Indigenous groups argue at the Supreme Court of Canada they are owed billions in historical redress

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The Supreme Court of Canada is being asked to order financial redress worth as much as $126-billion to First Nations in Northern Ontario over broken treaty promises more than a century old. Taken together with another broken-promise case, heard last month, it is among the most important reconciliation matters the Supreme Court has heard in recent years.

On Tuesday, the country's top court heard a case brought by 21 First Nations that ceded lands roughly the size of France in an 1850 treaty. In return, among other things, their members received an annuity, which was to have been augmented as economic conditions allowed – but which has been stuck at $4 a person per year since 1875.

Two lower courts have said thousands of Anishinaabe people on the northern shores of Lake Superior and Lake Huron, in an area stretching north to Hudson Bay, are owed compensation. They said the Indigenous communities were left impoverished by the failure of government to increase the annuity, in breach of the 1850 promise. The roughly 35,000 beneficiaries say they missed out on wealth generated by minerals, lumber, lands and waters.

Last month, the Supreme Court heard a separate case from Southern Alberta about a broken promise from the federal Crown in the 1870s to turn over a certain amount of land based on the population of the Blood Tribe. No hearings have been held yet on damages.

In both cases, the governments involved told the Supreme Court that they admit they reneged on their promises. Yet in both, those governments said the court's role is not to order financial damages, but to issue a declaration guiding the parties in negotiations over the appropriate amount.

"I recognize that 150 years of failure to address the augmentation after 1875 is a failure of the honour of the Crown," Ontario's lawyer, Peter Griffin, said in response to a question from the first and only Indigenous member of the Supreme Court, Michelle O'Bonsawin.

"I'm not trying to make an argument here that asks for absolution."

But, he said, the job of courts is to guide negotiations by declaring the principles that apply, rather than assessing and ordering financial awards. He said he understands that Ontario will be asked: "Given 150 years of failure, what assurance do we have that you're going to do the job?"

His response was to point to a $10-billion proposed settlement with two of the 23 First Nations that initially brought the case in a lower court, with the cost to be split between Ottawa and Ontario. "Reconciliation doesn't happen in a courtroom," he said, citing a previous Supreme Court ruling that made this point.

Justice Sheilah Martin replied, "Accountability takes place in a courtroom." In the Alberta case last month pitting the federal Crown against the Blood Tribe, Justice Martin accused Ottawa of wanting Indigenous communities to come to government as "supplicants."

Justice Mary Moreau, in her first hearing since being appointed to the court by Prime Minister Justin Trudeau, asked Mr. Griffin on Tuesday why the government did not offer deadlines when saying it would negotiate.

"That's a fair point," he replied.

A lower court has held hearings on the appropriate financial award for revenue-sharing with the First Nations. The hearing at the Supreme Court is not about the amount of the award but whether judges may order damages in the case.

Justice Mahmud Jamal questioned whether courts had the expertise to set damages in such a case. The amount at stake is roughly between $10-billlion

and $126-billion, he noted. “How is that going to be a legal determination rather than a number plucked out of the air? How is a court equipped to make that determination?” Justice Jamal asked.

The response from Catherine Boies Parker, a lawyer representing Anishinaabe peoples who are part of the proposed $10-billion settlement: “The Crown doesn’t get to ignore its treaty obligations for 170 years and then come and say, ‘Just give us a bit more time.’” She added that the proposed settlement was achieved on the courthouse steps just as the session on damages was to begin in a lower court.

Lawyer Harley Schachter, representing Red Rock and Whitesand First Nations, said Ontario took the position on damages at a lower court that there was no revenue to share with the Indigenous communities, but rather a loss of up to $11-billion. “We saw the honour of the Crown on display and it was a sorry sight, if I can say so.” He said a Nobel Prize-winning economist, Joseph Stiglitz, had testified that up to $126-billion was fair compensation.

But Justice Malcolm Rowe said courts need a legal methodology to assess such things. “You don’t pluck these things out of the air and say, ‘I’ve got a guy who’s got a Nobel Prize, I win.’”

The federal government did not appeal Ontario Superior Court Justice Patricia Hennessy’s 2018 ruling that the Crown had acted without honour in failing to meet its obligations to review and augment the annuity. Zoe Oxaal, representing Ottawa on Tuesday, said courts may order financial compensation to recognize the honour of the Crown – but not to fully make up for the losses suffered.

To which “the working man/woman” says, “Are you trying to bankrupt the country? Me? Do you care? Or are you just after all the money you can get, d_mn everyone else, with moral failures of your own (you are nevertheless “entitled” to indulge)?” The fact, rather, is that the people who have benefitted the most from this dishonest and ruthless exploitation of Canadian peoples and resources—the wealthy, banks, resource industries, (those ubiquitous, nameless, courted) “investors”—should be the ones who pay compensation disproportionately. But this might cut into profits, dividends, share prices, pension funds, driving those stateless investors away. It will be left to ordinary Canadians to pay, only riling relations with Indigenous people all the more. What leaders will span this divide to actually seek and serve justice for all? TJB