



SUPREME COURT OF CANADA

CITATION: Shot Both Sides v.
Canada, 2024 SCC 12

APPEAL HEARD: October 12, 2023

JUDGMENT RENDERED: April 12,
2024

DOCKET: 40153

BETWEEN:

Jim Shot Both Sides, Roy Fox, Charles Fox, Steven Fox, Theresa Fox, Lester Tailfeathers, Gilbert Eagle Bear, Phillip Mistaken Chief, Pete Standing Alone, Rose Yellow Feet, Rufus Goodstriker, Leslie Healy, Councillors of the Blood Band, for themselves and on behalf of the Indians of Blood Band Reserve number 148 and Blood Reserve number 148

Appellants

and

His Majesty The King

Respondent

- and -

Attorney General of Ontario, Attorney General of Saskatchewan, Attorney General of Alberta, Treaty 8 First Nations of Alberta, Lac La Ronge, Innu Takuaikan Uashat Mak Mani-Utenam, Robinson Huron Treaty Anishinaabek, Assembly of Manitoba Chiefs, Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, Federation of Sovereign Indigenous Nations and Assembly of First Nations

Interveners

CORAM: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

**REASONS FOR
JUDGMENT:** O'Bonsawin J. (Wagner C.J. and Côté, Rowe, Martin, Kasirer
and Jamal JJ. concurring)
(paras. 1 to 84)

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**Jim Shot Both Sides, Roy Fox, Charles Fox, Steven Fox,
Theresa Fox, Lester Tailfeathers, Gilbert Eagle Bear,
Phillip Mistaken Chief, Pete Standing Alone, Rose Yellow Feet,
Rufus Goodstriker, Leslie Healy, Councillors of the Blood Band,
for themselves and on behalf of the Indians of Blood Band Reserve
number 148 and Blood Reserve number 148**

Appellants

v.

His Majesty The King

Respondent

and

**Attorney General of Ontario,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Treaty 8 First Nations of Alberta, Lac La Ronge,
Innu Takuaikan Uashat Mak Mani-Utenam,
Robinson Huron Treaty Anishinaabek,
Assembly of Manitoba Chiefs,
Cowichan Tribes, Stz'uminus First Nation,
Penelakut Tribe, Halalt First Nation,
Federation of Sovereign Indigenous Nations and
Assembly of First Nations**

Interveners

Indexed as: Shot Both Sides v. Canada

2024 SCC 12

File No.: 40153.

2023: October 12; 2024: April 12.

Present: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Aboriginal law — Treaty rights — Indian reserves — Enforceability of treaty — Indigenous tribe claiming that actual size of reserve established by treaty smaller in area than what was promised by treaty — Tribe commencing action for breach of treaty rights after expiry of applicable limitation period but prior to coming into force of s. 35 of Constitution Act, 1982 — Whether tribe's claim for breach of treaty rights actionable at common law prior to coming into force of s. 35 of Constitution Act, 1982 — Whether tribe's claim statute-barred.

Constitutional law — Aboriginal peoples — Treaty rights — Breach — Whether coming into force of s. 35 of Constitution Act, 1982 created new cause of action for breach of treaty rights — Constitution Act, 1982, s. 35(1).

Aboriginal law — Treaty rights — Breach — Remedies — Declaration — Indigenous tribe claiming that actual size of reserve established by treaty smaller in area than what was promised by treaty and commencing action for breach of treaty rights — Whether declaration is available remedy.

The Blood Tribe are a member tribe of the Blackfoot Confederacy of First Nations. On September 22, 1877, Treaty No. 7 was made between the Crown and the Confederacy. Treaty No. 7 established Blood Tribe Reserve No. 148, the largest

reserve in Canada and the home of the Blood Tribe. The reserve's size was to be set in accordance with the treaty land entitlement ("TLE") provisions, based on a formula promising one square mile for each family of five persons, or in that proportion for larger and smaller families. The Blood Tribe has long claimed that the size of the reserve did not respect the TLE formula. In 1971, a Blackfoot researcher gathered information on the total number of people in the Blood Tribe for the years 1879 to 1884 and, based on this information, confirmed that the existing reserve boundaries did not match the boundaries owed pursuant to the TLE formula. The Blood Tribe formally sought to negotiate with the Minister of Indian Affairs, who rejected its claims.

The Blood Tribe consequently commenced an action in the Federal Court in 1980, alleging breaches of the Crown's fiduciary duty, fraudulent concealment, and negligence, and seeking a declaration and damages for breach of contract arising from the Crown's failure to fulfill the TLE according to the prescribed formula (the "TLE Claim"). The trial judge dismissed all claims except the TLE Claim, concluding that the Crown had miscalculated the size of the reserve by underestimating the Blood Tribe's membership, and stated that the Crown's conduct during the reserve's creation was unconscionable. The trial judge found that although the facts underlying the TLE Claim were discoverable in 1971 or shortly thereafter, the applicable six-year limitation period did not begin to run until 1982, when the enactment of s. 35(1) of the *Constitution Act, 1982* created a new cause of action for treaty breaches. The remedies sought for the TLE Claim were therefore not statute-barred because the action was commenced in 1980. The Federal Court of Appeal allowed the Crown's appeal and

held that the TLE Claim was statute-barred. In its view, s. 35(1) of the *Constitution Act, 1982* did not create new treaty rights, and a remedy was available for the TLE Claim prior to 1982 regardless of the framed cause of action.

Held: The appeal should be allowed in part and a declaration issued.

Section 35(1) of the *Constitution Act, 1982* did not create a cause of action for breach of treaty rights. Treaty rights flow from the treaty, not the Constitution, and treaties are enforceable upon execution and give rise to actionable duties under the common law. Accordingly, the Blood Tribe's TLE Claim was enforceable at common law and actionable prior to the coming into force of s. 35(1). The Blood Tribe did not contest the trial judge's finding that the TLE Claim was discoverable as early as 1971 or that the action was not commenced until 1980. Consequently, the TLE Claim is statute-barred by operation of the applicable six-year limitation period. However, declaratory relief is warranted in the instant case given the longevity and magnitude of the Crown's dishonourable conduct towards the Blood Tribe. It will serve an important role in clarifying the Blood Tribe's TLE, identifying the Crown's dishonourable conduct, assisting future reconciliation efforts, and helping to restore the honour of the Crown.

The conclusion of a treaty-making process creates active and binding obligations on the Crown, and this is well established in Canadian caselaw. A long line of authorities has upheld the enforceability of treaties at common law and the actionable duties they enshrine. While the terminology surrounding the enforceability of treaties

may have changed over time, claims seeking to give legal effect to treaty terms were brought long before the coming into force of the *Constitution Act, 1982*. Courts prior to 1982 clearly recognized the legal character of treaties: they create and embody enforceable obligations based on the mutual consent of the parties. Treaties are binding legal instruments that must be upheld, and the right to a judicial remedy where treaty obligations are breached is provided by the common law, grounded in the terms of the treaty at issue.

The coming into force of s. 35(1) of the *Constitution Act, 1982* did not impact the enforceability of treaties at common law. Section 35(1) of the *Constitution Act, 1982* accords constitutional status to existing Aboriginal and treaty rights and prevents them from abrogation by federal, provincial, or territorial law. The coming into force of s. 35(1) constitutionally entrenched the Crown's obligation to respect existing treaty rights. But s. 35(1) did not create treaty rights. Treaty rights were enforceable prior to 1982 and the coming into force of s. 35(1) did not alter the commencement of limitation periods applicable to claims for breach of treaty rights. Although treaty rights are protected by the *Constitution Act, 1982*, their existence and scope are determined by the terms of the treaty interpreted with the principles set out in relevant authorities. The terms and limits of treaty rights do not stem from the language or purpose of s. 35(1). The core impact of s. 35(1) was to prevent abrogation by legislation, and it was intended to provide constitutional protection to pre-existing Aboriginal and treaty rights.

Authorities of the Court have recognized that rules on limitation periods apply to Aboriginal right and treaty claims. Although the constitutionality of applying limitations statutes to Aboriginal right and treaty claims was never addressed in these authorities, they recognized that such claims are subject to the general limitation periods of the province in which the action was commenced if captured by the respective limitations statute. However, limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct. Declaratory relief is a discretionary remedy that must be considered within the unique context of the legal dispute at issue. Declarations set out the parameters of a legal state of affairs or the legal relationship between the parties and can also confirm or deny the breach of a right or declare the existence of a new legal state of affairs. Courts have an extremely wide jurisdiction when issuing declaratory relief, but this discretion is not without limits: a court may grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought. Declarations should not be issued where there is no practical effect.

Declaratory relief takes on a unique tenor in the context of Aboriginal and treaty rights because it is a means by which a court can promote reconciliation to restore the nation-to-nation relationship. Reconciliation can be fostered by declaratory relief. The non-coercive nature of declaratory relief can help the parties to the dispute to resolve the issues without an excessively hostile or adversarial approach and can help

to restore the honour of the Crown. This approach is especially appropriate given the non-adversarial, trust-like relationship Canadian governments are supposed to have with Indigenous people. Avoiding expensive, lengthy, and adversarial litigation is an important step for reaching reconciliation-oriented results where Aboriginal and treaty rights are at issue. Declaratory relief can assist in providing a clear statement on the legal rights of Indigenous parties, the duties placed on the Crown, and the Crown's conduct in relation to those sacred promises. Clarity on these rights, duties, and conduct can help to uphold the honour of the Crown, guide the parties in the reconciliation process mandated by s. 35(1) of the *Constitution Act, 1982*, and assist with efforts to restore the nation-to-nation relationship. Declarations in the context of breach of treaty claims can also serve a corrective function by authoritatively demonstrating that the Crown has infringed the Indigenous party's rights. A clear statement setting out the Crown's infringement of an Indigenous party's rights may spur reconciliation efforts between the parties to address the wrongs suffered.

Cases Cited

Distinguished: *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; **considered:** *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, aff'd [1897] A.C. 199; *Henry v. The King* (1905), 9 Ex. C.R. 417; *Dreaver v. The King* (1935), 5 C.N.L.C. 92; *Pawis v. The Queen*, [1980] 2 F.C. 18; *Town of Hay River v. The Queen*, [1980] 1 F.C. 262; *R. v. Taylor* (1981), 34 O.R. (2d) 360; *R. v. Syliboy*,

[1929] 1 D.L.R. 307; **referred to:** *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. McGregor*, 2023 SCC 4; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. White* (1964), 50 D.L.R. (2d) 613, aff'd (1965), 52 D.L.R. (2d) 481; *R. v. Badger*, [1996] 1 S.C.R. 771; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Yahey v. British Columbia*, 2021 BCSC 1287, 43 C.E.L.R. (4th) 1; *1472292 Ontario Inc. (Rosen*

Express) v. Northbridge General Insurance Company, 2019 ONCA 753, 96 C.C.L.I. (5th) 1.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 15.

Constitution Act, 1867, s. 91(24).

Constitution Act, 1982, s. 35(1).

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APPEAL from a judgment of the Federal Court of Appeal (Boivin, Rennie and Woods JJ.A.), 2022 FCA 20, 468 D.L.R. (4th) 98, [2022] F.C.J. No. 151 (Lexis), 2022 CarswellNat 255 (WL), varying a judgment of Zinn J., 2019 FC 789, [2020] 1

F.C.R. 22, [2019] 4 C.N.L.R. 19, [2019] F.C.J. No. 892 (Lexis), 2019 CarswellNat 3618 (WL). Appeal allowed in part.

Gary Befus, Brendan Miller, Eugene Meehan, K.C., and Thomas Slade, for the appellants.

Dayna Anderson, Anusha Aruliah and Amy Martin-LeBlanc, for the respondent.

Richard Ogden and Imran Kamal, for the intervener the Attorney General of Ontario.

P. Mitch McAdam, K.C., for the intervener the Attorney General of Saskatchewan.

Neil Dobson and Heather A. Campbell, for the intervener the Attorney General of Alberta.

Kate Gunn, for the intervener the Treaty 8 First Nations of Alberta.

Glenn K. Epp and Eric L. Pentland, for the intervener Lac La Ronge.

Isabelle Boisvert-Chastenay and Marie-Claude André-Grégoire, for the intervener Innu TakuaiKAN Uashat Mak Mani-Utenam.

Dianne Corbiere, Catherine Boies Parker, K.C., and Christopher Albinati,
for the intervener Robinson Huron Treaty Anishinaabek.

Carly Fox, for the intervener the Assembly of Manitoba Chiefs.

David M. Robbins, Jessica Proudfoot and Alexis C. Giannelia, for the
interveners the Cowichan Tribes, the Stz'uminus First Nation, the Penelakut Tribe and
the Halalt First Nation.

Ron S. Maurice and Geneviève Boulay, for the intervener the Federation of
Sovereign Indigenous Nations.

Adam Williamson and Stuart Wuttke, for the intervener the Assembly of
First Nations.

The judgment of the Court was delivered by

O'BONSAWIN J.—

I. Overview

[1] Treaties between the Crown and Indigenous peoples are fundamental to
Canada's history and constitutional landscape. The promises and obligations enshrined
in these fundamental agreements reflect a lasting commitment to maintaining a just

relationship between the Crown and Indigenous peoples and were intended to be honoured by the Crown “so long as the sun rises and the river flows” (Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at pp. 18-19, citing *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118 (C.A.), at p. 124, per Lord Denning).

[2] In this matter, Treaty No. 7 enshrines solemn promises and obligations exchanged between the Crown and the Kainai, also known as the “Aakainawa, the Tribe of Many Leaders” (“Blood Tribe”). Of particular importance to this appeal, Treaty No. 7 established Blood Tribe Reserve No. 148 (“Reserve”), which is the largest reserve in Canada and the home of the Blood Tribe. The Reserve’s size was to be set in accordance with the treaty land entitlement (“TLE”) provisions, based on a formula promising “one square mile for each family of five persons, or in that proportion for larger and smaller families” (Treaty No. 7 (1877), at p. 4; 2019 FC 789, [2020] 1 F.C.R. 22, at Appendix D).

[3] The Blood Tribe has long claimed that the Reserve did not accord with the promises enshrined in Treaty No. 7. After a lengthy procedural history, the Blood Tribe sought declarations to that effect, an order directing Canada to procure lands for addition to the Reserve, and monetary compensation for lost use, mineral royalties, and rents. The Federal Court found that Canada was in breach of the TLE formula in Treaty No. 7 and the size of the Reserve it had provided was 162.5 square miles too small.

Before this Court, Canada concedes its breach of Treaty No. 7 with respect to the TLE but argues that the Blood Tribe's claim is statute-barred under Alberta's *Limitation of Actions Act*, R.S.A. 1970, c. 209, and the *Federal Courts Act*, R.S.C. 1985, c. F-7. Section 5(1)(g) of Alberta's *Limitation of Actions Act* sets out a six-year limitation period for "any other action not in [the] Act or any other Act specifically provided for"; pursuant to s. 39(1) of the *Federal Courts Act*, Alberta's limitations statute applies to Federal Court proceedings "in respect of any cause of action arising in that province".

[4] This appeal concerns whether the Blood Tribe's TLE claim is barred by the six-year limitation period in Alberta's *Limitation of Actions Act*. This inquiry turns on a narrow question: whether the breach of the TLE was actionable in Canadian courts prior to the coming into force of s. 35(1) of the *Constitution Act, 1982*. The Blood Tribe argues that their claim cannot be statute-barred under Alberta's *Limitation of Actions Act* and the *Federal Courts Act* prior to there being a recognized action in law, which they allege was not the case for breach of treaty claims until the coming into force of s. 35(1). The constitutional applicability and operability of Alberta's *Limitation of Actions Act*, as incorporated into federal law by s. 39(1) of the *Federal Courts Act*, is not at issue.

[5] For the reasons that follow, I would allow the appeal in part. The Federal Court of Appeal correctly held that the coming into force of s. 35(1) of the *Constitution Act, 1982* did not alter the commencement of the limitation period applicable to the Blood Tribe's TLE claim. Treaty rights flow from the treaty, not the Constitution. It is

well established in Canadian caselaw that treaties are enforceable upon execution and give rise to actionable duties under the common law. As the Federal Court of Appeal concluded, the Blood Tribe's claim is thus statute-barred. However, I find that declaratory relief is warranted given the longevity and magnitude of the Crown's dishonourable conduct towards the Blood Tribe. Declaratory relief in this context will promote reconciliation and help to restore the nation-to-nation relationship between the Blood Tribe and the Crown.

II. Facts

[6] The historical context for this appeal is extensive. The Federal Court and the Federal Court of Appeal provided a comprehensive overview of this history and the evidence adduced by the parties (see, e.g., trial reasons, at paras. 56-219; 2022 FCA 20, 468 D.L.R. (4th) 98, at paras. 20-36). The trial judge's factual findings based on that evidence were not challenged on appeal. Although this Court is seized with a discrete question of law, a concise summary of the historical background that provides an understanding of the relationship between the Crown and the Blood Tribe is essential to engaging with the parties' arguments and appreciating the context for this claim.

A. *The Blood Tribe and Blood Tribe Reserve No. 148*

[7] The Blood Tribe are a member tribe of the Blackfoot Confederacy of First Nations. The Confederacy was comprised of three tribes: the Blood Tribe, Siksika (Blackfoot), and Piikani (Peigan).

[8] The Reserve is the home of the Blood Tribe. Located in southern Alberta, the Reserve is the largest reserve in Canada and occupies an area of 547.5 square miles. The Reserve was established by Treaty No. 7, which was made on September 22, 1877, between the Crown and the Confederacy.

B. *Treaty No. 7 and the Creation of Blood Tribe Reserve No. 148*

[9] Treaty No. 7 promised a reserve to each tribe of the Confederacy. The Reserve's location was set out in Treaty No. 7, but was later changed by a separate agreement between the Blood Tribe and the Crown. The Blood Tribe has long claimed that the Reserve did not accord with the promises set out in Treaty No. 7.

[10] The size of the Reserve, the TLE, was meant to correspond to a formula. The formula promised "one square mile for each family of five persons, or in that proportion for larger and smaller families".

C. *Locating and Surveying Blood Tribe Reserve No. 148*

[11] Surveyors set the boundaries of the Reserve in 1882, five years after the execution of Treaty No. 7. The initial survey described the Reserve as an area of roughly 650 square miles in south-western Alberta. The Canadian government also granted two grazing leases to third parties on lands south of the Reserve in 1882. The northern boundaries of the grazing leases overlapped the surveyed Reserve.

[12] Canadian officials quickly recognized the overlapping boundaries and asked the Blood Tribe to agree to a new boundary. A second survey in 1883 led to a new agreement that defined the Reserve's southern boundary by a latitudinal description north of the grazing leases' boundaries. The boundary change reduced the size of the Reserve from 650 square miles to its current size of 547.5 square miles.

[13] Blood Tribe members expressed concern over the size of the Reserve in 1888 and identified that it was not as large as they expected when they signed Treaty No. 7. They also expressed uncertainty with the precise location of the southern boundary. As a result, members of the Blood Tribe were shown the location of the new boundary for the first time in 1888. The surveyor recorded that the Blood Tribe's Chief "was asked if he was satisfied, and he answered in the affirmative" (C.A. reasons, at para. 25).

[14] Concerns over the size of the Reserve arose again in 1969, nearly a century after the second survey. On November 4, 1969, a Blackfoot researcher presented the Blood Tribe with a report on the 1882 and 1883 surveys. This report detailed the reduction in the Reserve's size. The researcher travelled to Ottawa in August 1971 to gather information on the total number of people in the Blood Tribe for the years 1879 to 1884. Based on this information, the researcher confirmed that the existing boundaries did not match the boundaries owed pursuant to the TLE formula.

D. *Negotiations and Initial Legal Action*

[15] The Blood Tribe formally sought to negotiate with the Minister of Indian Affairs and Northern Development (now the Minister of Crown-Indigenous Relations) on February 27, 1976. The Blood Tribe made two claims related to the Reserve: (i) the TLE had not been correctly assigned, and (ii) they were entitled to a broader area (“Big Claim”). The Minister rejected both claims on June 20, 1978.

[16] After the unsuccessful negotiations, the Blood Tribe commenced an action in the Federal Court on January 10, 1980. The statement of claim alleged breaches of the Crown’s fiduciary duty arising from the second survey, fraudulent concealment, and negligence. The Blood Tribe sought a declaration and damages for breach of contract arising from the failure to fulfill the TLE according to the prescribed formula. The claim was amended on February 24, 1999 to include, among other changes, that the Blood Tribe had constitutionally protected treaty rights pursuant to s. 35(1) of the *Constitution Act, 1982*.

[17] The Federal Court action was put into abeyance pending an assessment under the Specific Claims Policy of the Department of Indian Affairs and Northern Development. Due to the “glacial” pace of this process, the Blood Tribe moved to reactivate its Federal Court action on August 7, 1996 (C.A. reasons, at para. 32).

[18] The TLE claim was rejected under the Specific Claims Policy in November 2003 on the basis that Canada had no outstanding legal obligation. The Indian Claims Commission conducted an inquiry into the claims and, on March 30, 2007, made two recommendations: (i) that the Big Claim not be accepted, and (ii) that a surrender was

required because the 1883 boundary change removed land from the Reserve. The Commission recommended that the Minister of Indian Affairs and Northern Development negotiate a resolution.

[19] The reactivated Federal Court action was divided into three phases. Phase I was heard in May 2016 for the purpose of receiving oral history evidence from members of the Blood Tribe. Phase II, dealing with liability, fact, and expert witness evidence, was held in 2018. Phase III has not been heard and was to address remedies.

III. Procedural History

A. *Federal Court, 2019 FC 789, [2020] 1 F.C.R. 22*

[20] The Blood Tribe's action was divided into three claims:

- (a) The "Big Claim": The Blood Tribe claimed that the Reserve did not accord with the land promised by Canada and included a larger area.
- (b) The "1882 Survey Claim": The Blood Tribe asserted that the 1882 survey created a reserve and the reduction of 102.5 square miles in the second survey required that it surrender the land pursuant to the *Indian Act, 1880*, S.C. 1880, c. 28. The Blood Tribe submitted that it was entitled to that land or compensation for the loss of it because it gave no such surrender.

(c) The “TLE Claim”: The Blood Tribe submitted that its membership at the relevant time was such that its promised reserve under the TLE is larger than provided for under either survey. As a result, Canada breached this treaty promise and failed in its fiduciary duty to honestly and accurately implement the treaty promises.

[21] The Crown contested each claim. The Crown disputed the land captured by the Big Claim, argued that the 1882 survey did not create a reserve, and asserted that the current size of the Reserve aligned with the TLE formula. The Crown also argued the action was statute-barred.

[22] The trial judge found that Canada was in breach of its treaty commitments, but all claims except the TLE Claim were dismissed. The Big Claim was dismissed on its merits and the 1882 Survey Claim was dismissed on the basis that it was statute-barred. The limitations defence barred the 1882 Survey Claim even though Canada breached its fiduciary duty in implementing Treaty No. 7 and in dealing with the subsequent creation of the Reserve. The facts underlying the 1882 Survey Claim were provided to the Blood Tribe in 1969, 11 years before the claim was commenced.

[23] The trial judge concluded that Canada miscalculated the size of the Reserve by underestimating the Blood Tribe’s membership. Based on the membership at the date of the signing of Treaty No. 7, the Reserve should have been 162.5 square miles larger. He stated that Canada’s conduct during the Reserve’s creation was

unconscionable, but the conduct could have been discovered in 1971 or shortly thereafter.

[24] The trial judge found that although the facts underlying the TLE Claim were discoverable by 1971, the applicable limitation period did not begin to run until 1982. The enactment of s. 35(1) of the *Constitution Act, 1982* created a new cause of action for treaty breaches. The remedies sought for the TLE Claim were not statute-barred because the action was commenced in 1980.

B. *Federal Court of Appeal, 2022 FCA 20, 468 D.L.R. (4th) 98*

[25] The Federal Court of Appeal allowed Canada's appeal and held that the Blood Tribe's TLE Claim was statute-barred. Canada had only challenged the finding that the breach of the TLE Claim was not statute-barred because it was not actionable until the coming into force of s. 35(1) of the *Constitution Act, 1982*. The parties did not challenge the trial judge's factual findings, the dismissal of the 1882 Survey Claim and the Big Claim, or the statutory interpretation or constitutional applicability of s. 5(1)(g) of Alberta's *Limitation of Actions Act*.

[26] The Federal Court of Appeal reached its conclusion for three reasons. First, the trial judge erred in treating treaties as international agreements and applying international law doctrines. Although the trial judge's reasons were "ambiguous" on this point, the Federal Court of Appeal found that "[r]eading the reasons as a whole and having regard to the extensive reliance on international law cases to support the

conclusion that treaties were not enforceable, . . . the judge, in fact, concluded that the historic treaties were international treaties” (para. 61). Historic treaties do not engage the act of state doctrine and do not require incorporation into domestic law to be enforceable. The Federal Court of Appeal relied on this Court’s caselaw that rejected characterizing treaties as international agreements (see, e.g., *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1038).

[27] Second, the trial judge’s decision was contrary to an unbroken line of decisions over 120 years recognizing the enforceability of commitments in the numbered treaties. The Federal Court of Appeal held that prior caselaw “has consistently taught that the numbered treaties created binding obligations, both legal and moral, on the Crown. Their terms were enforceable in Canadian courts because a foundational, robust legal principle compelled compliance — the honour of the Crown” (para. 14). Courts should not pigeon-hole claims ascertaining a breach of treaty commitments into a particular cause of action. A remedy was available for the Blood Tribe’s TLE Claim prior to 1982 regardless of the framed cause of action.

[28] Third, the Federal Court of Appeal held that the trial judge misunderstood the effect of s. 35(1) of the *Constitution Act, 1982* in relation to treaties. Section 35(1) did not create new treaty rights. Instead, it gave constitutional protection to existing treaty rights so they could no longer be abrogated by legislation.

IV. Issues

[29] This Court must decide whether the Blood Tribe's TLE Claim is barred by Alberta's *Limitation of Actions Act* and s. 39(1) of the *Federal Courts Act*. This inquiry turns on two narrow issues raised by the Blood Tribe:

(1) Was a breach of the TLE actionable in Canadian courts prior to the coming into force of s. 35(1) of the *Constitution Act, 1982*?

(2) Were the limitation periods in Alberta's *Limitation of Actions Act* effective to bar the Blood Tribe's TLE Claim prior to the coming into force of s. 35(1) of the *Constitution Act, 1982*?

[30] The Blood Tribe also seeks declaratory relief related to the Crown's breach of Treaty No. 7. At the hearing of this appeal, Canada conceded that declaratory relief may be appropriate. As a result, after resolving the two core issues on this appeal, the reasons below address the issue of declaratory relief.

V. Analysis

[31] To resolve the parties' dispute, this Court must consider the impact of s. 35(1) of the *Constitution Act, 1982* on breach of treaty claims and whether these claims were actionable prior to the section coming into force. If a breach of the TLE was enforceable and actionable prior to the coming into force of s. 35(1), the Blood Tribe concedes that its claim is statute-barred as it does not otherwise contest the discoverability of its claim.

[32] As explained below, s. 35(1) of the *Constitution Act, 1982* did not create a cause of action for breach of treaty rights. The Federal Court of Appeal appropriately recognized that “[t]reaty rights flow from the treaty, not the Constitution” (para. 205). Treaty rights were enforceable prior to 1982 and relief was available to the parties. The coming into force of s. 35(1) did not alter the commencement of the limitation period applicable to the Blood Tribe’s TLE Claim. As concluded by the Federal Court of Appeal, the Blood Tribe’s claim is thus statute-barred pursuant to s. 5(1)(g) of Alberta’s *Limitation of Actions Act* and s. 39(1) of the *Federal Courts Act*. However, I find that declaratory relief is warranted given the Crown’s dishonourable conduct towards the Blood Tribe.

A. *The Scope of This Appeal*

[33] It is important to begin by delineating the scope of this appeal. The parties seek an answer to a discrete legal issue: is the Blood Tribe’s TLE Claim barred by Alberta’s *Limitation of Actions Act*? This issue turns on whether breach of treaty claims were actionable prior to the coming into force of s. 35(1) of the *Constitution Act, 1982*. To address this issue, this Court must consider the enforceability of Treaty No. 7 at common law and the meaning and impact of s. 35(1) in relation to treaty rights, not the constitutional applicability of limitations legislation. Several interveners advance arguments beyond this issue regarding the constitutional applicability or operability of limitations legislation to breach of treaty claims. In light of these arguments, it is necessary to clarify the scope of the appeal.

[34] As previously indicated, the constitutional applicability or operability of limitations legislation is not at issue on this appeal. This is acknowledged explicitly by the parties. In their factum, the Blood Tribe acknowledge that the issue on appeal is “not that limitation periods do not apply to Aboriginal claims or that courts can waive them, but that a plaintiff’s claim ought not to be barred prior to there being a recognized action in law” (A.F., at para. 132). Similarly, the Crown states that “[t]his Court should not consider the constitutional validity, applicability, or operability of federal legislation” (R.F. in response to interveners, at para. 4). Any extension of the appeal beyond the narrow issue, whether a breach of treaty claim was actionable prior to the enactment of s. 35(1) of the *Constitution Act, 1982*, would thus be contrary to the parties’ express submissions.

[35] The Blood Tribe does not ask this Court to assess the constitutional applicability of Alberta’s *Limitation of Actions Act* to breach of treaty claims. This Court has cautioned against deciding issues that are not necessary to the resolution of an appeal absent exceptional circumstances (*R. v. McGregor*, 2023 SCC 4, at paras. 23-24). The constitutional applicability of the limitations legislation at issue has not been properly raised in this Court and is not a “component of the overall analysis of the grounds as raised by the parties” (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 33). The Federal Court of Appeal acknowledged that the Blood Tribe’s submissions did not call into question the constitutional applicability of the *Limitation of Actions Act* (para. 210). This Court is faced with a similarly narrow legal issue.

B. *Was a Breach of the TLE Actionable in Canadian Courts Prior to the Coming Into Force of Section 35(1) of the Constitution Act, 1982?*

[36] Assessing whether a breach of Treaty No. 7 was actionable prior to 1982 requires an analysis of two issues: (i) the enforceability of Treaty No. 7 at common law, and (ii) the impact, if any, of the coming into force of s. 35(1) of the *Constitution Act, 1982*. If treaty rights were enforceable and actionable prior to 1982, then the limitation period applicable to the Blood Tribe's claim began to run when the claim was discoverable, more than 10 years before the coming into force of s. 35(1).

(1) The Enforceability of Treaty No. 7 at Common Law

[37] Treaties are enforceable from the date of execution. While the terminology surrounding the enforceability of treaties may have changed over time, claims seeking to give legal effect to treaty terms were brought before the coming into force of the *Constitution Act, 1982*. Long before 1982, courts recognized that treaties were not merely political promises and created enforceable obligations, including “contractual rights” (see, e.g., *R. v. White* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 618, aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.); J. Promislow, “Treaties in History and Law” (2014), 47 *U.B.C. L. Rev.* 1085, at pp. 1147-48). The Blood Tribe's approach to this litigation reflects the enforceability of treaties prior to 1982 since their claim was framed as a breach of contract and was brought in 1980.

[38] The enforceability of treaties from the date of execution is well established in this Court's caselaw without reference to s. 35(1). For example, this Court in *R. v. Badger*, [1996] 1 S.C.R. 771, stated at para. 76: "Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties" (emphasis added). Similarly, this Court identified in *Sioui*, at p. 1044, that "what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity" (emphasis added). *Sioui* built on *Simon*, where this Court emphasized that the agreement at issue was a treaty because it was "an enforceable obligation between the Indians and the white man" (p. 410).

[39] The enforceability of treaties from the date of execution is supported by the fundamental nature of the promises they enshrine. Courts, legislatures, and academic commentators have consistently acknowledged this significance: "treaties represent an Indian Magna Carta" (H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (1969), at p. 28); "treaties are vital, living instruments of relationship" (Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at p. 128); and "a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred" (*Badger*, at para. 41). In addition, the Crown is assumed to intend to fulfill these integral promises (para. 41; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R.

623, at para. 79; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 19-20).

[40] The Federal Court of Appeal reached the correct conclusion regarding the enforceability of treaties prior to 1982. As noted at para. 100 of its reasons, “[t]reaties were entered into with the intention to create legal obligations and how that obligation is characterized is of no consequence to the question [of] whether their terms are enforceable.” Courts prior to 1982 clearly recognized the legal character of treaties: they create and embody enforceable obligations based on the mutual consent of the parties.

(a) *Caselaw Demonstrates That Breach of Treaty Claims Were Actionable Pre-1982*

[41] Courts recognized that treaty promises created enforceable and actionable legal duties prior to 1982. Although the characterization of treaties and their obligations may have varied, “it is too much of a leap to suggest that treaties were not justiciable in Canada through the 19th century; that the executive’s personal goodwill and subsequent actions could not give rise to legally or equitably enforceable obligations” (Promislow, at p. 1147). Instead, a long line of authorities upheld the enforceability of treaties at common law and the actionable duties they enshrine. These authorities were comprehensively summarized by the Federal Court of Appeal, but several are particularly notable.

[42] Early decisions of this Court and the Judicial Committee of the Privy Council (“JCPC”) characterized treaties as enforceable contracts. *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), is helpful as a starting point. The Blood Tribe relies on *St. Catherine’s* for the argument that Indigenous claims were treated as political matters. However, a close analysis of the JCPC’s reasons reveals that this case was not about the enforceability of treaty commitments. Instead, the appeal concerned Ontario’s control of Crown lands. Despite the limits of its analysis, *St. Catherine’s* sets out the JCPC’s understanding and characterization of treaties as “formal contract[s]” (see pp. 51-52 and 54-55).

[43] This Court and the JCPC recognized the enforceability of treaties a decade later in *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434 (“*Annuities Case (SCC)*”), aff’d [1897] A.C. 199 (“*Annuities Case (JCPC)*”). The dispute concerned a treaty commitment to increase annuity payments over time to the Ojibway in the Lake Huron district of the Robinson-Huron Treaty. The JCPC recognized that the treaty made the provincial government “liable to fulfil the promises and agreements made on its behalf” and characterized the question as one of “contract liability for a pecuniary obligation” (pp. 205 and 213). This Court in the *Annuities Case (SCC)* also acknowledged the enforceability of the obligations: “. . . the Indians are of right, under the treaties, entitled to the payment of the arrears” (p. 498). Contrary to the Blood Tribe’s reliance on this authority in this matter, the reference to a treaty right being a “personal obligation” at p. 213 of the *Annuities Case (JCPC)* does not diminish the

enforceability of the commitment since this characterization was only used to distinguish the obligations from a charge in land.

[44] The *Annuities Case (JCPC)* was built on in *Henry v. The King* (1905), 9 Ex. C.R. 417, where the Exchequer Court considered the enforceability of treaty commitments and recognized their legal effect. The Mississaugas of the Credit filed a petition seeking a declaration that they were entitled to certain moneys owed under a treaty. The court required the payment of the annuities demanded in the claim and supported the enforceability of the treaty in several respects. For example, the treaty was characterized as an enforceable agreement with consideration (p. 429). Furthermore, jurisdiction was based on the claim arising from an agreement or treaty. The court reached this conclusion because the Mississaugas' right "rests upon the treaty or contract between the Crown and them, and . . . the court has . . . jurisdiction so to declare" (p. 446).

[45] The Exchequer Court in *Dreaver v. The King* (1935), 5 C.N.L.C. 92, continued to enforce specific treaty terms. *Dreaver* concerned a petition of right filed by the Mistawasis Band in Saskatchewan seeking amounts to reimburse education and medicine expenses that were improperly charged to its trust account. The band relied on a treaty promise requiring the Crown to provide free education and medicine. In granting the petition, the court relied on the treaty promises and gave them legal effect. The treaty at issue created an actionable right that the band relied upon to pursue relief.

[46] Caselaw nearing the coming into force of the *Constitution Act, 1982* upheld the view that treaty obligations were enforceable and actionable at common law. For example, the Federal Court in *Pawis v. The Queen*, [1980] 2 F.C. 18, considered the relationship between the *Ontario Fishery Regulations*, SOR/63-157, and the treaty rights of the Ojibway and explicitly recognized that breaches of treaty obligations were actionable. When characterizing the treaty at issue, the court emphasized its enforceability:

. . . the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein . . . were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract. [Emphasis added; pp. 24-25.]

[47] A similar result was reached in *Town of Hay River v. The Queen*, [1980] 1 F.C. 262, and *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.). In *Hay River*, the Federal Court held that the treaty at issue was not “simply a contract between those who actually subscribed to it” and instead “impose[d] and confer[red] continuing obligations and rights” (p. 265). In *Taylor*, the Court of Appeal for Ontario did not characterize the nature of the treaty at issue but held that the treaty had a clear legal effect: it preserved historic rights to hunt and fish. None of these authorities suggest that treaties were not enforceable prior to the coming into force of s. 35(1) of the *Constitution Act, 1982*.

[48] The Blood Tribe’s categorization of these authorities based on how the treaty was used (i.e. either as a “sword” or a “shield”) does not diminish the conclusions of the courts discussed above. The Federal Court of Appeal correctly dismissed this argument, holding that “[t]here is no logical reason to conclude that the use of a treaty to defend conduct has no bearing on the question [of] whether a treaty is enforceable, whereas an action to assert a treaty term, does” (para. 101). Enforceability at common law speaks to a clear and concise question: does the treaty have legal effect? Regardless of the form of proceeding, the authorities outlined above demonstrate that treaties were given legal effect, and thus were enforceable, prior to 1982. The ability for Indigenous interests, including treaty rights, to arise in an array of forums and proceedings does not diminish their legal effect or viability (*R. v. Desautel*, 2021 SCC 17, [2021] 1 S.C.R. 533, at paras. 89-92).

[49] The Federal Court of Appeal appropriately considered and followed the authorities set out above, including by disregarding *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.). The Nova Scotia County Court in *Syliboy* held that the treaty at issue was a “mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual” (pp. 313-14). As the Federal Court of Appeal correctly concluded, “*Syliboy* was incorrectly decided in its time, and remains so today” (para. 140). This Court previously reached this conclusion in *Simon*, noting that the decision “reflects the biases and prejudices of another era in our history” and relies on language that is “no

longer acceptable in Canadian law” (p. 399). *Syliboy* did not and does not reflect the current state of the law.

[50] Treaty obligations are enforceable and actionable from their execution. The conclusion of a treaty-making process creates active and binding obligations on the Crown, and this is well established in Canadian caselaw. The position of the Blood Tribe that treaties were treated as political matters prior to 1982 conflicts with these authorities and undermines the binding nature of promises made in historic treaties. This line of cases gave legal effect and judicial remedies, including declaratory relief and monetary orders, based on the obligations enshrined in treaties (see, e.g., *Henry*, at pp. 445-47; *Dreaver*, at p. 122).

(b) *Treaty No. 7 Was Enforceable and Actionable at Common Law*

[51] The Federal Court of Appeal correctly held that Treaty No. 7 was enforceable at common law. This aligns with the authorities set out above and reflects the nature of treaties as binding legal instruments that must be upheld. The right to a judicial remedy where treaty obligations are breached is provided by the common law, grounded in the terms of the treaty at issue, and does not require s. 35(1) of the *Constitution Act, 1982* or legislation enacted pursuant to s. 91(24) of the *Constitution Act, 1867*. This conclusion is reinforced when the impact of s. 35(1) is analyzed, as demonstrated below.

(2) The Impact of Section 35(1) of the *Constitution Act, 1982*

[52] The enforceability of Treaty No. 7 at common law is the heart of this appeal. Having established the Treaty's enforceability at common law above, it is necessary to consider whether the coming into force of s. 35(1) of the *Constitution Act, 1982* impacted this enforceability. The enactment of the *Constitution Act, 1982* profoundly shaped and solidified the protection of Aboriginal and treaty rights in Canada. Section 35(1) is instrumental in this respect and provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35(1) limits the doctrine of parliamentary sovereignty in its application to Aboriginal and treaty rights in Canada and prevents Parliament from extinguishing these rights (*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 11; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1108-10; P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 489).

[53] Section 35(1) of the *Constitution Act, 1982* accords constitutional status to existing Aboriginal and treaty rights and prevents them from abrogation by federal, provincial, or territorial law (*Desautel*, at para. 34; J. Woodward, *Aboriginal Law in Canada* (loose-leaf), at § 5:2). The coming into force of s. 35(1) constitutionally "entrenched" the Crown's obligation to respect existing treaty rights (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 4; *R. v. Marshall*, [1999] 3 S.C.R. 533 ("*Marshall (No. 2)*"), at para. 6). As a result, s. 35(1) constitutionalizes existing rights so that they can no longer be abrogated by legislation. This was recognized in *Mitchell*, at para. 11:

The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw*, *supra*.

[54] Section 35(1) did not create treaty rights. Although treaty rights are protected by the *Constitution Act, 1982*, their existence and scope are determined by the terms of the treaty interpreted with the principles set out in *R. v. Marshall*, [1999] 3 S.C.R. 456 (“*Marshall (No. 1)*”). The terms and limits of treaty rights do not stem from the language or purpose of s. 35(1), which recognizes and affirms existing rights (*Badger*, at para. 76; P. W. Hogg, “The Constitutional Basis of Aboriginal Rights”, in P. Noreau and L. Rolland, eds., *Mélanges Andrée Lajoie: Le droit, une variable dépendante* (2008), 177, at p. 182; J. T. S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at p. 39).

[55] This Court has recognized that s. 35(1) was intended to “provide constitutional protection” to pre-existing Aboriginal and treaty rights (*Badger*, at para. 12; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 84). Furthermore, as stated clearly in *Marshall (No. 1)*, at para. 48, the core impact of s. 35(1) was to prevent abrogation by legislation:

Until enactment of the *Constitution Act, 1982*, the treaty rights of aboriginal peoples could be overridden by competent legislation as easily

as could the rights and liberties of other inhabitants. The hedge offered no special protection, as the aboriginal people learned in earlier hunting cases such as *Sikyea v. The Queen*, [1964] S.C.R. 642, and *R. v. George*, [1966] S.C.R. 267. On April 17, 1982, however, this particular type of “hedge” was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to the test laid down in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1112 *et seq.*, as adapted to apply to treaties in *Badger*, *supra*, *per* Cory J., at paras. 75 *et seq.*

[56] The Federal Court of Appeal correctly set out the effect of s. 35(1) and acknowledged that the section is “not the source of treaty rights” (paras. 204-5). This conclusion aligns with the approach to Aboriginal rights under Canadian law: “. . . section 35 did not create the legal doctrine of Aboriginal rights — Aboriginal rights existed and were recognized at common law” (para. 205). Remedies were available to the Blood Tribe prior to the coming into force of the *Constitution Act, 1982* and were sought through its 1980 breach of contract action.

[57] The Blood Tribe’s reliance on *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, overlooks the differences between the coming into force of s. 15 of the *Canadian Charter of Rights and Freedoms* and s. 35(1). This Court in *Ravndahl* held that the cause of action for the discrimination claim at issue arose through the coming into force of s. 15. Prior to the coming into force of s. 15, the *Ravndahl* plaintiff had “no cognizable legal right upon which to base her claim” (para. 18). By contrast, there is a basis in common law for the Blood Tribe’s breach of treaty claim because the enforceable and actionable nature of treaties prior to 1982 is well established. The coming into force of s. 35(1) did not create a cognizable legal right to ground the Blood Tribe’s breach of treaty claim. The right has existed at common law since the execution

of Treaty No. 7 in 1877. The coming into force of s. 35(1) of the *Constitution Act, 1982* did not alter the commencement of the limitation period applicable to the Blood Tribe's claim.

C. *Were the Limitation Periods in Alberta's Limitation of Actions Act Effective to Bar the Blood Tribe's TLE Claim Prior to the Coming Into Force of Section 35(1) of the Constitution Act, 1982?*

[58] For the reasons above, the Blood Tribe's claim was actionable prior to the coming into force of s. 35(1) and thus the limitation period set out in Alberta's *Limitation of Actions Act* was effective to bar the claim prior to 1982. The only argument the Blood Tribe advances to contest the running of the relevant limitation period is that the claim was not recognized at law. The Blood Tribe does not otherwise contest that its claim is captured by s. 5(1)(g) of Alberta's *Limitation of Actions Act*.

[59] Section 5(1)(g) of Alberta's *Limitation of Actions Act* is a residual basket clause. Specifically, it sets out a six-year limitation period for "any other action not in [the] Act or any other Act specifically provided for". The Blood Tribe does not contest the trial judge's finding that the TLE Claim was discoverable as early as 1971 or that the action was not commenced until 1980 (C.A. reasons, at paras. 6 and 210). As the Federal Court of Appeal concluded, "[t]he Federal Court found that . . . had a cause of action for breach of a treaty commitment been available, the six-year limitation period in paragraph 5(g) of *The Limitation of Actions Act, 1970* would have barred the action. These findings are not contested and no issue is raised . . . as to whether, as a matter of

statutory interpretation or constitutionality, paragraph 5(g) barred the action had a cause of action existed” (para. 210).

[60] The result that can be drawn from the analysis above aligns with authorities from this Court that recognized that the rules on limitation periods apply to Aboriginal right and treaty claims (see, e.g., *Manitoba Metis*, at para. 134; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at paras. 12-13; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paras. 121 and 125-33). Although the constitutionality of applying limitations statutes to Aboriginal right and treaty claims was never addressed in these authorities, they recognized that such claims are subject to the general limitation periods of the province in which the action was commenced if captured by the respective limitations statute (Woodward, at § 20:18; J. T. S. McCabe, *The Law of Treaties Between the Crown and Aboriginal Peoples* (2010), at p. 421).

[61] Throughout this appeal, Canada drew attention to other means of advancing reconciliation and restoring the nation-to-nation relationship, including through negotiations and the Specific Claims Tribunal (R.F., at paras. 71-74). This Court has previously acknowledged the importance of reconciliation efforts outside of the courts and these processes may be meaningful to addressing the Crown’s breach of its obligations to the Blood Tribe (see, e.g., *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (“C-92 Reference”), at paras. 76-78; *Delgamuukw*, at para. 186; *Desautel*, at para. 87, quoting S.

Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139). In light of the prospect of future reconciliation efforts, it is necessary for this Court to consider the remaining relief sought by the Blood Tribe in its court action.

D. *The Availability and Scope of Declaratory Relief*

[62] In its action, the Blood Tribe seeks declaratory relief. At trial, the Blood Tribe sought, among other claims, a declaration that the Crown breached the TLE (C.A. reasons, at paras. 3 and 31). The Crown has subsequently conceded it breached its treaty obligation with respect to the Blood Tribe's land entitlement (R.F., at para. 2). At the hearing of this appeal, the Crown conceded that declaratory relief may be appropriate and could assist with reconciliation efforts with the Blood Tribe (transcript, at pp. 111-16).

[63] The law of limitations set out above does not preclude a declaration in this matter. Although claims for personal relief or damages flowing from treaty breaches may be subject to limitations statutes, limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct. (*Manitoba Metis*, at paras. 135, 137, 139 and 143). At issue here is a constitutionally protected treaty right and the honour of the Crown, itself a constitutional principle (para. 136). This Court has recognized that declarations can be obtained to assist with extra-judicial negotiations with the Crown even where personal relief may be statute-barred as discussed below (para. 137).

[64] Declaratory relief is warranted in this appeal. This Court has the authority to grant the judgment that the courts below should have ordered (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 45). The courts below had the authority to provide the declaratory relief sought by the Blood Tribe (*Federal Courts Rules*, SOR/98-106, r. 64; *Federal Courts Act*, at ss. 2(1), 17(1), 52(b)(i)). This section analyzes the nature of declaratory relief, identifies its value in breach of treaty cases, and explains why it is warranted in the circumstances of this appeal.

(1) The Discretionary Nature of Declaratory Relief

[65] Declarations are “authoritative statements of legal states of affairs” (S. A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (2019), at p. 15; Lord Woolf and J. Woolf, *The Declaratory Judgment* (4th ed. 2011), at pp. 1-2). A bare declaratory judgment does not grant consequential or coercive relief. Indeed, “[t]he essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness, and judicial support to the legal relationship between parties without an order of enforcement or execution” (L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 6).

[66] Declarations set out the parameters of a legal state of affairs or the legal relationship between the parties. They primarily confirm or deny the legal rights of the parties. Importantly, declarations can also confirm or deny the breach of a right or declare the existence of a new legal state of affairs (see, e.g., *Manitoba Metis*, at paras. 6 and 154; Smith, at p. 15).

[67] Declaratory relief is a discretionary remedy (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 83). Courts have an “extremely wide jurisdiction” when issuing declaratory relief (Sarna, at p. 37; R. Zakrzewski, *Remedies Reclassified* (2005), at p. 158). This discretion is not without limits, and this Court has set out criteria that inform the availability of declaratory relief. In *Ewert*, this Court stated: “A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought . . .” (para. 81). Courts have long relied on these criteria for assessing the availability of declaratory relief (see, e.g., *S.A.*, at para. 60; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46).

[68] Declarations should not be issued where there is no practical effect. As noted by this Court in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 832, “a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise”. The importance of practical utility is well established, including through the following excerpts from academic commentary:

A declaration must serve some utility to the parties; otherwise, the court speaks for no reason befitting its jurisdiction. Therefore a court should

avoid issuing a declaration devoid of tangible or concrete use to the litigants.

(Sarna, at p. 46)

The courts will not generally grant a declaration that is merely advisory, of no practical utility, or deals with a hypothetical dispute. . . . [A declaration] may also serve a corrective function in that it may authoritatively demonstrate to the defendant that he or she is infringing the claimant's rights.

(Zakrzewski, at p. 159)

It is essential that the declaration be directed to the determination of legal controversies and produces some real consequences for the parties.

(D. Wright, *Remedies* (2nd ed. 2014), at p. 284)

[69] As noted by the majority of the British Columbia Court of Appeal in *West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232, at para. 343, “there is no obligation in the law of declaratory relief to litigate the range of a declaration’s effects. The question is simply whether the declaration will have practical utility” (emphasis added).

(2) The Value of Declaratory Relief in Breach of Treaty Cases

[70] Declaratory relief takes on a “unique tenor” in the context of Aboriginal and treaty rights because it is a means by which a court can promote reconciliation to restore the nation-to-nation relationship (the Hon. M. Rowe and D. Shnier, “The Limits of the Declaratory Judgment” (2022), 67 *McGill L.J.* 295, at pp. 314 and 318). It relies in part on the government acknowledging the declaration promptly and acting honourably in determining the means for advancing reconciliation (J. Teillet, “A Tale

of Two Agreements: Implementing Section 52(1) Remedies for the Violation of Métis Harvesting Rights”, in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 333, at pp. 340-41). That this assumption can be difficult in breach of treaty cases, as reconciliation efforts often follow decades of dishonourable Crown conduct and adversarial litigation, does not diminish the possible salutary effect of declarations.

[71] The reconciliation process differs from the conflict driven, adversarial litigation process that is often antithetical to meaningful and lasting reconciliation. As the Court noted in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24, “[t]rue reconciliation is rarely, if ever, achieved in courtrooms.” The Court has repeatedly emphasized the importance of reconciliation between Indigenous peoples and the Crown outside of the courts (see, e.g., *C-92 Reference*, at para. 77; *Desautel*, at para. 87; *Haida Nation*, at para. 20; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 47).

[72] Reconciliation can be fostered by declaratory relief. The non-coercive nature of declaratory relief can help “the parties to the dispute to resolve the issues without an excessively hostile or adversarial approach” and can help to restore the honour of the Crown (Sarna, at p. 178). Academic commentary has recognized that this approach “is especially appropriate given the non-adversarial, trust-like relationship Canadian governments are supposed to have with Aboriginal people” (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 15:31). Avoiding

expensive, lengthy, and adversarial litigation is an important step for reaching reconciliation-oriented results where Aboriginal and treaty rights are at issue.

[73] In Aboriginal and treaty rights claims, declaratory relief can assist in providing a clear statement on the legal rights of Indigenous parties, the duties placed on the Crown, and the Crown's conduct in relation to those sacred promises. Clarity on these rights, duties, and conduct can help to uphold the honour of the Crown, guide the parties in the reconciliation process mandated by s. 35(1) of the *Constitution Act, 1982*, and assist with efforts to restore the nation-to-nation relationship.

[74] Declarations in the context of breach of treaty claims can serve a corrective function by authoritatively demonstrating that the Crown has infringed the Indigenous party's rights (Zakrzewski, at p. 159). A clear statement setting out the Crown's infringement of an Indigenous party's rights may spur reconciliation efforts between the parties to address the wrongs suffered. Declaratory relief is not meant to represent the end of the reconciliation process for the Crown's breach of Treaty No. 7: it merely helps set the stage for further efforts at restoring the nation-to-nation relationship and the honour of the Crown.

(3) Declaratory Relief Is Warranted for the Blood Tribe

[75] Canada breached its treaty promises to the Blood Tribe. Canada did not provide the land as promised: 162.5 fewer square miles were set aside than should have been. In 1883, the Lieutenant Governor of the North-West Territories instructed the

surveyor to change the boundaries of the Reserve contrary to Canada's treaty commitments. Crown representatives subsequently made false representations to the Blood Tribe that the TLE was fulfilled including in an 1888 letter stating that the Reserve "contained far more than [the Blood Tribe] were entitled to" (trial reasons, at para. 459). The discrepancy was never remedied or acknowledged and it was only through the efforts of a Blackfoot researcher from 1969 to 1971 that the extent of the Crown's misconduct in relation to the TLE became known. This conduct is deplorable and does not reflect the fundamental objective of the modern law of treaty rights, which is the reconciliation of Indigenous and non-Indigenous peoples and their respective claims, interests, and ambitions (*Mikisew Cree First Nation*, at para. 1). In oral submissions before this Court, the Crown acknowledged that its breach of the Treaty was "very serious", "dishonourable", and even "unconscionable" (transcript, at pp. 95-96).

[76] Treaty promises were intended to be honoured so long as the sun rises and river flows. They are "vital, living instruments of relationship" and the Crown is assumed to intend to fulfill these integral promises (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, at p. 128; *Badger*, at para. 41; *Manitoba Metis*, at para. 79; *Haida Nation*, at paras. 19-20). By disregarding its commitments in Treaty No. 7, Canada failed to uphold and appreciate the sacred nature of its promises.

[77] Several considerations support the exercise of discretion to grant declaratory relief with that context in mind. Prior authorities of this Court have set out

the criteria that establish whether a declaration may be warranted (see, e.g., *S.A.*, at para. 60; *Ewert*, at para. 81). Those criteria are satisfied here, and the particulars of the appeal before us further support the exercise of discretion by this Court to award declaratory relief. There is no dispute that this Court has jurisdiction to hear the issue or that the Blood Tribe has a genuine interest in resolving the issue. The analysis below is thus limited to whether there is practical utility in granting a declaration and whether the Crown has an interest in opposing the declaration (*S.A.*, at para. 60; *Ewert*, at para. 81).

[78] A declaration in this context will have a practical effect. The Crown's dishonourable breach of Treaty No. 7 is ongoing and the fractured relationship between the Crown and the Blood Tribe should be resolved through continued reconciliation efforts. This is not a situation where a declaration would be devoid of tangible or concrete use or could be viewed as "fictitious or academic" (*Solosky*, at p. 831). The declaration will be relied on to outline the Crown's past dishonourable conduct in relation to Treaty No. 7. Declaratory relief may also serve a corrective function in these circumstances as it authoritatively demonstrates that Canada breached the Blood Tribe's treaty rights, which can help to advance reconciliation. Any uncertainty over whether reconciliation efforts will be successful for strengthening the nation-to-nation relationship does not diminish the practical utility of the declaration (*West Moberly*, at paras. 321-24 and 331).

[79] The declaration sets out the Crown's conduct and guides the parties towards the reconciliation process. The rights of the Blood Tribe are guaranteed by Treaty No. 7 itself and constitutionally recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Further, declaratory relief of this nature aligns with and advances the constitutional imperative of reconciliation. A declaration in this context is not a statement of "[d]etached facts" or "general pronouncements of law" (*West Moberly*, at paras. 312 and 336; see, e.g., *Yahey v. British Columbia*, 2021 BCSC 1287, 43 C.E.L.R. (4th) 1, at paras. 1876-77 and 1884; *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753, 96 C.C.L.I. (5th) 1, at paras. 30-31).

[80] The dispute between the Crown and the Blood Tribe is real and not academic. The Crown has opposed the declaration being sought by the Blood Tribe at almost every stage of this litigation. The dispute is grounded in an extensive and contested factual matrix regarding the Crown's commitments under Treaty No. 7 and the size of the TLE. The Crown contested that it breached its obligations under Treaty No. 7 when the action was commenced in 1980. This issue remained in dispute for decades, resulting in a lengthy and complex trial before the Federal Court and a holding that Canada breached its treaty commitments. Declaratory relief was sought by the Blood Tribe in its statement of claim to resolve the live conflict on this issue through legal action (C.A. reasons, at para. 3).

[81] Before this Court, the Crown concedes its breach of the TLE and that a declaration may be an appropriate remedy. Accordingly, it could be said the Crown no longer has an interest in opposing the declaration sought with respect to the final criteria for declaratory relief. However, enabling this belated concession to foreclose the possibility of declaratory relief would privilege form over substance with respect to the nature of the “real” dispute before us, and would overlook the protracted nature of the dispute that led the parties to this point. As such, I am not persuaded that this concession, at the eleventh hour of this litigation and in the context of the Crown’s vigorous opposition to any relief in these proceedings, should now prevent this Court from issuing a declaration.

[82] Ultimately, a declaration is a discretionary remedy that must be considered within the unique context of the legal dispute at issue. The considerations analyzed above support the issuance of declaratory relief in these circumstances. These considerations must be assessed through the lens of decades of disagreement between the parties on the scope of the treaty promises owed to the Blood Tribe that culminated in extensive litigation. The Blood Tribe and the Crown have been involved in a contentious and adversarial litigation process culminating in an appeal to this Court, not an “academic”, “hypothetical”, or “theoretical” dispute (*Solosky*, at pp. 832-33; *S.A.*, at para. 60). Declaratory relief will serve an important role in clarifying the Blood Tribe’s TLE, identifying the Crown’s dishonourable conduct, assisting future reconciliation efforts, and helping to restore the honour of the Crown.

[83] The Blood Tribe is entitled to the following declaration in light of these considerations and context:

Under the treaty land entitlement provisions of Treaty No. 7, the Blood Tribe was entitled to a reserve equal to 710 square miles in area;

The Blood Tribe's current reserve is 162.5 square miles smaller in area than what was promised in Treaty No. 7; and

Canada, having provided the Blood Tribe with a reserve of 547.5 square miles in area, dishonourably breached the treaty land entitlement provisions of Treaty No. 7.

VI. Disposition

[84] I would allow the appeal in part and issue the declaratory relief set out above. The appellants are awarded their costs throughout.

Appeal allowed in part with costs throughout.

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Solicitors for the intervener Lac La Ronge: TLE, Edmonton.

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