws. Article 27 outlines the need to create processes to address outstanding grievances between Indigenous Peoples and states, which would include unfulfilled treaty promises, that "[give] due recognition to indigenous peoples' laws, traditions, customs and land tenure systems."³⁴ Article 40 recognizes that Indigenous Peoples have the right to prompt

²⁸ *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis*] at para 73(3).

²⁹ *Manitoba Metis* at para 75.

³⁰ *Manitoba Metis* at para 73(4).

³¹ UNDRIP, Art 43.

³² *Principles of Reconciliation* at 3.

³³ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s. 4.

³⁴ UNDRIP Art 27

decisions through just and fair procedures for the resolution of conflicts and disputes with states or other parties, which decisions “shall give due consideration to the customs, traditions, rules, and legal systems of the indigenous peoples concerned and international human rights.”³⁵

20. Disputes regarding treaty interpretation and implementation—matters foundational to the relationship between Indigenous Peoples and the Crown—must be resolved in a manner consistent with the human rights norms reflected in UNDRIP. UNDRIP rejects unilateral, imposed, and assimilationist approaches. Instead, it requires that Indigenous Legal Traditions be recognized and considered in resolving disputes between Indigenous Peoples and states.

3. How to include Indigenous Legal Traditions and Laws in the interpretation and implementation of historical Crown promises

21. To include Indigenous Legal Traditions and Laws in the interpretation and implementation of historical Crown promises, adjudicators, including Canadian courts, are required to recognize and respectfully consider Indigenous Legal Traditions and Laws.

22. Recognition of Indigenous Legal Traditions and Laws requires understanding their diversity and specificity, which must be honoured to avoid falling into inappropriate stereotypes of pan-Indigeneity.³⁶ Respectful recognition also requires awareness of the various sources of Indigenous Law, and of the fact that different Indigenous Legal Traditions have different ways of achieving justice and redress.

23. Recognition is necessary, but not sufficient, for the fair and balanced interpretation and implementation of a historical Crown promise. Courts must also respectfully include Indigenous Legal Traditions and Laws in their deliberations. Given Canada’s long history of denial and suppression of Indigenous Legal Traditions and Laws, and the current reality that most lawyers and judges have not received substantive training in Indigenous Legal Traditions, respectful consideration of Indigenous Laws requires more than the good will and open-mindedness of individual judges and lawyers (although these are important elements).³⁷

³⁵ UNDRIP Art 40.

³⁶ A New Way Forward at 14, The Work Ahead at 11.

³⁷ A New Way Forward at 12; An Inside Job, at 739-740, 748.

24. Respectful consideration of Indigenous Legal Traditions requires courts to make a concerted effort to understand the context in which that Legal Tradition exists. A particular Indigenous Legal Tradition is intertwined with the land, language, culture, and worldview of the Indigenous Nation to which it belongs.³⁸ Gender is a relevant consideration, as Indigenous women and men often hold different traditional knowledge, including with respect to Indigenous Laws.³⁹ As the trial judge in this matter experienced, the richest education comes from immersive learning experiences on the land and in the communities of Indigenous Peoples whose Laws are at issue.⁴⁰ While land-based learning may be out of reach for many courts, there is no shortcut past the humility, patience, time, and effort that is required of an outsider to an Indigenous culture to learn about Indigenous Laws.⁴¹

4. The trial court properly considered Indigenous Legal Traditions and Laws

25. A review of the reasons for judgment reveals that the trial judge gave respectful attention to the Legal Traditions and Laws of the Anishinaabe parties to the Treaties.⁴² The trial judge created space for Anishinaabe Law within the trial process and invested time to understand the evidence shared with her regarding the Anishinaabe worldview.⁴³ She recognized that resolution must be ongoing⁴⁴—a key component⁴⁵ of many Indigenous Legal Traditions⁴⁵—and she took an expansive view of what constitutes valid evidence.⁴⁶

26. The trial judge took her responsibility to include the Legal Traditions and Laws of the Anishinaabe treaty parties seriously. Over the course of stage one of this action, the trial judge

³⁸ A New Way Forward at 18; *Canada's Indigenous Constitution* at 23-24.

³⁹ Gunn, Brenda L., "Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (Waterloo: Centre for International Governance Innovation, 2019) [*Braiding Legal Orders*] at 34-36.

⁴⁰ Askew, Hannah, "UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders" in *Braiding Legal Orders* at 87.

⁴¹ *Ibid* at 190. Lindsay Borrows, "Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149.

⁴² Trial Reasons at para 13.

⁴³ Trial Reasons at paras 19-61, 601-611.

⁴⁴ Trial Reasons at para 465.

⁴⁵ A New Way Forward; The Work Ahead.

⁴⁶ Trial Reasons at para 12.

had the opportunity to learn about Anishinaabe Law from Elders, expert witnesses, and other skilled teachers, both through evidence presented in court and through immersive experiences on the land and in community.⁴⁷ The trial judge analyzed the common intentions of the Treaty parties in light of the principles of Anishinaabe Law she had learned, including the principles of respect, responsibility, reciprocity, and renewal.⁴⁸

27. The trial judge held that the Anishinaabe parties to the Treaties understood the purposes behind the Treaties' promises in the context of their own Laws and systems of governance, which centre around the animating concepts of *pimaatiziwin* (life, everything is alive and sacred) and *gizhewaadiziwin* (the way of the Creator).⁴⁹ Anishinaabe Laws and governance foreground principles of reciprocity, respect, responsibility, and renewal.⁵⁰ The trial judge described the evidence of Anishinaabe Law this way:

From the Anishinaabe perspective, all of creation sustains, teaches, and heals the humans, the animals, and the plants in a web of interdependence. In return, the Anishinaabe accept responsibility for the land to ensure that it, and the rest of creation, can thrive.⁵¹

28. The trial judge heard evidence that Anishinaabe Law was a vital and dynamic force during the negotiation of the Treaties. Together with the common law, it shaped the format and content of the negotiations and formed a benchmark against which the Anishinaabe parties assessed the acceptability of the Treaties.⁵² The Crown, as represented by William Robinson, understood this, and participated in the protocols, metaphors, and ceremonies of Anishinaabe Law that had come to characterize Great Lakes diplomacy in the nineteenth century.⁵³

29. The trial judge interpreted the meaning of the Treaties' augmentation promise by drawing on the Crown perspective and the Anishinaabe perspective on that promise. She heard evidence and made findings that the Anishinaabe parties understood the augmentation promise in the

⁴⁷ Trial Reasons at paras 8-10, 601-611, see also *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at para 569 per Hourigan J.

⁴⁸ Trial Reasons at paras 395-397, 411-423.

⁴⁹ Trial Reasons at para 21.

⁵⁰ Trial Reasons at paras 412-423.

⁵¹ Trial Reasons at para 60.

⁵² Trial Reasons at paras 43-61, 412-423, 463-475.

⁵³ Trial Reasons at para 214, see also paras 46-55, 62-9

context of their Legal Tradition and Laws.⁵⁴ In doing so, the trial judge followed the correct approach to treaty interpretation. The Coalition agrees with the Anishinaabe respondents that a deferential standard of review is appropriate for the trial judge's findings.

5. Conclusion

30. The respectful inclusion of Indigenous Legal Traditions and Laws in the interpretation and implementation of historical Crown promises is required by the jurisprudence of this Court, and essential to foster reconciliation, uphold the honour of the Crown, and comply with UNDRIP. Giving due weight and respectful consideration to Indigenous Legal Traditions and Laws when interpreting historical Crown promises, including treaty promises, promotes just outcomes. Such judicial considerations must be meaningful and in good faith with the intention of reaching outcomes that reflect the multi-juridical nature of Canada.

31. Respect for Indigenous Legal Traditions is demonstrated through recognition of, and sincere intellectual engagement with, these traditions as bodies of law to be considered, analyzed, debated, and learned from.⁵⁵ By respecting and recognizing Indigenous Legal Traditions and Laws as vital to the interpretation and implementation of historical Crown promises in a modern context, including the required redress for their breach, Canadian courts uphold the integrity and durability of Crown promises to Indigenous Peoples in a manner that supports reconciliation and a just and pluralistic society.

PART IV - COSTS

32. The Coalition seeks no costs and requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February, 2023.



Peter Millerd



Brenda Gaertner



Erica Stahl

Counsel for the Interveners the Union of British Columbia Indian Chiefs, Nlaka'pamux Nation Tribal Council, Chawathil First Nation, High Bar First Nation, Neskonlith Indian Band, Penticton Indian Band, Skuppah Indian Band, and Upper Nicola Band

⁵⁴ Trial Reasons at paras 395-397, 411-475.

⁵⁵ An Inside Job, at 733-734, 738.

PART VII – TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

	Paragraph
Cases	
<u>Beckman v Carmacks/Little Salmon, 2010 SCC 53</u>	13
<u>Delgamuukw v British Columbia, [1997] 3 SCR 1010</u>	12
<u>Manitoba Metis Federation Inc v Canada (Attorney General), 2013 SCC 14, [2013] 1 SCR 623</u>	17
<u>Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69</u>	13
<u>R v Marshall, [1999] 3 SCR 456</u>	14
<u>R v Marshall; R v Bernard, 2005 SCC 43</u>	12, 14
<u>R v Sparrow, [1990] 1 SCR 1075</u>	2, 12
<u>R v Van der Peet, [1996] 2 SCR 507</u>	12
<u>Restoule v Canada (Attorney General), 2018 ONSC 7701</u>	1, 2, 9, 25, 26, 27, 28, 29
<u>Restoule v Canada (Attorney General), 2021 ONCA 779</u>	26
<u>Southwind v Canada, 2021 SCC 28</u>	13
<u>Tsilhqot'in Nation v British Columbia, 2014 SCC 44</u>	12
<u>Williams Lake Indian Band v Canada, 2018 SCC 4</u>	12
Statutes	
<u>Specific Claims Tribunal Act SC 2008, c 22</u>	4
<u>United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14, s. 4</u>	18
Other Authorities	
<u>Askew, Hannah, “UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders” in John Borrows et al, eds, Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples, (Waterloo: Centre for International Governance Innovation, 2019)</u>	24
Borrows, John, <i>Canada’s Indigenous Constitution</i> (Toronto: University of Toronto Press, 2010)	7, 9, 24

	Paragraph
<u>Borrows, John “Creating an Indigenous Legal Community” (2005) 50 McGill LJ 153</u>	12
<u>Borrows, John <i>Recovering Canada: The Resurgence of Indigenous Law</i> (Toronto: University of Toronto Press, 2002)</u>	8, 10
<u>Borrows, Lindsay “Dabaadendiziwin: Practices of Humility in a Multi-uridical Legal Landscape” (2016) 33:1 Windsor YB Access Just 149</u>	24
<u>Canada, <i>The Final Report of the Truth and Reconciliation Commission of Canada: Canada’s Residential Schools: Reconciliation</i>, vol 6 (McGill-Queen’s University Press, 2015)</u>	7, 10, 13, 14, 15
<u>Canada, Truth and Reconciliation Commission, <i>What We Have Learned: Principles of Truth and Reconciliation</i> (2015)</u>	13, 14, 18
<u>Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (Paper prepared for the Continuing Legal Education Society of British Columbia, November 2012)</u>	10
<u>Gunn, Brenda L., “Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples” in John Borrows et al, eds, <i>Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples</i>, (Waterloo: Centre for International Governance Innovation, 2019)</u>	24
<u>Napoleon, Val & Friedland, Hadley “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725</u>	8, 24
<u>A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes” (August 2018), online (pdf): <i>Union of BC Indian Chiefs Publications</i></u>	9, 22, 23, 24, 25
<u><i>United Nations Declaration on the Rights of Indigenous Peoples, A Res 61 295, UNGAOR,61st Sess, Supp No 49, (2007)</i></u>	11, 18, 19, 19
<u>“The Work Ahead: Eliminating Canada’s Conflict of Interest to Create a Fair, Legitimate Process” (18 December 2019), online (pdf): <i>Union of BC Indian Chiefs Publications</i></u>	9, 13, 22, 25