CITATION: Restoule v. Canada (Attorney General), 2018 ONSC 7701
COURT FILE NO.: C-3512-14 & C3512-14A and
COURT FILE NO.: 2001-0673
DATE: 20181221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Court File No.: C-3512-14 & C3512-14A	
MIKE RESTOULE, PATSY CORBIERE, DUKE PELTIER, PETER RECOLLET, DEAN SAYERS and ROGER DAYBUTCH, on their own behalf and on behalf of ALL MEMBERS OF THE OJIBEWA (ANISHINAABE) NATION WHO ARE BENEFICIARIES OF THE ROBINSON HURON TREATY OF 1850 Plaintiffs	Joseph J. Arvay Q.C., David C. Nahwegahbow, Catherine Boies Parker Q.C., Dianne G. Corbiere, Christopher Albinati, Donald L. Worme Q.C., Scott Robertson and Jim Ratis, for the Plaintiffs.
– and –	
THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	Owen Young, Michael McCulloch, Barry Ennis and Scott Warwick, for the Defendant The Attorney General of Canada. Michael R. Stephenson, Peter Lemmond, Sarah Valair and Christine Perruzza for the Defendant The Attorney General of Ontario.
THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION Third Parties	Harley Schachter and Kaitlyn Lewis, for the Third Parties.
-AND-	

Court File No.: 2001-0673	
THE CHIEF and COUNCIL OF RED ROCK FIRST NATION, on behalf of the RED ROCKFIRST NATION BAND OF INDIANS, THE CHIEF and COUNCIL of the WITHESAND FIRST NATION on behalf of the WHITESAND FIRST NATION BAND OF INDIANS Plaintiffs	Harley Schachter and Kaitlyn Lewis, for the Plaintiffs.
– and –	
THE ATTORNEY GENERAL OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and the ATTORNEY GENERAL OF ONTARIO as representing HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendants	Owen Young, Michael McCulloch, Barry Ennis and Scott Warwick, for the Defendant The Attorney General of Canada. Michael R. Stephenson, Peter Lemmond, Sarah Valair and Christine Perruzza for the Defendant The Attorney General of Ontario
	HEARD: September 25, 26, 27, October 2, 3, 4, 5, 10, 11, 12, 16, 17, 18, 19, 24, 25, 26, 27, 30, 31, November 1, 2, 3, 6, 7, 8, 9, 10, 14, 15, 16, 17, 27, 28, 29, 30, December 11, 12, 13, 14, 2017, January 10, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, February 5, 6, 7, 8, 13, 14, March 5, 6, 7, 8, 9, 12, 13, 14, 15, June 4, 5, 6, 7, 13, 14, 15, 18, 19, 20, 22, 2018.

P.C. HENNESSY, J.

REASONS FOR JUDGMENT – STAGE ONE

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REASONS FOR JUDGMENT – STAGE ONE

I. INTRODUCTION

[1] In 1850 in Bawaating, near Sault Ste. Marie, Ontario, the Anishinaabe of the upper Great Lakes region signed two historic Treaties with the Crown, the Robinson Huron Treaty and Robinson Superior Treaty, that provided for a land cession of a vast territory in Northern Ontario.[1] The Crown paid a lump sum up front and promised to pay a perpetual annuity to the Anishinaabe, to be increased subject to certain conditions. The annuity has not been increased since 1875 when it was set at $4 per person. The nature of the annuity and the conditions under which increases are to be made are the subject of this litigation.

[2] The Plaintiff First Nations ask the court to interpret the Treaties' long-forgotten promise to increase the annuities according to the common intention that best reconciles the interests of the parties at the time the Treaties were signed. This interpretive task requires an appreciation of the Anishinaabe and Euro-Canadian perspectives, the history of the parties' cross-cultural shared experience, and the Crown's duty of honourable dealings with Indigenous peoples.

[3] I find that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant. The economic circumstances will trigger an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss. The principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown the obligation to diligently implement the Treaties' promise to achieve their purpose (*i.e. of reflecting the value of the territories in the annuities*) and other related justiciable duties.

[4] While there may be steps within the implementation process where the Crown has discretion, this discretion must be exercised honourably and with a view to fulfilling the Treaties' promise. The discretion is not unfettered and is subject to review.

A. Procedure of the Trial and Nature of the Evidence

[5] Both the Huron and Superior Plaintiffs have proceeded by separate actions seeking declaratory and compensatory relief related to the interpretation, implementation, and alleged breach of the Treaties' annuity provisions. The two actions are being tried together. Although the trial is a single whole, it has been split into three stages to render it practicable to try the many issues raised by the claims and defences.

[6] The Plaintiffs were granted leave to proceed in Stage One by way of summary judgment motion in which they extracted specific subjects from their pleaded claims. Applying the

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[1] A transcription of the Robinson Huron Treaty and Robinson Superior Treaty can be found at Appendix "A" and Appendix "B" of this judgment, respectively.

Rules of Civil Procedure[2] and the principles expressed in *Hryniak v. Mauldin*,[3] the court directed that Stage One evidence be adduced through a combination of affidavits, expert reports, and *viva voce* testimony.

[7] The two summary judgment motions put a central issue and a series of sub-issues before the court. The Plaintiffs move for a declaration that, considered apart from the pleaded defences based on statutes of limitation, *res judicata*, laches, and acquiescence, since 1850 the Crown has been and remains legally obligated under the Robinson Huron and Superior Treaties of 1850 to increase the annuities under the Treaties from time to time if the territories subject to the Treaties produced or produce an amount which would enable the Crown to do so without incurring loss, and that the size of the increase to the annuities is not limited to an amount based on £1 (equivalent to $4) per person.

[8] The parties put the Anishinaabe and Euro-Canadian perspective before the court through eighteen witnesses: eleven qualified experts, who all filed extensive reports, sometimes representing years of academic study and investigation, four Elders, and three Chiefs. The areas of expertise included: history, ethno-history, economic history, Indigenous legal orders, and Anishinaabe linguistic and cultural practices and forms.

[9] I have relied on the following expert witnesses throughout this decision: Dr. Paul Driben,[4] Ms. Gwynneth Jones,[5] Mr. James Morrison,[6] Mr. Alan Corbiere,[7] Dr. Heidi Bohaker,[8] Dr.

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[2] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[3] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.
[4] **Dr. Paul Driben**, ethnohistorian qualified as an expert in Anishinaabe cultural traditions, on the details of the Anishinaabe historical use and occupancy of the land, in cross-cultural understandings of both the Anishinaabe and non-Anishinaabe/Crown actors in the treaty-making process.
[5] **Ms. Gwynneth Jones**, historian qualified as having expertise with respect to the interpretation of historical documents, the interpretation of the interaction between the Canadian government and Aboriginal peoples.
[6] **Mr. James Morrison**, ethnohistorian qualified as an expert on the Robinson Treaties, with expertise in treaty-making and land settlement in the context of treaty-making in what is now Ontario and qualified to give expert evidence on the social, political, and historical context bearing on the negotiation and 19th century implementation of the Robinson Treaties of 1850, including Indigenous-Crown relations and Anishinaabe history and culture.
[7] **Mr. Alan Corbiere**, ethnohistorian qualified as an expert in the oral history and written record of the wampum and Covenant Chain relationship between the Anishinaabe and the Crown from the Anishinaabe perspective during the 18th and 19th centuries.
[8] **Dr. Heidi Bohaker**, historian and ethnohistorian qualified as an expert in the principles of Anishinaabe governance, doodemag, alliances, and treaty-making, with a specific expertise in the Anishinaabe cultural and political contexts that may have informed Anishinaabe expectations of treaty-making with the Crown and the Colonial Government.

Heidi Kiiwetinepinesiik Stark,[9] Dr. Carl Beal,[10] Dr. Alain Beaulieu,[11] Dr. Douglas McCalla,[12] Mr. Jean-Philippe Chartrand,[13] and Dr. von Gernet.[14]

[10] In addition to these experts, the court had the privilege of listening to Elders and Chiefs who further described the political, cultural, historical, and linguistic traditions of the Anishinaabe.[15] To a great extent, this historical evidence was not controversial. Where I have attributed a certain description to one witness, it does not mean that this person was the sole source of this information. At trial, many witnesses covered the same topics.

[11] The parties filed a joint book of approximately 30,000 pages of primary sources (the "Joint Book of Primary Documents") and possibly the same volume of secondary source material (the "Joint Book of Secondary Documents"). The collection of material filed may well be the most comprehensive collection of historic and cultural material ever amassed on the making of the Robinson Treaties and the life and history of the Anishinaabe who occupied and were active on the north shores of Lake Huron and Lake Superior in the 19th century.

[12] There were very few disputes concerning the admissibility of evidence. The parties exchanged expert reports well before the hearing commenced. All parties showed a keen appreciation of the need to provide the court with the best possible evidence, sometimes making new transcriptions of hand-written primary documents during the course of the hearing. There was no disagreement that all types of evidence, if relevant and depending on cogency, had value. Evidence was not discounted because it came from an unusual source. The evidence of both the Anishinaabe perspective and the Euro-Canadian perspective came before the court on equal footing.[16] It was understood that the Plaintiffs had the burden, on the basis of persuasive evidence, to establish their claim on a balance of probabilities.

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[9] **Dr. Heidi Kiiwetinepinesiik Stark**, political scientist qualified with expertise in Anishinaabe jurisprudence and the application of laws through stories and metaphors to direct diplomacy and governance of Anishinaabe nations in their relations and treaty-making with the Crown and US Governments.

[10] **Dr. Carl Beal**, economist and economic historian qualified as an expert on the economic aspects of historical treaties, including treaties in what is now Ontario.

[11] **Dr. Alain Beaulieu**, ethnohistorian qualified to give evidence on agreements and events between the British, French, and Indigenous people from a colonial and Quebec perspective, with a particular emphasis on Indigenous-European relations in the first era of New France and the first decades of the British regime after 1763.

[12] **Dr. Douglas McCalla**, University Professor Emeritus at the University of Guelph, qualified as an expert with respect to the social and economic history of Upper Canada/Ontario in the mid-19th century.

[13] **Mr. Jean-Philippe Chartrand**, anthropologist and ethnohistorian qualified to provide opinion evidence regarding the intentions and understandings of the parties to the Robinson Treaties and related historical events both before and after the making of the Treaties.

[14] **Dr. Alexander von Gernet**, anthropologist and ethnohistorian qualified to provide opinion evidence with respect to the historical context for the making of the Robinson Treaties, including mining in the upper Great Lakes region in the 1840s, the history of early land treaties in present-day Ontario and northern United States, history of the formation of the Robinson Treaties, including the objectives and understandings of the Anishinaabe and Crown actors as reflected in this historical record.

[15] Elder Fred Kelly, Elder Rita Corbiere, Elder Irene Stevens, and Elder Irene Makedebin, as well as Chief Dean Sayers, Chief Duke Peltier, and Chief Angus Toulouse all gave testimony in this case.

[16] See *Mitchell v. Minister of Natural Revenue*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 39.

[13] The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective. The Plaintiffs did not ask the court to apply Anishinaabe law. Rather, the Plaintiffs and Canada submit that the court should take respectful consideration of Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis.

[14] I begin with a description of Anishinaabe political and social structures pre-contact and Anishinaabe life as documented post-contact with Europeans who arrived in this part of the world. I then outline the events leading up to the negotiations of the Robinson Treaties, from the issuance of the *Royal Proclamation* of 1763 to the Vidal-Anderson Commission in 1849. Finally, I examine the events immediately preceding the Treaty Council of 1850, the Treaty Council itself, and the events following the Treaty Council into the early 20th century. This history is necessary for the interpretation of the Robinson Treaties in their full historical, cultural, linguistic, and political context, as required by the Supreme Court of Canada.[17]

II. WHO WERE THE ANISHINAABE OF THE UPPER GREAT LAKES REGION?

[15] The beneficiaries of the Robinson Huron Treaty and Robinson Superior Treaty ("the Robinson Treaties" or "the Treaties") are known as the Anishinaabe of the upper Great Lakes. They live on the north shores of Lake Huron and Lake Superior. The Robinson Huron Treaty beneficiaries are members of 21 First Nations who reside on and off reserve. Current communities in the Robinson Huron Treaty territory include Sault Ste. Marie, Sudbury, Killarney, Manitoulin Island, Temiskaming Shores, and North Bay.

[16] The Robinson Superior Treaty beneficiaries reside along the eastern and the northern shores of Lake Superior. The Robinson Superior Treaty territory includes the current communities of Thunder Bay, Nipigon, Armstrong, and Wawa. Red Rock First Nation and Whitesand First Nation are two of the First Nations within the Robinson Superior Treaty territory; they are situated close to the communities of Nipigon and Armstrong, respectively.

[17] In earlier times, the Indigenous peoples along the two northern Great Lakes were known generally as the Ojibwe (or its variants Chippewa or Chippeway).[18] They spoke various dialects of Anishinaabemowin, the language of the Anishinaabe.

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[17] See *R v. Marshall*, [1999] 3 S.C.R. 456, at para. 11. The political, cultural, historic, and linguistic framework for the negotiations of the Robinson Treaties developed over more than a century of interactions between European newcomers and the Anishinaabe of the upper Great Lakes. The recorded history from European settlors of Anishinaabe culture begins as early as 1632 with the Jesuits.

[18] In the mid-1800s, there were Odawas and Potawatomis resident on Manitoulin Island; however, most the Indigenous people along the two northern Great Lakes were Ojibwe. "Chippewa" is used primarily in the United States and southern Canada. I use "Anishinaabe", as it is the name used by the people themselves and adheres to contemporary scholarly practices; further, the language of the trial used the term "Anishinaabe". I use the current reigning Anishinaabe orthography, which is called "double vowel" or the "Fiero System": see Bohaker Testimony, Final Transcript (November 7, 2017), Vol. 25: 3538.

[18] The Anishinaabe of the upper Great Lakes occupied and harvested over a territory from the vicinity of present-day Thunder Bay and the international border eastward to Lake Temiskaming, which marked the border between Upper and Lower Canada. The northern boundary extended along the height of land above Lake Huron and Lake Superior, from where the rivers drained into James Bay or Hudson Bay. Beyond lay Rupert's Land, the Charter territory of the Hudson's Bay Company ("HBC" or "the Company").[19]

A. 1700 – 1850

[19] In this section, I briefly describe the key features of Anishinaabe political and social organization and governance, and the practices of gift giving, reciprocity, and sharing of territory in existence prior to and following the signing of the Robinson Treaties in 1850. Throughout these descriptions, I refer briefly to metaphors that the Anishinaabe used in their speeches, arising from their ancient practices and values.

i. Governance

[20] The Anishinaabe were organized in bands and occupied discrete territories that bands considered their communal property.[20] Historically, the bands relocated annually, moving between smaller groups in the winter for hunting and coming together in larger gatherings in the spring and fall at council sites to conduct politics and engage in large scale social events.[21]

[21] Like all organized societies, the Anishinaabe had their own system of governance that included governing laws and principles. The principles of governance were based on sacred laws, among other sources. According to Elder Fred Kelly, two of the organizing principles of Anishinaabe law and systems of governance were *pimaatiziwin* (life), where everything is alive and everything is sacred, and *gizhewaadiziwin* (the way of the Creator), which encompasses the seven grandfather teachings or seven sacred laws of creation.[22] Dr. Stark testified that Anishinaabe governance also included the values of trust, responsibility, reciprocity, and renewal, and the understanding that the world is deeply interconnected and people must rely on one another to thrive.[23]

[22] The metaphor of *ishkode* (fire) is central to Anishinaabe governance and politics. Accounts of Anishinaabe interactions with Europeans from the earliest days of the 17th century include references to fire as part of the diplomatic discourse. In the broader Great Lakes region, fire was a metaphorical term that could refer to the place where a family lived

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[19] See "A Map of the Province of Upper Canada describing all the new Townships, Settlements, etc.", dated 1838, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0263; "Map of Lake Huron", dated August 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0634; "Map of Lake Superior", dated August 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0635.
[20] See Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 3.
[21] Bohaker Report, Trial Exhibit 032, at para. 7.
[22] Elder Kelly Testimony, Final Transcript (November 1, 2017), Volume 21: 2866 – 2867, 2934.
[23] Stark Testimony, Final Transcript (November 10, 2017), Vol. 28: 4033 – 4036, 4038.

(where smoke arose), to any small gathering of several extended families, to large confederacies of multiple smaller fires, or, more broadly, to a nation or people.

[23] The Anishinaabe also used the metaphor of fire to refer to councils of varying purposes, sizes, and compositions. The term "council fire" referred to a physical location where meetings were held, around which delegates sat. Council fires were ignited to host others with the aim of making decisions and agreements. According to Dr. Bohaker, Anishinaabe governance operated as a complex network of common and regional council fires (*ishkode*) that were hosted by an *Ogimaa* (Chief, leader).[24]

[24] Common and regional council fires denoted different levels of governance. Common councils handled a wide range of matters, including the settlement of internal and external disputes and transactions. General or regional councils, in contrast, brought people together from a much wider region to coordinate strategies, plan for concerted action, or make alliances.

[25] Council fires also functioned as a potent source of Anishinaabe political metaphor: new council sites were "kindled"; when council sessions ended the fire was "covered"; and when a council site was abandoned, the fire was said to be put out.[25]

[26] Like *ishkode*, the concept and qualities of Anishinaabe leadership were intertwined in the system of Anishinaabe governance. The Anishinaabe identified and recognized their leaders as *Ogimaa*. Each council fire had an *Ogimaa* (Chief, leader) from a specific doodem who was charged with the responsibility of keeping the fire and, by extension, hosting the council.

[27] Those who became *Ogimaa* had to demonstrate a record of accomplishments in other roles first, perhaps as a warrior or hunter, therefore meeting the test of being a good provider or exhibiting an ability to protect their people.

[28] Above all else, Anishinaabe leaders were expected to be generous "good leaders would accumulate [material] wealth in order to give it away".[26] Within the Anishinaabe worldview, generosity, care for the land and others, and commitment to provide for one's people were foundational to political authority. Dr. Stark described the root of the word *Ogimaa* as "those who I am responsible for".[27]

[29] Europeans also recognized Anishinaabe *Ogimaa*. When it was necessary to determine how the newcomers would settle what is now Canada, Crown representatives carried out their discussions with Anishinaabe Chiefs (*Ogimaa*) and principal men.

[30] In the Anishinaabe worldview, being recognized as an *Ogimaa* was not equated with authority. The term *Ogimaa* captured a concept of Anishinaabe leadership that embodied

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[24] Bohaker Report, Trial Exhibit 032, at paras. 11 – 16.
[25] *Ibid*, at para. 8.
[26] *Ibid*, at para. 76.
[27] Stark Report, Trial Exhibit 040, at para. 89.

principles of responsibility to and respect for the autonomy of others, as demonstrated through deliberative and consensus-based processes. *Ogimaa* did not assert authority over something or someone; rather, an *Ogimaa* sought to achieve consensus among their people. Anishinaabe leaders had no authority over other groups and could not sign treaties on behalf of other polities or even their own people without consent.[28]

[31] Dr. Bohaker testified that the continuity of the Anishinaabe system of governance over the Treaties' territories is evident from the longstanding protocols, practices, ceremonies, and traditions that dictated how the Anishinaabe chose their leadership, recognized the territories of specific communities or council fires, and reached consensus-based decisions about the use of their lands and resources.[29] The longstanding and continuous use of Anishinaabe place names, as evidenced from a comparison of place names ascribed on 17th century and 19th century maps, also illustrates the continuity of Anishinaabe governance.[30]

[32] Within the Anishinaabe system of governance, bands could negotiate the shared use of land and resources. The Anishinaabe had an established tradition of sharing their territory with others, provided that the use or occupation was authorized. Outside the established protocols for sharing territory, however, the Anishinaabe were "exceedingly strict" in regard to unauthorized intrusion in their territory.[31]

ii. Who was Chief Shingwaukonse?

[33] Chief Shingwaukonse, or Little Pine as he was also known, assumed a lead political role on behalf of the Anishinaabe of the territory north of Lake Huron. He was a key player in the principal events leading up to the Robinson Treaties, including the Treaty Council itself.

[34] Chief Shingwaukonse was, and is, recognized as a shrewd, experienced, and persuasive leader. He was a decorated Anishinaabe warrior who fought with distinction in the War of 1812 on the side of the British. Before that war, he had emerged as "a meta, a wabeno, a counselor, a war chief, and an orator or speaker" with strong personal alliances across the territory, in the military, the churches, and the civil society.[32]

[35] Chief Shingwaukonse fulfilled the primary requirements of an Anishinaabe leader: significant personal achievement coupled with a responsibility for others, as shown by his steadfast and persistent pressing of claims all the way up to the highest representative of

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[28] See Elder Kelly Testimony, Final Transcript: 2917 – 2918; 2998 – 3000; Bohaker Report, Trial Exhibit 032, at para. 74.
[29] Bohaker Testimony, Final Transcript (November 3, 2017), Vol. 23: 3114 – 3140.
[30] The place names ascribed on 17th century maps made by Jesuit Louis Nicolas are consistent with the territories of Common Councils identified on the maps of the province of Canada made by representatives of the Colonial Government in 1849.
[31] Driben Report, Trial Exhibit 003, at pp. 34 – 35.
[32] Henry Rowe Schoolcraft, *Personal Memoir of Thirty Years Residence with Indian Tribes on the American Frontier* (Philadelphia: Lippincott, Grambo and Co., 1851), at p. 110, Joint Book of Secondary Documents, Trial Exhibit VV-SEC-0017.

the Crown, the Governor General. As a skilled political negotiator,[33] he went out of his way to develop personal relationships with senior Crown officials. He travelled to Toronto and Montreal to make personal visits to the Lieutenant Governor and the Governor General.

[36] After the War of 1812, Chief Shingwaukonse and his followers settled at Ketegaunseebee, also known as Garden River.[34] His speeches, memorials, and petitions provide some of the clearest expressions of the intentions, visions, and frustrations of the Anishinaabe during the changing times of the mid-1800s.

[37] In the face of incursions by newcomers, Chief Shingwaukonse addressed petitions and memorials repeating his claims to the rights and authority that flowed from the Anishinaabe's ancient occupation of the territory, as well as his desire for compensation for the collective benefit of his band.[35]

[38] Chief Shingwaukonse was a leader with a vision for his people. He recognized that times were changing and that it would take new and creative strategies to preserve and sustain his people's cherished way of life.[36] He pressed for a settlement of Anishinaabe claims and focused on plans for self-determination and self-sufficiency for his people.

iii. Kinship and Doodem Identity

[39] Doodem identity defined Anishinaabe families and polities by creating kin. However, doodem was a kinship category much broader than the European notion of family, both extended and immediate. Doodem identity created a sense of connection between those who had the same doodem, regardless of whether they knew one another or had any biological connection at all. As Dr. Bohaker stated, Anishinaabe people regarded members of their doodem as kin, with obligations to show friendship, hospitality, and support, as well as a sense of responsibility to take care of those kin when those kin had needs.[37] Kin were bound, under whatever circumstances that they would meet, to treat each other not only as friends, but also as brothers, sisters, and relatives of the same family.

[40] The networks that met at council fires were structured through doodem identity (*doodemag* in the plural), which articulated their connection to place. A group or band would be known by its *Ogimaa's* doodem.

[41] Doodem identity was typically inherited through the father (although there were other ways to acquire a doodem identity, including through ceremonies of adoption and naming). A person kept their doodem identify throughout life. Because Anishinaabe marriage was an

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[33] Janet Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998), at p. 4, Joint Book of Secondary Documents, Trial Exhibit VV-SEC-0437.
[34] Garden River remains today as the home of a proud First Nation close to Sault Ste. Marie, along the St. Mary's River. One week of trial proceedings took place in this community.
[35] See Janet Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998), at pp. 3 – 4, Joint Book of Secondary Documents, Trial Exhibit VV-SEC-0437.
[36] *Ibid*.
[37] Bohaker Report, Trial Exhibit 032, at para. 19.

alliance between two different doodem identities, families thus had at least two lines of kin on which to depend.

[42] Unlike earlier treaties, the Robinson Treaties are not signed with doodem images. The signatories to the Robinson Treaties, however, did have doodem identities. The signatories included members of the Crane, Plover, Caribou, Bear, and Marten doodemag, among others.

a. Fictive Kinship and Alliances with Colonial Actors

[43] In the Anishinaabe worldview, there was no concept of engaging interpersonally with non-kin: one was either a relative or a stranger. If no kin relationship existed, a fictive kin relationship had to be created to initiate a relationship.[38] From the Anishinaabe perspective, fictive kin relationships were equivalent to and entailed the same obligations as real kin relationships, as conceived of from a Euro-Canadian perspective.

[44] Fictive kinship was established through trade, language, and intermarriage that proceeded in accordance with established Anishinaabe protocols in the region. When Europeans first arrived in the upper Great Lakes region, they were strangers to the Anishinaabe. According to Dr. Bohaker, only by becoming relatives through long-established Indigenous protocols could Europeans make alliances on which they depended for both trade and security.[39]

[45] According to Dr. Driben, the Crown was aware that the Anishinaabe lived in a world in which kinship governed their relationship with the Crown. To delineate the obligations and responsibilities flowing from the kinship relationship, kin metaphors, such as "Great Mother" and "Great Father", were used. The Anishinaabe understood that the Crown was not literally their father but used the kinship metaphor of "Great Father" as a means of relating to the British. Further, the Anishinaabe did not view the use of these kinship terms as a sign of subservience, but rather used these terms to identify the nature of the relationship. For example, the Anishinaabe did not conceive of "father" as an authoritative figure, but instead as one who was to provide for his children's wants and needs.[40]

[46] European actors also used kin metaphors in communications with the Anishinaabe. As Dr. Bohaker expressed: "In adopting Indigenous kinship metaphors, colonial officials indicated that they understood the moral obligations and duties that kin owned each other."[41] Mr. Chartrand testified that Crown actors understood kinship terms as serving a metaphorical function. While the Crown had its own principles of obligation to the Anishinaabe based in Euro-Canadian legal traditions, those principles nevertheless acknowledged and incorporated kinship metaphors.

[47] In 1850, kinship metaphors were still very much relevant and defined the expectations, perspectives, and understandings of both the Crown and the Anishinaabe in respect of the

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[38] Driben Report, Trial Exhibit 003, at pp. 22 – 23.
[39] Bohaker Report, Trial Exhibit 032, at para. 96.
[40] Corbiere Report, Trial Exhibit 026, at paras. 22 – 23.
[41] Bohaker Report, Trial Exhibit 032, at para. 129.

making, interpretation, and implementation of the Robinson Treaties.[42] In the context of the negotiations of the Robinson Treaties, the use of kinship terms served as a diplomatic formality,[43] which was not, however, divorced from the underlying metaphors that accompanied kinship terms. Although the Crown and the Anishinaabe came to the negotiation table from different worldviews, there was a reciprocal use and understanding of kinship metaphors.[44]

iv. Gift Giving, Presents, and the Principle of Reciprocity

[48] Gift giving was ubiquitous among the Anishinaabe;[45] it was considered an act of moral imperative, rather than an economic necessity. Exchanges were made between band members to ensure the health and well-being of the group, and between bands to forge and renew alliances. In a precarious hunting society, it was impossible to accumulate food for the inevitable rainy day; therefore, hunters shared their bounty knowing that in turn, another hunter would reciprocate and share his when needed. As Dr. Bohaker noted, the exchange of gifts among the Anishinaabe also acted as a means of redistributing the wealth throughout the region and encouraging the well-being of one's allies.[46]

[49] Gifts were given in accordance with the principle of reciprocity, which holds that items of value are given with the expectation that the gift will be returned. The nature and timing of the recompense depended on the actors. The rule of giving was this: the closer the kin relationship between the people, the greater the reliance and, therefore, the implication of trust.[47]

[50] Gift giving was also part of alliance-making ceremonies and was adopted in alliances between Euro-Canadians and the Anishinaabe. Prospective allies demonstrated their ability to take care of each other through the mutual exchange of gifts. Reciprocal gift giving was representative of the alliance that included the possibility of shared spaces and resources, embodying the principle of mutual interdependence. An alliance included the mutual promise of responsibility for each other.[48]

[51] Europeans understood the significance of gift giving in their alliance relations with the Anishinaabe. To conduct business with the Anishinaabe, a trader had to prove to the Anishinaabe that he was trustworthy, on Anishinaabe terms, using Anishinaabe protocols to establish a binding relationship. The most common protocol was gift giving.

[52] The exchange of gifts between the Anishinaabe and Europeans also occurred on a larger scale through the distribution of annual 'presents', utilitarian and luxury items that Crown

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[42] See Bohaker Report, Trial Exhibit 032, at paras. 130 – 134.
[43] Chartrand Report, Trial Exhibit 066, at p. 54.
[44] Chartrand Testimony, Final Transcript (January 18, 2018), Vol. 46: 6690 – 6694.
[45] The Jesuits documented lavish gift exchanges between bands at gatherings as early as 1642: see Bohaker Report, Trial Exhibit 032, at para. 100.
[46] Bohaker Report, Trial Exhibit 032, at para. 100.
[47] Driben Report, Trial Exhibit 003, at pp. 28 – 29.
[48] Bohaker Report, Trial Exhibit 032, at para. 99.

actors and Anishinaabe leaders bestowed on one another, establishing a binding relationship between the Anishinaabe and the Crown.

[53] The distribution of presents was a custom dating back to almost the point of first contact. For almost a hundred years prior to the Robinson Treaties, the Crown provided annual presents to the Anishinaabe to fulfil its promise to act generously in meeting the Anishinaabe's needs and to give "tribute" to the Anishinaabe for the use of their lands.[49] The distribution of presents on an annual basis was a way for the Crown and the Anishinaabe to re-establish and renew their relationship, acknowledge their military alliance, reciprocate for British presence in Anishinaabe territory.

[54] According to Mr. Corbiere, a metaphor that was directly related to presents and *ishkode* (fire) was "warmth", which meant presents in the sense of warming oneself at the King's Council Fire. Thus, when the British kindled council fires in Anishinaabe territory, these were places where the Anishinaabe could go to receive their annual warmth (presents) and reaffirm and renew their relationship with the Crown.[50]

[55] Annual presents were distributed until discontinued in 1858.

v. The Anishinaabe's Perspective on Creation and Relationship to Land

[56] When the Anishinaabe speak of creation, they recognize that they were brought into a complex web of relationships operating across the land. According to Elder Edward Benton-Banai, "[o]n the Earth the Creator placed the swimming creatures of the water. He gave life to all the plant and insect world. He placed crawling things and the four-legged things on the land. All of these parts of life lived in harmony with each other."[51] In the Anishinaabe worldview, all aspects of the natural world have the breath of life: the rocks, water, fire, and wind; the sun, stars, moon, and Earth. And man was the last form of life to be placed on the Earth. The Anishinaabe understand themselves as merely one part of creation, deeply connected to and interdependent on the larger collectivity of other beings.[52]

[57] To navigate the complex web of creation, the Anishinaabe developed laws that ensured they were relating to the land, animals, flora, fauna, *manidoog* (spirits), and others in respectful ways that account for mutual responsibility to one another.[53]

[58] The Anishinaabe describe wealth in the land in the form of fish and game, spiritual sustenance, and emotional and physical well-being.[54] The Anishinaabe's relationship to creation enabled the Anishinaabe to engage with the land, animals, plants, and

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[49] See Corbiere Report, Trial Exhibit 026, at paras. 21.
[50] *Ibid*, at paras. 195 – 197.
[51] Stark Report, Trial Exhibit 040, at para. 70, quoting Anishinaabe Elder and knowledge holder Edward Benton-Banai.
[52] Stark Report, Trial Exhibit 040, at para. 91.
[53] *Ibid*, at para. 4c.
[54] *Ibid*, at p. 59, para. 8.

aadizookaanag (sacred stories) in meaningful ways that nourished them physically and spiritually. These relationships also carried responsibilities.[55]

[59] In the Anishinaabe tradition, wherever a potential right exists, a correlative obligation can usually be found based on the individual's relationship with the other orders of the world. These are stewardship-like concepts (*bimeekumaugaewin*) and apply to the Anishinaabe's engagement with the land, plants, and other beings. Principles of acknowledgement, accomplishment, accountability, and approbation are embedded in the Anishinaabe creation epic and associated stories. Anishinaabe legal traditions concerning *bimeekumaugaewin* speak of how the world was created and how beings came to live on the earth; they tell of how the Anishinaabe depended on the Earth, plants, and animals for their sustenance and survival once they arrived.[56]

[60] As the last placed within creation, the Anishinaabe could not act in ways that would violate those relationships that came before their placement on the land and that were already in existence across creation.[57] 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.

[61] All of these features of the Anishinaabe perspective informed and influenced the Anishinaabe's reactions to Euro-Canadian incursions on their land and to the desire of the Crown to enter into a treaty for the surrender of this land.

III. THE WRITTEN RECORD 1763 – 1849: FROM THE ROYAL PROCLAMATION TO THE VIDAL-ANDERSON COMMISSION

[62] The events between 1763 and 1849 provide part of the historical and cultural context within which the Robinson Treaties were negotiated and signed and, therefore, provide important context for the task of interpreting the Treaties.[58] These events reveal that Indigenous participation in treaty making was more than passive acceptance of what was offered by the Crown. The Anishinaabe asserted their interests and the Crown understood that the outcome would be negotiated, not imposed. Moreover, the process of negotiation would reflect Anishinaabe perspectives and practices on the means by which consensus would be achieved.

[63] The written record provides a rich narrative of how the two cultures met and developed cross-cultural understandings necessary to co-exist.

[64] The following sections detail the events, as recorded by Euro-Canadians, leading up to the negotiations of the Robinson Treaties, from the issuance of the *Royal Proclamation* of 1763

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[55] *Ibid*, at para. 99.
[56] See John Borrows, Canada's *Indigenous Constitution* (Toronto, University of Toronto Press, 2010), at p. 79, Joint Book of Secondary Documents, Trial Exhibit VV-SEC-0564.
[57] Stark Report, Trial Exhibit 040, at para. 99.
[58] See *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 11.

to the Vidal-Anderson Commission in 1849. Although the record purports to provide a complete history, we know that Euro-Canadians created the record in their language and usually for their purposes, and the record was always created from a Euro-Canadian perspective. A strong caution is therefore necessary when reviewing the written record to remember its limits even in cases when it intends to report the Indigenous perspective.

A. Pre-1763: The Covenant Chain Alliance

[65] As a treaty relationship, the alliance between the British and Indigenous nations manifested itself in diplomatic forms that incorporated elements of both cultural traditions. At the heart of the British-Indigenous relationship was the Covenant Chain, an alliance that dated back to the early 17th century. When the British usurped control from the Dutch, the alliance centred on the Haudenosaunee Confederacy, known as the League of Five Nations (now called Six Nations). The alliance was represented symbolically as a ship tied to a tree, first with a rope and then with an iron chain. The rope represented an alliance of equals; the iron represented strength. The iron chain became one of silver, a metal more durable and more beautiful than iron. The metaphor associated with the chain was that if one party was in need, they only had to "tug on the rope" to give the signal that something was amiss, and "all would be restored."[59]

[66] The strength and success of the Covenant Chain alliance was due to the annual councils that were held to strengthen and brighten the Chain. The British met frequently at designated council fires with the Haudenosaunee to renew the Covenant Chain alliance. At the 1755 Council, Sir William Johnson, Superintendent of Indian Affairs, presented the Haudenosaunee with the Union Belt, a wampum belt employed to renew and strengthen the Covenant Chain. Johnson's speech and the presentation of the wampum belt underscored that the Covenant Chain was not an event, but a process that required annual meetings to maintain open communication, mutual agreement, and harmonious relations.[60]

[67] At these council fires, valuable gifts were exchanged as symbols of good will and tokens of the military and political alliance.

i. 1756 – 1763: Extending the Covenant Chain to the Western Nations

[68] The Anishinaabe and their allies fought alongside the French in North America during the Seven Years War (1756 – 1763) between the French and the British. As a strategic military move, the British endeavoured to secure the neutrality of the Western Nations, which included, among others, those people now known as the Anishinaabe (made up of Ojibwe, Odawa (Ottawa), and Pottawatomi), in their struggle with France for European supremacy in North America. They did this by extending the Covenant Chain to the Western Nations.

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[59] Corbiere Report, Trial Exhibit 026, at para. 342.
[60] *Ibid*, at para. 107.

[69] Following the end of hostilities in 1760, the British renewed their efforts to win over the formerly hostile First Nations and extended the Covenant Chain to those First Nations at a series of Councils.

[70] However, British diplomatic efforts were not entirely successful. In 1763, Odawa Chief Pontiac led an uprising against the British. Anishinaabe warriors attacked and captured a number of British posts in what became known as Pontiac's Rebellion or Pontiac's War.

[71] It was against this backdrop of continued hostilities that the Imperial Government[61] issued the *Royal Proclamation* of 1763 in an effort to bring about peace and stability in the region. The Crown also sought to smooth the way for further settlement and development.

B. 1763: The *Royal Proclamation* of 1763 – Setting Out the Principles for Treaty Making

[72] The process by which the terms of the *Royal Proclamation* of 1763 ("the *Royal Proclamation*" or "the *Proclamation*") would be implemented reflected Crown recognition of Anishinaabe sovereignty that survived the unilateral declaration of Crown sovereignty. This called for negotiation of the terms on which the land would be opened up for settlement by newcomers.

[73] The *Royal Proclamation* is a foundational moment in the history of Canada's relationship with Indigenous peoples. The *Royal Proclamation* was a unilateral declaration of the Crown, asserting Crown sovereignty over what is now Canada. At the same time, the *Proclamation* affirmed Aboriginal title and ownership of all unpurchased land.

[74] Specifically, the text of the *Royal Proclamation* stated:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose

[61] After 1791, the government in what is now Canada was separated into the Imperial Government, personified by the Governor General (representing the Crown), and the Colonial Government, consisting of an appointed Executive Council (or cabinet), an appointed legislative council and an elected legislative assembly.

> by the Governor or Commander in Chief of our Colony….[62] [Emphasis added.]

[75] The assertion of sovereignty in the preamble to the *Royal Proclamation* has long posed significant challenges to the relationship between Indigenous peoples and the descendants of settlers. According to Brian Slattery, through the preamble of the *Royal Proclamation*, "the Crown asserts ultimate sovereignty over extensive regions in the American interior", while simultaneously recognizing "that these territories are actually in the possession of numerous Indian nations, which are 'connected' with the Crown and live under British 'Protection'."[63]

[76] Suffice to say, the Supreme Court of Canada has considered the imposition of a colonial legal order throughout a series of decisions, from *St. Catharines Milling & Lumber Co. v. R.*[64] to *Tsilhqot'in Nation v. British Columbia*,[65] and has attempted to reconcile the two fundamentally contrary concepts found in the *Royal Proclamation*, namely the assertion of Crown sovereignty (the right to acquire title and the right to govern) and the pre-existence of Indigenous societies.

[77] As the Supreme Court of Canada said in *Tsilhqot'in Nation*, "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival."[66]

[78] The *Royal Proclamation* also had specific stipulations regarding the administration of and control over Indian lands: (a) the prohibition on the private purchase of Indian lands; (b) the prohibition on grants of patents or warrants of survey by the governor for unsurrendered Indian lands; and, (c) the requirement that Indian lands be surrendered to the Crown at a public meeting. Further, the *Royal Proclamation* stipulated that consideration or compensation was required to be paid for cessions of Indian lands. For the Crown to grant or sell land to settlers, they first had to acquire the title to the land through treaties with Indigenous peoples.

[79] According to Mr. Morrison, "nowhere else in North American was the Proclamation observed as rigorously as in what is now Ontario".[67] The motivation for and the fundamental concepts in the Robinson Treaties flow from the *Royal Proclamation*.

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[62] *The Royal Proclamation*, dated 7 October 1763, reprinted in Clarence S. Bringham, *British Royal Proclamations Relating to America, 1603 – 1783* ed. (New York: Burt Franklin, 1911), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0037.
[63] Brian Slattery, "The Aboriginal Constitution" (2014) 67:1 S.C.L.R. 319, at p. 326.
[64] *St. Catharines Milling & Lumber Co. v. R.* (1887), 13 S.C.R. 577.
[65] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257.
[66] *Ibid*, at para. 69.
[67] Morrison Report, Trial Exhibit 014, at para. 443.

[80] The *Royal Proclamation* is also the source of the special relationship between the Crown and Indigenous peoples, which requires the Crown to act honourably in its dealings with Indigenous peoples.[68]

C. 1764: Council at Niagara

[81] Following the issuance of the *Royal Proclamation*, Johnson convened a Council at Niagara in 1764 where over 1,700 Indigenous people, including many Ojibwe and Odawa Chiefs, gathered. Some historians contend that the tenets of the *Proclamation* became a formal part of the treaty relationship between the Crown and the Indigenous nations at this Council.[69]

[82] During the Council at Niagara, the Plaintiffs' experts assert that Johnson read the provisions of the *Royal Proclamation* respecting the protection of Indigenous land rights and a fair and properly regulated trade. The Defendants' experts dispute this opinion.

[83] There was also a debate among some of the experts whether the Council at Niagara concluded with a treaty, marked by the exchange of a wampum belt. It is not necessary or wise for me to attempt to resolve this question. In any event, the parties agree that the Council at Niagara was a diplomatic exercise where the British sought to renew and strengthen the Covenant Chain alliance with the Western Nations, among others.

i. Presentation of Wampum Belts and Speech at Niagara

[84] At the meetings between Johnson and the Indigenous nations, gifts as well as strings of wampum were exchanged between the parties, including the Great Covenant Chain Wampum and the 24 Nation Wampum.

[85] The Plaintiffs rely on the descriptions of these wampum belts as representing clear and enduring metaphors of promises of mutual support. According to Anishinaabe tradition, these understandings renewed and strengthened their relationship with the British.

[86] At this Council at Niagara, Johnson also gave a speech to his "Brothers of the Western Nations", underscoring the importance of renewing the alliance relationship:

> Brothers of the Western Nations, Sachims, Chiefs & Warriors – You have now been here for several days, during which time we have frequently met to Renew, and strengthen our Engagements, & you have made so many Promises of your Friendship, and Attachment to the English that there now only remains for us to exchange the great Belt [the Great Covenant Chain Wampum] of the Covenant Chain that we may not forget our mutual Engagements. —
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> …

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[68] See *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 66 – 67; *Mikisew Cree First Nation v. Canada (Governor General in Council*), 2018 SCC 40, at para. 21, Karakatsanis J., and para. 59, Abella J, dissenting on other grounds.
[69] Morrison Report, Trial Exhibit 014, at para. 445.

> I now therefore present you with the great Belt [the Great Covenant Chain Wampum] by which I bind all your Western Nations together with the English, and I desire you will take fast Hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipaweighs at St Mary's whilst the other end remain at my House. —… but keep your Eyes upon me, & I shall be always ready to hear your Complaints, procure you Justice, or rectify any mistaken Prejudices. if you will strictly Observe this, you will enjoy the favour of the English, a plentiful Trade, and you will become a happy People, — … I Exhort you then to preserve my Words in your Hearts, — to look upon this Belt as the Chain which binds you to the English, and never to let it slip out of your Hands.[70]

[87] The experts pointed out that when Johnson used the term "Brothers", he was speaking in the symbolic language of kinship that lay at the heart of Indigenous conceptions of political relations. Later, Johnson used the term "my children" and the Anishinaabe addressed him as "Our Father". From the Anishinaabe perspective, these terms represented a reciprocal relationship between independent entities in which the "father" owed certain duties to the "children".[71]

[88] According to Mr. Corbiere, following the issuance of the *Royal Proclamation* and the Council at Niagara, the Western Nations, including the Anishinaabe of the upper Great Lakes region, understood that they held title to their lands, maintained their autonomy, re-established fair trade relationships with the British, secured themselves protection from unscrupulous traders, and secured a process for restitution of fraudulent land purchases.[72] For their part, the delegates promised to keep the peace and to deliver their prisoners. In this way, the *Proclamation* became a crucial part of the Covenant Chain relationship that continued to bind the Anishinaabe of the upper Great Lakes region.[73]

ii. Diplomatic Discourse and Shared Metaphors

[89] The Covenant Chain alliance is a notable example of the cross-cultural merging of diplomatic protocols and legal orders. Following the issuance of the *Royal Proclamation*, instructions were issued to the Indian Department stipulating the required use of Indigenous customs as a means to cultivate Crown-Indigenous relations.[74] As a result, Crown representatives and Anishinaabe leaders developed a mutually understood

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[70] Transcription of Speech by William Johnson to the Western Nations, dated 31 July 1764, reprinted in *The Papers of Sir Williams Johnson*, Volume XI (Albany, New York: The University of the State of New York, 1953) at 309 – 310, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0054.
[71] Morrison Report, Trial Exhibit 014, at para. 504.
[72] Corbiere Report, Trial Exhibit 026, at para. 21.
[73] Morrison Report, Trial Exhibit 014, at para. 445.
[74] Instructions for Brigadier-General Sir John Johnson, Superintendent General & Inspector General of Indian Affairs in the Northern District or North America, dated 6 February 1783, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0098.

diplomatic discourse that they used in the decades prior to the Robinson Treaties. This discourse included symbols, metaphors, ceremonies, and items of material culture.

[90] One example of the merged symbols of diplomacy is the design of the Great Covenant Chain Wampum. The images on that belt represent, according to Mr. Corbiere, the "melding of two literary traditions".[75]

[91] Through the alliance relationship, the British developed understandings of Anishinaabe protocols and traditions sufficiently to incorporate them into their diplomatic exchanges. However, British legal customs were also followed. Treaties with the British were written on paper in English. The Indigenous parties "signed" the document, sometimes with their names, sometimes with an "X", and sometimes with their doodem images.

D. 1794: Dorchester Regulations – Operationalizing the *Royal Proclamation*

[92] The implementation of the *Proclamation* called for a process. The formal, public process was set out in 1794 by Lord Dorchester. But the tenets of the relationship, as mutually understood by reference to the Covenant Chain, would guide the settlement of the terms on which the land purchases were "to be made in public Council with great Solemnity and Ceremony according to the Ancient Usages and Customs of the Indians, the principal Chiefs and leading Men of the Nation or Nations to whom the land belong being first assembled," and also made with the assistance of "such Interpreters as best understand the Language of the Nation or Nations treated with".[76]

[93] These Regulations were rigorously applied until at least 1845 and followed to a great extent at the Treaty Council in 1850.

E. 1812 – 1815: War of 1812

[94] The War of 1812 was an important point in the Covenant Chain relationship between the British and the Anishinaabe of the upper Great Lakes region. The Anishinaabe responded when the British invoked the Covenant Chain relationship in 1812 and sought their support in the war against the Americans. Anishinaabe warriors fought alongside British forces. Some of these British and Anishinaabe soldiers or their family members played prominent roles in the Robinson Treaties.

[95] Long after the war had ended, both the Anishinaabe and Crown actors repeatedly recalled the considerable assistance that the Anishinaabe had provided to the British against American invasion. In September of 1849, for example, Indian Superintendent Thomas G. Anderson presented Chief Shingwaukonse and Chief Tagawinini with medals for their services in the War of 1812.[77]

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[75] Corbiere Report, Trial Exhibit 026, at para. 19.
[76] *Ibid*.
[77] See Diary of T.G. Anderson, entries dated 13 September 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0657.

i. The Shift from Military Alliance to Civilization Policy

[96] Until the 1820s, the Indian Department of the Colonial Government was a military department charged with maintaining the critical alliance between the Crown and Indigenous nations.

[97] As Upper Canada became more densely settled and agriculturally developed and the necessity for military allies waned, the Indian Department shifted from military to civil control and the Crown's policy toward Indigenous communities changed. As part of the move to civil control, the Crown embarked on their "civilization" policy, aimed at reclaiming Indigenous people "from a state of barbarism" and assimilating them into a sedentary, Christian, agricultural lifestyle.[78]

[98] While the "civilization" policy reflected a shift in the British Crown's internal objectives, the Crown also respected and renewed the existing military alliance relationship through the distribution of presents and medals.[79] As late as 1849, senior British officials and Anishinaabe leaders understood and held the military alliance in high regard.

[99] Nevertheless, the Government and bureaucratic transition from military to civil control drove changes that affected government approaches to treaty annuities, discussed below, among other things.[80]

F. 1818: The Treaty-Making Process Incorporates Annuities

[100] The perpetual nature of the opening up of land for settlement called for a reciprocal commitment from the Crown. This came in the form of annuities.

[101] Beginning in 1818, the Crown changed the compensation model in treaties for land surrenders. Annuities were provided rather than one-time distributions or payments.

[102] Annuities were expected to be funded from the proceeds of the lands that were surrendered. The Crown structured treaty payments as annuities based on a population model. The annuity was expressed as an aggregate amount, based on roughly two and a half pounds (£2.10; equivalent to $10) per person multiplied by the First Nation's population at the time the treaty was made. The multiplier of $10 was unrelated to the value or size of the land surrendered. The first such payment was made at the time the treaty was signed; annuities in the same amount were paid thereafter.

[103] The move to an annuity model was likely triggered by the pressures created by waves of immigration and the devolution of the responsibility for paying treaty annuities from the

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[78] Bagot Commission Report, Appendix "T" to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada, 1847, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0499, at electronic p. 363.
[79] See e.g. Diary of T.G. Anderson, entries dated 13 September 1849 and 7 November 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0657.
[80] For example, the alliance relationship that had been important to the British was significantly tested as the British began to make unilateral geopolitical boundary changes as a result of their independent negotiations with the Americans. This included moving the location of Council Fires without consultation.

Imperial Government to the local Colonial Government. The annuity model allowed the Crown to control its cash flow. The Crown proceeded on the presumption that land sales to settlers would generate sufficient funds to finance the annual payments in perpetuity.

[104] The same multiplier was used from 1818 to 1850 irrespective of the size or value of the land.

[105] Treaties for cessions of reserve lands (*i.e. the surrender of reserves of lands created in previous treaties*) followed a different model. In those cases, the band, family, or Indigenous party received credit from the proceeds, portions of proceeds, or interest on proceeds from the post-treaty sale of the ceded lands to settlers. Under this model, characterized as a proceeds model, the Crown held the proceeds in trust.[81]

i. 1830: The Colborne Policy and the Change in Annuities

[106] In 1830 there was a further change to the annuity system as part of the Government's "civilization" policy. Pursuant to the Colborne Policy, instituted by Lieutenant Governor Sir John Colborne, annuity payments for ceded lands were converted to a fixed lump sum held by the Crown and credited to the Indigenous party to the treaty. An account was established for each tribe, and the Chiefs made requisitions for goods out of that account. The requisitions were approved so long as the requisitioned items promoted a sedentary, agricultural, European way of life. Although there were occasionally allowances made to benefit particularly disadvantaged members of the community, the intent was for the requisitioned items to create a shared asset. Appropriate requisitions included materials to build houses, livestock for agriculture, fencing to delineate property, and the like. To a great extent these allowable expenditures were for the collective benefit or corporate development of the band.

[107] The rationale for the Colborne Policy was set out in the Bagot Commission of 1844. The requisition system aimed to correct the "evil" misuses of annuity payments, promote the settlement and civilization of the Indians, restrain improvident or improper expenditure, and assist the Government in directing undertakings for the advantage of the Indians.[82]

[108] Colborne's "civilization" policy requiring that the annuities be accessed through a requisition approval system to protect against improvident use was still in place in 1850 when Treaty Commissioner W.B. Robinson received his instructions to treat with the Anishinaabe of the upper Great Lakes region.

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[81] It was agreed that the method of compensating for the surrender of reserve lands was not in issue or relevant in this trial.

[82] Bagot Commission Report, Appendix "T" to the Sixth Volume of the Journals of the Legislative Assembly of the Province of Canada, 1847, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0499, at electronic p. 359.

ii. Anishinaabe Awareness of Colonial Government Treaty-Making Activities in the Province

[109] By 1850, Anishinaabe leaders, including Chiefs Shingwaukonse and Peau de Chat, had some familiarity with the treaty-making activity in Upper Canada where the Government promised annuities of $10 per person, as well as with American treaties that provided for significantly larger annuities that were paid in a combination of cash, goods, and services.

G. 1830s – 1840s: Life in the Upper Great Lakes Region

[110] The Anishinaabe economy in the upper Great Lakes region in the 18th and 19th century was based primarily around hunting, fishing, and trapping. For approximately 200 years, the Anishinaabe had been engaged in the commercial fur trade and had established trading practices with European traders for the sale of fish and game. In other ways, the Anishinaabe were also involved in the broader economy of the region, especially as hunting and trapping declined precipitously after the War of 1812. Elders at Garden River testified that great quantities of maple syrup and fuel wood for the steamers were sold to the newcomers. Bands and individuals throughout both the Huron and Superior regions also worked seasonally for trading companies as canoe-men and freight haulers for the HBC and manufactured birch bark canoes for sale. The bands that spent more time along the north shore of Lake Huron cultivated crops, primarily of corn, beans, and squash.

H. 1840s: Mining Activity in the Upper Great Lakes Region

[111] The large waves of immigration in the early 1800s in Upper Canada resulted in an increasing need for agricultural land to accommodate settlers. On the other hand, the upper Great Lakes region was viewed as little more than wilderness unsuitable for agriculture and unattractive to new settlers.

[112] During the 1840s prospectors moved into the region in search of valuable minerals encouraged by "copper fever" on the American side of Lake Superior.

[113] The Government of the Province of Canada was unprepared for the entrepreneurial interest in mining exploration and development in 1845. Among other things, they did not have a treaty with the Anishinaabe who occupied the very territory that was of interest to the mining companies. But this did not stop the Government from issuing mining licences as of August 1845. Demand for mining licences grew quickly as the "copper fever" intensified.

[114] In the Spring of 1846, Chief Shingwaukonse intercepted surveyors of town lots at Sault Ste. Marie. He confronted the surveyors about the survey work and the mining exploration that was being undertaken in the absence of a treaty between the Crown and the Anishinaabe.[83]

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[83] Letter from A. Vidal to D.B. Papineau, dated 27 April 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0410, transcription at Trial Exhibit 01A-TAB-0410.

[115] By late 1846, the Government issued regulations for obtaining patents to the mining locations.[84] The intense speculative interest in mining development reflected a widely held perception that the region contained great mineral wealth and could be a source of long-term prosperity. As the years went by, that hope proved significantly difficult to realize.

[116] By July of 1848, Chief Shingwaukonse complained personally to the Governor General in Montreal that "the lands which in former times they occupied and considered their own have lately been taken possession of by various mining companies" and that they were otherwise restricted in their ability to make a living, either by hunting or woodcutting.[85]

[117] Game was becoming scarce in the territory. Chief Shingwaukonse signalled that he could foresee the impact of mining and development on the next generation "when the animals of the woods should have grown too scarce for our subsistence."[86]

[118] The influx of Crown-sanctioned mining exploration and development increased the tensions over jurisdiction and control of the territory and became one of the key triggers for the negotiation of the Robinson Treaties.

I. 1845 – 1850: The Pre-Treaty Dialogue Between the Anishinaabe and the Crown

[119] In the five years preceding the Robinson Treaties, the mining activity, more than anything else, triggered strongly-worded complaints from the Anishinaabe. They claimed that issuing mining licences, permitting timber harvest and sales, and surveying town lots were direct challenges to their jurisdiction over the land. They repeatedly asserted their claim to the land and their exclusive control over the territory. The Anishinaabe Chiefs demanded recognition of their claims and compensation for the uses that Euro-Canadians were making of their land, including the exploitation of resources.

i. The Crown's Evolving View Pre-Treaty

[120] The Government response was incremental over the years from 1845 to 1850. The Government outright rejected the claims of the Anishinaabe, then demanded that the Anishinaabe prove their claims, and, finally, initiated a series of investigations.

[121] Some examples of Crown responses to the Anishinaabe claims shows their evolving opinion on "Indian title" in the upper Great Lakes region.

- **October 10, 1845**: The Executive Council recommends to the Governor General that he adopt measures for the extension of Government authority over that part of the Province bordering the north shore of Lake Huron.[87]

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[84] Order in Council, dated 9 May 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0420.
[85] Letter from T.E. Campbell to T.G. Anderson, dated 31 July 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0599, transcription at Trial Exhibit 01A-TAB-0599, transcription at Trial Exhibit 01A-TAB-0599.
[86] Letter from T.G. Anderson to T.E. Campbell, dated 9 October 1848 (appended unreferenced newspaper article), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0608, transcription at Trial Exhibit 01A-TAB-0608.
[87] Report of a Committee of the Executive Council on Land Applications, dated 10 October 1845, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0370, transcription at Trial Exhibit 01A-TAB-0370.

- **May 1846**: Commissioner of Crown Lands D.B. Papineau states that the Indians from Sault Ste. Marie are not considered to have any claims to the land, having emigrated from the United States.[88]

- **November 4, 1847**: Papineau issues a report stating that the land on the northern shores of Lakes Superior and Huron had not been ceded to the Crown, that the Anishinaabe should be protected in the possession of any lands which they hold and occupy. The Report also says, however, that the Anishinaabe claimants had no right to the land because they were "not the original proprietors of the soil" and because "being only a small tribe, they do not form a Nation and therefore cannot claim the Territory."[89]

- **April 1848**: Provincial Land Surveyor Alexander Vidal supports the Anishinaabe claim to the land at Garden River and recommends that the Anishinaabe be accorded free rights of the "British Indians".[90]

- **July 1848**: Indian Superintendent Thomas G. Anderson is instructed to collect additional information relative to the claim for title and with regard to the best method of compensating the Anishinaabe for any loss they have experienced.[91]

- **August 1848**: Anderson holds a Council at Sault Ste. Marie with Anishinaabe representatives from both Lake Huron and Lake Superior.

- **July 1849**: Commissioner of Crown Lands J.H. Price says that additional information is needed before negotiating a treaty with the Anishinaabe, but that a Government agent should assure the Anishinaabe that the Government intends "to remunerate them in an equitable manner for the relinquishment of any just claims" which may prove to exist.[92]

- **August 1849**: An OIC is issued, appointing Vidal and Anderson to investigate the claims and to seek out the expectations of the Anishinaabe as to the terms of a treaty with the Government.[93]

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[88] Transcription of Letter from D.B. Papineau to A. Vidal, dated May 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0415.
[89] D.B. Papineau, "Report of the Commissioner of Crown Lands", dated 4 November 1847, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0570, transcription at Trial Exhibit 01A-TAB-0570.
[90] "Report from the Commissioner of Crown Lands", quoting A. Vidal, dated 26 April 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0587, transcription at Trial Exhibit 01A-TAB-0587.
[91] Letter from T.E. Campbell to T.G. Anderson, dated 31 July 1848, Joint Book of Primary Documents, Trial Exhibit 0598.
[92] "Report of Commissioner of Crown Lands", dated 28 July 1849, with Order in Council, dated 4 August 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0632.
[93] *Ibid*.

[122] According to Mr. Morrison, the repeated denial of Anishinaabe title and the increasing demands of the Colonial Government for information were unprecedented.[94]

ii. The Anishinaabe Assert Jurisdiction and Demand a Treaty

[123] The Anishinaabe leaders initially voiced objection to unauthorized incursions onto their lands and opposed mineral extraction in the absence of compensation for the resources taken. Anishinaabe leaders engaged in what might now be called intensive government relations and advocacy work to demand recognition for their claim to the land and to protest what they believed was the ongoing, illegal use and occupation of Anishinaabe land.

[124] However, from 1845 to 1850, Anishinaabe petitions and memorials written on behalf of Chief Shingwaukonse and other Anishinaabe leaders shifted in emphasis to demands for treaty compensation in consideration of the perceived wealth from the mining development. The Anishinaabe also responded to the demands of the Colonial Government for "proof" of their title or ancient occupation.

[125] In their memorials and petitions, the Anishinaabe reminded the Crown of their ongoing relationship, including:

- The important military alliance between the Anishinaabe and the Crown;
- The promises made by Crown officials and representatives; and
- The long history and tradition of treaty making between the Anishinaabe and the Crown.

[126] I set out below a very brief set of excerpts from some of the most significant pieces of the written record and accounts of encounters.

- **February 20, 1846**: A petition written on behalf of Chief Shingwaukonse states that the Customs Collector has been improperly authorizing licensing of timber cutting on his land: "when Mr Wilson [the Customs Collector] sells our wood and acts with us as he does I feel as if he entered into my house and took without my leave, what he might find therein."[95]
- **April 27, 1846**: Chief Shingwaukonse, Chief Nebenaigoching, and others confront Vidal who conducted surveys of town lots in Sault Ste. Marie. The Chiefs tell Vidal that the Anishinaabe are "claiming all the land here as their own".[96]

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[94] Morrison Report, Trial Exhibit 014, at para. 157.
[95] Letter from Chief Shingwaukonse to George Ironside, Indian Superintendent, dated 20 February 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0414.
[96] Letter from A. Vidal to D.B. Papineau, dated 27 April 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0412.

- **June 10, 1846**: In an eloquent letter to Governor General Lord Cathcart, Chief Shingwaukonse asserts ownership over the territory. He protests the incursion of miners without consultation and states that he wishes to meet personally with a representative of the Crown. Chief Shingwaukonse refers to annuity-based treaties in other areas and recognizes the value in the territory. He contends that he understands that the newcomers have the technical ability to undertake exploration and development and proposes to share the benefits derived from the territory:

  > I see Men with large hammers coming to break open my treasures to make themselves rich & I want to stay and watch them and get my share. Great Father – The Indians elsewhere get annuity for lands sold if ours are not fit in most places for cultivation they contain what is perhaps more valuable & I should desire for sake of my people to derive benefit from them… I should much wish to Great Father to see you & take your hand and ask you to tell me of these things, and also open to you my mind for tho' I can write yet I could speak it better to you… I want always to live and plant at Garden River and as my people are poor to derive a share of what is found on my Lands.[97]

- **August 10, 1846**: Chief Shingwaukonse and other Anishinaabe Chiefs make a further petition to Governor General Lord Cathcart, reasserting their claim to the lands.[98] The petition states: "Already has the white man licked clean up from our lands the whole means of our subsistence, and now they commence to make us worse off they take everything away from us father."[99]

- **October 1846**: An exploration party acting for a Montreal businessman and the Queen's Printer lands at Garden River. Chief Shingwaukonse and other Chiefs tell the exploration party to cease operations, as this was their land.[100]

- **July 5, 1847**: Chief Shingwaukonse and three other signatory Chiefs address their concerns again to the Governor General (now Lord Elgin) in a memorial.

  The Chiefs recite their historical relationship and military loyalty to the Crown and indicate that they have confidence in the British to provide remuneration for Anishinaabe lands if and when the British wanted the lands, as the Americans had done.

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[97] Address of Chief Shingwaukonse to "Great Father" (Lord Cathcart), dated 10 June 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0437, transcription at Trial Exhibit 01A-TAB-0437.
[98] Memorial of Chiefs of Mahnetooahning in Reference to the White People, dated 10 August 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0452, transcription at Trial Exhibit 01A-TAB-0452.
[99] *Ibid*.
[100] See Memorial of Indians at the Sault Ste. Marie, dated 5 July 1847, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0548, transcription at Trial Exhibit 01A-TAB-0548.

They underscore the legitimacy of the Anishinaabe claims and complain about a recent visit by prospectors:

> [A]bout that time now one, then another whiteman came stealing along our shores and entering into our wigwams told us in answer to our enquiries that they were come to look for metals which they heard were to be found in our land and asked us to shew them the copper, but this we refused… when we heard several persons say that some of our land had already been sold to those explorers…[101]

The Chiefs propose a means by which the newcomers could access, explore, and develop mining projects on the land with the consent of the Anishinaabe. They suggest that the best way to solve the problem was to make a treaty, similar to the one Chief Shingwaukonse had proposed a year earlier, but which was now essential considering the arrival of exploring parties with Crown-authorized licenses: "And [the Chiefs] are very desirous of avoiding the unpleasant collisions into which they are in danger of being brought with the explorers".[102]

- **October 1847**: Chief Shingwaukonse and several other Chiefs travel to Toronto to meet with Governor General Lord Elgin for the first time. The Chiefs present a memorial to the Governor General setting forth their grievances in regard to the Government allocating their lands to mining companies without any compensation.[103]

- **June 1848**: Chief Shingwaukonse and others travel to Montreal to meet with Governor General Lord Elgin for the second time.

- **August 1848**: At the Council convened at Sault Ste. Marie, Anderson asks the Anishinaabe to justify their claims to the land. In their speeches, Chief Shingwaukonse and Chief Peau de Chat complain of the mining activities occurring in the territory and the negative effects those activities are having on the Anishinaabe way of life.[104]

- **October 1848**: Allan Macdonell (lawyer) drafts a notice on behalf of Chief Shingwaukonse to the mining companies demanding that they neither enter nor remove timber from the lands.[105]

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[101] *Ibid.*
[102] *Ibid.*
[103] "Arrival of His Excellency the Governor General", *British Colonist* (19 October 1847), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0569.
[104] Minutes of a Council held by T.G. Anderson, 18 August 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0604, transcription at Trial Exhibit 01A-TAB-0604.
[105] Letter from T.G. Anderson to T.E. Campbell, dated 9 October 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0608, transcription at Trial Exhibit 01A-TAB-0608.

- **April 21, 1849**: Macdonell writes to the Government to complain about "the occupancy by whites of certain portions of country claimed by them" and explains that by "selling locations to individuals before having had some treaty with the Indians" the Government has "created much discontent'".[106]

- **Summer 1849**: Chief Shingwaukonse, Chief Nebenaigoching, and a warrior named Menissinawenninne travel to Montreal, accompanied by Macdonell and the missionary Reverend Gustavus Anderson to meet with Lord Elgin for the third time. The *Montreal Gazette* publishes the written address to Lord Elgin from eight Anishinaabe Chiefs, including Chief Shingwaukonse and Chief Nebenaigoching. In the memorial, the Chiefs complained of the unjust sale of part of their lands to mining companies and complain about the negative impact on their territory.[107]

a. Summary of the Pre-Treaty Anishinaabe Complaints

[127] The 1846 petition and 1847 memorial stand out as eloquent pleas to renew the relationship with a look toward the future. From the Anishinaabe perspective, the Crown had broken a promise to respect their land rights; British occupation and incursions threatened their homes, their hunting territory, their means of subsistence, and their security. As formal and courteous as these letters were, these were claims for recognition of basic human needs, security, and economic well-being, and a plea for recognition as a people in rightful ownership of their land and control over their lives. They wanted to be treated with respect and fairness. The Chiefs were clear that they were prepared to make a treaty to protect their interests and permit further settlement and development on terms that were fair and just.

[128] Historians have said that the 1847 memorial eventually prompted the Government to seek a treaty agreement with the Anishinaabe of the upper Great Lakes region.[108] Although the Government continued to alienate lands, the Governor General began to intervene to push the Colonial Government to take steps to deal with the claim. The reports and investigations that followed in 1848 and 1849 may be seen as the preliminary steps in the treaty negotiations.

iii. Anderson's Visit and Report in 1848

[129] Chief Shingwaukonse's visit to the Governor General in the summer of 1848 prompted him to send Anderson to the Sault to ask the Anishinaabe to justify their claims. Anderson's Council on August 18 and 19, 1848 produced a strong response from Chief Shingwaukonse. In his speech, Chief Shingwaukonse made the following points: he spoke of his service to the Crown; he asserted ancient occupation over the land; and he reminded

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[106] Letter from A. Macdonell (Attorney) to T.E. Campbell, dated 21 April 1849, Trial Exhibit 01-TAB-0609 at 4s – 4w.
[107] "Appeal from the Chippewa Indians to the British Government", *Montreal Gazette* (7 July 1849), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0629, transcription at Trial Exhibit 01A-TAB-0629.
[108] See Chartrand Report, Trial Exhibit 065, at p. 79.

Anderson that the British promised they would never take any land without purchasing it. Chief Shingwaukonse contended that the Anishinaabe considered the land to be theirs:

> You wish to know why we call this our Land. We think the answer is very plain. The Great Spirit placed us on this land long before the Whites crossed the Great Salt Lake. Our ancestors then lived in happiness, there being plenty animals for food, at that time. We had everything we could desire, the animals supplied us with food, the skins were taken from their backs and placed on ours for covering.[109]

[130] Chief Shingwaukonse claimed that the miners had taken minerals without consultation, had burned the forest and driven the game away, and had forbade the Indians to cut timber on certain tracts. Chief Shingwaukonse then expressed his willingness to cede the lands if the Great Father was willing to purchase them.

[131] Both Chief Shingwaukonse and Chief Peau de Chat further described to Anderson that the destruction of the landscape had driven the game from the hunting grounds and the people have been left to starve:[110]

> The Great Spirit, we think, placed these rich mines on our lands for the benefit of his red children, so that their rising generation might get support from them when the animals of the woods should have grown too scarce for our subsistence. We will carry out, therefore, the good object of our Father, the Great Spirit. – We will sell you these lands, if you give us what is right – at the same time, we want pay for every pound of mineral that has been taken off of our lands, as well as for that which may hereafter be carried away."[111]

[132] This was not the first time that Chief Shingwaukonse had expressed the idea that compensation to the Anishinaabe should be linked to the wealth derived from the territory.

[133] Chief Peau de Chat responded to Anderson's questions in a similar fashion: "You ask how we possess this land... You white people well know, and we red skins know how we came

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[109] Minutes of a Council held by T.G. Anderson on Friday, 18 August 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0604, transcription at Trial Exhibit 01A-TAB-0604.
[110] *Ibid*.
[111] Letter from T.G. Anderson to T.E. Campbell, dated 9 October 1848 (appended unreferenced newspaper article), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0608, transcription at Trial Exhibit 01A-TAB-0608. An American newspaper reported this version of Chief Shingwaukonse's speech, as translated by Louis Cadotte. There are similarities and differences between the newspaper version and the Council Minutes on Chief Shingwaukonse's speech, including this final paragraph of the newspaper account. Ms. Jones noted that this last paragraph concurs with Anderson's report in affirming the willingness of Chief Shingwaukonse to negotiate for a purchase of lands and is consistent with earlier speeches and petitions in which Chief Shingwaukonse requested "a share of what is found on my Lands": see Jones Report, Trial Exhibit 010, at p. 83; Address of Chief Shingwaukonse to "Great Father" (Lord Cathcart), dated 10 June 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0437, transcription at Trial Exhibit 01A-TAB-0437.

in possession of this land. It was the Great Spirit who gave it to us, from the time that my ancestors came on this earth it has been considered ours".[112]

[134] Chief Peau de Chat also sought information on the value of the mineral wealth. He stated that he wanted a fair evaluation of his land's worth and arrears for the loss of minerals: "[T]ell the Governor at Montreal to… let us know what he will do and what our land is worth… A great deal of our mineral has been taken away. I must have something for it. I reflect upon it, as well as upon that which still remains."[113]

[135] Chief Peau de Chat, foreseeing treaty terms, stipulated the conditions of permission and payment for the land and the minerals extracted:

> I will let it [my land] go, and perhaps I will accomplish it. I wish to let the Governor have both land and Mineral. I expect him to ask me for it, and this is what would be for our good… [S]end someone to ask for my land, my Minerals &c. I won't be unwilling to let it go. The Government shall have it if they give us good pay.[114]

[136] In his report to the Executive Council, Anderson accepted the Anishinaabe claim that they were the proprietors "of the vast mineral beds and unceded Forests" of the territory[115] and confirmed the Chiefs' allegations relating to the miners' actions. He reported "there does not appear a doubt but [that] the present race are the proprietors of the vast mineral beds and unceded Forests… from time immemorial to the present day" and that the "ruin of their Hunting Grounds is fully corroborated".

[137] Anderson observed more than once that it would be expedient to treat for as much territory as possible and recommended "a treaty granting to the aborigines an equitable remuneration for the whole country, which as far as the Natives are concerned would be most to their benefit, in a perpetual annuity."[116]

[138] The report from Anderson's Council prompted the Government to appoint Vidal and Anderson to obtain further detail on the Anishinaabe claims, including census numbers and to prepare the Government for the eventual council where the Robinson Treaties were negotiated and signed.

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[112] Minutes of a Council held by T.G. Anderson on Friday, 18 August 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0604, transcription at Trial Exhibit 01A-TAB-0604.
[113] *Ibid.*
[114] *Ibid.*
[115] Transcript of Letter from T.G. Anderson to T.E. Campbell, dated 28 August 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0606.
[116] *Ibid.*

IV. THE VIDAL-ANDERSON COMMISSION

A. Fall 1849: The Vidal-Anderson Commission

[139] On August 4, 1849, the Government appointed Provincial Land Surveyor Alexander Vidal and Indian Superintendent Thomas G. Anderson to undertake the final inquiries into the Anishinaabe claims.

[140] Their instructions had three aspects:

- Continue to obtain information relating to the claim to title;
- Obtain other information (*e.g., population, land use, and extent of claim*); and
- Measure the expectations of the Anishinaabe relating to treaty terms, including compensation and reserves requested.[117]

[141] The Commissioners travelled 700 miles along the northern shores of Lakes Huron and Superior via a remarkable canoe and steamer expedition, vising various HBC posts between September and November 1849. Along the way, they met with 16 of the 22 Anishinaabe Chiefs.

[142] The Commissioners quickly learned that there was an impression among both the Anishinaabe and the settlers in the upper Great Lakes region that these men had been appointed to conduct treaty negotiations and to conclude a treaty. There was great disappointment when the limits of the Commission were clarified.

[143] In their meetings with the Chiefs, the Commissioners added a fourth aspect to their work. When they heard the expectations of the Chiefs, the Commissioners engaged with them and tried to temper the Chiefs' expectations.

[144] At the meetings, the Chiefs again took the opportunity to assert their fundamental right of possession and exclusive right of control over their hunting grounds. These rights, they said, flowed from their ancient occupation of the land.

[145] In Fort William, Chief Peau de Chat responded to questions about expected compensation with an opening proposal of $30 per person every year in perpetuity, plus money for a schoolmaster, doctor, blacksmith, carpenter, instructor in agriculture, and magistrate.[118] Mr. Morrison and Mr. Chartrand explained that these demands were consistent with the various provisions in the American treaties, which the Anishinaabe at Fort William were familiar with, having kin that had taken part in those agreements.

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[117] Minutes of Executive Council, dated 4 August 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0638, transcription at Trial Exhibit 01A-TAB-0638

[118] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, Appendix A, at p. 9.

[146] The Commissioners believed, however, that the Lake Superior Anishinaabe had been led "to form extravagant notions of the value of their lands" and that Chief Peau de Chat's demands were "unreasonable".[119] Anderson pointed out that the American treaties contained a clause whereby the Anishinaabe would be forcibly removed from their territory after 25 years; the Crown did not contemplate such a policy in respect to the upper Great Lakes region, making the American treaties poor comparators.[120] In their Report, Vidal and Anderson suggested that these demands had originated with "designing whites", such as the resident Jesuit priests.[121]

[147] In Sault Ste. Marie, the Commissioners met with Chief Shingwaukonse and Chief Nebenaigoching, among others. After asking their questions for demographic information, the Commissioners asked whether the Anishinaabe were willing to cede their land and what compensation they expected.

[148] Chief Shingwaukonse and the Commissioners also discussed the various leases the Anishinaabe had made with individuals and the Anglican Mission, as well as Chief Shingwaukonse's plan for a toll-generating road.

[149] The disclosure of these arrangements sparked sharp comments from the Commissioners who told Chief Shingwaukonse that the Government would not "sanction or allow such transactions" and cautioned him not to enter into any further arrangements without the authorization of the Government.

[150] For his part, Chief Shingwaukonse expressed his frustration after four years of continuous protests about the mining activities and the Government's disregard for their claims. He asked his lawyer Macdonell to respond to questions about his expectations for compensation:

> [W]e have appointed Macdonell to arrange our affairs and have told him all our desires; hear him for us. You do not understand what we say, you understand one another. We will not make replies, talk to Macdonell… I know nothing of the value of the land, - we thought of our ignorance and employed Macdonell. We wish you to hear him...[122]

[151] Vidal refused to hear Macdonell as the spokesperson for the Chiefs and closed the Council. Macdonell went on to speak and Anderson stayed to listen. The Commissioners reported that they told the Anishinaabe that to insist on putting Macdonell forward as their

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[119] *Ibid*, at p. 4.
[120] "Father Frémiot's Report to His Superior in New York", dated 18 October 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0669.
[121] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 4. See Diary of T.G. Anderson, entry dated 5 September 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0657.
[122] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, Appendix A, at pp. 10 – 11.

spokesperson was "virtually a rejection of the Government and might prevent them from participating in the benefits of a treaty".[123]

[152] As part of their dismissal of Macdonell, the Commissioners reminded the Anishinaabe that the Government had plans for the "improvement of their condition". In their Report, the Commissioners further disparaged the choice of Macdonell: "[T]he simple minded Indians have been led to believe that this person is more desirous and better able than the Government to protect their interests and promote their welfare".[124]

[153] In this way and in their responses to the expectations expressed especially by Chief Peau de Chat and Macdonell, the Commissioners put forward the Government position. While they did not make a formal offer on behalf of the Government, their comments were meant to temper or diminish the expectations of the Chiefs, whose views they had been sent to elicit.

[154] For example, the Commissioners responded that the proposal of a $30 annuity was unreasonable and excessive and stated that the removal clause in the American treaties meant that those treaties were not good comparators. They declared that there would be nothing in a treaty for "Half breeds".[125] These same positions were maintained during the formal Treaty Council deliberations the following year.

B. December 5, 1849: Report of the Vidal-Anderson Commission

[155] Notwithstanding the difficulties the Commissioners had in their meetings with some of the Chiefs and their fear that it might be impossible to treat with the Sault Ste. Marie band, the Commissioners did produce a significant Joint Report, dated December 5, 1849, which included some recommendations for terms that found their way into the Robinson Treaties.

i. Title

[156] Vidal and Anderson put to rest any further doubts about the validity of the Anishinaabe as the ancient occupiers of the territory with a legitimate claim of authority and jurisdiction:

> The claim of the present occupants of this tract, derived from their forefathers, who have from time immemorial hunted upon it, is unquestionably as good as that of any of the tribes who have received compensation for the cession of their rights in other parts of the Province; and therefore entitles them to similar remuneration, should the government require the surrender of the whole or any portion of the lands.[126]

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[123] *Ibid*, at p. 4.
[124] *Ibid*, at p. 4.
[125] "Father Frémiot's Report to His Superior in New York", dated 18 October 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0669; Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at pp. 4, 7, 11.
[126] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 2.

[157] Although the Commissioners recognized the legitimacy of the Anishinaabe's claims, they also observed that the Crown had always claimed "[t]he Territorial Estate and Eminent Dominion" in and over the soil.[127]

[158] The Crown's seemingly contradictory views embodied their layered understanding of the assertion of sovereignty and underlying Aboriginal title. However, these notions must have been conceptually incomprehensible to the Anishinaabe of the upper Great Lakes who had only relatively recently come into contact with the notions of common law title and alienation and monetization of land.

ii. The Anishinaabe's Willingness to Treat

[159] The Commissioners understood from their meeting that: "there would be no difficulty in making a treaty on just and mutually advantageous terms."[128]

[160] A treaty that contained mutually acceptable terms would fulfill the Crown's need to legitimize their current and future development activities and goals, as well as the Anishinaabe's demand for recognition of their authority over the land and their right to compensation for permitting the Crown to use and occupy the territory: "There is a general wish expressed by the Indians to cede their territory to the Government provided they are not required to remove from their present places of abode - their hunting and fishing [not interfered?] with and that the compensation given to them be a perpetual annuity".[129]

iii. Observations and Recommendations

[161] The Commissioners made the following observations and recommendations:

1. The Anishinaabe leaders could not know the value of the territory, nor could they estimate future revenues in Euro-Canadian monetary terms for the whole territory.[130]

2. The Commissioners could not estimate the value of the region in monetary terms.

3. Value was seen as revenue from mining locations and the proceeds from surveyed lots at Sault Ste. Marie.[131]

4. It was doubtful that any land could be found for agricultural purposes in the whole region.[132]

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[127] *Ibid*, at pp. 2 – 3.
[128] *Ibid*, at p. 4.
[129] *Ibid*, at p. 4.
[130] *Ibid*, at p. 5.
[131] *Ibid*, at p. 5.
[132] *Ibid*, at p. 5.

5. Unable to provide precise recommendations as to value of compensation to be offered, the Commissioners provided a rationale for their recommendation on a lower than usual annuity:

    - The only value in the land (copper) was situated along the lake shores;

    - The Anishinaabe would retain undisturbed possession of their hunting grounds in the interior (they would relinquish nothing but mere nominal title); and

    - The Anishinaabe would continue "to enjoy all present advantages and will not be poorer because the superior intelligence and industry of their white brethren are enabling them to draw wealth from a few limited portions of their territory".[133]

6. The Commissioners noted that the Anishinaabe would not be subject to the removal clauses present in the American treaties; rather, they would be paid forever and could remain where they were without disturbance.

7. They recommended that the Crown seek a surrender of the whole region north of Lake Superior and Lake Huron as opposed to paying compensation only for the mining locations granted to date because:

    - The territory was comparatively valueless;

    - It was necessary in any event to give compensation for land already taken;

    - The advantage of extinguishing the whole Indian title would allow the Government to dispose of the land in the future "without embarrassment";[134] and

    - The Anishinaabe were experiencing increasing scarcity of food and clothing and were diminishing in numbers and a treaty could provide the Anishinaabe with a means for potential economic assistance.[135]

8. A strong recommendation that after the first payment, all subsequent payments should be made in useful articles of clothing, provisions, goods, and implements, and should include a suitable annual appropriation for the establishment and maintenance of schools.[136]

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[133] *Ibid*, at p. 6.
[134] *Ibid*, at p. 5.
[135] *Ibid*, at p. 8.
[136] *Ibid*, at p. 6 – 7.

9. Observing again that little was known of the value of this so-called "vast but sterile territory", the Commissioners recommended a provision, "if necessary, for an increase of payment upon further discovery and development of any new sources of wealth."[137]

[162] The Commissioners may have had some knowledge that the Crown did not have the means to meet the Chiefs' expectations when they made their recommendation. In any event, the recommendation introduced to Robinson the idea of a mechanism to increase the annuity linked to future revenues. The recommendation was ultimately incorporated into the Robinson Treaties.

iv. Anishinaabe Use and Understanding of Money and the Concept of Value

[163] Before examining why Vidal and Anderson made the recommendation of augmenting the annuity in the event of any new sources of wealth from the territory, I examine the Anishinaabe experience with money and the concept of value as part of the contextual analysis.

a. Use and Understanding of Money

[164] Much was made during the hearing about whether or how much the Anishinaabe understood of the value of money in 1850. There is no doubt that post-contact both the newcomers and the Anishinaabe began to adopt cultural and ideological aspects of the other's culture, including their material culture of tools and other objects. I note that the interactions of the two cultures included, at some point, the shared use of some form of currency.

[165] The Anishinaabe in both the Huron and Superior territories had been participating in the fur trade economy, timbering, and commercial fisheries by the mid-1800s. They had experience with traders and the HBC as a commercial partner. Starting in the 17th century, the HBC devised their own scheme to record their barter trade. The HBC employed the *Made Beaver* ("MB") as its standard unit of evaluation. MB defined how many and what trade goods could be obtained with a given amount of beaver pelts in good condition. However, the value of MB had no corporeal existence.[138]

[166] That the Anishinaabe knew how to count and could operate in a barter economy or with MB, however, does not mean that they appreciated the values of large sums of money. Such sums were outside of their trading experiences. Nor did these Chiefs have experience negotiating or receiving large sums of treaty money. Rather, the Anishinaabe had an appreciation of comparative values (*i.e. what number of pelts it took to buy their usual commodities*) and some of the leaders had limited experience with currency.

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[137] *Ibid*, at p. 5.
[138] Driben Report, Trial Exhibit 003, at footnote 320; Driben Expert Reply Report, Trial Exhibit 004, at p. 19.

b. What did the Commissioners Mean by "Value of the Land"?

[167] I ask this question because no prior treaty linked compensation to value. The Commissioners seemed preoccupied with the idea of the value of the land; that the value was not known, that it could not be known, and that the Anishinaabe were ignorant of it. This last comment is a red herring, as is the debate among expert witnesses about whether the Anishinaabe knew or understood the value of money. There was no market for any Indian land once the *Royal Proclamation* of 1763 was declared. The Crown controlled the market for all land to the extent that they were the only entity permitted to "buy" land or acquire title from Indigenous peoples. The Colonial Government also set the price for which they bought land from the Anishinaabe, sold land to the settlers, and issued licences to the public. Consequently, the Government controlled, or arbitrarily set, the entire market for Anishinaabe land "sales". There was no way for Anishinaabe leaders to know "the value" of the land, if value was measured as a function of future revenue.

[168] Given that there was no open market for their land and that there was no culture or tradition among the Anishinaabe of monetizing land, it is fair to agree with the Commissioners that the Anishinaabe could not estimate the value of land.

[169] If, however, one speaks of the "value of the land" as something other than a monetary value, the record is replete with references to the Indigenous perspective and the Anishinaabe understanding of the value of the land. The land was a living part of the web of interconnected relations. The people had responsibilities toward the land; the land, in turn, sustained the people and was meant to sustain future generations.[139]

[170] Chief Shingwaukonse knew and reminded the newcomers that the land had historically sustained his people but that the traditional ways in which the land had sustained them were being lost. He recognized, as did the Commissioners, that new development in the region could be to the benefit of the Anishinaabe people. However one measured the value of the land, it had always been the Anishinaabe's source of their sustenance.

[171] The Commissioners' repeated statements on this issue of "ignorance of value" leads to three possible inferences concerning the Commissioners' assumptions: first, that "value", however it was defined, was going to be an important factor to consider to reach a mutually acceptable agreement on annuity amount; second, that the Anishinaabe would be in a compromised position without knowledge of the value of the land or the wealth that the territory could produce; and third, that the Commissioners believed the Crown was in a superior position to predict the "value of the land" and that this superior position in negotiating imposed certain duties on the Crown.

[172] The superior position of the Crown vis-à-vis this knowledge or information regarding estimated future revenues imposed a heavy burden on the Crown. Specifically, the Commissioners concluded that the Government would be required to fix the terms of the

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[139] Address of Chief Shingwaukonse to "Great Father" (Lord Cathcart), dated 10 June 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0437, transcription at Trial Exhibit 01A-TAB-0437.

treaty, and that the Anishinaabe were entitled "to the most liberal consideration and a scrupulous avoiding [of] any encroachment upon their rights."[140]

v. The Recommendation to Consider a Provision to Increase the Annuities

[173] By introducing the concept of value of the land as a consideration for compensation for land cession, the Commissioners found a way to bridge the gap between the expectations of the two parties.

[174] The Commissioners proposed a compensation model that took into consideration "the actual value" of the territory. In a recommendation that reverberates today, the Commissioners made a novel proposal for the new treaty to make "terms in accordance with present information of its resources" while adding a provision for an increase to the annuities "upon further discovery and development of any new sources of wealth" (emphasis added).[141] This recommendation was based on the knowledge the Commissioners acquired during their extensive consultations with the Anishinaabe, as well as their understanding of the challenges facing the Colonial Government at the time.

[175] The significance of this recommendation cannot be minimized. The Commissioners' recommendation represented a radically new approach on the part of the Crown. The proposal was without precedent in treaty making in Canada or the United States.[142] However, we cannot forget that Chiefs Shingwaukonse and Peau de Chat had earlier introduced this idea in their petitions, speeches, and memorials.

[176] Since at least 1846, Chief Shingwaukonse spoke of tying the mineral wealth or the monies collected in connection to the mining activity to compensation.[143] Chief Peau de Chat made similar comments. He said he expected compensation for the amounts of copper already removed, as well as for any remaining minerals.[144]

[177] While Chief Shingwaukonse and Chief Peau de Chat had suggested linking the concept of value of the land to the compensation paid, the first record that suggests that the Government seriously engaged with this idea is found in the Vidal-Anderson Report.

[178] The Commissioners recognized that the Government was not likely to meet the expectations of the Anishinaabe either because the Government could not support a $10 per person annuity for the estimated population or because the Government would not be

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[140] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 5.
[141] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 5.
[142] Chartrand Report, Trial Exhibit 065, at p. 121.
[143] "Appeal from the Chippewa Indians to the British Government", *Montreal Gazette* (7 July 1849), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0629, transcript at Trial Exhibit 01A-TAB-0629.
[144] Minutes of a Council held by T.G. Anderson on Friday, 18 August 1848, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0604, transcription at Trial Exhibit 01A-TAB-0604.

inclined to match the annuities paid under previous treaties in southern Ontario since the land was viewed as a so-called "vast but sterile territory".

[179] By the end of their meetings, the Commissioners also understood that while some of the Anishinaabe were prepared to permit the Crown to set the amount of the annuity, others, including the Chief Shingwaukonse, maintained higher demands. The Commissioners understood that mutually acceptable treaty terms could only be achieved if the vastly different expectations and beliefs of the value of the territory could be reconciled.

[180] Vidal and Anderson's recommendation of an innovative approach linking the annuity augmentation clause to the "discovery and development of any new sources of wealth" from the territory provided a means of reconciling the parties' divergent expectations.

C. Conclusion to the Vidal-Anderson Commission

[181] The Report of Commissioners' Vidal and Anderson dated December 5, 1849 and delivered in full on December 11, 1849,[145] provided the Governor General, the Executive Council, and, ultimately, Treaty Commissioner Robinson with detailed information about the territory, population, and the main actors and speakers, as well as an account of the Anishinaabe's expectations. The Report did not suggest that a treaty for the upper Great Lakes region would mirror the earlier treaties in Upper Canada. Rather, the Report prepared the Executive Council and Robinson for treaty discussions that would require an innovative solution to bridging the gap between the parties' expectations.

V. THE MICA BAY INCIDENT AND INSTRUCTIONS TO ROBINSON

[182] The meetings with the Commissioners did not provide any assurances to the Anishinaabe that a resolution to their claims was imminent. After three years of complaining about unauthorized encroachments on their traditional lands, it had become apparent to Chief Shingwaukonse and others that there was an unwillingness or inability on the part of the Crown to settle the Anishinaabe claims through political means or diplomacy. Following the meetings with Vidal and Anderson, the frustration of the Chiefs reached a new high.

[183] While the Commissioners were making their way back to Toronto, Chief Shingwaukonse and Chief Nebenaigoching, along with lawyer Macdonell, led a party of 100 Anishinaabe from both sides of the border to occupy the Quebec and Lake Superior Mining Association's location at Mica Bay with the purported intention of halting mining operations at that site.

[184] News of the Anishinaabe's march toward Mica Bay reached Toronto, and on November 19, 1849, Governor General Lord Elgin approved an OIC that authorized a contingent of troops to be dispatched to the region to "quash the insurgency, apprehend the participants

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[145] Vidal prepared a Supplemental Report, dated 17 December 1850, that was delivered to Superintendent General Colonel Bruce on 24 December 1850; see Letter from A. Vidal to J.H. Price, dated 17 December 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0714.

and restore peace."[146] Lord Elgin's reluctant authorization of troops was accompanied by an order to the Provincial Government to finally make a treaty with the Anishinaabe of the upper Great Lakes region:

> It is probable, however, that this necessity would not have arisen if, before concessions of mining privileges had been made in the District in question, the claims of the Indians had been fully investigated and adjudicated upon in the liberal and conciliatory spirit by which the British Government has been always motivated in its dealings with the aboriginal Tribes of North America. I consent to the employment of the coercive measures recommended by the Council on the understanding that the steps which have been already taken for an amicable and equitable adjustment of all Indian claims on the territory in question will be promptly followed up by the Provincial Government.[147]

[185] Numerous conflicting accounts have been written about the Mica Bay incident, including contemporaneous newspaper articles and letters from Macdonell, who accompanied the delegation.[148] There remains a fair bit of controversy about what actually happened at the mine site and who instigated the incident. What we do know is that the mining activity stopped, and that Chief Shingwaukonse, Chief Nebenaigoching, Macdonell, and others were arrested and brought to jail in Toronto to await trial.

[186] By this time, the Governor General had read the Vidal-Anderson Report (which was submitted amidst all the excitement at Mica Bay), had met with Anderson, and was fully aware of the following:

- The Province of Canada had been issuing tickets for mining locations along the north shores of Lake Huron and Lake Superior since 1845, permitting newcomers to carry out exploration and mining activities for copper;

- The Government had issued these tickets without permission from the local Anishinaabe and without first negotiating a treaty;

- The mining activity led to vigorous complaints from Anishinaabe leaders and demands that the Crown enter into a treaty with them for compensation for any use or occupation of the land.

A. The Involvement of William B. Robinson

[187] We do not have a full record of all that transpired in December of 1849 and January of 1850 in Toronto while the Chiefs were awaiting trial (which never took place as far as we

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[146] Chartrand Report, Trial Exhibit 065, at p. 137. See Executive Council Minutes, dated 19 November 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0686.
[147] Order in Council, dated 19 November 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0681.
[148] Chartrand Report, Trial Exhibit 065, at p. 137.

know). We do know, however, that along with Macdonell, the Chiefs met with William B. Robinson while they were there.

[188] William B. Robinson belonged to one of the most prominent families in Upper Canada. He was the younger brother of Peter Robinson and John Beverley Robinson, central figures in the Family Compact that dominated Upper Canada in the 1830s and continued to be prominent in the United Province of Canada in the 1840s. His eldest brother, Peter Robinson, was a Legislative and Executive Councillor. His other brother, John Beverly Robinson, was successively Solicitor General, Attorney General, and head of the government faction in the Legislative Assembly in the 1820s, and then spent three decades as the Chief Justice of Upper Canada.

[189] Like his brothers, William also pursued a career in provincial politics. Robinson was a member of the Legislative Council for Simcoe County, representing the Tory party, the former Chief Commissioner of Public Works, and a member of the Executive Council, appointed as Inspector General (Minister of Finance).[149]

[190] William B. Robinson also had experience in the fur trade, the mining sector, and the treaty-making process. Through his various roles, Robinson developed excellent relations with the Anishinaabe over the years and spoke some Anishinaabewmowin. He had the confidence of the Government, the mining sector, and the Anishinaabe.

[191] Based on the historical record, it appears that Robinson (in conjunction with Macdonell) was involved in making the arrangements for the Chiefs to receive bail and to return to Sault Ste. Marie.[150] Ultimately, the Committee of the Executive Council set aside £100 toward the costs of the Chiefs' return journey to Sault Ste. Marie.

[192] During this period in Toronto, the lawyer Macdonell was engaged in advocacy on behalf of the Anishinaabe with respect to their complaints. He wrote letters to Government officials and had discussions with Robinson, who was now becoming significantly involved in the matters between the Anishinaabe and the Government.[151] Macdonell later wrote about this time in Toronto, stating that he was involved in "negociations [sic]" with the Government and the Chiefs, and that he drafted a "memorandum for the basis of a treaty".[152] No such memorandum has been found. It appears that Robinson was involved in some form of dialogue with the Chiefs with respect to their claims. In his Official Report

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[149] Letter from James Hopkirk (Provincial Secretary's Office) to W.B. Robinson, dated 6 July 1846, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0446.
[150] Letter from W.B. Robinson to Colonel Bruce, dated 10 January 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0735.
[151] Letter from Allan Macdonell to Colonel Bruce, dated 19 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0718; Letter from Allan Macdonell to James Leslie, dated 23 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0722; Letter from W.B. Robinson to Colonel Bruce, dated 10 January 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0735.
[152] Allan Macdonell to George Brown, dated 30 April 1853, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0977.

on the Treaty Council, Robinson refers to discussions he had with the Chiefs while they were in Toronto.[153]

[193] The mining companies also continued to press for a resolution of the Anishinaabe's claims. Mining company managers were afraid of the possibility of future hostilities. They urged the Government to conclude a treaty with the Anishinaabe of the upper Great Lakes region.[154]

[194] In January of 1850, Robinson formally offered his assistance to help resolve the claims of the Anishinaabe of the upper Great Lakes region.[155] By an OIC dated January 11, 1850, the Executive Committee appointed Robinson as Treaty Commissioner and authorized him to negotiate "for the adjustment of [Anishinaabe] claims to the Lands in the vicinity of Lakes Huron and Superior, or of such portions of them as may be required for mining purposes."[156]

[195] It is generally accepted that the Mica Bay incident, including the arrest of Chief Shingwaukonse and Chief Nebenaigoching, in conjunction with the Vidal-Anderson Report were critical to the Crown taking the final steps to begin formal negotiations for a treaty.

B. Instructions to Robinson

[196] Robinson's mandate as Treaty Commissioner was set out in two separate OICs. The first, dated January 11, 1850 and discussed above, appointed Robinson as Treaty Commissioner and instructed him to "impact on the minds of the Indians that they ought not to expect excessive remuneration for the partial occupation of the Territory heretofore used as hunting grounds by persons who have been engaged in developing sources of wealth which they had themselves entirely neglected".[157]

[197] A second OIC, dated April 16, 1850, further detailed Robinson's mandate. Concerning the extent of territory that the Treaty should cover, the OIC stipulated three options:

- The whole territory on the northern coasts of Lake Huron and Lake Superior;
- In the alternative, the territory as many miles inland from the coast as possible; and

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[153] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680.
[154] See Letter from W.D. Cockburn (Office of the Montreal Mining Company, Montreal) to Commissioner of Crown Lands, dated 30 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0727.
[155] Letter from W.B. Robinson to Colonel Bruce, dated 10 January 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0735.
[156] Order in Council, dated 11 January 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0738, transcription at Trial Exhibit 01A-TAB-0738.
[157] *Ibid.*

- In the further alternative, the north eastern coast of Lake Huron, and such portion of the Lake Superior coast as embraces the location at Mica Bay and Michipicoten where the Quebec Mining Company has commenced operations.[158]

[198] In relation to the financial terms of the proposed Treaty, Robinson's mandate specified:

- Robinson could access up to £7,500 to fund the negotiations and an initial cash payment;
- The initial payment should be as small a sum as possible, and no more than £5,000;
- Robinson should include further compensation in the form of "perpetual annuities";
- The amount of the annuity should be no higher than what could be generated through interest on the notional capital sum equal to £25,000 minus the initial payment; and
- A deduction should be made to the perpetual annuity if the number of claimants drops below 600.[159]

[199] It is important to point out that the money available to Robinson for the Treaty could not support the standard annuity payments provided for in treaties since 1818. Those annuities were based on a population model where the annuity was calculated as the product of the actual population of the territory surrendered multiplied by $10 per person.

[200] There is no record of how or why the Government chose to authorize the notional capital sum £25,000, nor why the Government used the figure of 600 as a presumed base population number, when even their own information showed that population was closer to 2,000.[160] Given the actual population of the bands occupying the Lake Huron and Lake Superior territories and the stated notional capital sum (£25,000), the value of the annuity available to Robinson, if expressed in per person terms, would be significantly lower than the $10 per person standard. It appears therefore that the Executive Council intentionally sent Robinson to the Treaty Council without the financial authority to offer to match annuity provisions from previous treaties.

[201] At least two concerns likely factored into the low level of financial authority given to Robinson.

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[158] Transcription of an Order in Council from the Committee of the Executive Council to James Leslie (Provincial Secretary), dated 16 April 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0766.
[159] *Ibid*.
[160] See Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 3.

[202] First, the Government was of the view that the Anishinaabe were not giving up much, simply mining locations that they had neglected.[161]

[203] Second, in the late 1840s and continuing into 1850, the Province of Canada had been in a financial crisis. By 1850, the Province had not generated great sums from the mining permits that they had issued within the territory. There were only limited mining locations in operation and no imminent prospect of an extension of mining operations.[162]

[204] Apart from their general financial position, perhaps the letter from HBC Governor George Simpson to Robinson, dated May 10, 1850, also influenced the Government. The letter under-scored that the land had no value and provided a bleak assessment for the economic prospects of the region, especially as regards agriculture.

[205] By the Spring of 1850, both the Executive Council and Robinson would have been well aware that the established practice for setting the annuity amount could not be followed within the limits of the authority. By then, Robinson was aware that the estimated population of the Treaties' territories was between 2,000 and 2,662.[163] Therefore, it would have been obvious to Robinson before he arrived at the Treaty Council that the population model that had been used to calculate an annuity since 1818 was not in the cards; Robinson did not have the financial authority to duplicate that model.

[206] Moreover, the Chiefs had long expressed their own views about the value of their territories and the need for a treaty if mining was going to continue.

[207] Therefore, Robinson knew long before he arrived in Sault Ste. Marie in August that a treaty for this vast territory was going to be different from all of the treaties the Crown had concluded up until then.

VI. THE TREATY COUNCIL OF 1850: AN ACCOUNT

A. Chronology of the Treaty Council

[208] In the late summer of 1850, Robinson met with various Anishinaabe Chiefs and leaders in preliminary discussions followed by the formal Treaty Council. At the end of three weeks, two treaties were signed. Robinson signed on behalf of the Her Majesty the Queen; the Chiefs from the Lake Superior and Lake Huron territories signed on behalf of their respective tribes.

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[161] See Order in Council, dated 11 January 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0738, transcription at Trial Exhibit 01A-TAB-0738.
[162] Transcription of Letter from G. Simpson (HBC Governor) to W.B. Robinson, dated 10 May 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0776.
[163] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 3; Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680.

i. August 18, 1850 – September 4, 1850: Pre-Treaty Meetings with Anishinaabe Chiefs and Leaders

[209] Robinson arrived in Sault Ste. Marie on August 18, 1850.[164] His diary and Official Report provide the only details we have of the Treaty Council. Robinson refers to Sault St. Marie. However, as 95-year-old Elder Irene Stevens reminded us quite strictly, that place was always known to the Anishinaabe as Bawaating.[165]

[210] Robinson's diary indicates that he met with Chief Peau de Chat and members of the Superior delegation almost daily from August 21 to September 1, 1850.[166] He then met with Chief Shingwaukonse, Chief Tagawinini, and the Huron delegation at Garden River for one day: September 3, 1850, the formal opening of the Treaty Council. The Huron delegation then travelled to the Sault for the substantive discussions of the Treaty Council.

[211] Robinson's diary is sparse for the pre-Treaty period. The only comment about the Superior delegation was, "All seem well disposed to treat on fair terms."[167] From the Huron delegation, the only recorded comment is: "Stated they had all perfect confidence in Mr. Robinson and would settle their differences with him." Indian Superintendent General Colonel Robert Bruce joined Robinson for at least two (and possibly four) of his meetings.[168]

[212] Governor General Lord Elgin arrived on August 30, 1850. Robinson met with him that day and again on August 31. In Robinson's diary entry of August 31, he notes that he told Lord Elgin his "intentions as to the treaty, which he approved of".[169] Lord Elgin was well positioned to give Robinson his assurance of support. As Governor General, he retained the Crown's prerogative responsibility for Indian Affairs, including the making of treaties. Lord Elgin had said as much to Chief Peau de Chat the following day when he told Peau de Chat that he had left full power with Robinson to "settle this matter."[170]

[213] Robinson's visit to Garden River with the Governor General on September 3, 1850 marked the formal opening of the Treaty Council. The parties convened at Chief Shingwaukonse's house where the Governor General made an introductory address and the Chiefs responded with their own opening remarks. Interpreters and other Government officials were also

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[164] Diary of W.B. Robinson, entry dated 18 August 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[165] Elder Irene Stevens Testimony, Final Transcript (October 31, 2017), Vol. 20: 2752 – 2753, 2755 - 2756.
[166] During this period, Robinson may also have met with some Huron Chiefs, although that cannot be specifically determined from the record. We also know that Chief Peau de Chat, the spokesman for the Superior delegation was quite ill during this time: see Diary of W.B. Robinson, entries dated 21 August 1850 – 1 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[167] Diary of W.B. Robinson, entry dated 23 August 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[168] Diary of W.B. Robinson, entries dated 21 August 1850 – 1 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[169] Diary of W.B. Robinson, entries dated 30 – 31 August 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[170] Diary of W.B. Robinson, entry dated 1 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.

present. It was decided that the parties would return to Sault Ste. Marie for the substantive treaty discussions to accommodate Chief Peau de Chat, who was too ill to travel.[171]

ii. The Opening Offer

[214] The substantive treaty discussions started September 5, 1850, following a pipe ceremony and possibly a smudging ceremony,[172] with all the delegates from Lakes Superior and Huron gathered. As Mr. Morrison pointed out, it is important to note that the Treaty Council took place around the Anishinaabe Council Fire at Bawaating (Sault Ste. Marie), and not at the King's Council Fire at Manitowaning, nor at the Legislative Assembly or Executive Council offices of the Provincial Government in Toronto, nor at the Royal Palace of the Monarch in London, England. Further, not only did the Treaty Council take place at a central and long-standing site of Anishinaabe governance, it was conducted in Anishinaabemowin, as well as English, and incorporated ceremonies and protocols that characterize the long-standing system of Great Lakes diplomacy.[173] The location of the Treaty Council, as well as the protocols and procedures followed, indicate that the British, including Robinson, had developed at least a functional understanding of the Anishinaabe systems of law, diplomacy, and language.

[215] Robinson's initial proposal included reservation and hunting rights: reasonable reservations for their own use and the use of all the territory ceded "to hunt & fish over as heretofore, except such places as were sold to white people and others [and] occupied in a manner to prevent such hunting, &c".[174] These issues were accepted and not discussed further.

[216] It is no surprise that from the outset, however, the question of financial compensation was the primary issue of concern. Robinson framed the financial terms as an option between two types of compensation: a single payment for the surrender of existing mining locations only or a gratuity/annuity provision for the surrender of the Anishinaabe's traditional territories as a whole.[175] The assembled Chiefs and principal men "all preferred the latter proposition" for compensation (*i.e. the option involving a gratuity and perpetual annuity, as opposed to a single payment for existing mining locations*).[176]

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[171] Diary of W.B. Robinson, entry dated 3 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[172] There was an account of the first day of the Treaty Council published in *The British Colonist* on October 1, 1850, which included a description of the ceremonies that occurred, including a pipe ceremony and possibly a smudge: see "The Indian Treaty", *The British Colonist* (1 October 1850), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0859, transcription at Trial Exhibit 01A-TAB-0859.
[173] Morrison Report, Trial Exhibit 014, Appendix "D", at pp. 109 – 115. See "The Indian Treaty", *The British Colonist* (1 October 1850), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0859, transcription at Trial Exhibit 01A-TAB-0859.
[174] Diary of W.B. Robinson, entry dated 5 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[175] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680, at p. 17.
[176] *Ibid*, at p. 18.

[217] Robinson outlined the Crown's proposal for compensation: £4,000 (equivalent to $16,000) in cash and a perpetual annuity of £1,000. The compensation offer was all the cash that Robinson had in hand.

[218] Robinson must have anticipated that the Chiefs and leaders would recognize that the offer was clearly well below those of prior treaties made in the Province over the decades, and that this low offer could create a problem in the negotiations. Robinson, therefore, justified the offer in terms based on the relatively low value of the subject lands.[177] He explained:

- That the land was vast and "notoriously barren and sterile" when compared to the good quality lands in Upper Canada that were sold readily at prices which enabled the Government to be more liberal with compensation;
- That the whites occupied the land covered by prior treaties in a way that precluded the possibility of Indian hunting or access to them;
- That in all probability the lands in question would never be settled except in a few localities by mining companies;
- That the occupation by settlers would be of great benefit to the Anishinaabe, as they would afford a market for selling items and would bring provisions at reasonable prices.[178]

[219] What Robinson did not say, or did not record that he said, was that the Province was broke. This fact is not controversial, and Ontario presented a large volume of evidence and argument to set out the factual basis for this proposition. Associated with this fact, and a reason for the low offer, was the related fact that the population of the Huron and Superior territories was much larger than those of the areas of prior treaties. Therefore, using the population-based formula would have required a much larger sum for the annuities than prior treaties and a far higher amount than authorized in the April OIC.

[220] I find that Robinson's initial offer also included the notion of an augmentation clause, stating that the perpetual annuity would be increased if revenues received from the territory permitted the Government to do so without incurring loss. The details surrounding the augmentation clause are discussed further below.

[221] Chief Peau de Chat expressed his satisfaction and willingness to treat and requested that he be given until the next day to reply to Robinson's proposal. Chief Peau de Chat asked

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[177] Dr. Driben disagrees with the timing of this explanation (*i.e. he posits that it was probably September 6, 1850*): see Driben Report, Trial Exhibit 003, at pp. 118 – 119. I do not find it a matter that requires me to find one way or the other; whether it was said September 5 or 6 does not impact on other findings.

[178] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680, at p. 17.

that half of the total compensation amount Robinson had proposed be allocated to the Lake Superior Anishinaabe.[179]

[222] Chief Shingwaukonse also asked for time to consider the proposal with the other Huron Chiefs, as was the practice among Anishinaabe leaders. Neither Chief could unilaterally accept or reject Robinson's proposal without first discussing it in their own Council. Chief Shingwaukonse and Chief Peau de Chat could only determine through consensus whether to accept or reject the terms, request modifications, or present additional demands.

[223] Robinson's proposals for explicit provisions for reserves and the protection of harvesting rights were more expansive than the standard practice of the Crown. It is likely that Robinson put these issues on the table at the outset in an effort to overcome the anticipated resistance to the low financial offer he had made and to which he was limited.

iii. September 6, 1850: Different Responses to the Opening Offer

[224] After having the opportunity to council on the evening of September 5 and/or the morning of September 6, the Chiefs met again with Robinson on September 6. Chief Peau de Chat informed Robinson then that the Superior Anishinaabe were prepared to sign a treaty.[180]

[225] Once the Superior delegation indicated they were prepared to sign, Robinson knew that he had achieved one of the most important goals for the Government with a treaty for cession of the Superior territory, which included the now "legitimized" mining locations. Somewhere around this time, Robinson began referring to two treaties, plural, and he shifted his attention to the Huron delegation.

[226] Later that day, Chief Shingwaukonse counter-proposed an annuity of $10 per head.[181] Robinson speculated in his Report that the demand was the result of advice "by certain interested parties", likely a veiled reference to Macdonell.

[227] Robinson explained that he could not accede to that request, and tried to persuade the Huron delegation to accept his offer by repeating the other benefits that he had first proposed as treaty terms: that they would have the same privileges as ever of hunting and fishing over the whole territory, because the land "will in all probability never be settled except in a few localities by mining companies", and that they would receive reserves of reasonable tracts for their own use.[182]

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[179] Diary of W.B. Robinson, entry dated 5 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[180] Diary of W.B. Robinson, entry dated 6 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[181] *Ibid.*
[182] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680, at p. 17; Diary of W.B. Robinson, entry dated 6 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.

[228] It is likely that both Chief Shingwaukonse's $10 demand and Robinson's justification for the low offer came from their familiarity with the population-based annuity model and the $10 multiplier employed in earlier land surrenders since 1818. By offering a low annuity, Robinson could remain within the limits of his financial authority. Chief Shingwaukonse, conversely, was aware of the Crown's pattern of offering the equivalent of $10 per capita as an annuity and sought parity for his people.

[229] Robinson told Chief Shingwaukonse that as a majority of the Chiefs the day before were in favour of the terms, Robinson was going to write up the Treaties on that basis.[183] By this point, it appears that all parties were aware that there would be two separate treaties, although made on exactly the same terms. Robinson spent the evening of September 6 writing a sketch of the Treaties.

iv. September 7, 1850: Chief Peau de Chat Signs and Chief Shingwaukonse Repeats His Demands

[230] On the morning of Saturday, August 7, Robinson met with the Superior delegation. Messrs. G. Johnson and J.W. Keating provided translation services and read the document aloud to the Chiefs and leaders. Robinson recorded in his diary that "[t]hey were all perfectly satisfied & said they were ready to sign it".[184]

[231] Chief Peau de Chat "acknowledged he understood the terms of the treaty & was satisfied."[185] He said "the amt he was to receive made no difference to him. He was already to obey the wishes of his Queen now, as he had always been."[186] Dr. Driben explained this comment from Chief Peau de Chat, stating that this short speech was "in accord with custom, in the characteristic, deferential manner called for on such occasions, as an expression of trust rather than of indifference".[187] Chief Peau de Chat, three other Chiefs, and five principal men signed the Robinson Superior Treaty in open council that day.[188]

[232] On the same day (September 7, 1850), Chief Shingwaukonse addressed Robinson, repeating his counter proposal. Robinson replied with an ultimatum: "I told him I could not alter my determination & as the majority of Chiefs were in favor of my proposition", Robinson would prepare the Treaty and bring it over the following day and those who signed "w^{d} [would] get the money for their tribes & those who did not sign w^{e} [would] get none & I sh^{d} [should] take the reminder of the money back to Toronto, give it to the govt to take no further trouble about the treaty matter".[189]

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[183] Diary of W.B. Robinson, entry dated 6 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[184] Diary of W.B. Robinson, entry dated 7 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[185] *Ibid.*
[186] *Ibid.*
[187] Driben Report, Trial Exhibit 003, at p. 121.
[188] Diary of W.B. Robinson, entry dated 7 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[189] *Ibid.*

[233] Robinson spent the afternoon of September 7 and September 8 preparing the Robinson Huron Treaty and also preparing the cash for the Lake Superior delegation (half of £4,000, as requested).[190]

v. September 9, 1850: The Huron Delegation Signs the Treaty

[234] On Monday, September 9, Chief Shingwaukonse and Chief Nebenaigoching again asked for a larger annuity ($10 per head) and raised the subject of land grants for the Métis.[191] Robinson rejected both requests. In his diary, Robinson said that he "then had the treaty again read out aloud to them all & explained".[192] When Chiefs Shingwaukonse and Nebenaigoching saw that the others were prepared to accept the proposed terms, they signed first, and the rest followed.[193]

[235] Mr. Morrison opined that when Robinson had the translator, likely Keating, read out and explain the Treaty on September 9, it is likely he would have been relying on Keating to help "sell the deal."[194] We must assume, based on Robinson's general reputation, that he would have wanted the delegates to understand the augmentation clause and would therefore have insisted that the clause be carefully explained.

vi. September 10 – 24, 1850: Making the First Payments

[236] On September 10, Robinson paid Chief Nebenaigoching's band in Sault Ste. Marie, and paid Chief Shingwaukonse and two others at Garden River the following day.

[237] On September 19, 1850, Robinson presented the Treaties to Prime Minister Louis-Hippolyte LaFontaine. His Official Report, dated September 24, 1850, was also delivered to Colonel Robert Bruce. On November 29, an OIC declared that the two Treaties were to be ratified and confirmed.[195]

B. The Treaties' Terms

i. The Surrender and Compensation Term

[238] The surrender clause in the Robinson Superior Treaty is expressed as follows:

> [The Anishinaabe of the Lake Superior territory] from Batchewanaung Bay to Pigeon River, at the western extremity of said lake, and inland throughout

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[190] *Ibid.*
[191] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680, at pp. 18, 20; Diary of W.B. Robinson, entry dated 9 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[192] Diary of W.B. Robinson, entry dated 9 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[193] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680, at p. 18.
[194] Morrison Report, Trial Exhibit 014, at para. 351.
[195] Order in Council, dated 29 November 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0883.

> that extent to the height of the land which separates the territory covered by the charter of the Honorable the Hudson's Bay Company from said tract [and] also the islands in the said lake… freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described [except for certain reservations (three in all) set out in the annexed schedule]…

[239] With respect to compensation, the Robinson Superior Treaty states:

> [F]or and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer, not later than the first day of August at the Honorable the Hudson's Bay Company's Posts of Michipicoton and Fort William.[196]

[240] Similarly, the Robinson Huron Treaty recites that the Anishinaabe:

> [I]nhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shore thereof, and inland to the height of land which separate the territory covered by the charter of the Honorable Hudson's Bay Company from Canada, as well as all unconceded lands within the limits of Canada West to which they have any just claim… on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant, and convey unto Her Majesty, Her heirs and successors for ever, all their right, title and interest to and in the whole of the territory above described [except for certain reservations (15 in all) set forth in the annexed schedule]…

[241] With respect to compensation, the Robinson Huron Treaty states:

> [F]or and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose.[197]

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[196] The Robinson Superior Treaty, dated 7 September 1850, see Appendix A.
[197] The Robinson Huron Treaty, dated 9 September 1850, see Appendix B.

[242] There are some slight differences in wording between the two Treaties; however, these differences were not raised as material differences for the purpose of this stage of the hearing.

ii. The Augmentation Clause

[243] The following clause in the text of both the Robinson Huron and Robinson Superior Treaties reads:

> The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order;…[198] [Emphasis added.]

[244] It is the interpretation of this provision, referred to as the augmentation clause throughout this judgment, that is in dispute. The parties have called the underlined portion either the *ex gratia* clause (Defendants) or the Her Majesty pleases clause or the graciousness clause (Plaintiffs).

a. Did Chief Shingwaukonse Give Up His Demand for Revenue-Based Compensation?

[245] Dr. von Gernet posited that Chief Shingwaukonse's response of asking for a population-based annuity during the negotiations meant that he had given up on his idea of a share of the wealth from the territory or a proceeds model.

[246] I find that the evidence does not support this speculation. Dr. Von Gernet based his opinion on the assumption that Chief Shingwaukonse could not or would not make demands for treaty terms outside of what he had seen in prior treaties in completely different circumstances, concerning considerably different territories. It also assumes that Chief Shingwaukonse, who had eloquently argued for a share of the wealth for over four years, abandoned his innovative idea after one opening speech from Robinson. This opinion is flawed, especially in the absence of any record of Chief Shingwaukonse's speeches at the Treaty Council.[199]

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[198] The Robinson Superior Treaty, dated 7 September 1850, see Appendix A. The Robinson Huron Treaty includes an almost identical provision, with slight differences: see The Robinson Huron Treaty, dated 9 September 1850, see Appendix B. These differences were not raised as material differences for the purpose of this stage of the hearing.

[199] The translations and transcriptions of the Anishinaabe Chiefs' speeches at the Treaty Council (which were in the possession of the Crown) have been lost.

[247] We know that Chief Shingwaukonse was a well-regarded and visionary political leader and speaker, and in the midst of a dynamic give-and-take set of negotiations with respect to the future relationship between his people and the Crown. Without the benefit of those speeches, to ignore Shingwaukonse's reputation as a visionary leader who had previously expressed a demand for a share of the wealth is a fatal flaw to the opinion.

[248] It is just as likely that Chief Shingwaukonse's demand for a $10 per capita annuity was made in the back-and-forth with Robinson, after both the initial offer of the annuity was made and after the augmentation clause was proposed. Instead of retreating from his demand for a shared proceeds model, Chief Shingwaukonse could have just as easily been asking for a higher floor or a "starting salary" (as it was called) for the annuity. Asking for a higher floor to the proposed annuity made sense when Robinson and others had done their best to convince the Anishinaabe that the land was vast, sterile, and without value, making the shared proceeds model quite risky.

[249] I find that there is simply no foundation for speculating that Chief Shingwaukonse's demand for a per capita annuity during the Treaty Council is proof that he or the other Chiefs had given up or retreated from their long-held position that the compensation had to reflect the value of the territory.

[250] In any event, Canada does not rely on Dr. von Gernet's opinion at the end of the day. Dr. von Gernet's opinion does not contribute to the ultimate analysis.

b. How did Robinson Explain the Augmentation Clause in His Official Report?

[251] Robinson's Official Report, dated September 24, 1850, was meant for Lord Elgin and the Executive Council. In reference to the augmentation clause, Robinson made the following comments:

> I trust his Excellency will approve of my having concluded the treaty on the basis of a small annuity and the immediate and final settlement of the matter, rather than paying the Indians the full amount of all moneys on hand, and a promise of accounting to them for future sales… Believing that His Excellency and the Government were desirous of leaving the Indians no just cause of complaint on their surrendering the extensive territory embraced in the treaty; and knowing there were individuals who most assiduously endeavored to create dissatisfaction among them, I inserted a clause securing to them certain prospective advantages should the lands in question prove sufficiently productive at any future period to enable the Government without loss to increase the annuity. This was so reasonable and just that I had no difficulty in making them comprehend it, and it in a great measure silenced the clamor raised by their evil advisers.[200]

[200] Letter from W.B. Robinson to Colonel Bruce, on transmitting the Robinson Treaties, dated 24 September 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680, at p. 18 – 19.

c. Is it Reasonable to Conclude that Governor General Lord Elgin Approved of Robinson's Intention to Offer an Augmentation Clause?

[252] Robinson met with the Governor General on August 30 and August 31 in Sault Ste. Marie and informed the Governor General of his "intentions as to the treaty", of which the Governor General approved.[201] It is reasonable to conclude that if Robinson was contemplating treaty terms outside the past practice of the Government, and possibly committing a share of future proceeds from the territory, that he discussed this idea and sought the approval from the Governor General himself. The question arises: what topics, issues, or ideas did Robinson discuss with Lord Elgin on August 30 and 31, and what intention, term, or promise did the Governor General approve?

[253] Mr. Morrison opined that Lord Elgin directed Robinson to implement the various recommendations of the Vidal-Anderson Report. Mr. Chartrand stated that "whatever Robinson presented to Lord Elgin on August 31, were his own proposals" and "Robinson's proposals may well have been based in part on some of the recommendations outlined in the Vidal-Anderson report."[202] I agree that, at a minimum, Robinson would have asked and obtained the Governor General's approval to seek a surrender of Indian title to the territory north of both Lakes. Mr. Chartrand opined that it is likely that at minimum, the discussion would have focused on which of the two treaty options (*either a complete surrender of the territory along the northern shores of the two lakes or a cession only compensated for lands taken up by established mining locations*) was preferred.[203] These alternate options were both set out in the OIC of April 1850.

[254] I am of the view that it is also likely that the two men discussed payment terms, including annuities. While securing the surrender of title to the mining locations was of primary importance to the Colonial Government, the Province was also constrained by its financial circumstances and had set clear financial parameters for the compensation provisions. These two themes would have been uppermost in Robinson's mind.

[255] For the reasons that follow, I find it reasonable to conclude that Robinson asked for and received Lord Elgin's approval for the augmentation clause during the August 30 and 31 meetings.

[256] It is well to review the information Robinson had by the late summer of 1850.

[257] From Robinson's time with the Chiefs in Toronto, he would have been well aware that the Anishinaabe had reached the end of their patience with the repeated incursions into their territory, the endless investigations into their title, and their unanswered and longstanding demands for recognition and fair compensation, particularly as it related to resource exploitation of minerals and timber.

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[201] Diary of W.B. Robinson, entries dated 30 – 31 August 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0857, transcription at Trial Exhibit 01A-TAB-0857.
[202] Chartrand Report, Trial Exhibit 067, at p. 62.
[203] Chartrand Report, Trial Exhibit 065, at p. 170

[258] Robinson had read and found useful the Vidal-Anderson Report, which introduced the link between annuities and territorial revenues. The instructions in the January 8, 1850 OIC were consistent with the Vidal-Anderson Report and anticipated that the treaty payment to the Anishinaabe would come from revenues received from the mining locations. The Executive Council instructed Robinson to consider that the funds advanced to Chief Shingwaukonse and others to return home following their arrest "must form a charge against any monies received on account of the mining locations."[204] In other words, the mining location revenue was the source of funding either for the lump sum payment or the annuities.

[259] Robinson would have recognized that the Commissioners' recommended augmentation term could possibly provide an attractive means to satisfy the expectations of the Anishinaabe. However, because the Government had no prior experience with such an idea, he would have taken the opportunity to discuss and seek approval from the Governor General.

[260] Mr. Chartrand agreed that if Robinson was considering an augmentation clause "as an enticement" for the Anishinaabe Chiefs and leaders, it is likely that, prior to presenting such an unprecedented clause in council, he would have consulted with the Governor General who was present. This was especially so in the context of a rich, important, and historic ongoing relationship.

[261] Robinson's instructions were flexible enough that his augmentation clause proposal could fit within their scope. But its novelty would have compelled him to discuss the idea and seek approval before making it an official offer. Recall, Robinson had a strong reputation with the Anishinaabe and also status with the Executive Council. He would have taken a cautious approach to introducing the clause; he was no rogue.

[262] Lord Elgin had already signalled his intention to resolve the claims of the Anishinaabe. His consent to the deployment of the troops to Mica Bay was made on the understanding that the Provincial Government would promptly move to settle the claims.

[263] I conclude that Robinson would have discussed this novel idea for the augmentation clause with Lord Elgin, and Lord Elgin gave him the authorization he needed to proceed. This is consistent with what is known about the way Robinson acted. He secured Lord Elgin's approval to proceed on that basis.

[264] Finally, there is nothing in the historical record following the Treaties to suggest that either the Governor General or the Executive Council were unhappy with the augmentation clause. Robinson must have been confident that he had secured approval to make a treaty on the basis of an augmentation provision with Lord Elgin. Hence, he said in his report: "I trust his Excellency will approve of my having concluded the treaty…".

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[204] Order in Council, dated 11 January 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0738, transcription at Trial Exhibit 01A-TAB-0738.

d. When was the Concept of the Augmentation Clause Introduced or Proposed?

[265] The Superior Plaintiffs submit that Robinson made the offer of the augmentation clause before Chief Peau de Chat indicated his willingness to sign the Treaty on September 6, 1850.

[266] Because neither Robinson's diary nor Official Report reveal when Robinson introduced the augmentation provision, we must follow the logic of the events to best infer when he might have done that.

[267] The question of timing is important when assessing if or to what extent the augmentation clause was an incentive to the Superior delegation to sign the Treaty.

[268] For the following reasons, I find it reasonable to conclude that the augmentation clause was discussed or presented before or at the full council including Chief Peau de Chat and Chief Shingwaukonse on September 5, 1850 or the early part of the day on September 6, 1850.

[269] Robinson opened the proceedings on September 5 speaking to a single assembly of Anishinaabe Chiefs and leaders, and presented an offer based on obtaining a single agreement covering both the Superior and Huron territories. The record shows that Robinson first referenced "treaties" in plural on September 6, only after Chief Shingwaukonse's strong response in opposition to the initial offer presented.

[270] Chief Peau de Chat, on the other hand, speaking on behalf of the Superior delegation later in the day agreed to sign the Treaty. Mr. Morrison attributed the Lake Superior Chiefs' willingness to treat almost immediately to the fact that they, unlike the Huron delegation, had been meeting with Robinson and other Crown officials, including the Governor General, continuously from the time of their arrival on August 21, 1850. I accept this is as a reasonable reading of Robinson's diary and a reasonable conclusion to draw from it.

[271] As a result of the pre-Treaty meetings and the Vidal-Anderson Commission Report, at the very least Robinson had to have known that his low annuity offer would find little favour with the Chiefs.

[272] Robinson went to the Treaty Council intending to conclude a single treaty as per his instructions. Therefore, even if Robinson thought it was only Chief Shingwaukonse and Chief Nebenaigoching from the Huron delegation (who he knew from their recent stay in Toronto) who would actively push back on his offer, Robinson had to put his best position forward from the outset in an attempt to achieve an agreement.

[273] Mr. Chartrand conceded that if the augmentation clause was presented on September 5, that would support Chief Peau de Chat's initial positive comments and predispose him to agree to the Treaty terms.

[274] Unless the augmentation provision had been offered by the time Chief Peau de Chat agreed to sign, there is no other reasonable explanation for Chief Peau de Chat to say on September 7 that, "the amt he was to receive made no difference to him." It is only reasonable that a Chief who was selected as the speaker for his whole region, who had a long history of

advocating for his people, with their interests at the forefront, would have been relying on the augmentation provision when he said the amount made no difference to him.[205] He knew that the mine locations of Mica Bay and Michipicoton Island were within his territory, that the Treaty represented that the Crown now respected the Anishinaabe's authority, and that the Crown was ready to pay compensation for access to the territory.

[275] Robinson knew to persuade Chief Peau de Chat of the fairness of his proposals if he was to fulfil the Government's priorities to legitimize the mining locations.

[276] Finally, there is no other reasonable conclusion than that Robinson proposed the augmentation clause by September 6, given that Chief Peau de Chat would have had to discuss it and get the views of his delegation before accepting this innovative provision. Chief Peau de Chat had an opportunity to do so on September 5 at the end of the day and the morning of September 6 before convening with Robinson.

[277] For Chief Peau de Chat to express his satisfaction with the Treaty terms on September 6, 1850, he must have taken the opportunity to discuss and come to a consensus with his delegation on the augmentation clause prior to providing his assent.

[278] I am satisfied that the most plausible scenario is that by the time Chief Peau de Chat agreed to accept the terms of the Treaty, he had discussed the augmentation provision in council with the Superior delegation on September 5 and/or September 6 before convening with Robinson. Therefore, Chief Peau de Chat must have had the idea proposed to him by September 6.

[279] In this respect, I disagree with the opinion of Defendant witnesses Mr. Chartrand and Dr. von Gernet. Mr. Chartrand's opinion, somewhat modified in his oral evidence, was that Robinson decided to include an annuity augmentation clause during the treaty negotiations of September 6 in response to Chief Shingwaukonse's demand for perpetual annuities to be set at $10 per capita.[206] However, since neither Ontario nor Canada appear to rely on this opinion for their final submissions, I will not discuss it further. Suffice to say that Dr. von Gernet's position that "Robinson decided to add the augmentation provision (either in the evening of the 6 or in the morning of the following day)"[207] is unsupported on the evidence. For the reasons set out above I do not find any logic to Dr. von Gernet's opinion.

[280] Rather, it is possible and reasonable to assume that Robinson may have introduced the concept, or, to use the vernacular, floated the idea of an augmentation clause in his meeting with Chief Peau de Chat any time after August 31, 1850, when the Governor General had approved Robinson's "intentions".

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[205] See "Discovery Questions and Answers Posed to Canada", dated 12 January 2018, Trial Exhibit 063 at Question #427a.
[206] Chartrand Report, Trial Exhibit 065, at p. 218.
[207] von Gernet Report, Trial Exhibit 079, at p. 205.

VII. WHAT IS THE SIGNIFICANCE OF THE POST-TREATY HISTORICAL RECORD?

[281] When I speak about the post-Treaty historical record, I am referring to the written record, which includes oral histories, correspondence, government documents, and translations of Anishinaabe speeches and letters.[208]

[282] Canada contends that the absence of complaints from the Anishinaabe regarding the payments to individuals supports the proposition that the Anishinaabe understood and accepted that the Treaties' promise was an individual entitlement, as opposed to a collective entitlement. Ontario urged the court to consider the post-Treaty record in support of their view that the parties understood that the augmentation promise was capped at $4 per capita.

[283] In this section, I briefly review the post-Treaty historical record and the relevant conduct, as well as the positions of the parties on the relevance of this record.

A. The Post-Treaty Context: The Historical and Cultural Conditions Following the Robinson Treaties

[284] The treaty interpretation exercise requires the court to look at the full context of circumstances surrounding the Treaties. This includes a review of post-Treaty accounts and conduct set in their historical and cultural context to determine if there is evidence by conduct or otherwise of how the parties understood the terms of the Treaties.[209] The weight to be attributed to the post-treaty record will vary in each case and will depend on the nature and context of the accounts and conduct.[210]

[285] Without taking context into account, one risks being drawn into the type of error that courts have long been cautioned to avoid (that is, reliance on a "strict" interpretation of the text or absence of text). A court must engage in generous rules of interpretation that extend beyond the four corners of the treaty document.[211]

[286] In the context of the Robinson Treaties, during the post-Treaty period the Anishinaabe of the upper Great Lakes region were dealing with the following serious issues:

- Scarcity of food and resources, described in 1883 in desperate terms: "…but the truth is that nothing is left [for] us now but rocks and sand as Whites have taken possession of all that is good in our once fertile country" (emphasis in original);[212]

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[208] I do not refer to either Robinson's Official Report or his diary of the Treaty Council in this section. I considered these two documents, made contemporaneously with the Treaty Council, in the section on the Treaty Council.
[209] *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360 (C.A.).
[210] *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band*, [2002] O.J. No. 3741 (Sup Ct), [2003] 1 C.N.L.R. 6, at para. 50.
[211] *R. v. Marshall*, [1999] 3 S.C.R. 456, at paras. 9 – 14; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52.
[212] Transcription of Letter from Pierre Oningenun (Oaugtgun) (Chief of the Spanish River Band) to Superintendent General of Indian Affairs, dated 3 December 1883, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1196.

- Regulatory restrictions imposed on hunting and fishing that resulted in prosecutions;

- Concerns about protecting Anishinaabe fisheries and other resources from settler use and development;

- Intense pressures on the Anishinaabe to give up portions of the lands they had reserved that had proven valuable;

- Disputes concerning the size of reserves;

- The interference with Anishinaabe traditional governance structures through the *Indian Act*, including prohibitions of certain religious practices;

- The Crown's silence in response to claims for increases to the annuity payments and, after 1875, demands for arrears for increases that should have been made decades earlier;

- Mobility restrictions, in particular after the 1869 Red River Rebellion; and

- The establishment of Residential Schools where the Anishinaabe were facing considerable pressure to have their children educated in Euro-Canadian ways.

[287] These many issues occupied the Anishinaabe throughout the post-Treaty period. From the Anishinaabe perspective, some of these issues were considered breaches of their long-standing and ongoing treaty relationship with the Crown. It would be reasonable to infer that these issues might have taken priority in the Crown-Anishinaabe dialogue.

B. The Post-Treaty Conduct: The Initial Payments of the Annuities and the One Increase Made to the Annuities

[288] Canada relies on post-Treaty conduct, including actual payment practices, to give meaning to the Treaties.

[289] Based on the population of the Huron and Superior Territories in 1850, the annuity (£600 for the Huron Anishinaabe and £500 to the Superior Anishinaabe) worked out to the equivalent of approximately $1.70 and $1.60 per capita, respectively.

[290] From 1851 to 1854, the Huron Treaty annuity was paid out in goods to each band; no individual cash payments were made. Starting in 1855 as a result of a number of factors, the Crown paid the annuity to individuals in money. Through the 1850s, the HBC distributed the Robinson Superior Treaty annuity payments in cash to the head of each family. The HBC remained in charge of distributing the Robinson Superior Treaty annuity to the Lake Superior Anishinaabe for nearly 25 years.

[291] The first and only augmentation to the annuities was made in 1875 when the Government of Canada, in response to years of demands from various Chiefs of the two territories,

increased the annuities to $4 (equivalent to £1) per capita,[213] which has been paid out to individuals on an annual basis since that time.

[292] In 1877, the Chiefs began petitioning for arrears of the increase to annuity payments for the period 1850 – 1874, arguing that the economic circumstances had existed for many years prior to 1875 to justify this increase.[214] Payment of arrears finally began in 1903. A dispute between Ontario and Quebec as to who was constitutionally required to pay the arrears occasioned the delay in satisfying the arrears of annuity payments.

C. The Post-Treaty Written Record: Letters, Petitions, and Memorials from Anishinaabe Chiefs and Principal Men

[293] The post-Treaty written record includes letters, petitions, and memorials from the Chiefs and Principal men from both territories who, through Euro-Canadian interpreters and transcribers, pressed Crown officials to address both demands for an increase in the annuities and demands for the payment of arrears. At the same time, the Anishinaabe expressed their views, dissatisfaction, frustration, and confusion as to the meaning of the obligations under the Treaties. The record also includes Robinson's explanations of the value of annuity payments and of the operation of the augmentation clause and correspondence from certain Colonial officials, including Members of Parliament, who interceded on behalf of the Anishinaabe.

i. A Brief Summary of Key Documents that Comprise the Post-Treaty Written Record

[294] In this section, I briefly review the main post-Treaty documents that were entered as evidence.

1. **November 1850**: Robinson was compelled to respond to a complaint from Chief Shingwaukonse who was "very much dissatisfied indeed with the late Treaty" and believed that the Anishinaabe had been "shamefully deceived… particularly as regards the amount which they are to receive annually".[215] Chief Shingwaukonse also expressed his unhappiness that the services of a carpenter were not provided to his village.

   Chief Shingwaukonse's complaint was transmitted to Robinson from the Superintendent of Indian Affairs. Robinson responded on December 27, 1850, stating:

   > The clause I introduced to increase the amount under certain reasonable circumstances should & I have no doubt will, satisfy the

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[213] Order in Council, dated 22 July 1875, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1134, transcription at Trial Exhibit 01A-TAB-1134, transcription at Trial Exhibit 01A-TAB-1134.
[214] Transcription of Petition of the Chiefs of the Northern Shores of Lake Huron and Lake Superior to Governor General Dufferin, dated 7 November 1877, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0832.
[215] Letter from G. Ironside to Colonel Bruce, dated 20 November 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0878, transcription at Trial Exhibit 01A-TAB-0878.

> Indians generally — and convince Her Majesty's Gov^{t} that they have no just cause of complaint… It may well be for Cap^{t} Ironside to explain to such of the Indians as he meets with at any time that part of the Treaty, which secures to them a larger annuity should the territory surrendered enable the Gov^{t} to [exercise?] it without loss.[216]

While Robinson does identify the precondition for the increase (*i.e., that the Government must be able to increase the annuity without incurring loss*), Robinson's response was intended to assuage Chief Shingwaukonse's concerns over two things: the amount of the annuity (in dollar terms) and how the increased annuity could satisfy the collective desires of the Anishinaabe to bring a carpenter into the community. Nowhere in this letter does Robinson refer to a limit or cap to that increased annuity.

2. **August 17, 1851**: Petition from Lake Huron Chiefs that concerned a request that the formula for calculating the annuity distributions be based on the extent of their traditional territory, as opposed to calculated on a per capita basis.[217]

3. **January 3, 1851**: Petition from Fort William First Nation addressing many issues, including the small size of the annuity. The petition underscores the claim that the Treaty was not fully explained to the Lake Superior Chiefs and it shows the confusion over whether the Treaty promised annuity payments by way of goods or services.[218]

4. **September 19, 1857**: Letter from Reverend Choné on behalf of the Fort William Chiefs in which he "makes use of very strange language and again demands 'the £10'",[219] demonstrating the continuing Anishinaabe confusion over pounds and dollars.

5. **June 12, 1869**: Petition from Lake Huron Chiefs expressing concern that if the land in their territory was being sold for less than market value, their right to an increased annuity would be compromised because the total revenues would be less.[220]

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[216] Letter from W.B. Robinson to Colonel Bruce, dated 27 December 1850, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0887, transcription at Trial Exhibit 01A-TAB-0887.
[217] Transcription of Petition from Two Lake Huron Chiefs to Governor General Lord Elgin, dated 17 August 1851, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0931.
[218] Petition from Fort William First Nation to Lord Elgin, dated 3 January 1852, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0955.
[219] Letter from J. Wilson to R.T. Pennefather, dated 19 September 1857, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1012, transcription at Trial Exhibit 01B-TAB-07.
[220] Petition from Lake Huron Chiefs to Governor General Baronet, dated 12 June 1869, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1072, transcription at Trial Exhibit 01A-TAB-1072.

6. **February and March 1873**: Petitions from Fort William First Nation that both reference a $4 promise.[221] Neither of these petitions indicate, however, that annuity payments are limited to $4.

7. **April 7, 1873**: Letter from Simon Dawson (Member of Parliament) forwarding the 1873 Fort William petitions and expressing the view that the lands ceded under the Robinson Treaties were sufficiently productive to warrant an increase to "at least $4; if not, of such further sum (over and above the $4) as Her Majesty may be graciously pleased to order".[222]

8. **March 20, 1874**: Petition of the Chiefs of Fort William to the Governor General setting out a complaint about the decreasing value of the annuity payments since 1850 and requesting that they be augmented, quoting the augmentation clause in the Treaty text. The Anishinaabe further note that, in 1850, they did not understand monetary values and were not capable of estimating the value of the annuity.[223]

9. **November 7, 1877**: Petition apparently drafted by E.B. Borron (Member of Parliament) on behalf of the Huron Anishinaabe claiming arrears that accumulated prior to the 1875 adjustment to $4.[224]

10. **December 3, 1883**: Petition from Spanish River Band Chief Pierre Oningenun (Oaugtgun) stating that the Anishinaabe had been promised that as "soon as the lands sold had been surveyed we would be paid the annual sum of $10 per head".[225] There was also a petition from the Parry Island Band in 1887 that purports to provide an oral history of the Penetanguishene adhesion to the Robinson Huron Treaty. That petition also references an increase to $10, stating that the annuity payments would be increased incrementally to $10 per year over 10 years, without further increase.[226]

11. **January 9, 1884**: Letter from Indian Agent Charles Skene reporting on the issues discussed at the Grand Council meeting at Parry Island in 1883, including the issue of annuity arrears and advances above $4. Skene stated: "The Indians therefore

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[221] Petition of Fort William Chiefs, dated 12 February 1873, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1088, transcription at Trial Exhibit 01A-TAB-1088; Petition of Fort William Chiefs, dated 1 March 1873, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1090, transcription at 01A-TAB-1090.
[222] Letter from S.J. Dawson to Secretary to His Excellency the Governor General, dated 7 April 1873, Joint Book of Primary Documents, Trial Exhibit 1092, transcription at Trial Exhibit 01A-TAB-1092.
[223] Petition of the Chiefs of Fort William to the Governor General, dated March 20, 1874, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1108, transcription at Trial Exhibit 01B-TAB-10.
[224] Letter from E.B. Borron to D. Mills, dated 23 November 1877, appended to Petition (drafted by E.B. Borron) of the Huron Anishinaabe Chiefs and Principal Men, dated 7 November 1877, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1158.
[225] Transcription of Letter from Pierre Oningenun (Oaugtgun) (Chief of the Spanish River Band) to Superintendent General of Indian Affairs, dated 3 December 1883, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1196.
[226] Letter from Chief and Councillors of Parry Island Band to Department of Indian Affairs, dated 25 March 1887, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1257, transcription at Trial Exhibit 01A-TAB-1257.

think that by this time enough has been paid to the Crown Lands from lands ceded by them to en-title them to an advance" upon the $4 now paid.[227]

12. **January 14, 1884**: Letter from Chief Solomon James of Shawanaga First Nation stating: "The Government should carefully consider the increase from four dollars ($4.00) as we are all aware that a large revenue is derived annually from the Territory ceded to the Crown particularly in the North Shore of Lake Huron".[228]

13. **June 1, 1893**: Affidavit of John Mashekyash. This affidavit was prepared as part of an investigation into the claims for annuities by the Métis and was drafted over 42 years after the Robinson Huron Treaty was signed and 18 years after the annuity payments were raised to $4. It was agreed that the purpose of the affidavit had nothing to do with the augmentation clause. Ontario relies on the following excerpt to show the Anishinaabe understanding of a cap to the augmentation promise:

> Mr. Robinson sead [said] that we would get five dollars Pr [per] head. Mr. Robinson then also told us all that next year that we would get one dollar and a half Pr [per] head and that for four years and at the end of the four years when the government will have sould [sold] enough of the land that was ceded to them to enable them to give you four dollars Pr [per] head you will get that every year as an annuity… But the present government has not delt [dealt] with us Indians as Mr. Robinson promised they would do.[229]

ii. The Frailties of the Later Post-Treaty Written Accounts

[295] Along with an appreciation of context, any analysis of recollections of past events must take into account the well-recognized frailties associated with such accounts. Witnesses for both the Plaintiffs and the Defendants identified the frailties associated with accounts of events or understandings that occurred long ago in the past.

[296] The range of frailties inherent in these types of accounts includes:

- Memory defects;
- Interpreter bias;
- Cultural bias;
- Interviewer bias;

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[227] Letter from C. Skene to J. Macdonald, dated 9 January 1884, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1200, transcription at Trial Exhibit 01B-TAB-12.
[228] Letter from Solomon James (Chief of Shawanaga First Nation) to W. O'Brien, dated 14 January 1884, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1201, transcription at Trial Exhibit 01A-TAB-1201.
[229] Affidavit of John Mashekyash, dated 1 June 1893, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1332, transcription at 01A-TAB-1332.

- Feedback effect; and

- Knowledge bias, including information received from various Euro-Canadians, including missionaries and Government officials, as well as from other Anishinaabe that may have influenced Anishinaabe understandings.

[297] More specifically, Ms. Jones identified many challenges when relying on the written record, including post-Treaty accounts, in this case. These include:

- What information the author of a document had access to;

- Whether they would have been included or excluded from discussions and conversations taking place on account of linguistic differences;

- Whether the author of the document had distinct beliefs and perspectives that influenced how they perceived the event;

- Whether the conceptual framework of the author at the time is different from the conceptual framework used today; and

- The fact that the Anishinaabe did not write any of the documents (with very few exceptions) for their own purposes or in their own language. Euro-Canadians wrote the documents which we now read, and their Euro-Canadian understandings were understandably filtered through their own interpretation of language and context.[230]

D. Analysis of the Post-Treaty Historical Record

i. Ontario's Position on the Post-Treaty Record as it Relates to a "Cap"

[298] Ontario contends that the failure of the Anishinaabe to expressly articulate their claim that the Crown promised increases to the annuity beyond $4 per capita in these post-Treaty accounts is proof that the Anishinaabe did not hold that understanding. Ontario submits that apart from some references to a promise of $10 per person and the Skene letter of 1884, there are no documents indicating that the Anishinaabe or the Crown actors believed that the Crown was under an obligation to increase the annuities above $4 per person.

[299] Ontario relies on the opinion of Mr. Chartrand for their position: "[M]y review of the documentary evidence detailing Indigenous understandings of the augmentation clause indicates that in all instances, Indigenous leaders either implicitly or explicitly understood that per capita annuity payments were subject to a 'cap'".[231]

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[230] Jones Testimony, Final Transcript (October 10, 2017), Vol. 8: 1037 – 1039.
[231] Chartrand Report, Trial Exhibit 065, at p. 407.

ii. Canada's Position on the Post-Treaty Record as it Relates to a "Cap"

[300] Canada takes a different position on the treatment and relevance of the post-Treaty record than Ontario. Canada submits that post-Treaty accounts are of little to no use to the court in interpreting the augmentation clause inserted into the Robinson Treaties.

[301] Rather, Canada relies on post-Treaty conduct to counter the Superior Plaintiffs' argument that the $4 amount is a distributive share of a collective entitlement. Canada relies on the fact that there were no complaints from the Anishinaabe when the annuities were paid to individuals and submits that this fact demonstrates that the annuities are individual entitlements. Canada does not rely on the post-Treaty record or conduct to support any interpretation concerning a cap on the augmentation of the annuities.

iii. The Plaintiffs' Position on the Post-Treaty Record as it Relates to a "Cap"

[302] The Plaintiffs disagree with the Crowns' interpretations and claim that the post-Treaty historical record does not support either Ontario's or Canada's positions on the intentions of the parties.

iv. The Significance of the Post-Treaty Historical Record on Whether There is a "Cap" on the Increases to the Annuities

[303] The Plaintiffs and Canada say that the post-Treaty written record has limited value in the interpretative exercise in light of the frailties listed above and the context in which the Anishinaabe leaders were focused on other and more immediate needs and concerns. This is especially the case post-1875, where the petitions were more focused on the issue of arrears. I agree with the Plaintiffs and Canada in this regard.

[304] Over the years, the various petitions suggest an inconsistent, often conflicting understanding of the annuity augmentation clause. We cannot rely on these post-Treaty accounts to support any particular understanding of the Anishinaabe intention, nor understanding of limits, if any, on the promise to increase the annuities.

[305] With respect to the 1873 petitions from the Fort William First Nation, Dr. Bohaker testified, and Mr. Chartrand agreed, that these petitions could be labelled "pity speeches", a term historian use to describe the use of metaphor to ask relations to meet their obligations within the ongoing relationship. One would not expect a pity speech to set out the full scope of the obligations arising from the treaty relationship, but rather to make modest requests that would remind the treaty partner of their promise to care for the other.

[306] The Plaintiffs point to the Skene letter of 1884 as evidence of the Anishinaabe understanding that there was an obligation on the Crown to increase the annuities, long after the annuity payments had been increased to $4. The letter from Chief Solomon James of Shawanaga First Nation, dated January 14, 1884, also appears to be a direct claim for an increase, clearly linked to the Crown's revenue, to the annuity payments to an amount exceeding $4. It is likely that Skene's letter is referring, in part, a meeting with Chief Solomon James. Both Chief Solomon James' letter and Skene's letter note that the Anishinaabe think they are "entitled" to an advance above the $4.

[307] The Mashekyash affidavit deserves special attention because of Ontario's strong reliance on it. Elder John Mashekyash of Batchewana First Nation was present at the negotiations of the Treaties in 1850.

[308] Mr. Mashekyash's affidavit was first subject to comment in Mr. Morrison's RCAP Report. In his RCAP Report and in his evidence before this court, Mr. Morrison suggested that Mr. Mashekyash's understanding of the augmentation clause might have resulted from a reading of the Robinson Huron Treaty text by the person interviewing him. During oral testimony, Mr. Morrison also noted that Mr. Mashekyash's expression of his dissatisfaction with the Government was based on his thinking about both arrears and the fact that the annuities had not been increased above $4 per person.

[309] In cross-examination, Mr. Morrison was challenged on what was characterized as a recent modification from his original opinion in order to be more helpful to the Plaintiffs. I found Mr. Morrison to be thoughtful and diligent in his work with the historical record. This hearing required many of the historical witnesses to re-evaluate their opinions in light of the expanded record that was now made available to them. I did not find Mr. Morrison's opinion on possible origins of Mr. Mashekyash's dissatisfaction to be manufactured or partisan.

[310] On the other hand, I do not take Mr. Morrison's opinion as determinative of either Mr. Mashekyash's source of frustration nor on the ultimate question of what Mr. Mashekyash understood of the Treaties' promise.

[311] It is possible that Mr. Mashekyash interpreted the Treaties' promise in the same way that the Crown Defendants do today. However, there is no evidence that other signatories or other Chiefs held this interpretation of the Treaties. Further, there was no evidence that Mr. Mashekyash disclosed his recalled understanding to any Chiefs or members of his band or others in the decades following the signing of the Treaties.

[312] All of the frailties of memory and the passage of time apply to Mr. Mashekyash's account. Mr. Mashekyash may have been correctly recalling what he heard over 42 years prior. It is equally possible that he may have been recalling things that he heard over the prior four decades in discussions with others, including Crown officials. It is also possible that Mr. Mashekyash was influenced by a reading or explanation of the Treaty text by his interviewer. We do not know how long Mr. Mashekyash held this view or whether others influenced this view over the years.

[313] Given the frailties of Mr. Mashekyash's recollections so long after the event, it would be risky to give much weight to any particular reading of the Mashekyash affidavit. On its own, I do not find that it supports any widespread understanding of the Huron Chiefs at the time the Robinson Huron Treaty was signed. Further, it is important to note that Mr. Mashekyash's evidence has no impact on the Superior case, as there is no evidence that he

was in Chief Peau de Chat's lodge when the Robinson Superior Treaty was allegedly read over and explained.[232]

[314] Everything considered, the post-Treaty accounts do not support Ontario's position of a $4 per capita "cap". Some of these documents refer to $4, but not to the augmentation clause. A number of these documents make no reference at all to the augmentation clause. It appears that at least two writers refer to a $10 cap. Some writers refer to a year-by-year augmentation for either four or ten years.

[315] Further, as the Plaintiff witnesses point out, Ontario's reading of the documentary record, in the absence of any historical or cultural context, is flawed. By insisting that every petition must set out the full set of entitlements, Mr. Chartrand ignored his own opinion that the Anishinaabe were "modest" and "diplomatic" when making requests under the Treaties. Nor does Mr. Chartrand's opinion account for the fact that the Anishinaabe were facing pressures from all directions and may have chosen to focus solely on Crown management of their territorial land revenue, which was the basis for increases to the annuities.

[316] Mr. Chartrand failed to appreciate that a simple reading of the texts of documents created by or for Anishinaabe leaders in the 19th century will not lead to reliable conclusions about their intentions decades prior. Mr. Chartrand himself acknowledged that the context in which this record was created was important to consider. However, he did not address the context or appear to consider it for his opinion.[233]

[317] Ignoring the context is always fatal to a proper interpretive exercise. Post-Treaty accounts or conduct will be relevant to the analysis of the parties' understandings of the treaty if the broader context in which these accounts or conduct existed is also taken into consideration.

[318] I find that the post-Treaty record, both written and conduct, is vague, inconsistent, and conflicting. It is of limited assistance to the exercise of searching for the parties' common intention. It shows that different people at different times and places held different understandings of the Treaties' promise.

[319] Even if I were persuaded that there was some merit to the argument that a failure to mention or define the full treaty obligation in each of these petitions draws a conclusion of the Anishinaabe understanding of a $4 cap, there is a good explanation, historically and culturally, why the Anishinaabe petitioners did not mention or define the full treaty obligation in each complaint. The petitions themselves show that the Anishinaabe were not detail focused. Their way of life had been seriously disrupted. Even if and when there was game to hunt, they were being prosecuted for harvesting. They were being pressured to "remove" to other settlement areas. Suggesting that the Anishinaabe made written

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[232] John Mashekyash was a principal man of the Batchewana First Nation, participated in the 1850 Treaty Council, and signed the Robinson Huron Treaty.
[233] Chartrand Testimony, Final Transcript (January 22, 2018), Vol. 48: 6928 – 6933.

grievances that would comply with a modern idea of a fully realized claim is asking too much of this interpretative process.

[320] For many of the same reasons, I do not agree with Canada's submissions that the absence of complaint about the mode of distribution is determinative of the Anishinaabe understanding of the promise or that Canada maintained a unilateral discretion on how to fulfil the Treaties' promise to increase the annuities.

VIII. PRINCIPLES OF TREATY INTERPRETATION

[321] The task before this court requires the consideration and application of the well-settled principles of treaty interpretation to determine the Treaties' promise. The promise to be determined (*i.e. when, how, and to what extent the perpetual annuity shall be increased*) is unique among historic treaties between Indigenous peoples and the Crown.

[322] As the Supreme Court of Canada states, the purpose of historic treaties, such as the Robinson Treaties, is to reconcile the pre-existence of Indigenous societies with the assertion of Crown sovereignty.[234] Therefore, treaties must be interpreted in a way that achieves the purpose of the treaty, gives effect to the interpretation of the parties' common intention that best reconciles the interests of both parties at the time the treaty was made, and that promotes the treaty's reconciliatory function.[235]

[323] There is no dispute among the parties regarding the substance of the principles of treaty interpretation or their applicability to the questions before the court.

[324] The principles of treaty interpretation were first summarized in *R. v. Marshall*:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation;

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories;

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;

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[234] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 71.
[235] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, Binnie J, and para. 78, McLachlin CJ, dissenting. While McLachlin CJ was writing in dissent in *Marshall*, she was in agreement with the majority on the principles of treaty interpretation. See *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 71, 73 – 77.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time;

7. A technical or contractual interpretation of treaty wording should be avoided;

8. While construing the language generously, the court cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic; and

9. Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[236]

[325] As both Binnie J. and McLachlin C.J. stated in *Marshall*, the overall goal and the bottom line of treaty interpretation is to choose from among the various possible interpretations of common intention at the time the treaty was made, the interpretation that best reconciles the parties' interests.[237]

[326] Courts have recognized the inherent difficulties in ascertaining what the parties intended. It is neither an easy nor straightforward task to interpret these Treaties, made in circumstances where:

- The parties held different worldviews. The experts in Anishinaabe culture, traditions, and legal orders underscored the centrality for the Anishinaabe of maintaining relationships between themselves, with others, and with the land. The Euro-Canadians, on the other hand, while dealing honourably with the Indigenous people, subscribed to the Imperial Government's vision of their right to expand the British Empire.

- The Anishinaabe parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations.

- The Treaties were written in the language and according to the linguistic practices and patterns of Euro-Canadians. Language, as we know, shapes one's

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[236] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78. See *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Simon*, [1985] 2 S.C.R. 387; *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025; *R. v. Badger*, [1996] 1 S.C.R. 771; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Fletcher v. Ontario*, 2016 ONSC 5874, at paras. 118 – 120, where Lederer J. reviews and summarizes the Supreme Court of Canada jurisprudence on the principles of treaty interpretation, including *Marshall*.

[237] *R. v. Marshall*, [1999] 3 S.C.R. 456, at paras. 14, 78, citing *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025, at p. 1069.

understanding of the world. The Elders and language specialists testified that certain words and concepts in the Treaties could not be translated into Anishinaabemowin.

- The language used in the Treaties probably does not reflect, with total accuracy, each party's understanding of the effect of the Treaties at the time they were entered into.[238]

- The translations and transcriptions of the Anishinaabe Chiefs' speeches at the Treaty Council (which were in the possession of the Crown) were somehow lost.

- The interpretive exercise is carried our more than 150 years after the parties made their agreement.

[327] In *Marshall*, McLachlin C.J. set out the two-step approach to treaty interpretation.

[328] The first step asks the court to examine the words of the treaty text and note any patent ambiguities and misunderstandings arising from linguistic and cultural differences.[239] This exercise will lead to one or more possible interpretations and will identify the framework for a historical contextual inquiry to enable the court to ascertain a final interpretation. Binnie J. noted that even in the absence of any ambiguity on the face of the treaty, extrinsic evidence of the historical and cultural context of the treaty may be received.[240] From the principles, it is clear that a contextual analysis is required in every treaty interpretation.

[329] The second step of the analysis is a consideration of the possible meanings of the text against the treaty's historical and cultural context.[241] These various meanings may arise from the text or the contextual analysis.

[330] The court must take into account the context in which the Robinson Treaties were negotiated, concluded, and committed to writing, including, among other things, the pressures flowing from the mining activity in the region and the demands from the Anishinaabe for a share of the proceeds of that activity. It has long been understood that treaties, as written documents, recorded agreements that had already been reached orally and did not necessarily record the full extent of those oral agreements.[242] Contextual evidence, therefore, is relied on to assist the court in ascertaining the full extent of the agreement between the parties.

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[238] *R. v. Horseman*, [1990] 1 S.C.R. 901. See *Fletcher v. Ontario*, 2016 ONSC 5874, at para. 119.
[239] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 82.
[240] *Ibid*, at para. 11. See *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360 (C.A.). See also *Sioui v Quebec (Attorney General)*, [1990] 1 S.C.R. 1025, at p. 1045.
[241] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 83.
[242] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52, quoting Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338 – 342. See *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14.

[331] At the end of the contextual analysis of the text, in what I call the third step, the court must rely on the historical context to determine which interpretation comes closest to reflecting the parties' common intention. This is done by choosing "from among the various possible interpretations of the common intention the one which best reconciles the parties' interests."[243]

[332] Finally, if the court identifies a particular right that was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right.[244]

[333] As Canada said in its final submissions, recognizing the priority of the contextual review, "[a] reconciliatory and purposive approach to treaty interpretation should not be mechanical or formalistic, but recognize that the Robinson Treaties established and reshaped aspects of the Crown-Anishinaabe relationship in a manner that contemplated its long continuation and future evolution."

[334] In other words, the central purpose of the Robinson Treaties, to renew a relationship on which this country was founded, must remain at the forefront of the interpretation exercise.

A. What is Purposive Interpretation?

[335] In the Aboriginal law context, the obligation to engage in a purposive interpretation originates in the jurisprudence on section 35 of the *Constitution Act, 1982*: "The nature of s. 35 itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."[245]

[336] Section 35 provides the overarching constitutional framework of treaty rights and, therefore, informs the exercise of treaty interpretation under section 35(1). Because treaty promises are analogous to constitutional provisions,[246] they must be interpreted in a generous and liberal manner.

[337] To achieve a purposive interpretation, the court must keep in mind the purpose of the augmentation clause, the purpose of the treaty as a whole, and the purpose of all treaties between the Crown and Canada's Indigenous peoples, that is, the reconciliation of the pre-existence of Indigenous sovereignty with assumed Crown sovereignty.[247]

[338] The purpose of the augmentation clause was to bridge the gap between the expectations of the parties. The Crown sought a cession of vast territory in northern Ontario, with mineral

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[243] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 83, citing *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025, at p. 1069.
[244] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 83. See *R. v. Simon*, [1985] 2 S.C.R. 387, pp. at 402 – 403; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 30, 33.
[245] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1106.
[246] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 71.
[247] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 71.

and lumbering resources, while limiting their current financial liability to a compensation amount that would have been unacceptable to the Anishinaabe. The Anishinaabe sought full respect for their pre-existing sovereignty over the territory and compensation that reflected the value of the land. The augmentation clause bridged the gap between the expectations by promising that future annuities would reflect the value of the territory.

[339] This requirement to take a purposive approach is also a duty flowing from the honour of the Crown, which governs the relationship between the Crown and Indigenous peoples and requires the Crown to act in a way that accomplishes the intended purpose of the treaty.[248] A purposive approach gives meaning and substance to the promises the Crown made.[249] In a final analysis, a purposive approach respects the authority and autonomy of the parties to the treaty.

IX. THE POSITIONS OF THE PARTIES AND THE ISSUES IN DISPUTE

A. The Interpretation of the Augmentation Clause is in Dispute

[340] The focus of this hearing and the primary dispute is over the interpretation of the annuity augmentation clause.

[341] The augmentation clause is found within the compensation provision, one of four basic elements of the Robinson Treaties: (i) a release or cession of the Anishinaabe interest in the lands north of Lake Superior and Lake Huron; (ii) an assurance that the Anishinaabe maintained the rights of wildlife harvesting and the ways of life associated with them; (iii) the establishment of reserves; and (iv) compensation, a combination of a lump sum payment together with a perpetual annuity.

[342] The augmentation clause states:

> [T]hat for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes… [I]n case the territory hereby ceded by the parties… shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any

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[248] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 73 – 77; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 20.
[249] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76, citing *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 52.

> one year, or such further sum as Her Majesty may be graciously pleased to order;…[250]

[343] The parties are in dispute over two features of the augmentation clause. The first and primary dispute concerns whether the Treaties include a mandatory promise to increase the annuity payments over the equivalent of $4 (equivalent to £1) per person, if the economic conditions allow, or whether that decision is discretionary.

[344] The phrase "if the economic conditions allow" refers to the following phrase in the Treaties: "in case the territory… shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity".

[345] The second point of dispute centers on whether the annuity features both a collective amount and a distributive amount.

[346] Specifically, the Superior Plaintiffs submit that the Treaties specified that the "collective amount" — the perpetual annuity of £500 (Robinson Superior Treaty) or £600 (Robinson Huron Treaty) — was to be paid to the Chiefs and their Tribes. The Superior Plaintiffs have termed the per capita payment of £1 as the "distributive amount", a sum to be paid from the collective amount to individuals. The Treaties stipulated that the distributive amount was limited to £1 per person or such further sum as Her Majesty may be graciously pleased to order.

[347] In summary, two principal issues arise for the interpretation:

1. Does the augmentation clause express a mandatory or discretionary obligation to increase the annuity in step with increases to revenues received from the Treaties' territories?

2. Does the augmentation clause distinguish between the collective annuity (either £500 or £600) paid to the Chiefs and their Tribes and a distributive amount that is paid to individuals from the collective amount and is limited to £1 (equivalent to $4) or such further sum as Her Majesty may be graciously pleased to order?

[348] It would be dangerous, however, to say that the difference in the parties' positions can be boiled down to simple binary choices: obligation or discretion; collective or distributive.

[349] Regardless of whether the promise to increase the annuities is mandatory or discretionary or based on collective or distributive amounts, the Treaties do not prescribe a protocol or a guide for the mechanics of implementing this promise (*i.e. the frequency, method, or factors to be considered, the corresponding duties that arise, or the scope or limits of review*). Therefore, while it is not controversial that the duties flowing from the honour of the Crown bind the Crown (irrespective of the nature of the promise), the specific duties that arise in this case are undefined on the face of the Treaties.

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[250] The Robinson Superior Treaty, dated 7 September 1850, see Appendix A.

[350] Hence, regardless of the nature of the promise in the augmentation clause, questions regarding implementation remain subject to dispute and, therefore, open to interpretation. These issues are enumerated below and discussed in the remainder of this decision.

[351] To situate the subsequent discussion of the interpretation and implementation of the Robinson Treaties, the following section outlines the positions of the parties on these two principal issues. In accordance with the bottom line of treaty interpretation, I discuss the parties' positions on common intention. By common intention, I mean the words as they are used in *Marshall*: "The goal of treaty interpretation is to choose from among the various possible interpretations of common intention, the one which best reconciles the interests of both parties at the time the treaty was signed".[251]

B. Positions of the Parties on "Common Intention"

[352] Each of the parties submitted their position on the "common intention" of the Treaties' promise. Each party approached the question of common intention in their own way. Below, I have reproduced the submissions of the parties on common intention, with some editing on my part. I follow each of the parties' positions with my own summary understanding of the positions, some of which is also informed by the parties' final submissions.

i. Huron Plaintiff's Position on Common Intention

a. Contextual Analysis of Common Intention

[353] The Huron Plaintiffs underscore that any attempt to determine common intention must look beyond the words of the Treaty and take into consideration the fundamentally different worldviews of the parties, their shared history, and their shared images in the century leading up to the Robinson Huron Treaty. They remind the Court of the *Aandsokaan* (spirit story) when Nanebozho is transformed into a hare but retains its fundamental identity; they also refer to the wampum belt showing two figures holding hands as links in a chain.

[354] The shared history, images, and stories reflect the Covenant Chain alliance, the shared concept of preservation of autonomy, and the Nation-to-Nation relationship between the Treaty parties.

[355] The Huron Plaintiffs reminded the Court of the principles of treaty alliance: mutual respect for each other's autonomy, mutual responsibilities of care, and reciprocity or mutual benefit, as well as renewal of the Covenant Chain alliance to ensure the fulfillment of the other three principles. The Plaintiffs submit that these principles are now recognized in common law through the honour of the Crown and the fiduciary duties that may arise.

[356] The Huron Plaintiffs submit that the Robinson Huron Treaty was about sharing benefits and responsibilities that come with the right to benefit from the lands and the authority to permit others to do the same. There is nothing in the Treaty text, the Anishinaabe legal

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[251] *R v Marshall*, [1999] 3 S.C.R. 456, at paras. 14, 78.

order, or the evidence to suggest that either nations' autonomy, jurisdiction, or the Anishinaabe's pre-existing web of relationships with creation were intended to be extinguished. Many of the Anishinaabe's pre-existing rights to hunt, to harvest, to use and maintain connection to the land, and to enjoy exclusive use and control of land surrounding village sites and common council fires were reserved.

b. The Huron Plaintiffs' Position on the Common Intention of the Overall Treaty Promise

[357] The Huron Plaintiffs say that the best, if not only, possible interpretation of common intention is simply that the parties agreed to share: the Crown and the newcomers could utilize the territory in a manner that respected the Anishinaabe's pre-existing relationship to and authority over the land and the Anishinaabe could continue to benefit from the bounty of the territory. The Huron Plaintiffs say both parties had a fundamental interest in adapting to the changing circumstances of the period in a way that would promote continued growth and future prosperity for their people. From the Anishinaabe perspective, the Treaty was intended to deepen and strengthen their long-standing treaty relationship with the Crown by extending to the Crown the Anishinaabe's inherent relationship with the land (Anishinaabeakiing). From the Crown's perspective, the Treaty reconciled the pre-existing sovereignty of the Anishinaabe with the assumed sovereignty of the Crown.

c. The Huron Plaintiffs' Position on the Common Intention of the Augmentation Clause

[358] The Huron Plaintiffs submit that the parties intended that both the Anishinaabe and the newcomers would continue to thrive and flourish. The relatively small annuity combined with the Crown's promise to increase the annuity based on the net productivity of the territory was central to this fundamental purpose. The Crown was required to augment the annuity once the land became sufficiently productive to enable it to do so, after deducting necessary expenses. The increase was intended to be commensurate to the increase in new economic development and activity from the territory, which the parties knew would impact the Anishinaabe's ability to sustain themselves from the land.

[359] The framework for the augmentation of annuities was expected to take place in a manner that promoted balance, mutual respect, responsibility, and reciprocity between the Treaty partners. The parties did not intend to impose an onerous accounting burden on the Crown, but did intend that the timing of annuity increases, the management of revenues from the territory, the calculation of net revenue, and appropriate disclosure would take place in a manner consistent with the honour of the Crown and be mindful of the needs of the Anishinaabe.

[360] The parties intended that the land would be managed in a responsible way to ensure sustainability for future generations, that the parties would be honest with one another, and that the parties would not act unilaterally in a way that would cause harm or impoverishment to the other Treaty partner or to the Treaty relationship. The Huron Plaintiffs also made specific proposals with respect to implementation principles.

[361] The Huron Plaintiffs say that the treaty partners intended to ensure the renewal of the Treaty relationship: if either party wished to revisit and adjust the terms of the agreement made in 1850, then it was expected that disclosure and full and informed consent would be required.

d. Summary of the Huron Plaintiffs' Position on Common Intention

[362] As I understand the Huron Plaintiffs' position, they say that finding the common intention must take into account the long-standing relationship between the Treaty partners that was based on mutual respect, responsibility, and reciprocity and the common intention to ensure the future sustainability of both parties in changing circumstances. These goals would be accomplished by renewing the treaty relationship and moving to a fair sharing agreement of the land and its resources.

[363] Both the Huron and Superior Plaintiffs are of the view that the parties understood and intended that the Crown made a binding promise and, therefore, has an obligation to fulfil the promise of increasing the annuities beyond the amount of $4 per person where the economic circumstances exist.

[364] The Huron Plaintiffs submit that where discretion exists to determine when and how further increases to the annuity are to be calculated and paid, this discretion is not unfettered. Rather, this discretion is to be exercised honourably and consistent with a purposive interpretation of the Treaties, which would result in greater sharing of the economic benefits of the land.

ii. Superior Plaintiff's Position on Common Intention

[365] The Superior plaintiffs submit that before seeking to choose the interpretation of common intention that best reconciles the parties' respective interests, the court must first identify the key interests of each party at the time the Treaties were signed.

a. The Crown's Interests Concerning the Augmentation Clause

[366] The Superior Plaintiffs submit that the Crown had a pressing interest to get on the correct side of the law as they were in flagrant breach of at least the spirit of *the Royal Proclamation* of 1763 and the August 10, 1850 *Indian Protection Act*, which, in combination, made it illegal for Indigenous peoples to sell or lease Indian lands directly to third parties without the imposition of the Crown.

[367] According to the Superior Plaintiffs, the Crown had an interest to open up the Treaties' territories for Euro-Canadian settlement and development, allowing the settler society the right to use the land legally. To do this, the Crown had to acquire the land by agreement from the Anishinaabe.

[368] In part due to their difficult financial circumstances at the time, the Crown had an interest to defer payment for the ceded lands to a later date. The Crown had an interest in finding a way for the revenues to be derived from the Treaties' territories to self-fund the annuity, and thus, had an interest in linking the consideration to the value of the land.

[369] The Superior Plaintiffs submit that the Crown believed and accepted that they were subject to the honour of the Crown and that they had fiduciary responsibilities to the Anishinaabe, including ensuring that any annuity monies would not end up being used improvidently and would, instead, be used for the betterment of the collective. The Crown's interest included stipulating an annuity augmentation clause that:

1. Would leave the Anishinaabe with no just cause for complaint;

2. Would be consistent with the type of augmentation that a person of ordinary prudence would seek for their own interests;

3. Would reflect payment to the Anishinaabe of an amount that was equal to the value of the Anishinaabe Treaties' territories;

4. Would have a "starting salary" for an annuity that would be a function of the value of the Treaties' territories known at the time;

5. Would allow that annuity to increase on the discovery and development of any new sources of wealth;

6. Would direct the annuity money to be used for the corporate development of the band;

7. Would limit the amount of annuity money paid out in cash (to prevent the possibility of improvident use or improper expenditure of annuity monies as per the Bagot Commission);

8. Would have the best chance of keeping individuals from getting money, which all Crown actors feared would be effectively stolen by petty traders and most egregiously spent on alcohol; and

9. Would provide for no payment to individuals for distribution in cash except under special circumstances and with due precaution to secure the proper application of money.

b. <u>The Anishinaabe Interests Concerning the Augmentation Clause</u>

[370] The Superior Plaintiffs submit that Anishinaabe had an interest in allowing settlers to come in to help them develop the Treaties' territories and had an interest in securing a share of the wealth from the Treaties' territories in the same manner as they always had — by their absolute dominion and control over the economic activity taking place within their territory.

[371] The Anishinaabe had an interest in taking steps to ensure the continuance of their collective well-being. They may have wanted at least some per capita payments, but they would have placed the interests of the collectivity at the forefront. The Anishinaabe had an interest in ensuring that the manner that their annuities would be distributed would not be done in a

way that risked the loss of the value of the annuity. The Anishinaabe had an interest to secure benefits that would embrace and fulfill Chief Shingwaukonse's vision of a prosperous Anishinaabe nation within the Euro-Canadian nation state.

[372] The Anishinaabe had an interest to enter into a treaty that was consistent with Anishinaabe perspectives, including principles of Anishinaabe law, such as:

1. Kinship: where the Great Mother will be generous and ensure that the Anishinaabe thrive; and

2. Reciprocity: where the value of the gift received is commensurate with the value of what was given away.

c. The Superior Plaintiffs' Position Common Intention of the Augmentation Clause

[373] The possible common or "shared" intention that best reconciles the above interests is one that:

1. Stipulates an uncapped collective annuity augmentation.

2. Limits the per capita payouts ("distributive amount") from that uncapped collective entitlement ("collective amount"), until such time as Her Majesty is satisfied that increasing the per capita payments will not be detrimental to either the interests of the collective or the interests of individuals. While this intention may seem paternalistic in today's context, ascertaining the common intention of the parties is a historical exercise.

3. Limits the initial payment (the initial £4,000 lump sum "gratuity") to an amount that is less than the monies actually received from the Treaties' territories at the time. Although the monies actually received from the Treaties' territories were about £7,500 – £11,000 or so, Robinson was given somewhere between £5,000 and £6,000 *in specie*.

4. Fixes an annuity that has a "starting salary" that involves a capitalized amount that is lesser then the amount Robinson was told he could capitalize, being at most £25,000 (a capital sum of £18,333.33 at 6% yields £1,100 per year).

5. Takes a "wait and see" approach to the augmentation of the annuity.

6. Links the increased annuity to the value of the Treaties' territories in the future, with the value of the annuity to be commensurate to the value of what the Anishinaabe "gave" to the Crown.

7. Rewards the party who was prepared to bear the risk of there being no net Crown revenues in the future, as many, including Robinson, feared would be the case.

8. Makes provision for the parties to facilitate and strengthen their Nation-to-Nation relationship. This would likely include provisions to allow the parties to jointly discuss the future administration of the Treaties' territories to ensure that the territory is administered for the mutual benefit of the Anishinaabe and the settler society.

d. Summary of the Superior Plaintiffs' Position on Common Intention

[374] As I understand the Superior Plaintiffs' position, they share the Huron Plaintiffs' view that the collective annuity increases are not capped. Whatever discretion the Crown has in respect of the increases, the exercise of that discretion is not absolute. Any Crown discretion must be guided by the dictates of the Constitution, be consistent with the honour of the Crown and the fiduciary obligations that exist, and be exercised with a view to a timely, diligent, and purposive implementation of the annuity promise.

[375] The Superior Plaintiffs rely on the distinction between the collective and the distributive amount to support their interpretation of the augmentation clause. They say that the words "*provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order*" provides the Crown with a reviewable and justiciable discretion to increase the distributive amount to individuals, but does not impact the obligation to increase the collective amount of the annuity.

[376] Finally, the Superior Plaintiffs submit that it was the common intention that the Crown was obliged to consult and make disclosure, thus allowing the parties to jointly discuss the future administration of the territory to ensure that the Treaties' territories were administered for the mutual benefit of the parties to the Treaties.

iii. Canada's Position on Common Intention

a. Canada's Position on the Common Intention of the Augmentation Clause

[377] Canada submits that the common intention of the augmentation clause, or as they term it the graciousness clause, was formed by a congruence of values expressed through the norms that informed and shaped the conduct of Anishinaabe leaders and their people and the values of Robinson, Governor General Lord Elgin, and other mid-19th century Euro-Canadian actors for whom the Sovereign was the symbol and embodiment of positive values such as honour, graciousness, liberality, and justness.

[378] According to Canada, the Crown is required to apply net territorial resource revenues to increase annuity payments to the Chiefs and their Tribes until the payments reach an amount based on $4 per person. If and when net territorial resource revenues are realized after the $4 mark is reached, increases beyond that mark must be made from time to time on a basis to be determined through the exercise of Crown discretion. The duties of purposive and reconciliatory treaty interpretation flowing from the honour of the Crown frame the scope of this Crown discretion. Canada says that the Treaties created a "duty" that allows the parties to negotiate the augmentation and the payment going forward.

[379] Canada says that it must increase the annuities beyond $4, or provide an appropriate alternative, if the economic conditions are met. However, Canada maintains that they have a discretion how to make this decision, which must be exercised consistent with the honour of the Crown and other principles of treaty interpretation.

[380] Crown decisions pursuant to these duties under the graciousness clause must be honourable and liberal or generous, taking into consideration the purposes of the augmentation provision, as well as the Anishinaabe and Canadian values of respect, responsibility, reciprocity, and renewal. Canada submits that these values are incorporated into the Robinson Treaties and are essential features of the parties' continuing relationship.

[381] According to Canada, the purposes of the augmentation provision include:

1. Providing a means of addressing the uncertain economic future of the Treaties' territories;

2. Providing, as one part of the overall consideration in the Treaties, an annuity benefit, or appropriate alternative, that reflects honourably and liberally or generously the value of the Anishinaabe's ceded interest as demonstrated by the continuing resource productivity of the lands; and

3. Reconciling potential annuity increases under the Robinson Treaties with the interests of other Canadians.

[382] Canada rejects the notion that the augmentation clause contains both a collective amount and a distributive amount. Rather, Canada views the sub-clause "*or such further sum as Her Majesty may be graciously pleased to order*" as modifying the Treaties' promise of increases to the annuity and creating a Crown discretion with respect to increases over $4 per person.

b. <u>The Fulfillment of the Crown's Treaty Obligations</u>

[383] Canada further submits that the Crown can fulfil its treaty obligations as follows:

1. The Crown is required to periodically decide, in a manner that is fair and transparent, whether and how to increase the amount of the annuity payments;

2. The Crown is further required to make the above decisions on the basis of:

    a. Reasonably regular reviews of Government natural resource revenues produced from the Treaties' tracts; or

    b. In response to treaty-related funding or other requests from the signatory First Nations; or

3. As a result of other economic, social, or political events and circumstances having an impact on the Treaties' annuities; that is, the Government may fulfil its

obligation either by making further annuity increases or by providing appropriate alternatives to annuity increases.

[384] The Crown's duties apply both prospectively and retrospectively, and the Court may review the Crown's past, present, and future conduct to assess whether the Crown has fulfilled its duties.

c. Summary of Canada's Position on Common Intention

[385] As I understand Canada's position, they (as do counsel for Ontario) acknowledge an obligation to apply net revenues to increase annuities up to $4 per person. If and when net revenues are realized after the $4 per capita point is reached, the Crown has full discretion concerning when and how to make increases or to provide appropriate alternatives from time to time.

[386] In exercising their discretion of when, whether, and how to make increases, Canada acknowledges the Crown must consider requests for increases, make regular reviews of revenues, and make periodic decisions in a fair and transparent manner, taking into consideration the values of respect, responsibility, reciprocity, and renewal. As part of a purposive and reconciliatory interpretation of the Treaties, Canada submits that its decisions must reflect the value of the ceded interest by taking into account net territorial resource revenues.

[387] Canada acknowledges that their decisions and the fulfilment of their duties flowing from the honour of the Crown (past, present, and future) are reviewable. Specifically, Canada submits that a direct review of the exercise of discretion is unnecessary; rather, what is required is a review of the fulfillment of the justiciable duties against the standard of the honour of the Crown.

iv. Ontario's Position on Common Intention

a. Ontario's Position on the Common Intention of the Augmentation Clause

[388] Ontario submits that the common intention with respect to the annuities payable under the Treaties was:

1. That the Crown promised unconditionally to pay a perpetual annuity of £500 under the Robinson Superior Treaty and £600 under the Robinson Huron Treaty.

2. That the Crown promised to increase the perpetual annuity from time to time to £1 per person, in the event the Crown received sufficient net revenues from the territories to permit it to do so without incurring loss. This promise was mandatory if the condition of sufficient revenues was met.

3. That the limit on the Crown's promise to increase annuities was £1 (equivalent to $4) per person.

4. That the $4 per person cap defined the upper limit of the Crown's maximum total liability under its promise to augment annuities, but the Crown could increase the annuities beyond what it was obliged to pay if it chose to do so.

5. That the Crown would consider the possibility of increasing annuities beyond $4 per person if a First Nation requested the Crown to do so, and the Crown would provide an explanation of its decision in response to such a request.

6. That the Treaties' partners would also have expected that the Crown would consider the possibility of increasing annuities from time to time, even in the absence of a request.

7. That, with respect to further increases, the Crown had an unfettered discretion that could take into account the interests of all of the Crown's subjects (Indigenous and non-Indigenous) in whatever circumstances might arise.

8. That the parties to the Treaties did not understand or intend that the cap related only to amounts that would be distributed to individual First Nation members. Therefore, Ontario rejects the notion that the augmentation clause contains of both a collective amount and a distributive amount. According to Ontario, the sub-clause "*or such further sum as Her Majesty may be graciously pleased to order*" is an *ex gratia* clause, in effect saying that any increase over $4 may be made by the Crown on an *ex gratia* basis, but that such increases are not a mandatory obligation.

9. That the Crown would engage in an honourable process when it considered the possibility of an increase in the annuity, including how it engaged with the Treaties' First Nations.

10. That the parties to the Treaties would not have anticipated that the Queen would ever order annuities in excess of the fixed $10 per person annuity that some of the Anishinaabe Chiefs proposed during the negotiations of the Treaties.

[389] Ontario also proposed that the appropriate interpretation of the Treaties includes an implied term to increase the annuity to protect against erosion due to inflation. This indexation proposal is discussed separately in the section on Indexation. Ontario also made specific reference to the principles for determining revenues and expenses which are discussed in the Implementation Section.

b. Summary of Ontario's Position on Common Intention

[390] As I understand Ontario's position, like Canada, they acknowledge the common intention that the Crown is obliged to increase the annuities up to the equivalent of $4 per person should the prescribed economic circumstances exist.

[391] With respect to any further increase, Ontario submits that the Crown may consider *ex gratia* payments over $4 per person in their unfettered discretion — $4 per person defines the

upper limit of the Crown's promise. At the same time, Ontario admits that the Crown must exercise their discretion to *consider* increases from time to time, whether or not requested to do so. In exercising this discretion, the Crown must act honourably and may take into consideration all of the Crown's subjects (Indigenous and non-Indigenous) in all circumstances. Ontario says that the Treaties do not impose an obligation to increase the annuities beyond where they are today ($4 per person) and, hence, the maximum liability with respect to annuities under the Treaties has been met.

C. The Issues to be Resolved

[392] After reviewing the positions of the parties on common intention, I am left with the following issues to resolve:

1. Is the Crown obliged to increase the collective annuity beyond an amount equivalent to $4 per person in certain economic circumstances or is an increase to the annuities within the discretion of the Crown?

2. If the Crown is obligated to increase the collective annuity beyond an amount equivalent to $4 per person, what is the scope of the discretion left to the Crown in the implementation of their obligation?

3. Is the $4 amount in the augmentation clause a distributive amount and, if so, what Crown discretion applies to the implementation of an annual distribution to individuals?

4. What duties flow from the principle of the honour of the Crown? The parties proposed various specific duties that they say flow from the honour of the Crown, including disclosure, consultation, and frequency and timing of review, among others.

5. Does the Crown owe a fiduciary duty to the Treaties' beneficiaries and, if so, what duties flow from that fiduciary duty?

6. How is the economic trigger for an increase calculated ("*an amount which will enable the Government of this Province, without incurring loss, to increase the annuity"*)?

    a. Are revenues limited to resource revenues from the territory or do they include all revenues from the territories, including tax revenues?

    b. Are expenses limited to those expenses necessarily and directly incurred to generate revenues or are expenses characterized more broadly?

7. Alternatively, should the Court imply a term requiring the Crown to increase the annuity of $4 per person to overcome persistent inflation and maintain the purchasing power of the original annuity amount? The Plaintiffs and Ontario

propose implying a term for indexation; Canada rejects this proposal.

[393] Whether the Crown has consistently fulfilled its duties to purposively and diligently interpret and implement the Treaties or whether the Crown has breached its duties are not Stage One issues.

[394] The sections that follow examine these questions in the context of the historical record before the Court, the submissions of the parties, and existing Canadian jurisprudence.

X. FINDING THE COMMON INTENTION THAT BEST RECONCILES THE PARTIES' INTERESTS

[395] Using the principles of treaty interpretation, my task here is to approach the exercise of ascertaining the common intention of the parties and interpreting the Treaties' promise in the step-by-step process, as set out by McLachlin C.J. in *Marshall.*

[396] Finding the common intention starts with the premise that "treaty making was seen by both Indigenous peoples and the Crown as a worthwhile enterprise aimed at advancing both peoples' interest through agreement".[252]

[397] In brief, I find that the interpretation of common intention that best reconciles the parties' interests in relation to the Treaties' promise contained in the augmentation clause is:

- That the parties did not intend to fix a cap on the annuity; and
- That the parties intended that the reference to £1 (equivalent to $4) in the augmentation clause is a limit only on the annuity amount that may be distributed to individuals, and this distributive amount is a portion of the collective lump sum annuity payable to the Chiefs and their Tribes.

A. Step One: Presence of Any Patent Ambiguities or Misunderstandings

[398] I do not find it difficult to identify ambiguities or confusion from a reading of the text of the augmentation clause. These misunderstandings go to the core of whether and how the benefits of the wealth derived from the traditional territory of the Anishinaabe shall be shared. I have pointed out these ambiguities and misunderstandings in the discussion of the Post-Treaty Record.

[399] In addition to strict ambiguities, the text of the Treaties does not include the level of detail that would be common to legal practitioners of our generation. It is hard to imagine that any Crown-Indigenous agreement made in the last few decades, dealing with such vast amounts of land and resources, would be so lean on details.[253] On two of the issues that

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[252] Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last" in John Borrows & Michael Coyle, eds. *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017), at pp. 57 – 58.
[253] See *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, at para. 18.

require an interpretation, it is the absence of detail that leads to the different possible interpretations and, thus, misunderstandings.

[400] The first and most confounding ambiguity is whether the parties intended that the promise of a perpetual annuity would be a collective, as opposed to an individual, entitlement. This issue is key to understanding the parties' intentions with respect to the existence of a "cap".

[401] In the first part of the text, the Treaties speak to a lump sum perpetual annuity of £500 or £600, respectively, to be paid to the Chiefs and their Tribes. There is no expression of a per capita payment in this part of the consideration clause: "[T]hat for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes…".

[402] In the augmentation clause that follows, there is a provision to increase the annuity that can be triggered if a condition is met: "in case the territory hereby ceded by the parties… shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time".

[403] The following sub-clause sets out a further condition of the increase, in terms that the Defendants have called a "cap on the annuity" of $4 (equivalent to £1) per person: "…provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order."

[404] The question that arises from a straight reading of these clauses is: Did the parties intend that increases to the entire lump sum annuity, paid to the Chiefs and their Tribes in perpetuity, were to be capped by an amount paid to each individual? Or, was the lump sum annuity to be increased without limit, while any individual distributions from the lump sum would be subject to a cap?

[405] Because the initial words of the consideration clause create a perpetual annuity in the form of a lump sum paid to the Chiefs and their Tribes, there is an obvious missing link to the last sub-clause where there is reference to individual payments. There is no other reference in the text of the Treaties that mentions payments to individuals.

[406] From my reading of the clause, this text causes a real risk of misunderstanding or different understandings. The Plaintiffs say that the $4 cap either does not apply or that, if it does apply, it applies only to individual distributions.

[407] Ontario contends that the sub-clause is meant to define the limit of the promise: to increase the annuities to a maximum of $4 per capita. Any other increase, according to Ontario, would only occur *ex gratia* (*i.e. within the Crown's complete discretion*).

[408] Canada proposes a hybrid interpretation and submits that it was the common intention of the parties that the Crown had an obligation to increase the collective annuities until the

payments reach a level equivalent to $4 per person and the Crown is further required to make increases beyond the $4 mark from time to time in their discretion.

[409] On the face of the text, these may be possible interpretations.

[410] The other difficulty posed by a simple reading of the text is how to calculate the productivity of the territory to determine if and when increases are triggered.

B. Step Two: Consideration of the Historical and Cultural Context of the Robinson Treaties

[411] A proper analysis of the Treaties must take into account the following historical and cultural context:

- The Anishinaabe perspective, particularly looking at the concepts of respect, responsibility, reciprocity, and renewal as manifested in Anishinaabe stories, governance structures, and political relationships, including alliance relationships;
- The Crown perspective, as seen through the eyes of the Colonial Government and their representatives;
- The historical record of claims and grievances by Anishinaabe Chiefs and leaders;
- The Treaty Council record created by Robinson at the time of the Treaties, including Robinson's diary and Official Report;
- The issues concerning the interpretation, transcription, and drafting of the Treaties' documents;
- The post-Treaty record (written and conduct), to the extent that it is relevant; and
- The principle of the honour of the Crown.

i. The Anishinaabe Perspective

[412] The Plaintiffs remind the court that the Anishinaabe Chiefs and leaders came to the Treaty Council to secure a treaty that was consistent with their long-term relationship with the Crown, which was characterized by the Anishinaabe principles of respect, reciprocity, responsibility, and renewal. From the Anishinaabe perspective, the central goal of the treaty was to renew their relationship with the Crown, which was grounded in the Covenant Chain alliance and visually represented on wampum belts with images of two figures holding hands as part of two links in a chain.

[413] To a great extent, the Defendants agree with this proposition. Canada says that both parties understood and accepted the history of the Covenant Chain relationship and the concepts which informed it. It is fair to say that the Anishinaabe Chiefs and leaders and the Crown actors worked across their respective cultures, often with overlapping perspectives, to come

to an agreement that allowed both parties to realize the future opportunities and potential of the territory.

[414] In any event, it is useful to review these concepts of the legal and political understandings of the Anishinaabe, as they are foundational to the Plaintiffs' position on how to interpret the Anishinaabe perspective and intention at the time. As a preliminary note, for the Anishinaabe of the upper Great Lakes region, treaties were sacred agreements that brought newcomers into the existing relationship the Anishinaabe had will all of creation. The Supreme Court of Canada has confirmed the sacred nature of treaties and the solemnity of the promises they contain.[254]

a. Respect

[415] The Anishinaabe were seeking respect for their jurisdiction over the territory (acknowledged in the *Royal Proclamation* of 1763) and their authority to enter into agreements to share the use of and authority over the territory. The Anishinaabe sought respect for their autonomy, their relationship with the land, and their concepts of governance, as well as a respect for the limits of their experience dealing with Euro-Canadian legal systems and concepts, including the monetization and alienation of land.

b. Responsibility

[416] The Anishinaabe Chiefs and leaders approached the treaty discussions in accordance with their concept of responsibility, which is connected to the concept of interdependence. The Anishinaabe had a responsibility toward their bands, their clans, and their kin, as well as to the land in all of its manifestations — the animals, flora, fauna, and non-human beings with whom the Anishinaabe shared the territory. There was considerable evidence about the scope of this mutual responsibility. Dr. Stark, for example, described the notion of mutual responsibility in the context of the story of *The Woman Who Married a Beaver*.[255]

[417] The Anishinaabe Chiefs and leaders came to the Treaty Council with a responsibility to ensure that their people could enjoy continued dependence on the land for their sustenance, their shelter, their medicines, and their spiritual well-being, and, equally, that they could continue to be responsible for that land. Robinson recognized this, evidenced by his initial offer that identified proposed reserves and retained hunting and harvesting rights.

c. Reciprocity

[418] Dr. Driben explained the principle of reciprocity in the context of gift-giving, saying that reciprocity refers to exchanges within relationships and holds that items of value are given

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[254] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.
[255] Stark Report, Trial Exhibit 040, at paras. 45 – 48; Stark Testimony, Final Transcript (November 10, 2017), Vol. 28: 4037 – 4040.

with the expectation that the gift will be returned.[256] In a society without currency, gift exchanges recognized mutual interdependence and resource sharing.[257]

[419] At the Treaty Council, Chief Shingwaukonse, Chief Peau de Chat, and the other Anishinaabe leaders fully understood that they were providing the Crown with access to and administration over their land for the purpose of Euro-Canadian settlement and development. They were giving the greatest gift of all — "the land and water over which countless generations of their ancestors had presided… the source of *bimaadiziwin*, which is to say, life in the fullest sense of the term."[258]

[420] The Anishinaabe Chiefs and leaders had every reason to expect that their "gift" attracted a reciprocal "gift", commensurate with the value of what they had provided.

d. Renewal

[421] Both parties recognized that the treaty relationship was ongoing and would continue to be renewed. Since the time of Sir William Johnson and Covenant Chain diplomacy, the Crown reminded their allies that regular renewals of the relationship were necessary to maintain the strength of the alliance. Mr. Corbiere testified that the "covenant chain was a process not an event, a process that required annual meetings to maintain open communication, mutual agreement and thus, harmonious relations".[259]

[422] The Robinson Treaties of 1850 descended from that Covenant Chain relationship. The Treaties were a renewal of the ongoing relationship between the Anishinaabe and the Crown. The Treaties were not meant to be the last word on the relationship. Renewal of the relationship was necessary to ensure that both parties could continue to thrive in changing environments.[260]

[423] These principles of respect, responsibility, reciprocity, and renewal were fundamental to the Anishinaabe's understanding of relationships. For the Anishinaabe, the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances.

ii. Crown Perspective

[424] The views of the Crown and of their representative Robinson were shaped by and were a function of the historic and cultural milieu of 1850 in the United Province of Canada.

[425] The Crown perspective may be gleaned from the words and actions of Crown actors, starting as far back as the *Royal Proclamation* of 1763 and continuing until the Treaty

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[256] Driben Report, Trial Exhibit 003, at pp. 28 – 29.
[257] Bohaker Report, Trial Exhibit 032, at para. 99.
[258] Driben Reply Report, Trial Exhibit 004, at p. 10.
[259] Corbiere Report, Trial Exhibit 026, at paras. 106 – 107.
[260] See Stark Report, Trial Exhibit 040, at para. 48; Stark Testimony, Final Transcript (November 10, 2017), Vol. 28: 4037 – 4040.

Council itself. The historical record reveals the perspective of the Crown as it implemented the Imperial policy of creating a British colony in the new world and as newcomers related to the Anishinaabe in the century following. The language of both the *Royal Proclamation* and, later, the Robinson Treaties expressed the intention of the Crown to act with justice or fairness and liberality or benevolence.[261]

a. Liberally and Justly

[426] The Imperial Crown used the words "…And whereas it is just and reasonable…" in the *Royal Proclamation*.[262] When Robinson drafted the Treaties in 1850 in Bawaating, he mirrored those notions when he wrote: "The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects…". At the time of the *Royal Proclamation*, the Imperial Government continued to rely on Indigenous peoples as military allies. They approached the nations occupying vast territories of Ontario, Quebec, and beyond with a guarantee that settlement would only occur after the Indigenous peoples gave their consent through treaties. Other than the unexplained assertion of dominion, the approach was one of respect and alliance.

[427] Robinson's instructions followed directly from this perspective and recognized that the Anishinaabe held title to the land and were the "proprietors of the vast mineral beds and unceded Forests".

[428] While the importance of the military alliance may have diminished to some extent, Robinson, his superiors in the Colonial Government, and Governor General Lord Elgin, as the representative of the Imperial Government, recognized that a treaty was the only means by which the newcomers could open up the territory to future opportunities. They needed the full consent of the Anishinaabe to fully access the wealth and benefits of the territory.

[429] Robinson was instructed to obtain a treaty that would legitimize the Crown's settlement and development of this vast northern region. In fulfilling his instructions, Robinson was guided by the Colonial intentions of acting justly and liberally.

b. The Pressures on the Crown and the Novel Approach to the Annuities

[430] The Crown was facing a completely new set of circumstances when it entered the Anishinaabe territory of the upper Great Lakes region, including pressures from the Anishinaabe leaders and Chiefs, from the mining sector, and from their dire financial situation.

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[261] Note the discussion in Chancellor Boyd's opinion in *St Catherine's Milling & Lumber Co v. R.*, [1885] O.J. No. 67, 10 O.R. 196 (H Ct. J): "The liberal treatment of the Indians… [is] the outgrowth of that benevolent policy [the policy flowing from the *Royal Proclamation*] which before Confederation attained its highest excellence in Upper Canada".

[262] *The Royal Proclamation*, dated 7 October 1763, reprinted in Clarence S. Bringham, *British Royal Proclamations Relating to America, 1603 – 1783* ed. (New York: Burt Franklin, 1911), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0037.

[431] The issuance of mining tickets and subsequent activities of the miners led to vigorous complaints from the Indigenous leaders who demanded that their rights be respected. The enterprising northern entrepreneurs expressed similar sentiments and pressured the Crown to resolve the issue.

[432] The Government sought to continue the settlement and development of the Province in a peaceful and non-violent way. The Government, however, could not incur large debt to obtain the right to open up the territory.

[433] Consequently, it appears that the Crown was prepared to depart from their longstanding practice of setting the annuity amount as an amount equivalent to $10 multiplied by the population. Although the Crown wanted or even needed the treaty, they did not have the capital to fund the annuities if they were to follow their pattern on the same basis as they had done since 1818.

[434] The known patterns of treaty making changed when the Crown decided to venture northward to seek a treaty to open up the vast boreal forest for mining development. The Crown hoped that the annuities for the Robinson Treaties would be funded out of the proceeds of the lands surrendered, but unlike the very marketable agricultural land in the south, the Crown had no familiarity with mining and could not predict how the future would unfold in the north or what other revenues might ever be generated from this territory. Their own officials had called the territory "vast but sterile". All we can conclude is that Crown actors had limited imagination, but perhaps they can be forgiven for what they did not know or could not imagine.

[435] Robinson could not bind the Treasury to annuities on the scale of southern Ontario treaties in the face of uncertain revenues.

[436] And in Chief Shingwaukonse, the Crown faced a formidable visionary, who was prepared to share the territory so long as the Anishinaabe would benefit from the ability of the newcomers to exploit the resources in ways the Anishinaabe were not yet technically capable. In this very new environment it was obvious that Robinson would have to depart from the fixed annuity model found in prior treaties.

[437] Under these pressures, with this knowledge, and with the notions of dealing liberally and justly with the Anishinaabe, Robinson set out to fulfil his instructions to treat with the Anishinaabe of the upper Great Lakes region.

c. Explanations, Translations, and Expressions of Satisfaction

[438] What can we take from Robinson's many references in his diary and Official Report that the Chiefs were satisfied after the Treaties were read out, interpreted, and explained to them?

[439] Ontario submits that the Anishinaabe had the benefit of multiple interpreters who were skilled cross-cultural translators.

[440] As Mr. Morrison said, the interpreters at the 1850 Treaty Council, both official and unofficial, were a genuine part of the multicultural world of the upper Great Lakes region. All had considerable experience as "cultural brokers".

[441] Robinson also reported in his letter to Colonel Bruce that: "I had no difficulty in making them [the Anishinaabe] comprehend it [the augmentation clause]".

[442] I accept that the interpreters covered the "shall not exceed £1 (equivalent to $4)" as part of their explanation and we know of no complaints at the time of the interpretations. But, with all due respect to the interpreters and those who seek to decipher what the interpreters were able to explain, during this hearing a roomful of skilled lawyers could not agree on how to interpret the Treaties. And they all speak English and were all educated in the Common Law. At best, we can say that the language of the Treaties is ambiguous regarding the impact of the "cap". There is no record of Robinson himself explaining the "cap", the notion of discretion, or royal prerogative.

[443] I can also take judicial notice of the difficulty of interpreting legal terms to lay people. This is compounded when there is a large cultural gap.

[444] During the proceedings, we had a few days of evidence when some witnesses including Mr. Corbiere, Elder Fred Kelly, and Elder Rita Corbiere testified using Anishinaabemowin terms or phrases. For the purposes of the court record, and in consultation with counsel, Court Services provided a team of two certified interpreters. These two interpreters were Anishinaabemowin speakers and teachers from the area and had studied and spoken the language for their entire lives. At certain times, they were assisted by another language speaker. I point this out to underscore that interpretation is not a straightforward or simple task. It takes time and a sophisticated understanding of the two relevant cultures.

[445] Moreover, the court also had the benefit of hearing the testimony of Elder Rita Corbiere, a life-long speaker, teacher, and student of Anishinaabemowin. Elder Corbiere prepared a translation of the Treaties into Anishinaabemowin, which she read into the record.[263] As best we know, this is the first time that the text of the Treaties had been read aloud in the language of the Anishinaabe.

[446] Elder Corbiere described her challenges in doing the translation. There were a number of words and phrases for which she said there was no direct translation (*e.g. cede, surrender*). She also said that the number "two thousand" would have been very hard to translate, perhaps impossible. There is no word for "title" in the language and, in fact, there was no concept of alienation of land. In her testimony, Elder Corbiere further explained how there is no way to translate, "as Her Majesty may be graciously pleased to order." She testified that the Anishinaabe lived with notions of what they expected of their leaders: to be generous, to live in a good way, to do right by the people.

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[263] Elder Corbiere read her translation from the witness box in open court. That day, court was held on Manitoulin Island and many Treaties' beneficiaries, including many language speakers, were present.

[447] The Robinson Treaties use formal English and legal terminology. I am not at all convinced that the presence of interpreters could or should have given Robinson confidence that the Chiefs understood the concepts of discretion, royal prerogative, or Her Majesty's graciousness, if such concepts had been embedded into the Treaties. And, therefore, such concepts could not have informed the common intention of the parties.

[448] To the extent that Ontario relies on the fact that there were interpreters present at the Treaty Council or that Robinson reported that the Anishinaabe were satisfied with the terms, the best we can conclude from that is: the Anishinaabe Chiefs were happy with what was explained to them. The presence of interpreters speaks to the good will of Robinson and Crown actors, and their intention to use their efforts to ensure that the Anishinaabe Chiefs and leaders left the Council with a full and faithful understanding of the terms of the Treaties. We cannot, however, conclude how the augmentation clause was explained.

d. The Augmentation Clause

[449] In this section, I intend only to look at the following two phrases and what they say about the Crown's intention regarding the concept of the augmentation clause, in particular its discretionary versus mandatory nature.

[450] Robinson ends his reference to the augmentation clause with the following two phrases: "[D]esirous of leaving the Indians [with] no just cause of complaint on their surrendering their extensive territory… I inserted a clause securing to them certain prospective advantages should the lands in question prove sufficiently productive…"[264]

[451] First, I note the use of the phrase "no just cause of complaint". This phrase reflects the language of the *Royal Proclamation*: "…that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent…".[265]

[452] In his Official Report, Robinson makes clear that, as he perceives it, he conducted the Treaty Council and carried out his duties in accordance with the duty imposed on him as Treaty Commissioner: to act honourably.

[453] When Robinson reported that the augmentation clause was so "reasonable and just", it is my view that he could not have been referring to an annuity capped at $4. Chief Shingwaukonse and the other Anishinaabe Chiefs would not have found a $4 cap to their annuities either reasonable or just; it was far less than half of what other bands received as fixed sum annuities and, additionally, it did not respond to their demand for a share of the future wealth of the territory.

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[264] Report of W. B. Robinson to Colonel Bruce, Superintendent General of Indian Affairs, on transmitting the Robinson Treaty, dated 24 September 1850 at 18, Joint Book of Primary Documents, Trial Exhibit 01-TAB-1680.
[265] *The Royal Proclamation*, dated 7 October 1763, reprinted in Clarence S. Bringham, *British Royal Proclamations Relating to America, 1603 – 1783* ed. (New York: Burt Franklin, 1911), Joint Book of Primary Documents, Trial Exhibit 01-TAB-0037.

[454] Had Robinson intended a treaty that followed the precedents in the Province in any way, he would have been more likely to propose a $10 cap. A $10 cap would mirror (to some extent) prior treaties and would still protect the Crown from liability if the land was not profitable. However, a $4 cap had no reference at all in the Province's treaty-making history. It is important to note that increases and caps had no precedence in prior treaties either. In any event, it is more likely that Robinson, under some pressure from some Chiefs at the Council to ear mark some funds for individual distribution and in compliance with the Colborne Policy that limited his ability to make cash payments to individuals, set a low cap on the individual distributive amount (the £1 or $4 cap). Her Majesty was left with the discretion to increase this cap should future circumstances permit.

[455] The Plaintiffs submit that, alternatively, if the reference to a £1 amount is interpreted as a temporary or permanent cap on the whole of the collective entitlement, the most plausible explanation why Robinson chose a £1 amount was that Robinson was using the £1 amount as a "placeholder", as per other treaties made previously in Upper Canada. In other words, the £1 amount was not the true extent of the consideration, but simply a placeholder amount.

[456] The parties did not fully develop this argument; however, as an alternative characterization of the £1 amount, it has a certain logic. Once the general principles of the Treaty were agreed, the First Nation parties, especially those represented by Chief Peau de Chat, were content to permit the Crown to set amount of the annuity payments, understanding that Her Majesty's graciousness would be exercised honourably to ensure that the annuities reflected the value of land, to the extent that the Crown would not incur a loss.

[457] Thus, as Robinson explained in his report, he drafted the augmentation clause in such a way that he could practically satisfy the Anishinaabe's expectations and, at the same time, limit the Crown's financial exposure and not impose an unreasonable administrative burden (*i.e. such as requiring a strict accounting of all proceeds received from the territory*).

[458] From Robinson's own reporting, it is reasonable to conclude that he meant to treat the Anishinaabe justly and liberally, to take into account their expectations, to limit the financial impact on the Crown, and to adhere to the Colborne Policy. The prospective advantages to be realized from the territory would be to the benefit of both the Crown and the Anishinaabe.

C. Step Three: Choosing the Common Intention that Best Reconciles the Intentions of the Parties

i. Possible Interpretations of Common Intention

[459] On the words of the text alone, and notwithstanding the ambiguities and confusions already noted, there may be three possible interpretations of the augmentation clause. One interpretation is that the Crown's promise was capped at $4 per person; in other words, once the annuity was increased to an amount equivalent to $4 per person, the Crown had no further liability.

[460] A second interpretation is that the Crown was obliged to make orders (*"as Her Majesty may be graciously pleased to order"*) for further payments above $4 per person when the economic circumstances permitted the Crown to do so without incurring loss.

[461] A third interpretation, which includes the second interpretation, is that the Treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met. The reference to £1 (equivalent of $4) in the augmentation clause is a limit only on the amount that may be distributed to individuals.

[462] Applying the approved treaty interpretation principles, including the honour of the Crown, and examining the full context in which the Treaties were made, only the third interpretation comes close to reflecting the parties' common intention.

ii. The Interpretation that Best Reconciles the Parties' Common Interests

a. The Parties Did Not Intend to Fix a Cap on the Annuities

[463] I find that the parties did not intend to limit increases to the annuities to $4 per person. The best possible interpretation of the parties' common intention, the one that best reconciles their interests, is that the Crown promised to increase the collective annuities, without limit, in circumstances where the territory produces an amount as would enable the Government to do so without incurring loss. I find that this treaty promise, contained in both the Robinson Huron Treaty and Robinson Superior Treaty, is a treaty right protected by s. 35 of the *Constitution Act, 1982*.[266]

[464] Further, the common intention was that the reference to £1 (equivalent of $4) in the augmentation clause is a limit only on the amount that may be distributed to individuals, and this distributive amount is a portion of the collective lump sum annuity payable to the Chiefs and their Tribes.

[465] This interpretation holds the parties in a relationship, looking toward the future together. I find that the interpretation that imposes a $4 per person cap on the annuities does not reflect either the common intention nor reconcile the parties' interests; it suggests that the Treaties were a one-time transaction. As the historical and cultural context demonstrates, this was not the case; the parties were and continue to be in an ongoing relationship.

b. The "If and When" Sharing Model Satisfies the Goals of the Parties

[466] A plan to share the wealth on an "if and when" basis through an augmentation clause was always central to the understanding, the aspiration, and the intent of both the Anishinaabe and the Crown.

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[266] *Mitchell v Minister of National Revenue*, 2001 SCC 33, [2001] 1 S.C.R. 33, at paras. 138 – 139, Binnie J., concurring.

[467] We can follow the development of the concept from Chief Shingwaukonse's petition in 1846, through to similar expressions from Chief Peau de Chat, to a recommendation found in the Vidal-Anderson Report. The Chiefs expressed notions that were central to the Anishinaabe perspective and their longstanding pattern of sharing territory with other nations. They had also begun the experience of sharing the land with the newcomers. The if and when approach presumes that parties who could not predict the value of the territory were prepared to modify their demands to take into account the actual "value" realized from the territory.

[468] The Anishinaabe took the risk that they would continue to receive very low annuities if the territories were not profitable. The Crown limited its liability if the territories were not profitable but took the risk of far higher annuities than was their practice if the territories were profitable.

[469] For the Crown, the idea of sharing revenues was novel, but reflected their goal to obtain access to the land and resources, limit their liability, and deal honourably with the Anishinaabe.

[470] A treaty that linked the future revenue of the territory to the annuities payable to the Anishinaabe answered the uncertainties and risks present. A revenue sharing model was consistent with the perspective that the Anishinaabe Chiefs held about their relationships with the newcomers and the land. It was also consistent with the Anishinaabe's duties of responsibility as leaders toward their people. In addition, the sharing model invited renewal as circumstances changed. Most importantly, a sharing model was consistent with the principle of reciprocity.

[471] At the Treaty Council, both parties underscored their long-standing and important relationship. The Anishinaabe demonstrated throughout their pre-Treaty interactions that they were dealing with the Crown as kin. The Crown also relied on their long-standing relationship where they expressed their alliance within the Covenant Chain relationship. The Anishinaabe recognized the monarch as possessing all of the qualities of a great leader. There was trust on both sides.

[472] Within their relationship, Robinson proposed the augmentation clause not so much as a compromise, but more as an inducement. He had to persuade the Anishinaabe, who were holding firmly to their desire that the land continue to sustain them, their communities, and the future generations. At the same time, Robinson had to keep in mind the duties that the Crown had assumed and continued to express — the duties that flowed from the honour of the Crown following the issuance of the *Royal Proclamation*.

[473] This is not to say that Robinson was focused only on liberal and just bargaining. He was a tough negotiator. He side-lined Macdonell, the lawyer to the Huron delegation; he divided the single group of Chiefs into two groups because he thought he was more likely to persuade the Superior Chiefs to treat; he put a "take it or leave it" proposal on the table when faced with a tough negotiator on the Huron side of the lodge.

[474] But Robinson found the point where the two sides could agree. By drafting a provision that allowed the Government to defer any increases to the annuity until the increases could be funded from the revenue from the territory, Robinson met all of the goals of the Crown. At the same time, from what Robinson reported, and what we must assume, Robinson did not engage in sharp dealing by demanding that the Anishinaabe bear the burden of the Province's financial pressures and accept forever an annuity that was well below their expectations. Instead, it is reasonable to conclude that Robinson sought Governor General Lord Elgin's approval to offer an increase if and when the Territories produced sufficient net revenues.

[475] Lord Elgin, as the Crown's representative, was eager that an honourable treaty be concluded that would allow development to continue within a predictable, secure, and peaceful framework. In Robinson's meeting with Lord Elgin in the days prior to the formal opening of the Treaty Council, it is reasonable to conclude that those goals and intentions were reviewed and sanctioned. With the Governor General's approval, Robinson ultimately proposed an agreement that the Anishinaabe Chiefs could accept on behalf of their people.

XI. THE HONOUR OF THE CROWN

[476] There is no controversy among the parties that the principle of the honour of the Crown binds the Crown in its dealings with the beneficiaries of the Robinson Treaties. The Crown acknowledges and accepts this duty. The legal principles established by the Supreme Court are not contested.

[477] However, the way in which the honour of the Crown is engaged in the circumstances before the court is the subject of dispute.

[478] The honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and Indigenous peoples.[267] Its underlying purpose is the reconciliation of Crown and Indigenous interests.[268] In our case, the duty of honour applies in the making, interpretation, and implementation of the Robinson Treaties.[269]

[479] The honour of the Crown has been a principle animating Crown conduct since at least the *Royal Proclamation* of 1763, through which the British asserted sovereignty over what is now Canada and assumed *de facto* control over land and resources previously in the control of Indigenous peoples.[270] At the time of the Treaties and before, the Anishinaabe of the

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[267] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 21.
[268] *Ibid*, at paras. 21 – 22; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 66 – 67.
[269] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 68, 73.
[270] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32. See *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 66 – 67. According to John Borrows, "the British inserted statements into the Proclamation that claimed 'dominion' and 'sovereignty' over the territories First Nations occupied… Therefore, the Proclamation illustrated the British

upper Great Lakes region were living in distinct societies, with their own social and political structures, as well as laws and interests in land.[271] Today, reconciliation remains the fundamental objective of Aboriginal law and treaty rights.[272]

[480] The honour of the Crown has been enshrined in s. 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights. Because of its close relationship with s. 35, the honour of the Crown has been described as a "constitutional principle".[273]

[481] Plainly and simply put, this principle requires that the Crown act honourably in all of its dealings with the beneficiaries of the Robinson Huron and Robinson Superior Treaties from the pre-Treaty meetings, through the Treaty Council negotiations, and into past and future interpretation and implementation of the Treaties. The duty of honour requires the Crown to conduct itself and its affairs in a way that accomplishes the intended purposes of the Treaties; the Crown must give meaning and substance to the promises made.[274]

A. The Duties that Flow from the Honour of the Crown

[482] While the Defendants agree with the proposition that the honour of the Crown may be the source of a range of legally enforceable duties that will vary with the circumstances,[275] the nature and extent of those duties or concrete practices as they relate to the implementation of the promises in the Robinson Treaties are in contention.

[483] The Supreme Court of Canada has already recognized certain duties flowing from the honour of the Crown. They fall roughly into four categories:

1. A fiduciary duty when the Crown assumes discretionary control over a specific or cognizable Aboriginal interest;

2. A duty to consult, and where appropriate to accommodate, when the Crown contemplates an action that will affect either a claimed but as yet unproven Aboriginal interest or an established treaty right;

3. A duty of honourable treaty-making and implementation, including a duty to act in a way that accomplishes the intended purposes of the treaty; and

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government's attempt to exercise sovereignty over First Nations…": see John Borrows, "Constitutional Law from a First Nations Perspective" (1994), 28:1 UBC L Rev 1, at pp. 17 – 19.

[271] See *Mitchell v. Minister of Natural Resources*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9.

[272] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 1.

[273] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 24; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42.

[274] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 73(4), 75 – 76.

[275] *Ibid*, at para. 74; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18.

4. A duty to take a broad purposive approach to the interpretation of the treaty promise in conjunction with a duty to act diligently to fulfil that promise.[276]

B. The Positions of the Parties on the Duties Flowing from the Honour of the Crown

[484] The Defendants contend that they hold significant discretion with respect to the implementation of the augmentation clause. The Plaintiffs, on the other hand, submit that after over 150 years without any engagement or exercise of discretion on the issue, the court must provide some direction to the Crown on how to implement the Treaties' promise.

i. The Plaintiffs' Positions on the Duties Flowing from the Honour of the Crown

[485] The Plaintiffs submit that the honour of the Crown imposes specific duties on the Crown, particularly in light of the passage of time since the Crown last considered the implementation of the augmentation clause. The Plaintiffs also say that the duties flowing from the honour of the Crown bind the Crown irrespective of the interpretation of the Treaties' promise (*i.e. whether mandatory or discretionary*).

[486] In concrete terms, the Plaintiffs argue that the honour of the Crown imposed at least the following duties at the time of treaty making and continues to impose these duties on the interpretation and implementation of the Treaties' promise:

- That Robinson had a duty to set an annuity that would reflect the value of the territory, considering the Anishinaabe were ignorant about the value of their territory, money, and distribution mechanisms;

- That Robinson had a duty to not implicitly extinguish Aboriginal title in the making and drafting of the Treaties, when extinguishment was not necessary for the Crown to secure effective control over the administration of the territory;

- That the Crown now augment the annuities in a timely and purposive fashion pursuant to a set of principles outlining the revenue and expense calculation;

- That the Crown must avoid a legalistic interpretation of the augmentation clause and, in particular, must not take advantage of any cap on the collective entitlement;

- That the Crown has a duty to disclose;

- That the Crown has a duty to consult on the process for when and how increases can and should be made and whether there are net revenues to be shared;

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[276] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 73 – 75. See *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 43.

- That there is a fiduciary duty imposed on the Crown; and

- That there is a duty to imply a term to guarantee that the annuity right retains "real value and meaning" and, therefore, is protected against inflation; however, the Plaintiffs submit that indexation for inflation alone does not discharge the Crown's obligations under the honour of the Crown.

ii. The Defendants' Positions on the Duties Flowing from the Honour of the Crown

[487] Ontario submits that the honour of the Crown is engaged to the extent that the Crown must exercise their discretion to consider any increase to the annuity clause from time to time, or on request, and must give reasons for any decisions they make. They submit that there is no duty to consult or to disclose with respect to possible increases; however, they acknowledge a duty of some transparency, a duty to share some information, and a duty to provide a basis for any decision they make with respect to their discretion to increase the annuity.

[488] Ontario says that the Crown is bound by the duty to act in good faith, and that it cannot act unconstitutionally nor for any improper purpose when it exercises its discretion. Ontario argues that the Crown's unfettered discretion and flexibility to consider, on an *ex gratia* basis, any increases, should be preserved. They submit that the court should not set out any procedural requirements that are necessary to satisfy the honour of the Crown. They say that preserving the Crown's flexibility as it relates to increases would be consistent with the proper role of the court, since the court may be called on after the fact to review Crown decisions.

[489] Similarly, Canada submits that the honour of the Crown will attract certain duties, primarily a duty of purposive interpretation and implementation of the Treaties. However, they say that the court cannot prescribe a specific framework to operationalize the duties associated with the interpretation or implementation of the Treaties.

[490] Canada now recognizes that the exercise and fulfilment of duties arising from the honour of the Crown are reviewable against "accepted standards of conduct". I note that this is a significant move from the position taken in the pleadings and up until the closing of the trial. Initially, it was Canada's position that their decisions on the implementation of the augmentation clause were not justiciable. Recognizing that the court may review decisions on the implementation of the treaty promise is a welcome and helpful evolution.

C. Discussion of the Honour of the Crown and the Duties that Flow from the Honour of the Crown

[491] The underlying purpose of the honour of the Crown is to facilitate the reconciliation of the pre-existing sovereignty of Indigenous peoples with the assumed sovereignty of the

Crown.[277] One way to achieve the reconciliation of interests in this case is to negotiate a resolution to the interpretation and implementation of the Treaties' promise. Negotiation has the benefit and advantage that it avoids judicially imposed outcomes. Negotiation has the further benefit that it facilitates the resolution of terms that are notoriously difficult to achieve in an adversarial process. The Supreme Court of Canada had held that, as opposed to litigation, "negotiation is a preferable way of reconciling state and Aboriginal interests."[278]

[492] However, when negotiation fails to achieve a resolution or if the Crown refuses to negotiate, the Treaties' beneficiaries are entitled to ask for judicial intervention.[279] And if the Treaties' beneficiaries issue a claim after 168 years of no action on the part of the Crown, the court cannot simply accept the Crown's acknowledgment of their duty of honour and permit the Crown to carry on without further direction.

[493] But that is exactly what the Crown is asking to court to do. For instance, in resisting the imposition of any court ordered duty of disclosure, the Crown suggests that they have a duty of acting "with some transparency". The Plaintiffs, however, ask the court to exercise its authority to impose specific duties on the Crown, taking into account the specific circumstances of the history of the Treaties and the history of Crown conduct. They ask the court to impose substantive duties, such as the duty to consult and the duty to disclose. These duties and other implementation issues that are more process oriented contain many complexities and do not lend themselves easily to legally enforceable duties. However, there is a rich history of jurisprudence and Crown practice on the duty of consultation. A duty of transparency is completely undefined.

[494] In my view, to accept the Crown's position that they should be permitted, with unfettered discretion, to honourably implement the Treaties' promise, is to invite unending litigation to determine whether during the complex implementation process the Crown acted honourably enough. This will be cold comfort to the beneficiaries who have been waiting, without a word from the Crown, for over a century.

[495] Since 1850 the Crown has acted with unfettered discretion in their interpretation and implementation of the Treaties, in a way that has seriously undermined their duty of honour. This left the Treaties' promise completely forgotten by the Crown. To permit the Crown to continue in the same fashion would mean that the Treaties would never be the means by which the beneficiaries were dealt with in a "just and liberal manner", as promised in 1850. Unfettered discretion, especially without the burden of a duty of consultation or disclosure or the mechanics to calculate net revenues, risks unilateral action on the part of the Crown and quite likely reduces the duty of honour to something so vague as to be meaningless. This would be antithetical to an honourable process and the principle of the honour of the Crown.

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[277] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 66 – 67; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20

[278] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 14.

[279] I have no information on whether or to what extent the parties before the court engaged in any negotiations.

[496] After the extensive efforts that have been put into this case by all parties over the last 5 – 10 years, we will not have made any headway if the only declaration made is that the Crown must act honourably and in a way that fulfils the purposes of the Treaties. The jurisprudence is clear that legally enforceable duties flow from the honour of the Crown and vary depending on the circumstances.

[497] I accept that in these circumstances, the court has the authority and the imperative to impose specific and general duties on the Crown. I reject the notion that the court cannot disturb the unfettered discretion that has governed the Crown's conduct to date.

[498] Next, I examine the relationship between the principle of the honour of the Crown and the doctrine of fiduciary duty before reviewing what specific and general duties are appropriate in these circumstances.

XII. FIDUCIARY DUTY

A. The Relationship Between the Principle of the Honour of the Crown and the Doctrine of Fiduciary Duty

[499] The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific or cognizable Aboriginal interest.[280] Although the principle of the honour of the Crown imposes obligations on the Crown in all interactions between the Crown and Indigenous peoples in Canada, a finding of a fiduciary duty may impose additional duties on the Crown, as well as open up an array of equitable remedies.

[500] The Supreme Court of Canada has commented on the relationship between the principle of the honour of the Crown and the doctrine of fiduciary duty in post-*Haida* decisions, most recently in *Wewaykum Indian Band v. Canada (Attorney General)*. The interaction of these two doctrines has raised further questions both in an appellate decision and in the academic literature.

[501] In their submissions, Canada argues that the proper analytical framework for this case is one of purposive treaty interpretation and implementation grounded in the honour of the Crown, not one of fiduciary duty. The Plaintiffs, on the other hand, contend that, notwithstanding that similar duties may be imposed on the Crown under the application of both doctrines, there are a range of equitable remedies available in the event of a breach of fiduciary duty that may otherwise be unavailable. The Plaintiffs submit that they are permitted to plead their case using whatever causes of action are available and that they have chosen to seek remedies that may only be available to them for breach of fiduciary duty.

[502] The Saskatchewan Court of Appeal squarely addressed the issue of the interaction between the principle of the honour of the Crown and the doctrine of fiduciary duty in *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, where the court noted that the "generalized fiduciary obligation (in form, a principle that calls for honourable conduct)

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[280] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 73.

has been largely replaced by the honour of the Crown principle which effectively mandates the same thing."[281]

[503] In *Wewaykum*, however, Binnie J. underscored the importance of determining whether a fiduciary duty exists where the plaintiffs have claimed one for the express purpose of accessing remedies that at this time are not available under the principle of the honour of the Crown.[282]

[504] The Plaintiffs here specifically rely on a finding of fiduciary duty to rebut Ontario's defences based on limitations and laches. Ontario is vigorously making these defences. Canada is not. There is also the possibility of equitable damages that would arise if a breach of fiduciary duty is found.

[505] It is not necessary for the Court at this level to consider whether one of these duties has primacy over the other. At this time, the action as pleaded relies on the doctrine of fiduciary duty, claims equitable remedies, and relies on the equitable defences that would otherwise be unavailable to the Plaintiffs. While the issue of remedies is outside the purview of this stage of the litigation, the question of the imposition of fiduciary duty must be resolved for these parties at this time. It cannot be ignored because a different model may be developed at some future point.

B. Do the Treaties Impose a Fiduciary Duty on the Crown with Respect to the Augmentation Clause?

[506] In this section, I review the elements of the two approaches to fiduciary duty (*sui generis* and ad hoc). The Plaintiffs rely principally on the remedial purpose of fiduciary duty, that is, to be a check on the Crown's expanding discretionary control over Indigenous peoples, for their position that a fiduciary duty is imposed on the Crown.

[507] The Defendants reject the argument that the Treaties impose a fiduciary duty. They submit that the Treaties cannot constitute the conventional obligation to put the interests of the Treaties' beneficiaries before any other interest.

C. Elements of the Two Approaches to Fiduciary Duty

[508] In the most recent Supreme Court of Canada decision on fiduciary duty, *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, Wagner C.J. spoke to the elements of the two established approaches to the fiduciary duty:

1. ***Sui Generis* Fiduciary Duty**: Unique to the Aboriginal law context, a fiduciary duty may arise from the Crown's discretionary control over a specific or

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[281] *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, 485 Sask. R. 162, at para. 83, citing Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon, Saskatchewan: Purich Publishing Limited, 2015), at p. 91.
[282] *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 94.

cognizable Aboriginal interest. Such a duty may arise if the following conditions are met:

(i) The existence of a specific or cognizable Aboriginal interest, and
(ii) A Crown undertaking of discretionary control over that interest.[283]

2. **Ad Hoc Fiduciary Duty**: A fiduciary duty may also arise where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of a beneficiary or beneficiaries. Such a duty may arise if the following conditions are met:

(i) An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
(ii) A defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
(iii) A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[284]

D. *Sui Generis* Fiduciary Duty

[509] The first element of the *sui generis* approach requires the Plaintiffs to establish that they have a specific or cognizable Aboriginal interest: the interest must be a distinctly Aboriginal, communal interest in land that is integral to the nature of the distinctive community and their relationship to the land. The Anishinaabe interest in the territories that became the subject of the Robinson Treaties was historically occupied and communally held prior to contact and is, therefore, capable of constituting a specific or cognizable Aboriginal interest in land in the pre-Treaty context. There is no controversy on this point.

[510] The Defendants contend, however, that the surrender that was made as part of the Treaties extinguished the Anishinaabe's specific or cognizable Aboriginal interest in the lands, and, therefore, the pre-existing interest is not capable of grounding a *sui generis* fiduciary duty.

[511] I do not have to decide whether the Anishinaabe's cognizable interest in the land survives the signing of the Robinson Treaties. This question can be left for another day because I find that the second element of the *sui generis* analysis is not met. That is, there was no Crown undertaking of discretionary control over the Anishinaabe's interest in land, however that interest might be characterized.

[512] Specifically, I find that neither the Treaties' text nor the context in which the Treaties' promise was made support the contention that the augmentation clause included the notion or concept that the Crown would administer the land on behalf of the Treaties'

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[283] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, at para. 44.
[284] *Ibid*.

beneficiaries. In the absence of an undertaking in respect of the cognizable interest in the land, I find that a *sui generis* fiduciary duty does not arise from the Robinson Treaties' promise.

E. Ad Hoc Fiduciary Duty

[513] An ad hoc fiduciary obligation may arise where the general conditions for a private law ad hoc fiduciary relationship are satisfied, that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the beneficiaries.[285]

[514] Of the three elements of the ad hoc fiduciary duty analysis, only the first and third elements are in dispute. The second element, that there is a defined class of persons vulnerable to the fiduciary's control, is not disputed: the beneficiaries of the Robinson Treaties represent a defined class of persons vulnerable to the Crown's control.

[515] The proper point to begin the analysis of the remaining two elements is the identification of the interest in relation to which the Crown made an undertaking and to which the exercise of discretionary control will attract scrutiny.[286] At this point, we try to identify the interest that is vulnerable to an adverse exercise of Crown discretion.[287] Following that determination, the task is to define the content of the duty, which requires a look at the interest at stake.

[516] The Plaintiffs submit that the Treaties, being a solemn undertaking by the Crown to act in the best interests of the Treaties' beneficiaries coupled with the measure of discretion afforded to the Crown in carrying out its obligations under the augmentation clause, give rise to an ad hoc fiduciary duty.

[517] Ontario argues that an ad hoc fiduciary duty is premised on the fiduciary assuming an obligation to put the interest of the beneficiaries before any other interest. Ontario rejects the proposition that the Crown discretion required them to administer the land exclusively on behalf of the Treaties' First Nations. They submit that the Crown was responsible to exercise their discretion in accordance with the broader public interest, within a broad range of purposes and policy considerations.

[518] Canada submits that the broad political and public interest aspects of treaty making included the balancing of multiple polycentric interests and, therefore, the Robinson Treaties are not the appropriate context for an ad hoc fiduciary duty.

[519] For the reasons that follow, I find that an ad hoc fiduciary duty arises in the context of the Robinson Treaties. Specifically, I find that the Crown undertook to act exclusively in the

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[285] *Ibid.*
[286] See *ibid*, at para. 66.
[287] *Ibid*, at para. 72.

best interest of the Treaties' beneficiaries in their promise to engage in a process to determine if the economic circumstances warrant an increase to the annuities.

i. Analysis of the Ad Hoc Fiduciary Duty

[520] I deal with the third element first. The third element necessary for the finding of an ad hoc fiduciary duty is the existence of a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the exercise of the fiduciary's discretion. The analysis, therefore, requires a focus on the legal interest and the vulnerability of that interest.

[521] Rights under s. 35 of the *Constitution Act, 1982* satisfy the requirement of an independent legal interest that is capable of grounding a fiduciary duty.[288] An affirmative promise by the Crown incorporated into a treaty is enforceable as a treaty right within the purview of s. 35.[289]

[522] In the context of the Robinson Treaties, there was an affirmative promise to augment the annuities if the revenues received from the territories allowed the Crown to do so without incurring loss. In other words, the promise was first to *engage in a process* to determine if the condition was met, that is to determine whether the economic circumstances warrant an increase. Only if the economic circumstances warranted, there was a promise to increase the annuities. There was no promise that the result of the process would be increases to the annuities. The parties at the Treaty Council and the parties before this court accepted that the promise was a contingent promise based on a risk. For the Anishinaabe, the risk was that the territories would not produce revenues sufficient to increase the annuities; for the Crown, the risk was that they would be required to make substantial increases to the annuities if the revenues warranted such increases.

[523] The augmentation clause formed part of the consideration for the surrender. The promise to augment the perpetual annuities, on the condition that certain economic circumstances were met, is no less a promise than the lump sum amount promised in the Treaties. The augmentation promise was the key to bringing the parties to an agreement. It was an inducement or a way to bridge the expectations of the parties and formed the common intention of the parties when the Treaties were signed. Without the promise of the augmentation clause, it is probable that there would have been no treaty. When negotiations were difficult, the Crown made an affirmative promise. The corresponding right to that promise is the right to have the Crown engage in a process. As a treaty promise, the promise contained in the augmentation clause has the status of a legal and constitutional right, vulnerable to the Crown's discretionary control. This finding satisfies the third branch of the ad hoc fiduciary duty analysis.

[524] With respect to the first element, the question is: did the Crown undertake to act in the best interests of the Anishinaabe? The Crown promise was also an undertaking to look at relevant revenues and expenses and make increases if they could do so without incurring

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[288] *Ibid*, at para. 53.
[289] *Mitchell v. Minister of National Revenue*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 138, Binnie J. concurring.

loss was made in the best interests of the Treaties' beneficiaries and with the utmost of loyalty to them. The Crown has no competing interest or duty in the performance of this exercise. There is no other group to whom the Crown owes a duty of loyalty in this process. This finding that the Crown owes a duty of utmost loyalty to the Anishinaabe of the upper Great Lakes to exercise its discretion satisfies the first branch of the ad hoc fiduciary duty analysis.

[525] The Crown argument that an ad hoc fiduciary duty analysis fails because the Crown cannot act with exclusive or utmost loyalty to the Anishinaabe because it "wears many hats" is based on a faulty premise. The Crown focused on the land as the interest at stake; however, the interest at stake is embedded in the augmentation clause. It is a promise to engage in the process of implementing the conditional augmentation promise. The legal interest subject to the duty is not in an absolute right to increases and is not in relation to the administration of the land. Rather, the legal interest created by the augmentation clause is to engage in the process to determine whether increases are payable. The right to have the Crown engage in the process came into effect upon the signing of the Treaties and continues to exist today.

[526] The Crown reminded that court that a finding of ad hoc fiduciary duty on the part of the Crown would be rare.[290] However, the circumstances in this case, being a duty to engage in a process to meet a treaty promise, may constitute one of those rare cases. The Crown has no other conflicting demands when it comes to engaging in the process.

[527] The purpose of the fiduciary duty is to facilitate supervision of the high degree of discretionary control assumed by the Crown over the lives of Indigenous peoples.[291] In the context of the Robinson Treaties' promise and undertaking, the conduct of the Crown as fiduciary that comes under scrutiny is its exercise of discretionary control over the process to implement the augmentation clause. While the process is not explicitly defined in the Treaties, the Crown is bound by the honour of the Crown and a fiduciary duty to conduct themselves within the parameters framed by those duties. The fiduciary duty applies so that the actions of Crown officials that could have an adverse impact upon the implementation of the promise meet established standards of conduct in the context of the Crown-Anishinaabe relationship.

[528] The question arises: what are the standards of conduct and the duties flowing from a finding of an ad hoc fiduciary duty in the context of the Robinson Treaties?

ii. Content of the Ad Hoc Fiduciary Duty

[529] I have found that the promise contained in the augmentation clause is mandatory. Nonetheless, the Crown retains some discretion in implementing this promise. While the Crown undertaking to exercise its discretionary control over that process must be done in

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[290] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 44, 48.
[291] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, at para. 47. See *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 79.

the best interests of the beneficiaries, there remains outstanding questions concerning the content of the ad hoc fiduciary duty imposed on the Crown.

[530] The best interests define the standard of conduct of the fiduciary; they do not define the outcome. It is the standard of conduct that defines, in general terms, the duties of the fiduciary. As the court said in *Williams Lake*, the Crown will fulfil its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result.[292]

[531] The circumstances in which the fiduciary obligation arises shape the content.[293] Although the content of the Crown's fiduciary duty varies, it includes, to some extent, the duty of loyalty, the duty of good faith, and the duty of disclosure (appropriate to the subject matter), among other duties. The standard of care to which a fiduciary is held in its pursuit of the beneficiaries' interests is that of a person of ordinary prudence in managing their own affairs.[294]

[532] For example, the Crown has discretion on when and how it provides sufficient information to allow the Anishinaabe, or a court on review, to assess the Crown's calculations of net Crown revenues. The discretion is subject to the duties of a fiduciary and, therefore, is not unfettered and must be carried out within the parameters of the duty of honour and the duties of loyalty and utmost good faith.

iii. Conclusion on the Ad Hoc Fiduciary Duty

[533] I am satisfied that an ad hoc fiduciary duty arises in the context of the Robinson Treaties and attaches to the Treaties' promise to engage with the process to determine if the Crown can increase the annuities without incurring loss (based on a calculation of relevant revenues and expenses to determine net Crown revenues).

XIII. IMPLEMENTATION OF THE TREATIES' PROMISE

[534] The Treaties' promise to increase the collective annuity when economic circumstances warrant raises issues of implementation. The duties flowing from the principle of the honour of the Crown and the doctrine of fiduciary duty provide the framework for the implementation process.

[535] The implementation issues in dispute include the following:

- What are the principles applicable to the determination of relevant revenues and expenses when considering whether the Crown is able to increase the annuities "without incurring loss"?

- What is a fair share of the net revenues received from the Treaties' territories?

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[292] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, at para. 48.
[293] *Ibid*, at para. 55.
[294] *Ibid*, at para. 46.

- What duties govern the processes and procedures of implementation: discretion, disclosure, consultation, and review?

- Does the Crown have unfettered discretion to make treaty implementation decisions?

[536] The annuities were last increased in 1875. Therefore, regrettably, there is no set protocol, mechanism, or precedent for the process of considering increases to the annuities. Hence, the court and the parties must return to the shared goals, expectations, and understandings of the parties in 1850 and, based on those shared goals, expectations, and understandings, devise processes and procedures for the implementation of the Treaties' promise in the modern era.

[537] The implementation process and the duties imposed on the Crown through that process must, therefore, have a rational and logical connection to those shared goals, expectations, and understandings.

A. The Legal Principles Governing the Implementation of the Treaties' Promise

[538] The honour of the Crown requires that the Crown fulfil their treaty promises with honour, diligence, and integrity. The duty of honour also includes a duty to interpret and implement the Treaties purposively and in a liberal or generous manner. The Defendants accept this characterization of their duties. As I have found, there is also an ad hoc fiduciary duty on the part of the Crown.

[539] All parties realize that the implementation of the Treaties' promise going forward will go a long way in shaping the current and future relationship between the Crown and the Anishinaabe of the upper Great Lakes region.

B. What are the Principles for Calculating Relevant Revenues and Expenses?

[540] All parties agree that the Treaties require a consideration of net Crown revenues. To determine how to calculate the net amount, the Plaintiffs ask the court to define the principles of what constitutes a revenue and an expense. On this issue there is wide disagreement.

[541] The Defendants urge the court to proceed cautiously on these questions and submit that they are better dealt with at Stage Three of the litigation where damages, if any, will be determined. The Plaintiffs, conversely, say that there is sufficient evidence before the court to articulate general principles for the calculation of net Crown revenues. I agree, to some extent, with both positions.

[542] Ontario relies on the arbitrations in the 1890s, where Canada and Ontario sought to determine responsibility for various debts and liabilities that predated Confederation, to show the understandings of the Crown. I agree with the Plaintiffs that it was in the interest of both Canada and Ontario to agree and to keep revenues as low as possible and expenses as high as possible. Further, and most importantly, the First Nations were not a party to the

arbitrations. For these reasons, I do not find the arbitration characterization of relevant expenses and revenues to be helpful for the purposes of setting the principles for the calculation of net Crown revenues or for ascertaining the intentions and understandings of the Crown in 1850.

[543] Although there is ample evidence with respect to the revenue and expense situation in 1850 and up to 1875, there is simply not enough evidence before the court to fully appreciate the more recent government financial data without more context. On the record currently before the court, however, I do find it possible to set out some general guiding principles concerning relevant revenues and expenses.

i. What Constitutes Relevant Revenues?

[544] The Defendants submit that resource-based territorial revenues should be used for the calculation of net Crown revenues. The Superior Plaintiffs submit that all Crown revenues from the Treaties' territories should be included in the calculation, including all tax revenues. The Huron Plaintiffs submit that all Crown revenues that arise directly or indirectly from the use of lands or resources within the Treaties' territories are relevant.

[545] The Superior Plaintiffs rely on the Vidal-Anderson Report of 1849, which recommended increases to the annuities to reflect "any new sources of wealth" within the territories.[295] They also rely on Chief Shingwaukonse's proposals about collecting tolls for travelling through the territories.

[546] I find that the bulk of the evidence supports the notion that the parties' expectations and assumptions in 1850 with respect to sharing wealth were generally in reference to Crown revenues from the land: sales, leases, and licences. At the time, most Crown revenues came from land sales and mining licences. There were also some revenues from lumbering activity.

[547] When the Superior Plaintiffs submit that the revenues to be considered include taxes, because they are analogous to tolls, I disagree. At this stage of the litigation, I find that the idea of tolls more closely resembles land-based revenues rather than income, sales, or corporate tax revenues. I accept the Superior Plaintiffs' contention that income, sales, or corporate tax revenues may originate in the territories. However, taxes are compulsory payments by individuals and corporations to government. They are levied to finance government services, enable governments to re-distribute income, and influence the behaviour of consumers and investors. In their earliest days (1917), incomes taxes were imposed equitably to distribute the enormous financial burdens of the war. I do not find taxes, as they currently exist or were historically imposed, to be in the same category whatsoever as revenues from the land. Taxes do not constitute a "source of wealth" from the territories.

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[295] Report of Commissioners A. Vidal and T.G. Anderson, dated 5 December 1849, Joint Book of Primary Documents, Trial Exhibit 01-TAB-0701, at p. 5.

ii. What Constitutes Relevant Expenses?

[548] With respect to expenses, the Plaintiffs say that expenses directly and necessarily related to generating resource revenues should be relevant. The Defendants submit that expenses should be more broadly construed to include all Crown spending in the territories, including expenditures for education, health, justice, and roads.

[549] Since I find that relevant revenues do not include taxes, then the infrastructure and institutions that are built with Crown tax revenues should not be included in the expenditures for the purpose of calculating net Crown revenues.

[550] As I understand the Crown's position, they also see their expenditures on health, education, justice, and transportation as a potential alternative way to satisfy the Treaties' promise. I deal with this issue of discretion separately.

iii. Summary on Revenues and Expenses

[551] I find, that as a general principle for calculating net Crown revenues for the purpose of implementing the promise to increase the annuities, that Crown resource-based revenues arising directly or in a closely related way to the use, sale, or licensing of land (which could include the waters) in the Treaties' territories should be considered relevant. At the time of the Treaties, mineral and lumbering revenues were considered. Other analogous revenues should be considered both historically and in the future.

[552] With respect to expenses, I find as a general principle that Crown expenses related to collecting, regulating, and supporting those revenues should form part of the consideration for the calculation of net Crown revenues.

[553] With respect to further principles guiding the definition of relevant revenues and expenses, I suggest that more or better evidence at Stage Three of this litigation may be of further assistance. The above general principles should be considered as a starting point only.

[554] The parties are encouraged to attempt to come to an agreement on specific revenue and expense categories to calculate the net Crown resource revenues of the territories. This should be possible after sufficient disclosure and consultation.

C. What Constitutes a Fair Share of Net Crown Revenues?

[555] The Plaintiffs argue that a default position on the proportionate sharing of net Crown revenues can, and should, be determined at this stage of the proceedings.

[556] The Plaintiffs say that as a default position the Anishinaabe should receive 100% of net Crown revenues or, in the alternative, two-thirds of the net Crown revenues to increase the annuities.

[557] They rely on the fact that pre-Treaty, any territorial revenue would have been entirely for the benefit of and payable to the Chiefs and their Tribes and that the Treaties did not contemplate a change in this flow of revenue. For their alternative argument, they rely on

a sharing arrangement in Treaty 48, made less than twenty years before the Robinson Treaties, where the parties agreed on a two-thirds, one-third sharing structure, with two-thirds of the revenues flowing to the First Nation parties.

[558] Neither Defendant made a proposal in direct response to the submission from the Plaintiffs that the Anishinaabe are entitled to 100% of the net Crown revenues.

[559] The evidentiary basis for this claim is slim at this time. It is not possible to articulate the principles for a fair share in a vacuum. There was very little evidence before the court on post-Treaty economic activity in the territories. In a later stage of these proceedings it will be up to the parties to demonstrate what division of revenues is supportable on the evidence.

[560] The Plaintiffs have argued vigorously and successfully that the Treaties were relational agreements that incorporated the concept of sharing the benefits of the land. Sharing, by definition, does not include taking 100% of the net benefits from the Crown.

[561] I realize that the Plaintiffs note that private entities take significant resource revenues from the territories and, hence, the revenues left in the hands of the Government do not constitute 100% of the revenues from the land. This is a result of how the Crown historically decided to manage the mining sector. However, without the benefit of the type of evidence that will be before the court at Stage Three or in a future process, it is impossible to gauge fairness to the parties on this record.

D. The Duties of Disclosure and Consultation

[562] The questions surrounding the process of implementing the Treaties' promise intersect with the Defendants' submission that the Crown maintains the right to exercise their unfettered discretion concerning how they will meet their treaty obligations. Both Canada and Ontario argue that the Crown must be provided with flexibility to make these decisions, in accordance with the broader public interest and within a broad range of purposes and policy considerations. Canada says that this approach fulfils the objective of the augmentation clause to reconcile annuity increases with the interests of other Canadians.

[563] Canada further submits that the duties of purposive and reconciliatory treaty interpretation and implementation flowing from the honour of the Crown frame the scope of Crown discretion. In simple terms, but for the broadly stated obligation to fulfil those duties and act in accordance with the honour of the Crown, both Defendants insist that they have unfettered discretion. Further, both Ontario and Canada reject the proposition that they have duties of disclosure or consultation in the implementation process.

[564] Ontario submits that the court is without jurisdiction to impose or articulate principles to guide the interpretation of what they call the *ex gratia* clause.

[565] I do not accept this limited role of the court with respect to the interpretation and implementation of a treaty right protected by s. 35 of the *Constitution Act, 1982*.

[566] An approach that would permit the Crown to act unilaterally on the main questions concerning the implementation of a treaty right is contrary to a purposive and reconciliatory

approach to implementation. The questions concerning implementation include: whether some other transfer or payment (*e.g. for health, education, justice, or transportation*) could be appropriate alternatives to increased annuities; whether to disclose resource revenues and what categories of revenues and expenses can be used in the calculation; and whether to increase the annuity at all if the economic situation warrants the increase.

[567] To act unilaterally would undermine what the Crown accepts are their obligations flowing from the honour of the Crown. The Defendants' position flies in the face of the *Manitoba Metis Federation* decision that defines duties flowing from the honour of the Crown and states that the honour of the Crown "is not a mere incantation, but rather a core percept" of Aboriginal law.[296] The duty of honour must find its application in concrete practices and in legally enforceable duties.[297]

[568] The honour of the Crown requires that the Crown work diligently to implement a process to consider increasing the annuities and the economic factors that interact with that decision. Should the net Crown resource revenues, as ultimately defined or agreed on, permit increases to the annuities to reflect the value of the ceded interest, the Crown does not have unfettered discretion on whether or how to make increases to the annuities.

[569] Nonetheless, the Crown does maintain significant discretion under the Treaties, including the implementation process, and, therefore, must adhere to their justiciable duties arising from the honour of the Crown and their fiduciary obligations. The Treaties' promise recognizing the Anishinaabe's continuing financial interest in the resource revenues from the territories cannot be implemented honourably without sufficient disclosure. Sufficient disclosure is necessary to assist the Treaties' beneficiaries, and the courts on review, in assessing the Crown's implementation proposals.

[570] The duty to consult and the fiduciary duty to disclose are essential components to the Crown's overarching obligation to act honourably when exercising their considerable discretion over the use of the land and the control of information.[298]

[571] The content of the duty of disclosure is, in general, obvious. It must include sufficient information to allow the parties to calculate net Crown resource revenues. When the Defendants spoke of "transparency", they may have meant the same thing. However, when disclosure is framed as a duty, it creates a corresponding right. The duty to disclose is not the same as the Crown's discretion to disclose.

[572] The parties did not focus their submissions on the duty to consult or its contents. The Treaties' promise creates a treaty right. Therefore, conduct that might have an adverse impact on that treaty right, including conduct during the implementation process, may give rise to a duty to consult. It would be next to impossible to define the contents of the duty

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[296] *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 73.
[297] *Ibid*, at paras. 73 – 83.
[298] See *ibid*, at para. 73; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, at paras. 25 – 26, Karakatsanis J., and para. 67, Abella J., dissenting on other grounds.

to consult at this stage, in this unique situation. Neither party has asked the court to define this duty at this time.

E. How does the Principle of Renewal Interact with the Implementation of the Treaties' Promise?

[573] The circumstances in 1850 in the upper Great Lakes region put pressure on both the Anishinaabe and the Crown to renew their relationship. In the face of undeniable challenges, including corporate pressure, sustainability of the Anishinaabe way of life, and a negative fiscal situation, the Anishinaabe and the Crown made solemn promises to each other that laid the foundation for settlement and development of the territories and a life together. The Anishinaabe and the Crown now have an opportunity to determine what role those historic promises will play in shaping their modern treaty relationship. The pressures they faced in 1850 will continue to challenge them. However, in 1850 the Crown and the Anishinaabe shared a vision that the Anishinaabe and the settler society could continue to co-exist in a mutually respectful and beneficial relationship going into the future. Today, we arrive at that point in the relationship again. It is therefore incumbent on the parties to renew their treaty relationship now and in the future.

XIV. WHETHER TO IMPLY AN INDEXATION TERM

[574] The Plaintiffs and Ontario have pleaded that the amounts set out or stated in the Treaties should be indexed independently of the operation of the augmentation clause to adjust for losses in purchasing power associated with persistent inflation. There is no disagreement with the proposition that none of the parties could have or would have considered that there might be any erosion of their Treaties' benefits over time due to inflation. From the parties' perspective in 1850, inflationary erosion was an unknown and unforeseen event.

[575] Both Ontario and the Plaintiffs propose an implied term that would restore the loss of purchasing power of the annuities.

[576] The Plaintiffs make the claim as an alternative argument. Should the court agree with the Plaintiffs that the annuity augmentation clause requires the Crown to increase the collective annuity in step with increases to territorial revenues, the Plaintiffs do not plead for the implied term. The Huron Plaintiffs make an additional alternative argument that should the fair share of net Crown revenues be determined to be anything less than 100%, then the $4 annuity base should be indexed for inflation. I find, however, that the Treaties were not a bargain for a $4 fixed amount; rather, they were future-oriented agreements situated within an ongoing relationship.

[577] Ontario, however, has made the claim for an implied term indexing for inflation a central feature of their case. To support their argument, Ontario relies on common law contractual theory of implied terms.

A. Common Law Test for Implying a Contractual Term

[578] Ontario submits that the circumstances of this case meet the test for implying a term: the implied term is necessary and fits within the parties' intentions of what was clearly agreed

on in 1850.[299] Ontario contends that an implied term protecting against inflation is consistent with and necessary to protect the common intention and expectations of the Treaties' parties.

[579] The Supreme Court of Canada considered the concept of implied contractual terms in the treaty context in *Marshall*, recognizing that courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract and to make honourable sense of the treaty arrangement.[300]

[580] Ontario says that the legally correct path to addressing the annuities is to imply a treaty term that mitigates the effects of persistent inflation on the purchasing power of the $4 annuity payments.

[581] The Plaintiffs join Ontario in saying that the common law test applies and also propose that the principle of the honour of the Crown and the principles of treaty interpretation and rectification support the claim for an implied term indexing the annuity payments, regardless of the subjective intention of the Treaties' parties, in order to make honourable sense of the treaty arrangement.[301]

[582] The Superior Plaintiffs contend that the true meaning to be ascribed by Robinson to the augmentation provision was: "provided that the amount paid to each individual shall not exceed the economic value that the sum of one pound provincial currency has in 1850 in any one year…". The Plaintiffs submit that the court should imply the term where the effect is to ensure that the written text is consistent with the parties' intentions as understood, but that were insufficiently expressed in the text of the Treaties.

[583] Canada rejects the argument about implied terms and argues that treaty terms cannot be implied if the actors in 1850 would not have, in fact, actually turned their minds to the question under any circumstance.

B. Analysis on Whether to Imply an Indexation Term

[584] The claim for an implied term indexing the annuities is based on the premise that had the parties known in 1850 about the phenomenon of persistent inflation, they would have turned their minds to a means to solve the problem (*i.e. a means to solve the erosion of purchasing power of the annuities*).

[585] I ask: is it possible to have one single historical phenomenon imputed to the minds of Robinson and the Anishinaabe Chiefs at Bawaating in 1850 to the exclusion of other historical trends, events, and practices?

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[299] *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29, citing G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994), at p. 476.
[300] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43.
[301] *Ibid*, at para. 14. See *Fletcher v Ontario*, 2016 ONSC 5874 at para 118.

[586] When Ontario and the Plaintiffs say that the parties would have sought inflation protection had they known about the phenomenon of persistent inflation, we are presuming that a single historical fact should be imputed, to the exclusion of all other events in the 168 years following the Treaty Council. But should we not presume that there may be other facts, events, trends, and practices that would also have to be imputed to the parties?

[587] It seems to me that the real problem is not so much that the financial circumstances changed in the 168 years since the Treaties were signed; the real problem is that the augmentation promise was ignored for that entire period. Even if one accepts an early position of the Defendants, that the Crown was not obliged to increase the annuity, both Defendants now acknowledge that the Crown was, and continues to be, obliged to exercise their discretion (or engage with their discretion) on the issue of augmenting the annuities. Had the Crown exercised their discretion, and refused to increase the annuities, the Crown would have provided or recorded their reasons, which are reviewable. And in this process, the issue of inflation would almost certainly have arisen.

[588] One other possible matter that may have been under consideration in these last 168 years was the nature and scope of transfers from the Crown to the Anishinaabe. This is not to say, as may be suggested by the Defendants, that future increases to the annuities may be substituted, in the Crown's discretion, by other types of transfers. It is only to recognize that imputing knowledge of one historical fact in the absence of the constellation of other historical facts should not be determinative on the question of indexation.

[589] However, nor should the Crown benefit from their neglect of the Treaties' provisions for over 150 years and thereby escape their obligation of honourable implementation of the Treaties' terms. At the implementation stage, the Crown is obliged, by virtue of the doctrine of the honour of the Crown, to purposively interpret and implement the Treaties' terms. A purposive reading of the terms at each stage of implementation may have obliged the Crown to adjust the annuity to protect the annuity against the consequences of inflation. At those stages where the Treaties should have been honourably implemented, the parties may have also considered many other current issues and trends. The means to address the annuity may have taken on any number of possible permutations.

[590] As I have said above, the Treaties' annuity provisions were intended by all to create a unique annuity promise that reflected the value of the Treaties' territories. Above all, this intention to look to future revenues of the territories was a forward-looking exercise. Both parties realized how low the annuities were in relation to the assumed value of the territories and in comparison to other treaties the Crown had made. The parties decided to look to the future to fashion what they must have intended was an honourable way of dealing with the annuity issue (being so relatively low) and an appropriate consideration for possible, but unknown, access to great wealth from the territories.

[591] I also note here that the Treaties included a diminution clause, which was common in treaties at that time. The Crown considered at the time the possibility that the number of beneficiaries of the Treaties would diminish. In each treaty, there was a provision that activated a proportional diminution of the annuity (the *collective* annuity) should the population fall below two-thirds of the population at the time of the Treaty Council.

[592] The augmentation and the diminution clauses demonstrate that the parties provided a means to deal with changing circumstances.

[593] I also consider other principles of treaty interpretation. While the court must construe the language of the treaty generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language or realistic".[302] As I have found, the annuity considerations, from the Anishinaabe perspective, were more focused on sharing the wealth than on fixed numbers. When the Fort William Anishinaabe complained about the annuity amount in the early years following the Treaty Council, they noted the low purchasing power that it had. This was not a result of inflation; it arose from the fact that they had not understood the purchasing power of the amount they had agreed to receive. Chief Shingwaukonse likely understood how low the annuity would be in early years. He confidently took the risk that the territories would increase in value and, in that way, that his people would be more appropriately compensated in the future. To accept the idea that indexation solves the problem created by a century and a half of neglect is to say the First Nations were content with the purchasing power of the initial annuity.

[594] I am not persuaded that explaining the concept of persistent inflation and erosion of purchasing power to the parties at the Treaty Council in 1850 would have triggered an agreement to an indexing clause. The Robinson Treaties, as I have interpreted them, already include provisions that take future possibilities into account, including the future value of the annuities.

[595] However, in the event that another court on appeal finds that the augmentation clause does not operate, as I find it does, to take into account future possibilities, another look should be had at the indexing claim. In such an event, a different view of the augmentation clause will provide another way to look at the indexing claim. At this time, however, I cannot foresee how that will evolve.

[596] The Robinson Treaties remain unique to the extent they provide for an augmentation of the annuities linked to the increases in territorial revenues. In this respect, I am influenced as well with the obligation on the court and on the Crown to interpret and update treaty rights to take into account modern practices reasonably incidental to the core treaty right.[303] This is a heavy obligation at the time of treaty implementation, which, as I have said, the Crown should have exercised over the last century and a half in an honourable way. By my reading of the augmentation clause, the implementation of an increase to collective annuities linked to rising territorial revenues would have called for modern accounting and reporting practices. This stage of the litigation does not involve the mechanics of valuation or accounting; however, it would not be surprising if there was some consideration for inflation in that exercise, if done honourably and purposively.

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[302] *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78. See *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 908.
[303] *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 31 – 33.

[597] The forward-looking features of the Robinson Treaties influence my views on the claim for an implied term. In treaties without an augmentation provision, different considerations could quite possibly result in different responses to this claim.

C. Conclusion on Whether to Imply an Indexation Term

[598] Ontario's claim, supported by the Plaintiffs in the alternative, that the court should imply a term in the Treaties to protect against erosion of the annuities due to inflation is dismissed.

XV. ORDERS AND DECLARATIONS

[599] Counsel shall prepare the draft Orders and Declarations for approval by all parties. Should counsel not be able to settle the Orders and Declarations, they may make arrangements through the Sudbury trial coordinator for a telephone conference at which time arrangements may be made to convene a meeting to settle the Orders.[304]

XVI. COSTS

[600] The Defendants agree that the Plaintiffs should receive their reasonable costs for Stage One and have agreed to split the costs 50-50 as between Ontario and Canada. I will deal with costs in a separate decision.

XVII. MIIGWECH

[601] In Anishinaabemowin, the word Miigwech means thank you. It was a word regularly used during the trial by participants from all parties.

[602] This phase of the litigation was case managed since the late summer of 2015. Counsel and the parties have now spent a considerable amount of time together working toward the shared goal of an efficient and respectful hearing on a complex and sensitive matter. From the outset, there were occasions when Anishinaabe ceremony came into the courtroom and the court process, through witnesses, counsel, and members of the host First Nations. This could not have happened without the cooperation and joint effort of counsel and the parties. At the end of the trial, we all had an opportunity to express our gratitude to one another and especially to all those from whom we had learned.

[603] I would like to take this opportunity to say Miigwech for some of the ways in which counsel and the parties cooperated to make this trial a proceeding of respect and an exercise in reconciliation.

[604] To the Crown Counsel teams who, with the support of their clients, accepted the invitation to participate in the first case management conference, two weeks of hearings, and many ceremonies on Anishinaabe First Nation territories.

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[304] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.04(10).

[605] To the Ontario Crown Counsel team who collected and digitized the entire joint documentary record of more than 30,000 pages, complete with digital search features.

[606] To members of all counsel teams and parties who have cooperated in an initiative to preserve the full digital record of this trial, including the exhibits, the transcripts, and the video for the benefit of all scholars, Treaty First Nations, and other interested persons.

[607] To members of the Superior and Huron Counsel teams and to community members from both territories who hosted us at Fort William First Nation, on Manitoulin Island, and at Atikameksheng Anishnawbek First Nation for ceremonies and feasts.

[608] To the many firekeepers who tended sacred fires throughout the hearing process from September to June in the full range of Northern Ontario weather, and to Elder Leroy Bennett of Sagamok Anishnawbek First Nation who conducted Smudge, Eagle Staff, and Pipe ceremonies and offered teachings to those who asked.

[609] To Court Services personnel from the Ministry of Attorney General who accommodated all of our requests, facilitated the set-up of the hearing in four different venues, and supported the process throughout in an exemplary fashion.

[610] The First Nations were warm and generous hosts when the court convened in their communities. As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. During the ceremonies, there were often teachings, sometimes centered on *bimaadiziwin* — how to lead a good life. Often teachings were more specific (*e.g. on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies*). The entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. I believe I speak for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices.

[611] Miigwech, Miigwech, Miigwech.

P. C. Hennessy, SCJ

Released: December 21, 2018

Robinson-Huron Treaty (1850)

Appendix A

CANADA.

INDIAN TREATIES

AND

SURRENDERS.

FROM 1680 TO 1890.—IN TWO VOLUMES.

VOL. I.

OTTAWA:
PRINTED BY BROWN CHAMBERLIN, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.

1891.

dent General of the Indian Department for the time being, for their sole use and benefit and to the best advantage. And the said William Benjamin Robinson, of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make the payments as before mentioned; and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General of Indian Affairs being first had and obtained; nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree that in case the Government of this Province, should before the date of this agreement, have sold or bargained to sell any mining locations or other property on the portions of the territory hereby reserved for their use and benefit, then and in that case such sale or promise of sale shall be perfected if the parties interested desire it, by the Government, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs. The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided, further, that the number of Indians entitled to the benefit of this Treaty shall amount to two-thirds of their present number (which is twelve hundred and forty), to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty, the annuity shall be diminished in proportion to their actual numbers.

SCHEDULE of reservations made by the above named and subscribing Chiefs and Principal Men:—

First.—Joseph Peau de Chat and his tribe, the reserve to commence about two miles from Fort William (inland) on the right bank of the River Kiminitiquia; thence westerly six miles parallel to the shores of the lake; thence northerly five miles; thence easterly to the right bank of the said river, so as not to interfere with any acquired rights of the Honorable the Hudson's Bay Company.

Second.—Four miles square at Gros Cap, being a valley near the Honorable Hudson's Bay Company's post of Michipicoton for Totomenai and tribe.

Third.—Four miles square on Gull River, near Lake Nipigon, on both sides of said river, for the Chief Mishe-muckqua.

Signed, sealed and delivered at Sault Ste. Marie the day and year first above written in presence of:

GEORGE IRONSIDE,
S. I. Affairs,
ARTHUR P. COOPER,
Capt. Comg. Rifle Bde.,
H. N. BALFOUR,
2nd Lieut. Rifle Brigade,

W. B. ROBINSON, [L.S.]
JOSEPH PEAU DE CHAT, x [L.S.]
JOHN ININWAYU, x [L.S.]
MISHE-MUCKQUA, x [L.S.]
TOTOMENAI, x [L.S.]
JACOB WASSEBA, x [L.S.]
AHMUTCHIWAGABOW, x [L.S.]
MICHEL SHEBAGESHICK, x [L.S.]
MANITONSHANISE, x [L.S.]

JOHN SWANSTON, *C. T. Hon. Hud. Bay Co.,* CHIGENAUS, x [L.S.]
GEORGE JOHNSTON, *Interpreter.*
T. W. KEATING.

Recorded in the office of the Provincial Registrar this 23rd day of November in Lib. "C.M. Miscellaneous," Fol. 7, &c.

R. A. TUCKER,
Registrar.

No. 61.

THIS AGREEMENT, made and entered into this ninth day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault St. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Shinguacouse, Nebenaigoching, Keokouse, Mishequonga, Tagawinini, Shabokeshick, Dokis, Ponekeosh, Windawtegowinini, Shawenakeshick, Namassin, Naoquagabo, Wabakekek, Kitchipossegun by Papasainse, Wagemake, Pamequonaishumg, Chiefs, and John Bell, Paqwutchinini, Mashekyash, Idowekesis, Waquacomiek, Ocheek, Metigomin, Watachewana, Minwawapenasse, Shenaoquom, Ouingegun, Panaissy, Papasainse, Ashewasega, Kageshewawetung, Shawonebin and also Chief Maisquaso (also Chiefs Muckata, Mishoquet and Mekis), and Mishoquetto, and Asa Waswanay and Pawiss, Principal Men of the Ojibiway Indians inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honorable Hudson's Bay Company from Canada, as well as all unconceded lands within the limits of Canada West to which they have any just claim, of the other part, Witnesseth: that for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose; they the said Chiefs and Principal Men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors for ever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said Chiefs and their tribes in common for their own use and benefit; and should the said Chiefs and their respective tribes at any time desire to dispose of any part of such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit and to the best advantage. And the said William Benjamin Robinson, of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make or cause to be made the payments as before mentioned; and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General

of Indian Affairs, or other officer of like authority, being first had and obtained; nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree that in case the Government of this Province should, before the date of this agreement, have sold, or bargained to sell, any mining locations or other property on the portions of the territory hereby reserved for their use, then and in that case such sale or promise of sale shall be perfected by the Government, if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs. The said William Benjamin Robinson, on behalf of Her Majesty, Who desires to deal liberally and justly with all Her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof; and should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

The said William Benjamin Robinson, of the first part, further agrees on the part of Her Majesty and the Government of this Province that in consequence of the Indians inhabiting French River and Lake Nipissing having become parties to this treaty the further sum of one hundred and sixty pounds Provincial currency shall be paid in addition to the two thousand pounds above mentioned.

SCHEDULE of reservations made by the above named subscribing Chiefs and Principal Men :—

1st. Pamequonaishcung and his band, a tract of land to commence seven miles from the mouth of the River Maganetawang and extending six miles east and west by three miles north.

2nd. Wagemake and his band, a tract of land to commence at a place called Nebickshegeshing, six miles from east to west by three miles in depth.

3rd. Kitcheposkissegun (by Papasainse), from Point Grondine, westward, six miles inland by two miles in front, so as to include the small Lake Nessinassung (a tract for themselves and their bands).

4th. Wabakekik, three miles front, near Shebawenaning, by five miles inland, for himself and band.

5th. Namassin and Naoquagabo and their bands, a tract of land commencing near La Cloche, at the Hudson Bay Company's boundary; thence westerly to the mouth of Spanish River; then four miles up the south bank of said river and across to the place of beginning.

6th. Shawinakeshick and his band, a tract of land now occupied by them and contained between two rivers called White Fish River and Wanabitasebe, seven miles inland.

7th. Windawtegowinini and his band, the peninsula east of Serpent River and formed by it, now occupied by them.

8th. Ponekeosh and his band, the land contained between the River Mississaga and the River Penebewabecong, up to the first rapids.

9th. Dokis and his band, three miles square at Wanabeyakoknun, near Lake Nipissing, and the island near the fall of Okickendawt.

10th. Shabokishick and his band, from their present planting grounds on Lake Nipissing to the Hudson's Bay Company's Post, six miles in depth.

11th. Tagawinini and his band, two miles square at Wanabitibing—a place about forty miles inland, near Lake Nipissing.

12th. Keokonse and his band, four miles from Thessalon River eastward by four miles inland.

13th. Mishequanga and his band, two miles on the lake shore, east and west of Ogawaminang, by one mile inland.

14th. For Shinguacouse and his band, a tract of land extending from Maskinongé Bay, inclusive, to Partridge Point, above Garden River, on the front, and inland ten miles throughout the whole distance, and also Squirrel Island.

15th. For Nebenaigoching and his band, a tract of land (extending from Wanabekinegunning west of Gros Cap to the boundary of the lands ceded by the Chiefs of Lake Superior and inland ten miles throughout the whole distance, including Batchewanaung Bay), and also the small island at Sault Ste. Marie used by them as a fishing station.

Signed, sealed and delivered at Sault Ste. Marie, the day and year first above written, in presence of
ASTLEY P. COOPER, *Capt. R. Bde.*,
GEORGE IRONSIDE, *S. I. Affairs.*,
T. M. BALFOUR, *2nd Lt. Rifle Bde.*,
ALLAN MACDONELL,
GEO. JOHNSTON, *Interpreter*,
LOUIS CADOT,
J. B. ASSIKINOCK,
T. W. KEATING.
JOS. WILSON,

PENETANGUISHENE, 16th Sept., 1850.
Witness to the signatures of
MUCKATA MISHAQUET,
MEKIS, MISHOQUETTE,
ASA WASWANAY and PAWISS,
T. G. ANDERSON, *S. I. A.*,
W. B. HAMILTON,
W. SIMPSON,
ALFRED A. THOMPSON.

SHINGUAKOUCE,	x	[L.S.]
NEBENAIGOCHING,	x	[L.S.]
KEOKONSE,	x	[L.S.]
MISHEQUONGA,	x	[L.S.]
TAGAWININI,	x	[L.S.]
SHABOKESHUK,	x	[L.S.]
DOKIS,	x	[L.S.]
PONEKEOSH,	x	[L.S.]
WINDAWTEGOWININI,	x	[L.S.]
SHAWENAKESHICK,	x	[L.S.]
NAMASSIN,	x	[L.S.]
MUCKATA MISHAQUET,	x	[L.S.]
MEKIS,	x	[L.S.]
MAISQUASO,	x	[L.S.]
NAOQUAGABO,	x	[L.S.]
WABOKEKIK,	x	[L.S.]
KITCHIPOSSEGUN, by PAPASAINSE,		[L.S.]
WAGEMAKE,	x	[L.S.]
PAMEQUONAISHCUNG,	x	[L.S.]
JOHN BELL,	x	[L.S.]
PAQWATCHININI,	x	[L.S.]
MASHEKYASH,	x	[L.S.]
IDOWE-KESIS,	x	[L.S.]
WAQUACOMIEK,	x	[L.S.]
MISHOQUETTO,	x	[L.S.]
ASA WASWANAY,	x	[L.S.]
PAWISS,	x	[L.S.]
W. B. ROBINSON,		[L.S.]
OCHEEK,	x	[L.S.]
METIGOMIN,	x	[L.S.]
WATACHEWANA,	x	[L.S.]
MIMEWAWAPENASSE,	x	[L.S.]
SHENAOQUM,		[L.S.]
ONINGEGUN,	x	[L.S.]
PANAISSY,	x	[L.S.]
PAPASAINSE,	x	[L.S.]
ASHEWASEGA,	x	[L.S.]
KAGISHEWAWETUNG by BABONEUNG,	x	[L.S.]
SHAWONEBIN,	x	[L.S.]

Reservations continued :—

For Chief Mekis and his band, residing at Wasaquising (Sandy Island), a tract of land at a place on the main shore opposite the island, being the place now occupied by them for residence and cultivation, four miles square.

For Chief Muckata Mishaquet and his band, a tract of land on the east side of the River Naishcouteong, near Pointe aux Barils, three miles square, and also a small tract in Washanwenega Bay, now occupied by a part of the band, three miles square.

Recorded in the office, of the Provincial Registrar, this 22nd day of November, in Lib. "C. M. Miscellaneous," Folio 1, &c.

R. A. TUCKER,
Registrar.

No. 65.

THIS INDENTURE, made at Niagara, in the District of Niagara, in the Province of Upper Canada, this eighteenth day of May, in the year of Our Lord one thousand eight hundred and thirty-one, between John Johnson Claus, of Niagara aforesaid, Esquire, Warren Claus, of the same place, Esquire, and Catherine Claus, of the same place, widow, executors and executrix of the last will and testament of the late Honorable William Claus, in his lifetime of Niagara aforesaid, a member of His Majesty's Legislative and Executive Council, and Deputy Superintendent General of Indian Affairs in the said Province, of the one part, and the Honorable James Baby, of the Town of York, in the Home District and Province aforesaid, Inspector General of Public Provincial Accounts, the Honorable John Henry Dunn, of the same place, Receiver General of His Majesty's revenues in the said Province, and the Honorable George Herchmer Markland, of the same place, a member of His Majesty's Legislative and Executive Councils, in the said Province, of the other part: Whereas, the late Right Honorable Thomas Douglass, Earl of Selkirk, of St. Mary's Isle, in North Britain, by his Indenture bearing date the fifteenth day of January, in the forty-eighth year of the reign of Our late Sovereign Lord King George the Third, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, and in the year of Our Lord one thousand eight hundred and eight, after reciting as is therein recited, and in pursuance of an agreement therein recited and referred to, and for and in consideration of the sum of three thousand four hundred and seventy-five pounds of current money of the said Province of Upper Canada, acknowledged by the said Thomas Douglass, Earl of Selkirk, in the said Indenture, to be due and owing by him to the Six Nations Indians mentioned and referred to in the said Indenture, and for the better securing the payment of the said sum of money, and the interest thereon, and also in consideration of the sum of five shillings of like current money to him, the said Thomas Douglass, Earl of Selkirk, in hand well and truly paid by the said hereinbefore mentioned William Claus, the receipt whereof was by the said Indenture acknowledged, he, the said Thomas Douglass, Earl of Selkirk, did grant, bargain, sell and demise, and by the said Indenture did acknowledge to have granted, bargained and sold and demised, unto the said William Claus, his executors, administrators and assigns, all that parcel or tract of land situate on the Grand River, in the County of Haldimand, in the District of Niagara, in the said Province of Upper Canada, containing by admeasurement thirty thousand and eight hundred acres, be the same more or less, which said thirty thousand and eight hundred acres are by the said Indenture declared to be butted and bounded, or to be otherwise known as follows, that is to say: Commencing at a white oak tree marked, and standing at the south-west angle of the reserve made by the Indians on the east side of the Grand River, below Dick and Doe Creek; then along the southern boundary of the said reserve, north thirty degrees east eighty chains, more or less, to the south-easternmost angle of the said reserve; then north sixty-two degrees thirty minutes west along the easternmost boundary of the said reserve sixty-seven chains, more or less; then north thirty degrees east to the easternmost boundary of the Indian lands, four hundred and four chains, more or less; then along the said boundary south sixty-two degrees thirty minutes east three hundred and sixty chains, more or less; then south thirty degrees east to a basswood tree upon the shore of Lake Erie, near the mouth of a small creek, five hundred and fourteen chains, more or less;

then along the shore of Lake Erie towards the mouth of the Grand River to a certain post or picket, one hundred and seventy-two chains, more or less; then north fifty-four degrees west one hundred and fifty-two chains, more or less; then west one hundred and sixty chains, more or less, to a maple tree on a branch of the said Grand River; then following the easternmost shore of the said river against the stream to the place of beginning; together with the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, to have and to hold the said parcel and tract of land or premises, and all and singular the hereditaments in the said Indenture expressed to be granted and demised, with their and every of their appurtenances unto the said William Claus, his executors, administrators and assigns, from the day next before the date of the said Indenture, for and during and unto the full end and term of one thousand years from thence next ensuing fully to be complete and ended, in trust, nevertheless, for and to the use and benefit of the Indians in the said Indenture mentioned, and their posterity: Provided always, and it was declared by the parties to the said Indenture to be the true intent and meaning thereof, that if the said Thomas Douglass, Earl of Selkirk, his heirs, executors, administrators or assigns, should well and truly pay or cause to be paid unto the said William Claus, his executors, administrators or assigns, the said sum of three thousand four hundred and seventy-five pounds of current money of Upper Canada, as aforesaid, on or before the eighteenth day of November next, after the date of the said Indenture, together with lawful interest thereon, to be computed from the eighteenth day of November then last past, without any deduction or abatement whatsoever, for or in respect of any taxes, charges, assessments or other matter, cause or thing whatsoever now taxed or imposed upon the hereditaments by the said Indenture granted or demised, or upon the said William Claus, his executors, administrators or assigns, for or in respect of the same by authority of Parliament or otherwise howsoever, or hereafter to be taxed or imposed, or if the said Thomas Douglass, Earl of Selkirk, his heirs, executors, administrators or assigns should well and truly pay, or cause to be paid, unto the said William Claus, his executors, administrators or assigns, the yearly interest of the said sum of three thousand four hundred and seventy-five pounds at and after the rate of six pounds for one hundred pounds for one year on each and every eighteenth day of November in each and every year, so long as the same should be and remain unpaid and unsatisfied, without any deduction or abatement whatsoever as aforesaid. Then and in either of the said cases, and from and after such payment should be made as aforesaid, the said Indenture and the demise thereby made and every matter, clause and thing in the said Indenture contained should cease, determine and be void to all intents and purposes, anything therein contained to the contrary notwithstanding. And the said Thomas Douglass, Earl of Selkirk, did by the said Indenture further covenant and agree for himself, his heirs, executors and administrators, to and with the said William Claus, his executors, administrators and assigns, that he, the said Thomas Douglass, Earl of Selkirk, his heirs, executors or administrators, should well and truly pay or cause to be paid unto the said William Claus, his executors, administrators or assigns, the said sum of three thousand four hundred and seventy-five pounds, and interest for the same, in manner mentioned, and at the time and in the manner in the said Indenture provided for the payment thereof or the yearly interest of the said sum of three thousand four hundred and seventy-five pounds in manner mentioned and provided in the said Indenture without any deduction or abatement whatsoever out of the same, according to the true intent and meaning of the said Indenture and the proviso therein contained. And it was by the said Indenture further covenanted and agreed that he the said Thomas Earl of Selkirk, and his heirs, and all and every other person or persons having or lawfully claiming or who should or might at any time or times thereafter have or lawfully claim any estate, right, title, interest or property either of law or equity of, in, to or out of the said parcel or tract of land and hereditaments in the said Indenture mentioned to be granted and demised from by or under him, them or any of them, should and would from time to time and at all times after default

Robinson-Superior Treaty (1850)

Appendix B

CANADA.

INDIAN TREATIES

AND

SURRENDERS.

FROM 1680 TO 1890.—IN TWO VOLUMES.

VOL. I.

OTTAWA:
PRINTED BY BROWN CHAMBERLIN, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.

1891.

In Testimony Whereof, we the Chiefs have hereunto set our names at Lower Munsee Town on Thames, the thirteenth day of February, 1849.

Signed in our presence, being first read and explained:	John Riley,	[L.S.]
	Miskokomon's (totem),	[L.S.]
J. B. Clench, *Supt. Indian Affairs,*	James Muskununjie's (totem),	[L.S.]
Peter Jones, *Wesleyan Missionary,*	Chicken Muskununjie's (totem),	[L.S.]
Henry C. Hogg, *Schoolmaster.*	John Tummago's (totem),	[L.S.]
	Joseph Canotung's (totem),	[L.S.]
	Eyaubanse's (totem),	[L.S.]
	Captain Thomas's (totem),	[L.S.]
	John Mundiway's (totem).	[L.S.]

No. 58½*e*.

Know all Men by These Presents that we John Riley, Miskokomon, James Muskenonge, Chicken Muskenonge, John Tummago, Joseph Kanotang, Eyawbanse, Captain Thomas and John Mundaway, Chiefs and Principal Men of the Chippewa Indians inhabiting and claiming the tract of land in the Township of Carradoc, in the London District of the Province of Canada, in full Council assembled, have agreed and do hereby agree to surrender and yield up to Her Most Gracious Majesty Queen Victoria, Her heirs and successors forever, all our right, title, interest, claim, property and demand whatsoever, of, in and to that piece or parcel of land situate, lying and being in the township, district and Province aforesaid, and may be otherwise known as follows:—

Commencing at a post planted on the north side of the river road at Lower Munsee at the distance of thirty chains forty-five links from the east side of the School lot, measured on the north side of said road, otherwise at the distance of one hundred and one chains sixty-seven links from the town line between Carradoc and Ekfrid, on a course north forty-five degrees east; then north sixteen degrees west six chains forty-five links; then north eighty-five degrees east six chains thirty-two and a-half links; then south sixteen degrees east six chains forty-five links; then south eighty-five degrees west six chains thirty-two and a-half links, more or less, to the place of beginning; containing four acres, more or less. To the end and purpose that Her said Majesty, Her heirs and successors, may be graciously pleased to grant in fee simple, or in such manner and form and under such restrictions as in Her said Majesty's wisdom may seem meet, the said four acres, upon which said four acres of land the Rev. Richard Hood, A.M., has erected an Episcopalian Church, under the direction of the Lord Bishop of Toronto, for the spiritual welfare of the Indians of Lower Munsee Settlement, which portion of land includes a burying-ground, and for no other purposes whatsoever.

In Testimony Whereof, we, the said Chiefs and Principal Men of the said Chippewa Tribe, have hereunto set our names and seals at Munsee Town the thirteenth day of February, in the year of Our Lord one thousand eight hundred and forty-nine.

Signed and sealed in our presence being first read and explained:	John Riley,	[L.S.]
	Miskokomon's (totem),	[L.S.]
J. B. Clench, *Supt. of Indian Affairs,*	James Muskununjie's (totem),	[L.S.]
Peter Jones, *Wesleyan Missionary,*	Chicken Muskununjie's (totem),	[L.S.]
Robt. F. Keays, *I.D,*	John Tommago's (totem),	[L.S.]
Henry C. Hogg, *Schoolmaster.*	Joseph Canotung's (totem),	[L.S.]
	Eyawbanse's (totem),	[L.S.]
	Captain Thomas's (totem),	[L.S.]
	John Mundiway's (totem),	[L.S.]

Certified.

J. B. CLENCH, *V.S.I.A.* [L.S.]

No. 59.

Know all Men by these Presents that we, Cheogima, Shawanon, Quequikibone, Pitweyishn, Kekanassiwe, Principal Chiefs of the Ojibeway Indians of the River St. Clair and Chenail Ecarté, in the Province of Canada, in consideration of the trust and confidence by us reposed in Her Most Gracious Majesty Victoria, and in order that Her Majesty, Her heirs and successors, may grant and dispose of the lands and hereditaments hereinafter comprised and described for the benefit of such Indians in such manner and form and at such price or prices as to Her said Majesty, Her heirs and successors, shall seem best, have remised, released, surrendered, quitted claim and yield up to Our said Most Gracious Majesty the Queen, and by these presents do remise, release, surrender, quit claim and yield up all that certain tract of land situate in the Western District of this Province, in the Township of Moore, being one mile in extent along the edge of the river and extending four miles back, and being bounded on the south side by the town line between Sombra and Moore, known as the Lower Indian Reserve, and containing two thousand six hundred and seventy-five acres. In trust for the benefit of the said Indians, that it may be granted and disposed of as Her Majesty, Her heirs and successors, may deem most advisable and for no other use, trust, intent or purpose whatsoever.

In Witness Whereof, we the said Indians have hereunto set our hands and seals at Kingston on the eighteenth day of August, in the year of Our Lord one thousand eight hundred and forty-nine.

Signed and sealed in the presence of	Cheogima (totem),
	Shawanon (totem),
Saml. P. Jarvis, *Ch. S. I. Affairs.*	Quequikibone (totem),
T. W. Keating, *A. S. I. A.*	Pitweyishn (totem),
	Kekanassiwe (totem),
	George Anse (totem),
	Kayoshk (totem),

No. 60.

This Agreement, made and entered into on the seventh day of September in the year of Our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Joseph Peau de Chat, John Ininway, Mishe-muckqua, Totomenai, Chiefs, and Jacob Wasseba, Ahmutchewagaton, Michel Shebageshick, Manitoshanise and Chigenaus, Principal Men of the Ojibeway Indians inhabiting the northern shore of Lake Superior, in the said Province of Canada, from Batchewanaung Bay to Pigeon River, at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the charter of the Honorable the Hudson's Bay Company from the said tract. And also the islands in the said lake within the boundaries of the British possessions therein, of the other part, Witnesseth: that for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer, not later than the first day of August, at the Honorable the Hudson's Bay Company's Posts of Michipicoton and Fort William; they, the said Chiefs and Principal Men do freely, fully and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said Chiefs and their tribes in common for the purposes of residence and cultivation. And should the said Chiefs and their respective tribes at any time desire to dispose of any mineral or other valuable productions upon the said reservations the same will be at their request sold by order of the Superinten-

dent General of the Indian Department for the time being, for their sole use and benefit and to the best advantage. And the said William Benjamin Robinson, of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make the payments as before mentioned; and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General of Indian Affairs being first had and obtained; nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree that in case the Government of this Province, should before the date of this agreement, have sold or bargained to sell any mining locations or other property on the portions of the territory hereby reserved for their use and benefit, then and in that case such sale or promise of sale shall be perfected if the parties interested desire it, by the Government, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs. The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all Her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided, further, that the number of Indians entitled to the benefit of this Treaty shall amount to two-thirds of their present number (which is twelve hundred and forty), to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty, the annuity shall be diminished in proportion to their actual numbers.

SCHEDULE of reservations made by the above named and subscribing Chiefs and Principal Men:—

First.—Joseph Peau de Chat and his tribe, the reserve to commence about two miles from Fort William (inland) on the right bank of the River Kiminitiquia; thence westerly six miles parallel to the shores of the lake; thence northerly five miles; thence easterly to the right bank of the said river, so as not to interfere with any acquired rights of the Honorable the Hudson's Bay Company.

Second.—Four miles square at Gros Cap, being a valley near the Honorable Hudson's Bay Company's post of Michipicoton for Totomenai and tribe.

Third.—Four miles square on Gull River, near Lake Nipigon, on both sides of said river, for the Chief Mishe-muckqua.

Signed, sealed and delivered at Sault Ste. Marie the day and year first above written in presence of:

GEORGE IRONSIDE,
S. I. Affairs,
ARTHUR P. COOPER,
Capt. Comg. Rifle Bde.,
H. N. BALFOUR,
2nd Lieut. Rifle Brigade,

W. B. ROBINSON, [L.S.]
JOSEPH PEAU DE CHAT, x [L.S.]
JOHN ININWAYU, x [L.S.]
MISHE-MUCKQUA, x [L.S.]
TOTOMENAI, x [L.S.]
JACOB WASSEBA, x [L.S.]
AHMUTCHIWAGABOW, x [L.S.]
MICHEL SHEBAGESHICK, x [L.S.]
MANITONSHANISE, x [L.S.]

JOHN SWANSTON,
C. T. Hon. Hud. Bay Co.,
GEORGE JOHNSTON,
Interpreter.
T. W. KEATING.

CHIGENAUS, x [L.S.]

Recorded in the office of the Provincial Registrar this 23rd day of November in Lib. "C.M. Miscellaneous," Fol. 7, &c.

R. A. TUCKER,
Registrar.

No. 61.

THIS AGREEMENT, made and entered into this ninth day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault St. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Shinguacouse, Nebenaigoching, Keokouse, Mishequonga, Tagawinini, Shabokeshick, Dokis, Ponekeosh, Windawtegowinini, Shawenakeshick, Namassin, Naoquagabo, Wabakekek, Kitchipossegun by Papasainse, Wagemake, Pamequonaishumg, Chiefs, and John Bell, Paqwutchinini, Mashekyash, Idowekesis, Waquacomiek, Ocheek, Metigomin, Watachewana, Minwawapenasse, Shenaoquom, Ouingegun, Panaissy, Papasainse, Ashewasega, Kageshewawetung, Shawonebin and also Chief Maisquaso (also Chiefs Muckata, Mishoquet and Mekis), and Mishoquetto, and Asa Waswanay and Pawiss, Principal Men of the Ojibiway Indians inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honorable Hudson's Bay Company from Canada, as well as all unconceded lands within the limits of Canada West to which they have any just claim, of the other part, Witnesseth: that for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose; they the said Chiefs and Principal Men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors for ever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said Chiefs and their tribes in common for their own use and benefit; and should the said Chiefs and their respective tribes at any time desire to dispose of any part of such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit and to the best advantage. And the said William Benjamin Robinson, of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make or cause to be made the payments as before mentioned; and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent General

CITATION: Restoule v. Canada (Attorney General), 2018 ONSC 7701
COURT FILE NO.: C-3512-14 & C3512-14A and
COURT FILE NO.: 2001-0673
DATE: 20181221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Court File No.: C-3512-14 & C3512-14A

MIKE RESTOULE, PATSY CORBIERE, DUKE PELTIER, PETER RECOLLET, DEAN SAYERS and ROGER DAYBUTCH, on their own behalf and on behalf of ALL MEMBERS OF THE OJIBEWA (ANISHINAABE) NATION WHO ARE BENEFICIARIES OF THE ROBINSON HURON TREATY OF 1850

Plaintiffs

– and –

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties

Court File No.: 2001-0673

THE CHIEF and COUNCIL OF RED ROCK FIRST NATION, on behalf of the RED ROCKFIRST NATION BAND OF INDIANS, THE CHIEF and COUNCIL of the WITHESAND FIRST NATION on behalf of the WHITESAND FIRST NATION BAND OF INDIANS

Plaintiffs

– and –

THE ATTORNEY GENERAL OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and the ATTORNEY GENERAL OF ONTARIO as representing HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

REASONS FOR JUDGMENT – STAGE ONE

P. C. Hennessy, J.

Released: December 21, 2018