

CITATION: Nootchtai v. Nahwegahbow Corbiere Genoodmagejig Barristers
and Solicitors, 2025 ONSC 6071
COURT FILE NO.: CV-24-00721782-00ES
DATE: 20251028

ONTARIO

**SUPERIOR COURT OF JUSTICE
(Estates List)**

BETWEEN:

Gimaa (Chief) Craig Nootchtai on his own
behalf, and on behalf of Atikameksheng
Anishnawbek First Nation, and Ogimaa
Kwe (Chief) Karen Bell and Councillor
Chester Langille on their own behalf, and
on behalf of Garden River First Nation

Applicants

– and –

Nahwegahbow Corbiere Genoodmagejig
Barristers and Solicitors, David
Nahwegahbow, Dianne Corbiere, Roger
Jones, Mark Stevenson, Donald Worme,
and Connie Addario, Mike Restoule, Peter
Recollet, Duke Peltier, Angus Toulouse,
Patsy Corbiere, and Wilma-Lee Johnson

Respondents

*H. Michael Rosenberg, Alana
Robert, and Gregory Ringkamp,
for the Applicants*

*Brian Gover, Dan Goudge, and
Geri Angelova, for the Respondent
Lawyers*

*Peter Wardle, Evan Rankin, and
Catherine Gleason-Mercier, for the
Litigation Management
Committee of the Robinson Huron
Treaty Litigation Fund*

HEARD: September 29, October 1
and 3, 2025

FL MYERS J:

REASONS FOR DECISION

Overview

- [1] The Applicants ask the court to review the legal fees claimed by the six lawyers comprising the “Legal Team” that represented the Robinson Huron Treaty Litigation Fund in litigation to enforce the Crown’s obligations under the Robinson Huron Treaty of 1850.
- [2] In 2024, the Supreme Court of Canada described the background of this litigation as follows:¹

[1] These appeals test the Crown’s commitment to reconciliation with the Anishinaabe of the upper Great Lakes after the Crown has dishonourably breached its sacred promises to them under the Robinson Treaties for almost 150 years.

[2] The Robinson Treaties of 1850 comprise the Robinson-Huron Treaty and the Robinson-Superior Treaty. Under these treaties, the Anishinaabe of the northern shores of Lake Huron and Lake Superior ceded their vast territories in exchange for, among other things, an annual payment in perpetuity. The annuities were to be increased over time under certain circumstances. However, for almost 150 years, the annuities have been frozen at a shocking \$4 per person, after the first and only increase was made in 1875. Today, in what can only be described as a mockery of the Crown’s treaty promise to the Anishinaabe of the upper Great Lakes, the annuities are distributed to individual treaty beneficiaries by giving them \$4 each.

¹ *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 (CanLII), 494 DLR (4th) 383.

- [3] After receiving this stinging rebuke by the country's highest court, the governments of Canada and Ontario together agreed to pay \$10 billion to the Robinson Huron Treaty Litigation Fund in fulfilment of the Crown's past Treaty obligations.
- [4] The Robinson Huron Treaty Litigation Fund is a trust that represents 21 participating First Nations and their approximately 40,000 members who are current beneficiaries under the Robinson Huron Treaty.
- [5] The Fund agreed to accept the \$10 billion offered in respect of payments owing to First Nations and their members from 1850 to the present. The litigation continues in relation to amounts that will become payable by the Crown under the Treaty in the future.
- [6] The Legal Team that acted for the Fund enjoyed stunning success. Through its sustained, creative, and excellent efforts, over some 17 years, the Legal Team engineered a settlement that is as historic as it is transformative to the beneficiary First Nations and their members.
- [7] The Legal Team did great legal work. Its member lawyers represented the clients zealously, resolutely, passionately, and with extraordinary success.
- [8] Apart from issues when dealing with its own remuneration, the Legal Team acted in the best traditions of the independent bar of Ontario to bring access to justice to clients who had been unable to obtain their fair measure of civil justice for more than 150 years.
- [9] The \$10 billion settlement achieved represents a degree of success beyond anyone's realistic assessment of the likely outcome of the litigation when it was first proposed.
- [10] And that is the nub of the issue that is the subject of this proceeding and this decision.
- [11] The issue before me in this proceeding is whether the Legal Team, as licensed legal professionals and members of the bar of Ontario, are entitled to a whopping \$510,000,000.00 as a 5% contingent fee on the \$10 billion settlement under the terms of a Partial Contingency Fee Agreement with the Fund dated June 17, 2011.

- [12] The applicants represent two of the 21 First Nations and their members who are beneficiaries of the Fund. They submit that the fees claimed by the Legal Team are too high and must be reduced despite approval by the Fund Trustees and Chiefs representing the large majority of the Robinson Huron First Nations and their members.

The Outcome – Lawyers in Ontario Are Entitled to Fair and Reasonable Fees but Not a Piece of the Action (Champerty).

- [13] Lawyers in Ontario are entitled to fair and reasonable fees for their services. They are entitled to be well-compensated as agreed between them and their clients.
- [14] But as regulated professionals, lawyers' fees are also subject to supervision by the Law Society of Ontario and by the courts. Lawyers' fees are subject to independent review to ensure that lawyers do not abuse the monopoly power of their licensure or their positions of authority to extract fees from clients that exceed what is fair and reasonable for licensed professionals in the circumstances.
- [15] The issue before me is whether the \$510,000,000.00 contingent success fee claimed by the six members of the Legal Team in this proceeding pursuant to the Partial Contingency Fee Agreement dated June 17, 2011 is fair and reasonable or if it amounts to unlawful "champerty."
- [16] Champerty is roughly described as buying a piece of a lawsuit without a legitimate interest in the case. Champerty has been forbidden in England since the Middle Ages. It remains illegal in Ontario. The law protects against champerty and champertous agreements in order to promote access to justice and other valid public policy objectives described by the Court of Appeal in *McIntyre Estate v. Ontario (Attorney General)*, (2002), 61 OR (3d) 257 (CA).
- [17] Contingency fees are a lawful form of remuneration for lawyers in Ontario. Lawyers are entitled to fair and reasonable contingency fees that can often be calculated as a share of the clients' recovery. Contingent fees calculated at 30% of a client's recovery are common in personal injury cases and in many class actions in Ontario. In many cases a percentage recovery can be a good measure of a fair and reasonable fee for legal services.

- [18] But lawyers are not their clients. The recovery from a lawsuit, whether by settlement or judgment, belongs to the clients. Lawyers are not entitled to a percentage of the clients' recovery amounting to a windfall of huge fees in an amount that is unrelated to value of the professional services rendered. That would be champerty.
- [19] A lawyer's professional retainer is not a lottery ticket offering a bonus prize of generational wealth to the lawyers if the clients hit the jackpot and win a mega-award.
- [20] In other words, in Ontario, money recovered for clients in litigation in excess of fair and reasonable legal fees must go to the clients.
- [21] Lawyers charging excessive fees beyond what is fair and reasonable undermines the integrity of the legal profession. See: *Fresco v. Canadian Imperial Bank of Commerce*, 2024 ONCA 628 at para. 84. In the *Fresco* case, Pepall JA wrote about the importance of maintaining proportionality between lawyers' fees and the settlement amount as follows:

[72] Importantly, the motion judge's finding also achieved a fair and proportional balance between class counsel fees and the class settlement fund. Such proportionality serves to protect the integrity of the profession in the face of a request by class counsel that, by its nature, operates to reduce the funds available for class members. This is a particularly important principle in the context of mega-fund settlements and supports the objectives that animate the *Class Proceedings Act*.²

² While technically speaking this case is not a class action, the same principles apply here. 40,000 peoples' interest were before the court in *Restoule* and they had to rely on the representative plaintiffs and their lawyers to ensure that the legal fees are fair, reasonable, and do not reduce disproportionately the funds available for the First Nations and their members. None of the 40,000 members even had the option to opt out. Steele J. ensured that all were given notice of this proceeding. Absent a relevant distinction in any given case, the principles applicable in class action mega-fund settlement cases are presumptively good analogies for those that apply under the *Solicitors Act*,

- [22] Like the case discussed in *Fresco*, this case involves a “mega-fund settlement” where the amount of the settlement is just so big that the percentage recovery guideline often used in contingency fee review must be discarded to avoid an unseemly, disproportionate, champertous windfall to the lawyers.
- [23] In this case, 15 of the 21 Robinson Huron First Nations will receive less from the \$10 billion settlement than the \$510,000,000.00 sought by the six members of the Legal Team. Under their agreement to take a 5% contingent success fee, the Legal Team proposes to take a disproportionate amount of the money that would otherwise go to their clients.
- [24] For the reasons that follow in later parts of this decision, I find that the fee component of the Partial Contingency Fee Agreement dated June 17, 2011 is neither fair nor reasonable.
- [25] The Legal Team is therefore not entitled to the contingent success fee of \$510,000,000.00 that it seeks.
- [26] The Legal Team is entitled to be paid, however. And, as noted above, it is entitled to be well-paid for excellent services rendered. The Legal Team has already received approximately \$17.5 million in fees. The Legal Team discounted its fees by \$5.78 million under the Partial Contingency Fee Agreement. Its total billable fees based on its 65,000 hours of time billed at their normal rates would have been approximately \$23 million before disbursements.
- [27] In my view, the value of the services rendered by the Legal Team, on a *quantum meruit* basis, based on a holistic review of the many factors discussed below, is **double** the lawyers’ full billable fees. This adds another \$23 million to the \$17 million already received for a total compensation of approximately \$40 million. This is in addition to another approximately \$6.5 million that has already been paid by the Fund for disbursements incurred.

RSO 1990, c S.15 in representative actions. See: *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2012 ONSC 4450, at para. 18 and *IBM Canada Limited v. Dario Ceci and Jacinthe Ratelle*, 2024 ONSC 1771 at para. 88.

- [28] Doubling lawyers' fees for excellent legal services is an extraordinary success fee. There are few, if any, cases where such a substantial bonus could be fairly charged to a client who has been paying most of the legal fees and all of the disbursements as the litigation proceeded. Absent a valid contingency fee agreement, doubling of fees on a *quantum meruit* basis is exceptional recognition of the value of the lawyers' services. But, in all the circumstances discussed below, including the clients' expectation, I find that doubling the Legal Team's billable fees is a very appropriate and deserved recognition of the excellence of the lawyers' work in this case.
- [29] An additional \$23 million is also just about four times the \$5.78 million fee discount that the Legal Team took under its Partial Contingency Fee Agreement. Using a multiplier that compares the amount put at risk by the law firm to the size of the success fee sought, is another guideline used in the case law to assess the reasonableness of contingent fees. No counsel was able to direct me to any case law saying expressly whether the multiplier should be applied to the full billable fees or just the amount for which the law firm is unpaid and put at risk in its contingency fee arrangement.
- [30] The reason there is no case law is likely because it is unusual to have a contingency agreement like the one here, under which only a small portion of the law firm's fees are put at risk or are invested in the outcome of the case. Under most contingency fee agreements, the lawyers receive no fees at all and often no reimbursement for disbursements incurred unless or until the case is settled or won. So, in most cases the amount at risk to the law firm in the event of a loss is the full amount of the firm's billable fees.
- [31] Here, doubling the Legal Team's billable fees works out to a multiplier of four times the amount of unbilled fees at risk or invested in the contingent outcome.³ I will discuss below however that the multiplier approach is not applicable to setting a fee on a *quantum meruit* basis.
- [32] My finding of the value of the services on a *quantum meruit* basis is based on a review of the relevant factors. It is not a statement that no different contingent fee arrangement might have been fair and

³ (4 * \$5.78 million = \$23.12 million.)

reasonable had the parties acted differently. I am not finding that the Legal Team might not have been able to negotiate a different agreement with a larger fee in different circumstances surrounding the execution of the agreement, the lawyers' assumption of risk, and the recent confirmation by the Fund of the fees sought by the Legal Team.

- [33] I cannot retroactively impose a different arrangement to which the parties might have agreed. This is especially difficult as I cannot change history to alter the lawyers' limited assumption of financial risk.
- [34] I also cannot undo or overlook the lack of independent legal advice provided to the Fund. The Legal Team had a blind spot to its obligations when its own remuneration was under consideration. Despite the excellence of its work on the merits of the Treaty claim, the Legal Team failed to recognize its position of conflict of interest when it advised its clients about its own fees. As detailed below, to advance the Legal Team's own claim to the \$510,000,000.00 fee, it gave no advice to the clients to protect their needs at the outset, and most recently, it gave inapt advice to the clients to dissuade them from obtaining independent legal advice. This colours any assessment of the Fund's position today and what it could, should, or would have done at the relevant times.

Factual Background

The Retainer of the Legal Team

- [35] Most of the facts that make up the relevant narrative are agreed by the parties or are uncontested. Most of the parties' submissions turn on the inferences to be drawn from the uncontested facts.
- [36] The Fund is comprised of 21 First Nations that are among the successors to the signatories of the Robinson Huron Treaty.
- [37] For many years Robinson Huron First Nations sought a way to remedy the wrongful conduct of the Crown's governmental representatives ignoring their Treaty obligations. Several of the First Nations retained a Toronto law firm as counsel in 2000 to try to enforce their treaty rights.
- [38] The retained lawyers were not able to surmount problems achieving consensus among the First Nations. By 2007, the law firm had yet to be able to draft a statement of claim, the very first step in a lawsuit.

[39] In June 2007, the Chiefs of the First Nations then involved created a working group to issue a request for proposals to seek new lawyers. The request for proposals contained several qualifications for new counsel including:

(a) demonstrated knowledge and expertise in Aboriginal issues;

(b) demonstrated experience in Aboriginal and treaty matters; and

(c) demonstrated capacity and experience to take cases to the Supreme Court of Canada.

[40] The request for proposal also noted that Aboriginal ancestry and/or fluency in the ancestral language(s) of Anishinaabemowin would be considered valuable qualifications.

[41] As it turned out, the language (and hence ancestry) qualifications were vital. The governments could not find the notes or transcripts of statements made by the First Nations representatives in the negotiation or the signing of the Treaty in and around 1850. Proving the meaning and import of the Treaty from the First Nations' side required extensive research into more than 150 years of history to piece together evidence from other sources, including oral history retained by Elders. This was an intensive and extensive task involving consultation with numerous sources and interviews with numerous people often in the Anishinaabemowin language(s).

[42] The Legal Team is a consortium of six senior lawyers who came together to respond to the request for proposals. They describe themselves in their factum as follows:

8 [...]All of the members of the Legal Team, with the exception of the late Mr. Arvay, were Indigenous—though Mr. Arvay was one of Canada's preeminent trial and appellate lawyers. Mr. Nahwegahbow, Ms. Corbiere, and Mr. Jones were from Robinson Huron First Nations, and Mr. Nahwegahbow and Mr. Jones were fluent in

Anishinaabemowin. Mr. Nahwegahbow, Ms. Corbiere, Mr. Arvay, and Mr. Worme all had expertise litigating Aboriginal and treaty rights cases. Mr. Jones and Mr. Stevenson had expertise in governance issues and high-stakes negotiations. [Notes omitted.]

- [43] Seven proposals from lawyers were received in response to the request for proposals. The working group scored the proposal of the Legal Team the highest largely as a result of the proposed willingness of the lawyers to discount their fees by 50% in return for a contingent success fee to be negotiated.
- [44] The fee discount was very important to the First Nations. Many did not have the financial means to fund a multi-million-dollar lawsuit. Their impoverishment by the Crown was the very subject matter of their complaint. So financing a lawsuit was a key issue for the First Nations and the commitment of the Legal Team to invest 50% of their billable time in the claim was important.
- [45] The Chiefs accepted the recommendation of their working group to retain the Legal Team.
- [46] At their first meeting in December, 2007, the relationship between the Legal Team and the clients was sanctified by a pipe ceremony. As explained in the evidence, a pipe ceremony is a sacred ceremony. In Anishinaabe tradition, the pipe ceremony brings the parties into a relationship of a form of kinship. The signing of the Robinson Huron Treaty was also sanctified by a pipe ceremony in 1850.

The Creation of the Trust – The Robinson Huron Treaty Litigation Fund

- [47] One of the first tasks of the Legal Team was to find a way to bring consensus to the clients so that a lawsuit could be brought and managed. The traditional Anishinaabe practice to continue discussions until consensus is reached had not proven effective with prior counsel.
- [48] One of the most, if not the single-most creative and important recommendation of the Legal Team was that the First Nations and their members participate through the legal construct of a trust. The Trustees of the trust would be able to vote by majority rule to manage the

litigation. Using a majority voting system was not the traditional Anishinaabe custom. But it was also not unknown to the parties. Federal law imposes a majority voting process on the First Nations' governing councils for example.

- [49] The Legal Team built into the trust indenture mechanisms to respect the sovereignty of the participating First Nations and to reflect Anishinaabe tradition to the extent possible. For example, the trust indenture requires Chiefs' approvals to be sought on behalf of their constituents First Nations. It also allows the Trustees to engage Elders to help resolve possible disputes in a consensual manner.
- [50] It took more than three years to conceive, negotiate, draft, and implement the trust indenture. The Robinson Huron Treaty Litigation Fund was created formally in August, 2010. Some of the First Nations did not sign on however for another two years.
- [51] I agree with the Legal Team's assessment of the key impact of the creation of the Fund at para. 14 of their factum:

The Litigation Fund proved highly effective. It established a viable governance structure by which the Robinson Huron First Nations could advance their collective claim, while preserving each of the 21 First Nations' sovereignty. [Notes omitted.]

The Partial Contingency Fee Agreement Dated June 17, 2011

- [52] Another important step in the process was the finalization of the Legal Team's retainer. The six lawyers comprising the Legal Team commenced working at 50% fees in 2007. Negotiations of their fee structure ran in parallel with the creation of the Fund.
- [53] The Legal Team initially proposed that in return for its 50% fee discount, it would receive 15% of the net recovery of the Fund in any litigation.
- [54] Negotiations ensued between the Legal Team and a committee created by the Chiefs. The negotiating committee proposed to the Chiefs that they be given authority to negotiate a contingent fee between 3% and 5% of the net recovery of the Fund.

- [55] The lawyers presented a budget to the client representatives indicating that they offered to contribute 50% of the budgeted costs of the case.
- [56] Mr. Duke Peltier was the lead negotiator for the Chiefs' negotiating committee. He prepared a graph showing the legal fees that would result from recoveries ranging from \$100 million to \$2.6 billion. He says he stopped at \$2.6 billion because he ran out of room on the page. But at \$2.6 billion legal fees would range from \$78 million at 3% to \$130 million at 5%. There is no doubt that big numbers were on the table.
- [57] Having said that, initial indications from an expert retained by the Legal Team, Dr. Carl Bell, was that the Fund would be "doing well" to recover \$400 million. This would lead of a contingent fee range of \$12 million to \$20 million. But Mr. Nahwegahbow, the lead counsel of the Legal Team, did postulate at the time that recovery could be in the billions.
- [58] Mr. Peltier testified that both sides sought to reach a fair agreement. He reviewed the different options proposed by the lawyers in the negotiations and had the information he wanted to have. He also said that the committee negotiating the retainer for the Chiefs believed that since the relationship had been sanctified by a pipe ceremony, they positively had to reach agreement. Moreover, to Mr. Peltier's understanding, the use of the pipe ceremony precluded any later resort to assessment of the lawyers' fees in court.
- [59] As negotiations ensued, the Legal Team pushed back on the suggestion that its contingent fee should be between 3% and 5%. Mr. Nahwegahbow said that if there was no agreement on an acceptable percentage recovery, the Fund would need to find new counsel. This was three years into the piece.
- [60] After different options were proposed, the parties agreed that the Legal Team would receive a contingent success fee calculated at 15% on the first \$100 million and 5% on any amounts above \$100 million.⁴
- [61] The Partial Contingency Fee Agreement was signed on June 17, 2011. It provides that the six members of the Legal Team will bill and be paid at

⁴ With a settlement of approximately \$10 billion, the Legal Team therefore claims \$15 million on the first \$100 million and \$495 million on the next \$9.9 billion for a total of \$510 million.

50% of their normal rates plus the partial contingent success fee agreed. The Legal Team told the Chiefs that if the case was lost, the Legal Team would lose 50% of their fees.

- [62] Mr. Peltier felt it was a fair deal because they had succeeded in reducing the lawyers' request for 15%.
- [63] But, the Partial Contingency Fee Agreement includes a term that allows other lawyers (who are not the six listed members of the Legal Team) to work on the file and be paid at full rates. Only one associate lawyer at the Nahwegahbow Corbiere firm was listed in the Partial Contingency Fee Agreement as a full-rate junior lawyer with a low hourly rate. However, as it turned out, some 40 other lawyers came onboard as the litigation ensued. They were all billed at their normal hourly rates.
- [64] There is nothing wrong and much right with legal work being delegated to the most efficient and cost-effective levels in the ordinary course. But in representing that the Legal Team was investing 50% of its fees contingent on the outcome, the Legal Team did not mention the effect or profitability of delegation under the Partial Contingency Fee Agreement.
- [65] As a result of the leverage employed by the Legal Team, using juniors and others (including at least one Queen's Counsel) all billing at full fees, the 50% discount on the fees of the members the Legal Team did not amount to a 50% discount on the cost of the litigation. Rather, the \$5.78 million discount amounted to about 25% of the full \$23 million billed by all lawyers working for and with the Legal Team under the Partial Contingency Fee Agreement.
- [66] With disbursements of another \$6.5 million paid by the clients, the Fund was bearing over 80% of the financial load of the litigation.
- [67] In addition, because of delegation to others, the six members of the Legal Team were able to work on other significant matters while this litigation ensued. Mr. Nahwegahbow was the most engaged member of the Legal Team. He devoted about 25% of his practice to the *Restoule* matter. He was carrying other major litigation matters at the same time.
- [68] The Partial Contingency Fee Agreement does not require the lawyers to fund disbursements. The Fund was required to pay the significant costs of expert researchers, expert economists, historians, and others.

Funding had to be found by the First Nations to carry expected multi-million-dollar disbursements.

- [69] The Partial Contingency Fee Agreement contains no fee cap.
- [70] The Partial Contingency Fee Agreement does not require the lawyers to indemnify the Fund for any costs awards that maybe made against it.
- [71] The Chiefs and their negotiating committee did not consult independent counsel about the risks and benefits of the contingency fee agreement. The Legal Team did not suggest or insist that the Fund or the Chiefs obtain independent legal advice.
- [72] The Legal Team knew that many of the First Nations were engaged in sophisticated litigation and negotiation with the government otherwise. They knew how to retain counsel if desired.
- [73] The only issue negotiated on behalf of the Chiefs was the amount of the percentage fee to be charged. Mr. Peltier consulted the Law Society's website and found a draft contingency fee agreement for a personal injury case and used it as his precedent. All he took from it apparently is that there is a percentage fee to be negotiated.
- [74] The applicants submit that the Robinson Huron First Nations were vulnerable parties in need of independent advice. The Legal Team says that the First Nations and their Chiefs represented sophisticated nations with substantial experience dealing with lawyers, the Canadian legal system, and governments at all levels.
- [75] I do not need to adopt one characterization or the other. Both can be true at the same time.
- [76] No matter how sophisticated one may be, no one knows what they do not know. It is not clear to me that the Legal Team itself recognized at the outset the importance of terms other than the percentage recovery that was the focus of the fee negotiations. There is no evidence that either side really understood the relevant variables and the risks associated with setting proportional fees in a mega-fund case. Much of the class actions case law about mega-fund settlements post-dates the Partial Contingency Fee Agreement.

- [77] There is no evidence that the Legal Team understood its ability to limit its risk by leveraging juniors or others to the extent that occurred organically as the file grew. I do not find that the Legal Team considered and deliberately limited its risk by foisting financial responsibility for

adverse costs awards and disbursements onto the under-funded clients. Nor do I find that anyone turned his or her mind to any realistic possibility of an astronomically large settlement and the appropriateness of a percentage fee claimed on that basis.

- [78] It is not an insult to anyone's intelligence or sophistication to find that when entering into largely uncharted legal waters, clients and lawyers alike can benefit from expert advice on the risks and benefits of upcoming decisions or transactions. Moreover, when lawyers are in a conflict of interest, such as when their own fees are under discussion, the clients ought to be referred for independent legal advice to obtain the necessary information and expertise.
- [79] The lawyers had the ability by education and training to educate themselves on contingency agreements risks and benefits had they wished to do so. As the clients' foray onto the internet discloses, they could have dearly used independent legal advice before entering into the Partial Contingency Fee Agreement.

The Compensation Disbursement Agreement

- [80] Another early, fundamental, and creative achievement by the Legal Team was the negotiation of the Compensation Disbursement Agreement. The agreement was approved by the Chiefs in August, 2012.
- [81] I noted above that a lack of consensus had plagued earlier efforts to advance claims for the Robinson Huron First Nations. In their factum, the Legal Team described the complexity, difficulty, and importance of the issue of obtaining consensus:

20. As noted above, a major obstacle to advancing the claim for breach of Treaty was the internal divisions amongst the Robinson Huron First Nations, including how any annuities compensation should be distributed. These divisions were rooted in overlapping treaty histories, mixed treaty and non-treaty membership, and the disruptive legacy of colonialism and the *Indian Act*. Left unresolved, this divisiveness risked derailing any litigation before it began. [Notes omitted.]

- [82] Drawing on their experience from other complex transactions (like those involved in Casino Rama) the Legal Team developed a population-based formula to distribute proceeds of settlement or judgment that was ultimately accepted by the Chiefs.
- [83] I agree with the Legal Team's submission that this agreement was "prescient strategic planning." By having the distribution model agreed years before settlement negotiations even began, the Legal Team precluded later in-fighting that could have affected the Legal Team's ability to conduct and conclude negotiations with the Crown.

Evidence Gathering Projects

- [84] While this topic can be dealt with briefly, its impact is enormous. After considering the preliminary matters needed for a lawsuit, like the proper parties and the causes of action to advance, the Legal Team had to consider whether it could obtain evidence to support the proposed claim. How does one obtain evidence from 150-175 years ago with written records lacking?
- [85] Once again, I accept the narrative provided by the Legal Team in its factum:

24. The Legal Team's preliminary work included undertaking an evidentiary research project that put the Anishinaabe perspective at the heart of the litigation strategy. Because previous counsel had collected no usable evidence, the Legal Team had to start from scratch. Oral histories and evidence of Anishinaabe legal traditions were collected. Consultants, historians, archivists, and document management specialists were engaged to collect and organize historical evidence.

25. The oral history project alone was extensive and innovative. Elders were identified and interviewed. The Legal Team's fluency in Anishinaabemowin and their membership in the Lake Huron Anishinaabek communities were essential to establishing trust with community members and to ensuring the authenticity, credibility, and reliability of the Elders' evidence that

would prove so influential in the *Restoule* action. [Notes omitted.]

- [86] The impact of the evidence presented at the two *Restoule* trials before Hennessey J. cannot be overstated. The Legal Team harnessed the First Nations' perspective on the evolution of a relationship conceived in trust into one of enforced deprivation over 150-plus years. In a presentation that was deep in symbolism and the spirit of reconciliation, the evidence included the first recorded public reading of the Robinson Huron Treaty in an Anishinaabemowin language.
- [87] The evidentiary cases put forward based on the extensive and innovative research projects developed and implemented by the Legal Team made the case for the Fund. As with most litigation, the facts win the case at trial. The *Restoule* case was no different. As I deal with below, the applicable law concerning the enforcement of treaty obligations as a matter of the "honour of the Crown" was developing before the Supreme Court of Canada as the *Restoule* case was being put together. It was well-ensconced before the first trial commenced. Counsel's job at trial was to establish on the evidence that the facts met the requirements of the law. And this they did expertly, effectively, and successfully.

Securing Litigation Funding

- [88] The Robinson Huron First Nations lacked the funding needed to pay even 50% of the legal fees needed for a massive case. Only four of the First Nations made the first \$70,000 contributions promised by all in the summer of 2010.
- [89] At one point, the outstanding fees and disbursements owing to the Legal Team exceeded \$200,000. The lawyers slowed their work while financial matters were resolved.
- [90] Once again, the Legal Team performed innovative and substantial work to help the Fund obtain financing. In January, 2014, Bank of Montreal agreed to lend \$7.25 million to fund the anticipated billings for the Legal Team through trial.
- [91] The loans were obtained with the First Nations' financial covenants. Many granted the bank security interests over their future gaming revenues to collateralize their loan commitments.

- [92] There is no doubt that the work of the Legal Team was instrumental in obtaining this financing. On the other hand, as discussed below, with the billable portion of its fees now fully secured through trial, the Legal Team's financial risk was reduced even further.

The Trials

- [93] The parties agreed to divide the trial into three stages. First, the court would be asked to decide if the Crown had violated the terms of the Treaty. If the Fund succeeded at stage one, the second stage of the trial would consider the Crown's defences based on the passage of time and other matters. Finally, if the Fund succeeded at both initial stages, a third stage trial would be held to address the remedy to which the Fund and its constituent First Nations were entitled to receive.
- [94] I accept again the Legal Team's narrative concerning the stage one and stage two trials from their factum:

36. The Legal Team met at least 34 times with Elders and Chiefs in 2017 to prepare for the Stage 1 hearing. This work was fundamental to the Legal Team's strategy of placing the Anishinaabe perspective and legal traditions at the centre of the proceedings.

37. Stage 1 began in September 2017, taking place over 78 days, with hearings in Thunder Bay, Garden River, Manitoulin Island, and Sudbury. The Legal Team brought and won a contested motion to have the proceedings livestreamed so that the Lake Huron and Lake Superior Anishinaabek could follow the proceedings. This was an innovation for proceedings in Ontario.

38. The Legal Team prepared 21 expert reports and led the evidence of 19 witnesses. It successfully challenged the admissibility and weight of the Crown's expert evidence, leading to the withdrawal of Ontario's expert, Laurence Mussio, and of Canada's expert, Dr. Paul McHugh.

39. On December 21, 2018, Justice Hennessy ruled in favour of the plaintiffs. Justice Hennessy held that the

Crown has a mandatory and reviewable obligation to pay augmented annuities whenever the net Crown resource-based revenues permitted the Crown to increase the annuities without incurring a loss. Her Honour further held that the proviso in the augmentation clause that limits the increase of the annuity to one pound (\$4.00) applies only to limit the individual distributive shares payable to individual beneficiaries, but does not apply to limit the augmentation of the collective annuity. The Stage 1 decision also recognized a Nation-to-Nation Treaty relationship and that the Treaty was entered into under both Anishinaabe law and common law. And Justice Hennessy confirmed that the annuity was a collective right, not an individual one, vindicating the Legal Team's choice of a representative action to advance the case. [Notes omitted.]

[...]

41. In Stage 2, the Legal Team confronted the Crown's limitations and Crown immunity defences. The Legal Team conducted extensive legal research and prepared detailed written submissions. The hearing took place over 10 days in October 2019. In June 2020, Justice Hennessy ruled in favour of the Plaintiffs, rejecting the Crown's defences and confirming the Crown's liability for breaches dating back to 1850. . [Notes omitted.]

- [95] The Fund succeeded in appeals to the Court of Appeal for Ontario and to the Supreme Court of Canada. I only mention for the discussion below about legal complexity, that the Fund was unsuccessful at the Supreme Court of Canada in trying to establish that the Crown was liable on the basis of breaches of fiduciary duty. From the clients' perspective however, wining on one ground was enough to require the Crown to participate in a third stage trial to decide on the remedy for its breaches of the Treaty.

Stage Three Trial Preparation and Settlement Negotiations

- [96] The Legal Team retained Nobel laureate economist Dr. Joseph Stiglitz and others to prepare reports on the value of the resources extracted from the Treaty territory.
- [97] The expert reports obtained by the Legal Team developed approaches to quantifying the resource-based revenues extracted from the Treaty lands that the Crown was liable to share with the First Nations. Some theories supported by apparently credible methodologies could have put the total sharable revenues in the *hundreds of billions of dollars*. While the pot of revenue was still subject to sharing, the risk to the governments of an absolutely massive pot raised the stakes.
- [98] The Legal Team had to navigate the settlement tactics and strategies of both levels of government. Despite the criticism levelled by the Supreme Court of Canada, both remained reluctant partners in settlement. The parties had to mediate before then-Justice Partick Smith just to reach an agreement to mediate towards a settlement on the merits before the Honourable Dennis O'Connor.
- [99] In addition to deftly managing the process to get to mediation, the Legal Team also made a critically important decision to obtain settlement advice from a lawyer with substantial experience at a senior level in both levels of government. While she could not share anything confidential of course, her practical advice helped focus the Legal Team on the art of the possible. She helped them propose a settlement within an attainable and yet still very lucrative range.
- [100] Settlement negotiations were held at various times from 2017 forward. However, they came to a head just before the commencement of the stage three remedies trial in early January, 2023. Justice Hennessy accepted a joint request for a two-week adjournment of the trial.
- [101] The \$10 billion settlement was agreed in principle on January 26, 2023.

Post-Settlement Fee Issues - The Legal Team offers to Share \$255 Million with the Fund

- [102] To support its fee claim of \$510,000,000.00 under the Partial Contingency Fee Agreement, the Legal Team prepared two reports for the Fund.

[103] On March 19, 2024, the Legal Team delivered a report that provided a comprehensive summary of the work it performed after being retained in 2007.

[104] On April 15, 2024, the Legal Team delivered a second report containing its opinions that:

- a. Anishinaabe law applied to the interpretation of the Fund's obligations under the Partial Contingency Fee Agreement; and
- b. under applicable Anishinaabe law the Legal Team was entitled to the full fee of \$510,000,000.00.

[105] The first section of the second report sets out at some length the principles of Anishinaabe law the Legal Team told the Fund were applicable to the Partial Contingency Fee Agreement.

[106] After setting out their case for payment of the \$510,000,000.00 fee under Anishinaabe law, the Legal Team provides its legal opinion to its client:

Our view is that Anishinaabe law applies to our relationship and to our retainer.

[107] The Legal Team allowed that Ontario law was relevant too. It then set out the explicit wording of para. 15 of the Partial Contingency Fee Agreement as follows:

The Client understands that all the usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada [now the Law Society of Ontario] and the common law, apply to this agreement.

[108] The Legal Team also noted that the preamble of the agreement recited that it was made pursuant to s. 28.1 of the *Solicitors Act*.

[109] The second report then deals at some length with the factors set out in some of the case law under Ontario law that are dealt with below for reviewing the reasonableness of lawyers' fees. The Legal Team did not present a balanced consideration of competing arguments on the various

factors, however. Rather, the Legal Team presented only its own side of the assessment of each factor.

[110] The second report then closes with another lengthy review of Anishinaabe principles. The Legal Team advised that under its view of applicable Anishinaabe legal principles concerning maintaining relationships, resurgence, and reciprocity, it had decided to offer to give back to the Fund \$255 million to be used by the Fund for specified communal purposes. It wrote:

Consistent with the principles of resurgence and reciprocity, the Legal Team agrees to dedicate 1/2 of its total fees of \$510 M they rightfully earned, that is, \$255.0 M, to RHT Anishinaabek purposes. In the result, the Legal Team would retain 255.0 M, which is equivalent to approximately 2.5% of the amount received as past compensation, a percentage less than the 3% - 4.6% range referred to in the Day School Settlement case. And over 17 years, it is \$15.0 M per year among 6 different senior lawyers.

The purposes which we want to recognize and dedicate funds to are the following:

- The promotion of Anishinaabemowin, Anishinaabe-adzawin and Anishinaabe law within the RHT area. These are important causes. It was how we won the case and as we learned from the Elders, there is no money for Anishinaabemowin. We want to help redress this need.
- To support the well-being of RHT Elders and to promote their recognition and respect, including finding ways to ensure their knowledge is protected and transmitted for the benefit of future generations.
- To support the advocacy for RHT Treaty rights, particularly for RHTLF in regard to future implementation of the augmentation

promise but also to support the advocacy efforts of RHW.

[111] Just one week later, on April 22, 2024, the Trustees of the Fund and the Chiefs of the First Nations met to discuss the lawyers' fees among other things. They had some discussion without the lawyers present and then the lawyers made a presentation seeking the fees they proposed in the second report.

[112] The Legal Team describes the meeting and upshot in its factum as follows:

71. After all questions were answered, the Legal Team left the room to allow the Chiefs and Trustees to deliberate. Atikameksheng and Garden River proposed that independent legal advice be obtained. However, 19 of the 21 Robinson Huron First Nations did not believe independent legal advice was necessary, and with a supermajority, the Chiefs and Trustees voted to approve the fees proposal. The only Chiefs and Trustees who opposed were the Applicants.

72. On May 1, 2024, the Legal Team and the Litigation Fund entered into a Contingency Fee Implementation Agreement. On May 3, 2024, the Litigation Fund paid the Legal Team's invoice for \$255 million. The Litigation Fund entered into a new retainer agreement with the Legal Team stipulating that legal fees for completing the *Restoule* action will be regular commercial rates after May 1, 2024. [Notes omitted.]

[113] The Legal Team's narrative omitted some facts of consequence.

[114] At the meeting of Trustees and Chiefs on April 22, 2025, the applicant Chief Nootchtai presented a resolution to defer approval to allow the Fund to obtain independent legal advice and to request an assessment of the proposed fees.

[115] In response, Legal Team member Dianne Corbiere advised that obtaining independent legal advice on the legal fees would delay distribution of the settlement funds to the First Nations and their members. She did not explain why this would be the case given that

Chief Nootchtai proposed that the Fund pay the \$510,000,000.00 sought by the Legal Team into a segregated trust account to allow the remaining settlement funds to be distributed.

- [116] Mr. Nahwegahbow agreed under cross-examination that funds could have been set aside to defer a decision on the approval of the legal fees sought by the Legal Team without delaying the distribution of the settlement generally.
- [117] Ms. Corbiere advised the meeting further that although different lawyers may have different views on their fees, the Legal Team were their “family members” and were looking to resolve their fees in accordance with Anishinaabe law. Yet, although there was no consensus

on the approval of the legal fees at the meeting, the Trustees did not consider appointing one or more Elders to assist in building a consensus under s. 5.2 of the trust indenture as provided by Anishinaabe tradition. Instead they called for a vote.

- [118] Ms. Corbiere did not advise the meeting that she was acting in a conflict of interest in purporting to advise the Fund, the Trustees, and the Chiefs about her and her team's own fees.
- [119] The fee approval went to a vote of the Chiefs and then the Trustees at the April 22, 2024 meeting.
- [120] The Chiefs' resolution to approve the Legal Team's fees, approves, "the proposal to settle legal fees" with the Legal Team. The Trustees' resolution that day accepts "the Part I and II Reports from the Legal Team and approve[s] the proposal to settle legal fees, as presented."
- [121] 13 of the 21 Chiefs voted to accept the Legal Team's fee settlement proposal. 15 of the 22 Trustees voted to accept the opinions in the Legal Team's reports and to accept the settlement offered. Other Chiefs apparently signified concurrence later to lead the Legal Team to submit that 19 of the 21 Chiefs approve. Whether they technically had the right to add votes later or not, it is clear that 19 of them support the Legal Team in this proceeding through the Litigation Management Committee.
- [122] At the next meeting of Trustees and Chiefs on May 14, 2024, Chief Nootchtai advanced another resolution to propose obtaining independent legal advice and assessment of the Legal Team's fees. Ms. Corbiere repeated her advice that questioning the legal fees would delay distribution of the remaining settlement funds to the First Nations and their members.
- [123] Mr. Nahwegahbow also spoke. He properly acknowledged that it was inappropriate for him to be providing advice because he was in a conflict of interest. However, he then went on to advise that assessment is permitted, "in normal circumstances where the bill has been issued unilaterally and there hadn't been a prior agreement. But here, like I said, we had a prior agreement." He also told the clients that a review of the fees of the Legal Team would express a lack of "confidence in our

ability to continue” to act for the Fund in the remaining litigation about future payments due under the Treaty.

- [124] The meeting voted down Chief Nootchtai’s proposal to seek independent legal advice and seek assessment of the fees of the Legal Team.

The Mizhinawe

- [125] In early 2023, the Honourable Harry LaForme accepted appointment by the Fund as *Mizhinawe*. The role is defined by Anishinaabe ceremony. It is seen as a sacred role involving communicating important messages through meetings, record keeping, and otherwise helping leaders through difficult negotiation.
- [126] In the summer of 2023, Mr. LaForme led numerous community engagement sessions with all 21 Robinson Huron First Nations to educate members concerning the settlement.
- [127] Mr. LaForme delivered a draft report in which he reported hearsay and double hearsay concerns told to him by community members about the legal fees being sought by the Legal Team. He reported that responses by or on behalf of the Legal Team were allegedly very inappropriate. He ultimately resigned from his position.
- [128] Mr. LaForme swore an affidavit in this proceeding at an earlier stage. The parties agreed that the earlier affidavits were part of the record for this hearing as well. Despite knowing of the affidavit, it was not addressed by the Legal Team until the third late affidavit delivered by Mr. Nahwegahbow.
- [129] In the interlocutory decision dated September 30, 2025, reported at 2025 ONSC 5540, I reserved on the applicants’ objections to the admissibility of Mr. Nahwegahbow’s third affidavit.
- [130] Mr. LaForme’s involvement was not referred to in the factum of the Legal Team and was mentioned only in passing orally. I do not find it helpful to try to assess how the Legal Team or others on their side might, allegedly, have responded to people raising questions about their fees at community meetings. Perhaps that is a question for the Law Society of Ontario.

[131] I also find Mr. Nahwegahbow's effort to undermine Mr. LaForme's evidence by questioning his legal ethics less than helpful. Once again, the place for that type of complaint, if real, is for the Law Society of Ontario. It does nothing to impair Mr. LaForme's credibility as a witness had I found his testimony relevant.

[132] In all I give neither affidavit any weight.

Evidence Concerning Anishinaabe Principles

[133] As everyone agrees that the legal fees payable to the Legal Team fall to be decided in accordance with Ontario law, I make no findings about the content of Anishinaabe law *per se*.

[134] I accept, of course, that all the thoughts and conduct of all parties to this proceeding were affected by the philosophical, legal, and moral principles involved in their culture. I received an expert and an Elder's affidavit delivered on behalf of the applicants and heard live evidence in open court from two Elders presented by the Litigation Management Committee of the Fund in support of the Legal Team. The evidence was subject to cross-examination as well (other than that of Elder Margaret Toulouse).

[135] There was little disagreement in the evidence of all four witnesses. For the applicants, the evidence stresses that all Anishinaabe interpersonal obligations and conduct are bounded by relationships. The idea of a bilateral commercial contract in which people bind themselves by law to specific conduct is unknown to Anishinaabe law and tradition. Rather, outcomes would be dictated by relational concepts like relative need, sharing, and reciprocity.

[136] In her trial decision at stage one of *Restoule*, Justice Hennessy explained:⁵

Like all organized societies, the Anishinaabe had their own system of governance that included governing laws and principles. The principles of governance were based

⁵ *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, 431 DLR (4th) 32, appeals allowed in part, 2021 ONCA 779, 466 D.L.R. (4th) 1, appeals allowed in part 2024 SCC 27, 494 D.L.R. (4th) 383, at para. 21.

on sacred laws, among other sources. According to Elder Fred Kelly, two of the organizing principles of Anishinaabe law and systems of governance were *gizhewaodiziwin* (life), where everything is alive and everything is sacred, and *gizhewaodiziwin* (the way of the Creator), which encompasses the seven grandfather teachings or seven sacred laws of creation. 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. [Notes omitted.]

- [137] The witnesses for the Fund discussed the same concepts but with a stress upon the idea of honouring one's commitments especially in light of the pipe ceremony which defined the parties' relationship to each other.
- [138] Elder Margaret Toulouse testified and offered her teachings in court. She is a member of the Crane Clan. She is a Knowledge-Keeper involved in the leadership of the Clan. She described some of the hardships under which she grew up. She said that Anishinaabe cultural practices were banned. The community is only now able to try to pick up some of the lost pieces and rituals from Elders.
- [139] Elder Margaret Toulouse is also a Pipe Carrier. She has responsibilities around practice, ritual, and teachings. Elder Margaret Toulouse explained that when a pipe ceremony is used for an agreement, the parties are offering their prayers to use wisdom, love, humility, and all seven teachings. All of creation is said to be with the participants. All of creation helps the parties have a firm and strong commitment. The pipe ceremony sanctifies and solemnizes the agreement. It is not necessary where parties are already in a relationship. It is needed for new relationships where strong prayers and increased solemnity are desired.
- [140] Elder Margaret Toulouse explained that the pipe ceremony means that all the participants will do all they can to keep their promises because they will feel all of creation and all their ancestors' presence in the relationship.
- [141] Elder Margaret Toulouse then discussed the concept of sharing as one of the seven teachings. It is a fundamental teaching to respect creation. It

means that “we only take what we need.” She explained that anyone who over-harvests depletes future growth.

- [142] She also discussed the teaching of humility. She said it is fundamental to look at others as a person like yourself. You trust them to perform their promises. In understanding promises, you must consider the purpose of the agreement and what the parties intended at the time. Then they must honour, respect, and tell the truth.
- [143] Elder Margaret Toulouse discussed gift-giving as well. She said that as Mother Earth has given us gifts, when we take a plant, we must always give something back. Gifts may be large or small. The value can increase to show appreciation for the other person.
- [144] Elder Margaret Toulouse was very appreciative of the Legal Team offering a gift of \$255 million. She was especially supportive of the lawyers’ goal to use some of the money to enhance Indigenous language education. She said she found it very appropriate for the Legal Team to gift identity to those who had lost their culture.
- [145] I also heard the evidence and teachings of Elder William Nelson Toulouse. He is a member of the Pipe Clan. He described the role of the Pipe Clan members to sit with leaders, to be a mediator if something goes wrong, and to be forward-looking as well.
- [146] Elder William Nelson Toulouse also described the cultural deprivation inflicted upon him and his community by the Church and the state while he was a child. His mother was taken to a residential school where she was mistreated. As a result he said, she did not know how to nurture her children. He described learning culture from life experience – essentially through working with his father and others in the community while striving to make a living to survive.
- [147] Elder William Nelson Toulouse described his significant involvement in programs aimed at revitalizing the Anishinaabemowin language(s). He discussed the difficulty obtaining funding for community education projects. He and others need funding to be able to work to create and implement programs to increase language education.
- [148] Elder William Nelson Toulouse also discussed some of the rocky roads that have been travelled for reform. He said that in the 1950s, their communities did not have the right to vote. But their communities were

safe. In the 1960s, especially with the advent of the *Canadian Bill of Rights*, SC 1960, c. 44, they obtained the right to vote. They also obtained a lifting of alcohol prohibition. This led to a period of serious dysfunction due to rampant alcoholism especially among youth. He said that many children were taken away due to bad behaviour at the time. There was also some movement to end the restrictions on ceremony and tradition. This enhanced the community's ability to help families in need.

- [149] Elder William Nelson Toulouse said that the receipt of settlement funds from the *Restoule* litigation has transformed lives. Dreams can be realized. But he also noted that with positive economic change there has also been some loss of tradition that he laments.
- [150] Elder William Nelson Toulouse said that the effect of the settlement itself was a big “win.” People who had been involved in trying to improve the community for decades thought they would never see the day when the Crown would approach them as equals under the Treaty. They can now use their language and practice their ceremonies.
- [151] Elder William Nelson Toulouse spoke of reciprocity – that both sides of the Treaty are important. While he appreciates the settlement funds, he said the recognition of traditional governance is the most important outcome to him.
- [152] Whether the settlement caused some additional reconciliation or *vice versa*, is not terribly important. Elder William Nelson Toulouse testified that the recognition of Anishinaabe governance and the settlement of the *Restoule* case now make the Robinson Huron Treaty an exercise in truth-telling and fulfilling promises as nations.
- [153] Elder William Nelson Toulouse was particularly pleased and supportive of the dedication of some of the proposed \$255 million gift from the Legal Team towards language education. He described the need for central control of language education to plan and to try to get individual Reserves to buy-in.
- [154] Elder William Nelson Toulouse agreed with the evidence for the applicants and Elder Margaret Toulouse that sharing and taking only what one needs are important and applicable teachings. He focused on the \$255 million being gifted by the Legal Team to the people to help prevent them from losing their language.

- [155] Finally, Elder William Nelson Toulouse indicated that while he supports traditional efforts to attain consensus, the voting procedures in the trust indenture are simply necessary for things to advance. He agreed that at the April 22, 2024 meeting there was no effort made to build consensus under Anishinaabe law. No Elders were brought in as allowed by the trust indenture. Moreover, he was at the meeting and is a Pipe Carrier. Yet he was not engaged to try to mediate a resolution among the Chiefs or the Trustees.
- [156] Neither Elder who testified in court discussed how paying \$255 million to six people is consistent with obligations that are always defined to some degree by considering relative need in Anishinaabe law and tradition. Moreover, while both Elders supported honouring commitments in the abstract, neither was asked to consider that the commitment to the Legal Team was always expressly subject to the *Solicitors Act*.
- [157] I am not trying to reach conclusions on issues under Anishinaabe law. I do not look to the Elders' knowledge for opinions about the *Solicitors Act* or the ultimate outcome of the issues before the court.
- [158] But in trying to understand differences between the approaches under Anishinaabe law and Ontario law, I asked Mr. Wardle why his client, representing a trust, would be taking a position supporting the Legal Team when the Trustees owe fiduciary duties to the 40,000 members who stand to gain from the Legal Team being held to fair and reasonable fees for services rendered. Perhaps that explains why the Fund is represented by its Litigation Management Committee instead of its Trustees before the court. In my view, they seem to continue to labour under the same misapprehension as when Mr. Peltier first studied and recommended the Partial Contingency Fee Agreement. They seem to think that the deal is that the lawyers get 5% and that they are duty and honour-bound to implement that deal.
- [159] But that was not the deal. If they thought that, then the correct legal principles under the *Solicitors Act* were not brought home to them by those advising them. The deal expressed in the Partial Contingency Fee Agreement was that the Legal Team would be paid 5% subject to s. 28.1 of the *Solicitors Act* and the usual controls and protections available at law. That means the lawyers' fees must always be fair and reasonable. They must be proportional based on the effort, risk, and outcome. And

they are subject to review by the court at the behest of the client or anyone who ultimately pays.

- [160] I am not purporting to tell the Fund Trustees, the Chiefs, or the First Nations how they should view their sense of honour and the application of Anishinaabe principles. But it is distinctly my role to interpret the retainer contract and to assess the reasonableness and lawfulness of the fees sought by the lawyers under Ontario law.

The Applicable Law

[161] The applicable provisions of the *Solicitors Act* are:

Enforcement of agreement

24 Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

Reopening of agreement

25 Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just.

[...]

Contingency fee agreements

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section.

Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful

disposition or completion of the matter in respect of which services are provided.

[162] There is also a regulation under the *Solicitors Act* that is relevant. The fifth point of clause 7(2) of *Contingency Fee Agreements*, O Reg 563/20, provides:

(2) In the case of a contingency fee agreement to which subsection (1) does not apply, the solicitor shall ensure that the agreement includes the following:

...

5. A statement that informs the client of the client's right to ask the Superior Court of Justice to assess and approve of the solicitor's bill, and that includes the applicable timelines for asking for the assessment set out under section 5 or clause 28.1 (11) (a) of the Act, as the case may be.

Issues

[163] The issues that I need to consider are:

- a. What is the effect of the Legal Team's conflict of interest?
- b. Is the Partial Contingency Fee Agreement fair and reasonable?
- c. What is the value of services rendered by the Legal Team based on the doctrine of *quantum meruit*?

Ontario Law Applies and the Legal Team Acted in Conflict of Interest Opining Otherwise

[164] In this proceeding the Legal Team accepts that Ontario law, specifically, ss. 24, 25, and 28.1 of the *Solicitors Act* apply to the interpretation and enforceability of the Partial Contingency Fee Agreement. This is despite the fact that in its second report, the Legal Team squeezed Ontario law between its opinion that Anishinaabe law applies to the Partial Contingency Fee Agreement and its view that its legal fees of \$510,000,000.00 were, "rightfully earned," under the agreement according to Anishinaabe law.

- [165] Steele J. of this court has already held that this assessment was to proceed under the *Solicitors Act*. *Nootchtai v. Nahwegahbow Corbiere Genoodmagejig*, 2024 ONSC 6088.
- [166] The Legal Team's acceptance of Ontario law is a clear indication that its second report was an advocacy piece presented to the clients as a formal legal opinion by the client's own lawyers. It was actually a settlement offer in which the Legal Team's personal interests were potentially adverse to the interests of the clients and were knowingly adverse to several of them who had spoken up already. It is stated to be an offer to settle "without prejudice." The approval resolutions of the Chiefs and the Trustees state that they were approving the fee settlements as proposed. The Trustees' resolution went further and expressly adopted the Legal Team's reports that include the legal opinions discussed.
- [167] I say this as this case calls out for independent legal advice. Ms. Corbiere twice gave advice to her clients that was simply incorrect expressly to pressure them to recognize her fees without obtaining independent legal advice. Funds for fees could have been parked readily in a trust account to allow the rest of the settlement funds to be disbursed while fees were discussed. Mr. Nahwegahbow agrees. She created false urgency to imperil the Funds' and the Chiefs' obvious priority to distribute the settlement funds. Ms. Corbiere implored her clients as "family" invoking the pipe ceremony to play on their honour without ensuring that they understood that assessing legal fees is both honourable under the applicable Ontario law and is expressly preserved in the contingency fee structure.
- [168] Mr. Nahwegahbow, for his part, at least recognized that he was in a conflict of interest and could not advise his clients on his fees. But he had already purported to give a written opinion that the Partial Contingency Fee Agreement is to be interpreted in accordance with Anishinaabe law despite its express terms importing Ontario law.
- [169] The Legal Team charged the clients and were paid for the two reports drafted to be the lawyers' advocacy and settlement offer for their success fee. They acted completely unaware of the difference between their personal interests and the clients' interests that they were duty-bound to protect.

- [170] After saying he could not give advice due to a conflict, Mr. Nahwegahbow then gave advice anyway and it too was incorrect and self-interested. He told the Trustees and Chiefs that their right to assess fees was lost because of the existence of the contingency agreement. The existence of this proceeding shows that the advice was incorrect when given. As set out above, the regulation under the *Solicitors Act* requires that contingency agreements must include a statement informing clients of their right to assess the lawyers' fees.
- [171] No one advised the Trustees about how their fiduciary duties to selflessly protect the interest of beneficiaries might impact the decision to accept the fee settlement offered. No one advised them that they could readily park the legal fees without delaying distribution of the settlement proceeds. No one advised them that a settlement offer could be refused or countered without any hint of dishonouring their contractual commitments. No one advised the Trustees or the Chiefs that under the Partial Contingency Fee Agreement the appropriateness of the fees claimed could be reviewed by the court despite Mr. Nahwegahbow's advice that he said he was not supposed to give because he was in a conflict of interest.
- [172] No one told the Trustees and the Chiefs that lawyers are not supposed to discourage assessment of fees. Encouraging fee assessment to ensure only lawful, fair, and reasonable fees are charged to clients is consonant with the honour of the legal profession.
- [173] I am not suggesting that there was any bad faith on the part of the Legal Team. That would make no sense in light of the amount of work performed over such a substantial period of time and with such great success. But, rather, this case is yet another indication of the insidious nature of conflicts of interest. It is simply human nature to believe we are acting in good faith even when in conflict of interest. But as just these few of the several examples in evidence show, counsel gave inapt advice when confronted with challenges to their personal interests.
- [174] Even the most well-meaning among us is subject to the invisible creep of conflict of interest robbing us of the clarity of independent judgment. My analysis below is set then in a relationship that is bounded in 2011 and 2024 with counsel not recognizing their own conflicts of interest and failing to ensure that the clients received proper, independent, objective advice on the transactions at hand.

- [175] The lack of independent legal advice alone does not make the fees sought or the Partial Contingency Fee Agreement *per se* unfair or unreasonable. But, where issues arise where the Legal Team acted in conflict of interest, in my view, the burden is on the Legal Team to show that the clients were as well advised as if they had received proper independent legal advice. Otherwise, the inferences will go against the lawyers.
- [176] On the same basis, while I respect the decision of the vast majority of Trustees and Chiefs to support the Legal Team, I cannot tell the degree to which those decisions made in 2011 and 2024 were infused with the conflicted and even wrong advice provided by their trusted Legal Team. I do not comment on the applicable principles of Anishinaabe law. But the absence of independent legal advice concerning the applicable law of Ontario, precludes me from assigning much weight to the majority approvals.
- [177] In cross-examination, Mr. Peltier swore that he did not see the conflict of interest with the Legal Team. He said that the Litigation Management Committee accepted the advice of the Legal Team that Anishinaabe law applies to the Partial Contingency Fee Agreement. They accepted the advice of the Legal Team that under Anishinaabe law they were required to pay the full amount of \$510,000,000.00 to honour their commitments even if they believed that the payment was too much. There was never any consideration of the relative needs of the parties under Anishinaabe law or otherwise.
- [178] I agree with Mr. Rosenberg's analogy that the Chiefs' and Trustees' approvals are built on a hill of sand. Since the approval of the Partial Contingency Fee Agreement in 2011 and acceptance of the settlement of the contingency fees proposed in 2024 were expressly premised in each case on conflicted legal advice, the approvals fall as the validity of the underpinnings collapse.
- [179] Justice Steele has already held that the minority First Nations represented by the applicants are entitled to ask a court to assess the lawfulness of the fees claimed by the Legal Team. The clients' consent is a factor, especially where client expectations may be considered in a *quantum meruit* analysis. But the consent is just one factor and it cannot have any real weight where the consent is borne of conflicted, and in some cases, wrong legal advice.

Assessing the Enforceability of a Contingency Fee Agreement

- [180] The parties recognize that the leading authority concerning an assessment of this type is *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, 2012 ONCA 496, 294 O.A.C. 333. In that case, the Court of Appeal focused on assessment of whether a contingency fee agreement is “fair and reasonable” as set out in s. 24 of the statute. At para. 13, the Court ruled:

...First, the fairness of the agreement is assessed as of the date it was entered into. Second, the reasonableness of the agreement is assessed as of the date of the hearing. A contingency fee agreement can only be declared void, or be cancelled and disregarded, where the court determines that it is either unfair or unreasonable.

- [181] The test is disjunctive. That is, the Partial Contingency Fee Agreement will be found to be void if it is either unfair at the date of its signing or unreasonable now. In my view, both conditions are met.

The Partial Contingency Fee Agreement Was Not Fair When It Was Signed.

- [182] Turning first to fairness, the Court of Appeal described the court’s concern as follows at para. 20 of *Hendricks-Hunter*:

The fairness requirement “is concerned with the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement that he or she executed” (*Raphael*, at para. 37). As noted above, the fairness of the agreement is determined as of the date the agreement was entered into.

- [183] I agree with the Legal Team that the Chiefs and their committee members who were negotiating the terms of the Legal Team’s retainer had enough experience with lawyers to have retained one if they wanted to do so. But they were not told by their lawyers that the Legal Team could not advise them on the proposed agreement and they needed independent legal advice especially because they were Trustees with fiduciary duties to beneficiaries and because of the sums involved. They thought they already had counsel on whom they could rely.

- [184] I have already found that neither side seems to have focussed on anything other than the percentage fee set out in the draft agreement. Yet, despite the apparent importance to the Chiefs of the lawyers' commitment to invest 50% of their legal fees in the case in view of the financial need of many of the First Nations, the terms of the Partial Contingency Fee Agreement did not fulfill the apparent commitment.
- [185] As I mentioned above, the Chiefs did not know what they did not know. There was no negotiation on the definition of the 50% proposed investment to be made by the Legal Team. The clause that allowed use of other lawyers at full rates was not subject to any preconditions, oversight, or prior approval for example. There could have been financial adjustments to protect the 50% investment rate or to minimize the financial strain on the Fund as that was important to the Chiefs.
- [186] The First Nations' financial need and impoverishment were a driving issue in the retainer of the Legal Team three years earlier. The Legal Team gave no advice to the Chiefs or their representatives about limiting their funding commitments to the 50% promised. No one advised them that the Fund could end up carrying over 80% of the cost of the case under the Partial Contingency Fee Agreement as drafted.
- [187] The signed agreement showed just one junior lawyer billing at a very low rate despite the Legal Team eventually using some 40 full-rate lawyers.
- [188] Fees billed by others overwhelmed the discounted fees by the Legal Team. The Legal Team's 50% discount turned into 25% of total hours billed (and less if one could calculate the profit obtained by the law firm on juniors' full-fee billings).
- [189] There was no discussion or negotiation around of the lawyers' funding beyond the 50% fee discount for the six members of the Legal Team. There was simply no discussion of the lawyers funding disbursements. There was no discussion of the lawyers indemnifying the Fund for adverse costs awards. Just by including disbursements in the math, the Chiefs were entering an agreement that left the Fund paying 81% of its costs of the litigation.
- [190] The Chiefs were not told by their lawyers that there were clauses other than the percentage of the settlement that mattered and were negotiable

concerning both the financial obligations of the client and the risk to the lawyers.

- [191] Of greatest significance, there was no discussion at all of the appropriateness or inappropriateness of the use of an uncapped percentage fee in a case thought to be worth at least hundreds of millions of dollars. The Chiefs negotiated a request for 15% down to 5% and thought they had done rather well. No one told them that the request for a percentage piece of the recovery was itself problematic in a case with anticipated recoveries in the hundreds of millions of dollars let alone the possibility of settlement or judgment in the billions of dollars.
- [192] To the contrary, when the client pushed back against the structure proposed by the Legal Team, Mr. Nahwegahbow threatened to quit. The Legal Team was three years into the piece already. Mr. Nahwegahbow agreed under cross-examination that he knew leaving the client would prejudice their interests at that stage (as would any change of lawyers). Recall that in view of the pipe ceremony having been used to consecrate the relationship, Mr. Peltier was of the view that he had no option but to make an agreement with the Legal Team.
- [193] I do not know if resigning was a real consideration or just a negotiating tactic by Mr. Nahwegahbow. It demonstrates yet again however, that no one was looking out solely for the interests of the First Nations and the Fund in the negotiation of the Partial Contingency Fee Agreement. Its counsel did not protect the financial priorities of the First Nations or advise them on the risks associated with various elements of the agreement they proposed.
- [194] I find that the Chiefs did not fully appreciate the nature of the agreement that they executed. They believed that the deal was that in return for the lawyers bearing 50% of the projected litigation cost, the Fund would pay a 5% contingency fee after the first \$100 million was paid at 15%. They did not appreciate that the agreement did not limit their funding obligations to 50%. They also did not understand that the amount of the contingent fee was always subject to assessment without in any way undermining the sanctity of the parties' commitments to each other.
- [195] No one told them that the draft agreement was champertous from the outset.

- [196] I do not know if the Chiefs thought the agreement was fair just because they felt they had to do a deal and they therefore reached the best consensus available (in light of the lawyers' threat to quit). They did not know that a percentage fee is not appropriate in a mega-fund case. There is no evidence that they knew that lawyers funding disbursements and costs were normal incidents of a contingency fee agreement. No one explored their goal to hold the lawyers to their 50% commitment or tested the First Nations' financial wherewithal to withstand the 81% of the litigation cost burden that was coming their way under this agreement.
- [197] I am not using hindsight. I recognize that no one knew in 2011 that 40 billers would be added or that disbursements would amount to \$6.5 million. Significant disbursements and staffing needs were predictable financial risks however. The point is that in 2011 no one even looked at the proposed terms of the agreement to protect the Fund and explain the nature of the risks and benefits under negotiation.
- [198] The Chiefs and Trustees could have retained lawyers. But there were not told by the lawyers on whom they relied and trusted that they should do so because the Legal Team was not in a position to advise them and did not advise them on points that were important.
- [199] For these reason I find that the Partial Contingency Fee Agreement was not fair when it was signed. The clients did not fully appreciate the risks being undertaken. The burden is on the Legal Team to prove that they did. All that was proven was that they clients understood that they had agreed to pay 5% of the settlement to the Legal Team. For the reasons set out above, that is not a full appreciation of the nature of the agreement.

The Partial Contingency Fee Agreement is also not Reasonable Today

- [200] Turning then to the reasonableness of the agreement, at para. 22 of *Hendricks-Hunter*, the Court of Appeal requires the court to consider the following four factors:
- (a) the time expended by the solicitor;
 - (b) the legal complexity of the matter at issue;

- (c) the results achieved; and
- (d) the risk assumed by the solicitor.

(a) Hours Expended

- [201] The lawyers docketed 65,000 hours over 17 years. That is a very long engagement that took a very substantial amount of work. However considering that much of the work centres around the two trials, the annual hours leading up to the trials are not extremely high. The Legal Team was able to take on other profitable work at the same time.
- [202] The Legal Team incurred \$23 million in billable time over its 17 years. Dividing \$23 million by 65,000 hours shows that the Legal Team billed at an average hourly rate of just above \$350 per hour. That is not a surprising figure given the high degree of delegation to juniors.
- [203] Dividing the \$510,000,000.00 claimed by 65,000 hours would yield an average hourly billable rate of more than \$7,800 per hour. Even looking at \$255 million, the average billing rate would be around \$3,900 per hour. Those rates would be a windfall that bear no relationship at all to the chargeable value of legal services in Ontario whether in 2007 or today.
- [204] The Legal Team notes that its regular hourly rates for its First Nations clients are quite modest. There is no evidence before me of what other firms charged First Nations, governments, or institutional clients with market power (like insurance companies) in 2007. I am unable to say that the regular rates charged by the Legal Team to the Fund in this case were another form of discount. They were certainly less than what mergers and acquisitions lawyers charged corporate clients for commercial transactions. But I cannot tell if they were simply regular, market-based rates based on what these clients were willing to pay in this locale at the time.

(b) Complexity

- [205] The complexity of the matter also weighs in favour of reasonableness. Mr. Rosenberg submits that the case was not that complex legally. The early opinions rendered by the Legal Team show that the Legal Team was very confident of success on both stages one and two of the trial. Although there was an old Privy Council case set against them, the Legal Team correctly recognized that the case could not reasonably survive the enactment of s. 35 of the *Canadian Charter of Rights and Freedoms*. Moreover, while not yet overwhelmingly adopted in the case law, the

concept of the honour of the Crown existed and was known to be available to the Legal Team. That position only got stronger as time passed and the case law coalesced around the enforceability of the Crown's treaty obligations.

- [206] Having read the decisions of the Court of Appeal for Ontario and the Supreme Court of Canada, it seems to me that the cases ultimately were quite complex legally.
- [207] The factual complexity of the case was also exceptionally high. Even dealing with how the parties were to be defined was an issue. The Legal Team used a representative action rather than a class action because they correctly determined that while the 40,000 members have rights under the Treaty, it is the First Nations themselves that hold the collectively expressed rights.
- [208] The practical upshot of this seemingly simple piece of Justice Hennessy's decision is quite profound. It means that the settlement proceeds go first to the First Nations. They may decide how to distribute the funds to members if so inclined. It also highlights that the Legal Team's offer to give \$255 million to the Fund was a direction of the settlement proceeds away from the First Nations and their members and towards the litigation device created by the lawyers. While the Chiefs of the First Nations have substantial roles in the Fund management, it means that minority First Nations, like those represented by the applicants, can see their shares of the settlement proceeds deflected to the control of the majority.
- [209] I discuss above the evidence of Elder William Nelson Toulouse who was especially supportive of directing funds to central control so he can continue his important language education work for years to come whether or not supported financially by individual Reserves.
- [210] I have already dealt with the incredible complexity of the evidence collection process for the *Restoule* case. The research projects to find written and oral evidence leave no room for much discussion of the case being anything but of the utmost factual complexity.

(c) The Result

- [211] The result achieved also speaks for itself. In approving the *Restoule* settlement agreement at \$10 billion, Chief Justice Morawetz referred to

the settlement as “historic.” See: *Mike Restoule v. The Attorney General of Canada*, 2024 ONSC 1127, at para. 13.

[212] I refer above to the evidence of both Elders Toulouse who discuss the transformative nature of the settlement on their communities and Anishinaabe culture in the Robinson Huron environs.

(d) The Risk Assumed by the Lawyers

[213] The assessment of risk is where the rubber hits the road. I find that the lawyers worked a lot, for a long time, on a factually complex case, in which they achieved a great result. But what did they risk to justify six people sharing \$510,000,000.00?

[214] The risk undertaken by the Legal Team was at the lowest end of risk in mega-fund cases. They risked ultimately 25% of their fees. They had no risk on disbursements. They bore no adverse costs awards risk. They were paid to help their clients obtain financing for their own fees for trial. So while they did carry some receivables for a few years (while slowing work when receivables got too high) they did not have the risk of the First Nations not being able to afford to pay if they lost the case.

[215] I agree with Mr. Rosenberg that the BMO loans de-risked the 75% of the fees being carried by the client.

[216] Some cases speak about lawyers putting their practices on hold while they “bet the firm” on the contingent outcome of a case. Here the Legal Team worked on many other prominent cases consistent with their expertise. Mr. Nahwegahbow devoted about 25% of his time to the *Restoule* case. By not billing 50% of his billable hours, he risked or invested about 12.5% or one-eighth of his annual fee billings. But, he had others working on the case at full rates. So while he was not billing his personal time, he was profiting on the time billed by others.⁶

⁶ The issue was argued principally from the perspective of the Nahwegahbow, Corbiere firm. Mr. Arvay has passed away. I have little evidence to allow a risk analysis from his perspective or that of other members of the Legal Team if they are different from the lead firm.

- [217] The facts of this case are readily contrasted with another recent case, *Imperial Tobacco Company Limited*, 2025 ONSC 4497. Although Chief Justice Morawetz held expressly and repeatedly that the case is a one-off or *sui generis*, counsel for the Legal Team says that it is for future cases to determine the use to be made of it as a precedent or a useful comparator.
- [218] In *Imperial Tobacco* the Chief Justice was asked to approve fees from the settlement in insolvency proceedings of successful Quebec class actions for damages incurred by smokers and government health budgets caused by tobacco.
- [219] Counsel sought about \$900 million in fees and reimbursement for disbursements in the aggregate representing about 22% of the \$4.1 billion settlement.
- [220] In *Imperial Tobacco*, the Chief Justice found as facts that several law firms had worked for 26 years expending just over 210,000 hours with a billable value of \$214 million. They funded tens of millions of dollars in disbursements themselves.
- [221] The lawyers went unpaid for 26 years. Their full fees were at risk. The contingent fees they sought, net of disbursements, were 3.81 times the fees put at risk by the lawyers.
- [222] No one opposed the fees sought in *Imperial Tobacco*.
- [223] The Chief Justice looked at the percentage claimed as well as the multiplier of funds at risk. He held that 22% was at the low end of class actions generally. He was also content that the four times multiplier on the ratio of unbilled fees to the fees sought was deservedly at the high end of that guideline as discussed by the Court of Appeal in *Fresco* and other cases.⁷

⁷ The Legal Team submits that the use of multipliers drawn from class action cases is not appropriate in this case because it is a representative action with fees being decided under the *Solicitors Act*. In my view the same principles apply generally as discussed in Footnote 2 above. Given the questions raised about the relative roles and rights of the 40,000 members, Chiefs, Trustees, and the Fund, in my view, principles that protect the interests of all

- [224] A fact that seemed to hold particular importance to the Chief Justice was that the lawyers' fees would effectively be borne by government (also plaintiffs) – none of whom opposed the fee approval. The recoveries of class action plaintiffs who had been injured by tobacco were fixed in the class actions. The injured patients would not receive any further money regardless of how much the lawyers were paid.
- [225] In this case, anything not paid to the lawyers (and through them to the Fund) will go to the First Nations and potentially to individual members as each First Nation decides.
- [226] The Legal Team submits that the two First Nations represented by the applicants account for only a very small share of the \$10 billion settlement and an even lesser share of the legal fees. I do not see how that is relevant at this stage. If I find that the Partial Contingency Fee Agreement is invalid, then the funds will be available to the Fund to presumably pay to First Nations. There is no evidence concerning what the other 19 First Nations will do with their recovery. I am not told that any have bound themselves to give settlement money received back to the Fund for example. I do not know if there are any legal or practical limits on the 19 First Nations' ability to fund the Fund with money they receive. Moreover, it is not at all clear to me that the lawyers can accept funds even if the other 19 First Nations wanted to pay them after this decision is made.⁸

beneficiaries who are represented by others in litigation and which protect the integrity of the legal profession are equally apt here. Moreover, the multiplier approach is just a cross-check or guideline in any case. There is no reason not to consider it as a data point.

⁸ During the hearing of this fee review, there was some discussion of whether First Nations that wish to give more money to the Legal Team might still do so as a gift regardless of this decision. I leave to others whether a lawyer or a law firm is entitled to accept a gift or other payment from a client, or a beneficiary of a client trust, in appreciation of services rendered in circumstances where a court has already set the amount of the fair and reasonable fees to which the firm is entitled at law.

[227] In all then, although the applicants themselves represent only a small portion of the settlement funds and costs involved, there is no telling at this stage how much of the money saved in legal fees will ultimately go to and stay with First Nations and their members regardless of the majority support for the Partial Contingency Fee Agreement.

[228] Ultimately Chief Justice Morawetz held:

[69] To state the obvious, the fee request is astronomical. But is there any principled basis on which the fee can be or should be reduced? The work was done pursuant to a written agreement. The work was well done and produced an exceptional result. The risk assumed by QCAP Counsel was significant and a premium, by way of a multiplier, is, in my view, justified.

[70] And, if there was a significant reduction, where would the money go? Subject to the proviso described below, it would not go to the benefit of the QCAPs. The funds would not go to the benefit of other class action plaintiffs. It would go to the provinces and territories, all of whom, with the exception of Québec, took no position on this motion.

[71] It also must be recognized that a significant amount of the funds awarded to counsel will find their way back to the government treasuries through taxation.

[72] This leads me to conclude that, from the standpoint of the class and the provinces and territories, the fee request of QCAP counsel cannot be said to be unreasonable.

[73] The fee request of \$909 million is unheard of in Canadian legal history. As previously stated, this is a unique case and this decision should never be considered to have any precedential value.

[74] Taking all the foregoing into account, I am unable to find a principled basis on which to reduce the fee request. Further, even if there was a significant reduction, the amount awarded will still be enormous.

- [229] Even if *Imperial Tobacco* could be used as a precedent, it does not help the Legal Team. While a 5% contingency rate is very low, it is clear that the percentage rate is not an effective measure of reasonableness in mega-fund cases. In a mega-fund settlement a percentage recovery is infused with the risks of champerty.
- [230] The multiplier in *Imperial Tobacco* was near the practical maximum of four times the funds at risk. Here the Legal Team seeks a multiplier of about 88 times its funds at risk.⁹
- [231] In *Imperial Tobacco* there was no question about fairness of the contingency fee agreements when entered into. They were class action personal injury agreements with counsel bearing 100% of the financial risk.
- [232] The Chief Justice made the point that there has to be a principled basis for any legal decision whether *sui generis* or not.
- [233] The Legal Team makes much of their offer to share half of the contingency fee claimed. If the gift is to be seen as a bow to cultural practice, there is no explanation of the derivation of the amount of the gift. Elder Margaret Toulouse discussed differing amounts of gifts in her evidence. At \$255 million, there is no discussion in any evidence about the relative need of the six members of the Legal Team to take and keep \$255 million or \$42.5 million each as compared to the needs of the community.
- [234] I find it troubling too that in offering to share their fees with the Fund, the Legal Team has set out defined uses. One of the uses is to pay the Legal Team's fees for the ongoing piece of the *Restoule* litigation. While there would be nothing wrong with the Fund deciding to set aside money for future legal fees if allowed to do so by its trust indenture, the Legal Team apparently does not see the self-interested nature of their offer to make that decision for the Fund to benefit themselves.
- [235] Although in its second report the Legal Team refers to its offer as a dedication of "1/2 of its total fees of \$510 M they rightfully earned," in

⁹ \$510,000,000.00 / 5,780,000.00 = 88.24

this proceeding, the Legal Team now treats its offer as a reduction of its legal fees to \$255 million.

- [236] The fee claimed cannot be seen to be \$255 million though, as that would leave nothing for the Legal Team to gift to the Fund. For its proposed gift strategy to work, the fee must be recognized at the full \$510,000,000.00 claimed under the Partial Contingency Fee Agreement.
- [237] But, counsel for the Legal Team was also clear in submitting that if I do not accept the fees at \$510,000,000.00 under the Partial Contingency Fee Agreement as drafted, then the Legal Team only seeks fees of \$255 million on a *quantum meruit* basis. That is, the Legal Team submits that the fair and reasonable value of its legal services on a *quantum meruit* basis is \$255 million.
- [238] In my view, this is an implicit concession that the fees sought under the Partial Contingent Fee Agreement are not reasonable. If a lawyer submits the fair and reasonable value of the legal services rendered is \$X, then *a fortiori*, a fee of \$2X cannot be reasonable. A fee that is double the lawyers' submission of the amount that is fair and reasonable cannot be reasonable by definition.
- [239] In my view, the Partial Contingency Fee Agreement's use of a percentage fee in this mega-fund case is not reasonable because it produces a fee that is not proportional to the time, value, success, or especially the risk undertaken. That is, even if a percentage fee might have been fairer before the value of the case was truly known, it cannot be reasonable when measured today in face of the \$10 billion settlement.
- [240] The facts that the funds are coming from (or will be going to) the beneficiaries and especially that 15 of the First Nations stand to receive less from the settlement than the \$510,000,000.00 sought by the Legal Team makes the Partial Contingency Fee Agreement unreasonable and one that would undermine the integrity of the profession.
- [241] The multiplier of 88 times the funds at risk supports the analysis that the fee claimed is not reasonable.
- [242] In *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, at para. 51, Belobaba J wrote:

Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of

scale, will result in windfalls. Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.
[Notes omitted.]

[243] I adopt these important words. In this case, the Legal Team is seeking generational wealth at the expense of the 40,000 beneficiaries whom they serve. That is not reasonable and it shines no honour upon them.

[244] Based on time, complexity, and result, high fees are deserved. Based on the key factor of risk, a lower reward is apt. Combined with an assessment of proportionality between the fee claimed and the settlement amount as discussed in *Fresco*, the disproportionate windfall claimed by the Legal Team under the Partial Contingency Fee Agreement is unreasonable.

[245] The Partial Contingency Fee Agreement is therefore unenforceable.

Quantum Meruit Fee Assessment

[246] I turn then to assessing the fair and reasonable value of the legal services rendered by the Legal Team. I agree with Ms. Angelova, that this is an assessment of the value of the work separate and apart from considerations of the invalidated contingency fee agreement.

[247] I also agree with Ms. Angelova, that limiting the Legal Team to its billable hours and rates would not adequately or reasonably recognize the value of its services. I agree with her as well that an assessment of the fair and reasonable value of legal services is not a mechanical exercise of multiplying hours worked by applicable hourly rates.

[248] Rather, assessing the value of legal services on a *quantum meruit* basis involves a contextual and holistic evaluation and balancing of numerous factors. In *Newell v. Sax*, 2019 ONCA 455, the Court of Appeal put it this way:

[40] In solicitors' assessments, the relevant circumstances are usually examined in reference to the well-established criteria articulated by this court in *Cohen v. Kealey* (1985), 10 O.A.C. 344 (C.A.), at p. 346. These criteria involve factors beyond a mathematical calculation of a solicitor's time records and turn on the evidence underlying them:

1. The time expended by the solicitor;
2. The legal complexity of the matter dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The reasonable expectation of the client as to the amount of fees.

[249] I have dealt with all of these factors already except the clients' reasonable expectations. The first seven factors all weigh in the lawyers' favour. They did a great job. The matter was complex. The Legal Team assumed responsibilities far beyond the average litigator who has a file delivered to her desk wrapped in red tape. The monetary value is mega-fund. The importance to the client was also at the highest end of any range of importance. Their nationhood and their ability to reinvigorate their culture were at stake. The lawyers displayed the top-notch, specialized skill for which they were retained. The result was a beyond anyone's reasonable expectation at the outset.

[250] With the settlement in hand, there is no issue raised today about the clients' ability to pay.

[251] The clients' reasonable expectation also favours a higher fee. While I cannot find that they *reasonably* expected to pay \$510,000,000.00 under an unreasonable agreement, they were willing and able to pay liberally assessed fair and reasonable fees for excellent services rendered. They never challenged a single docket entry despite the applicants pointing to a few that probably ought not to have been billed by the lawyers.

- [252] Ms. Angelova points to a letter sent on behalf of one of the applicant First Nations to their colleagues suggesting that limiting the Legal Team to a reasonable fee could yield another \$20 million for each First Nation. She submits that this means that the applicants accept the reasonableness of a fee of approximately \$118 million calculated by reducing the \$510,000,000.00 claimed by \$20 million for each of the 21 First Nations.¹⁰
- [253] In my view however, counsel is reading too much into a letter among the clients in which the minority is seeking to explain itself and soliciting support. There was no calculation made or intended. The amounts to be paid to each First Nation will not be the same under the Compensation Distribution Agreement. It is apparent that the applicant was speaking in orders of magnitude rather than making any admission in this letter.
- [254] The difficulty I am having is finding a principled basis on which to set a fee recognizing that all the *Cohen v Kealey* factors favour counsel. I am trying as well to avoid arbitrariness and pure subjectivity.
- [255] The Legal Team says that the fair and reasonable fee is \$255 million as that amount has already been paid to it by the Fund. But that invites me back into the contingency fee agreement that counsel rightly submits plays no role in this part of the analysis.
- [256] A fee of \$255 million works out to just over \$3,900 per hour for every billable hour worked by all counsel. There is no precedent or principle on which that can be found to be a reasonable value for legal services rendered in 2007 or 2025.
- [257] Alternatively, Ms. Angelova submits that 19 of the First Nations are content with their shares of the fees billed at \$255 million. The applicants' share would be approximately \$20.4 million. Any reduction, she submits should be to that piece only.
- [258] I cannot accept the alternative either, however. To reduce the amount payable by the applicants requires me to find that the services rendered

¹⁰ The math worked out to about \$118,000,000 based on calculations using the final amount of the settlement funds actually paid by the governments yielding fees of \$538,000,000.00 rather than \$510,000,000.00 that is used throughout for convenience and consistency.

have a fair and reasonable value and then attribute a proportionate piece of that value to the applicants. That would then leave the majority paying lawyers in excess of fair and reasonable fees set by the court. As discussed above, I am not making any findings about what First Nations or others may do with their settlement funds once received. But I cannot be setting fees for 19 First Nations and their members that exceed the fair and reasonable fees to which the lawyers are entitled by law.

- [259] Perhaps the clients' consent has more sway here in trying to set a fair value for counsel's services. I accept that the bulk of the First Nations are content for the Fund to pay more than it has paid, to be sure. But with the underpinnings of the consents thoroughly undermined, I cannot accord more weight to the position of the Litigation Management Committee than just to recognize that it is content to pay more than \$17 million in fees to recognize the outstanding results.
- [260] To assess the value of the services rendered, in my view, I am to consider what a reasonable client would expect to pay and a reasonable lawyer would require for fees on the factors set out above. There would be no fee discount in the absence of a contingency or success fee arrangement. Fees would likely be measured by hours and rates by the parties. Market forces allowing, counsel may demand high rates to reflect their expertise and the complexity of the case. At the end of the day counsel may request an extra premium to reflect the outstanding outcome.¹¹
- [261] Risk plays no role in a *quantum meruit* assessment because there is no contingent fee reward premised on counsel bearing risk for the client. The purpose of an assessment *quantum meruit* is to measure the value of services rendered rather than rewarding risk.
- [262] I accept the submission of Mr. Rosenberg for the applicants that doubling the Legal Team's billable fees is an excellent reflection of the top dollar recognition of all the relevant factors in this case. I am not aware of any other case where a court has doubled billable fees without a contingency

¹¹ I was not provided with any precedents on the law applicable when counsel has no contingency fee agreement but asks for a success fee or premium billing at the end of a case due to excellent results achieved. See, for example: *Confederation Treasury Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont SC).

or success fee agreement and based solely on a *Cohen v Kealey* assessment *quantum meruit*.

- [263] There are no perfect cross-checks. The percentage recovery is a meaningless number in a mega-fund case of this magnitude. The maximum multiplier of fees at risk is generally four. But this is a *quantum meruit* assessment that does not include risk as a factor. So the multiplier does not apply.
- [264] Most cases also say that comparing fees to other cases is also of limited use as each has its own particular melange of facts and applicable principles.¹²
- [265] Having said that, I do conclude with another case, but for a specific purpose. *Moushoom v. Canada (Attorney General)*, 2023 FC 1739, involved class actions arising from the residential schools. Aylen J. wrote that the \$23 billion dollar settlement in that case was the largest settlement in Canadian history. Nahwegahbow Corbiere were part of the counsel consortium acting for the Assembly of First Nations. Its fee agreement entitled it to a percentage recovery but subject to an \$80 million cap before trial and a \$100 million cap after the commencement of trial. Eschewing both percentages and multipliers, Aylen J looked principally at the risk assumed and the results achieved and set total fees of counsel at \$40 million.
- [266] My point in referring to the case is that I recognize that extra fees of \$23 million on a claim of \$510 million may seem small by comparison. But what that misses is that these are huge numbers being bandied about. No lawyer can reasonably expect to take advantage of a windfall or lottery ticket to claim \$85 million a head (\$510 million in the aggregate). While the \$10 billion settlement in this case was indeed spectacular, it is still less than outcome achieved in *Moushoom*. Yet even in that monster-of-all-cases, the court capped fees at \$40 million.

¹² See, for example, the decision of Perell J. at first instance in *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335, at para. 136 with which I agree. The Chief Justice also made this point in *Imperial Tobacco*.

- [267] A court telling a group of lawyers that the value of their fees is double what they charged is a spectacular outcome unless one is comparing it to an utterly unrealistic claim. I point to *Moushoom* only to show that these lawyers are doing as well as those in a case that was even larger and had risk. The facts and applicable principles in the two cases are very different. But it demonstrates a practical reality that \$40 million is a huge amount of money for a fee assessment.

Order

- [268] The Legal Team has already been paid \$255 million. The funds were paid with some haste despite the Fund and the Legal Team knowing that there was dissent. The Fund has held the other \$255 million that the Legal Team proposed to gift to it.
- [269] I trust at first instance that the Legal Team has not tried to move the contested funds beyond the reach of the clients or the court. I order the respondent Legal Team members and the estate of Mr. Arvay forthwith to refund to the Fund the excess \$232 million over and above the \$23 million extra fee approved in this decision.
- [270] In addition, the funds being held by the Fund in relation to the gift by the Legal Team are to be released to be dealt with as settlement proceeds by the Fund.
- [271] If all \$510,000,000.00 is deposited into segregated trust account(s) forthwith, I can be approached about a stay of this order for a period of time pending a motion for a stay pending appeal being brought in the appropriate appellate court.
- [272] This order is effective immediately despite there not yet being a formal order signed.
- [273] Counsel are to cooperate on the wording of a formal order that contains the operative terms set out in this section of the Reasons for Decision.

Costs

- [274] The applicants may deliver costs submissions by November 7, 2025. The Legal Team may deliver costs submissions by November 21, 2025. If one or both of the foregoing seek costs against the Litigation Management Committee, the Fund, or its Trustees, then the target(s) may deliver submissions by December 5, 2025.
- [275] Costs submissions shall be no longer than 2,500 words. Pages are to be double-spaced with regular margins typed at a minimum font size of 12-points (including footnotes if any). Parties may also deliver copies of any offers to settle on which they rely for costs purposes.

FL Myers J

Released: October 28. 2025

CITATION: Nootchtai v. Nahwegahbow Corbiere Genoodmagejig Barristers
and Solicitors, 2025 ONSC 6071

COURT FILE NO.: CV-24-00721782-00ES

DATE: 20251028

2025 ONSC 6071 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Gimaa (Chief) Craig Nootchtai on his own
behalf, and on behalf of Atikameksheng
Anishnawbek First Nation, and Ogimaa Kwe
(Chief) Karen Bell and Councillor Chester
Langille on their own behalf, and on behalf of
Garden River First Nation

Applicants

– and –

Nahwegahbow Corbiere Genoodmagejig
Barristers and Solicitors, David
Nahwegahbow, Dianne Corbiere, Roger
Jones, Mark Stevenson, Donald Worme, and
Connie Addario, Mike Restoule, Peter
Recollet, Duke Peltier, Angus Toulouse, Patsy
Corbiere, and Wilma Johnson-Lee

Respondents

REASONS FOR DECISION

FL Myers J

Released: October 28, 2025