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Our file No. 2530

Case Brief: *Ontario v. Restoule*, 2024 SCC 27

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What This Case Is About

On July 26, 2024, the Supreme Court of Canada (the “Court”) released its decision in *Ontario (Attorney General) v. Restoule*.¹ This case is about the interpretation of the annuity clause in the Robinson-Superior and Robinson-Huron Treaties (the “Treaties”).

The Treaties were negotiated in 1850 and provide for the surrender of a large portion of northern shore of Lake Huron in Ontario in exchange for promises including continued hunting and fishing rights, a lump sum payment, and an annual payment to the Anishinaabe (the “annuity”).

The Treaties are unique in that they contain an express augmentation clause linked to revenues from the territory. All levels of court held the Treaties’ augmentation clause created a collective promise to share in the wealth of the land. They differed with respect to whether there was a cap on the total annuity amount or merely on the maximum amount of the annuity that could be distributed to individuals.

What the Court Decided

The unanimous decision of the Court, written by Justice Jamal, allowed Ontario’s appeals in part.

The Court held the Treaties oblige the Crown to increase the annuity when economic circumstances warrant it, but only up to the equivalent of \$4 per person (the “soft cap”). Beyond the soft cap, the Crown has a duty to consider, from time to time, whether it can increase the annuities further without incurring loss. If it can, the Crown must exercise its discretion as to whether to increase the annuities and, if so, by how much.

This Crown discretion is not unfettered and must be exercised liberally, justly, and in a manner consistent with the honour of Crown, while engaging in an ongoing relationship based on Anishinaabe values of respect, responsibility, reciprocity, and renewal.

¹ *Ontario (Attorney General) v. Restoule*, 2024 SCC 27.

The Court upheld the finding that the Crown had a duty to implement the augmentation clause and failed to do so for the past 150 years. However, the Court did not declare how much should be paid to the Anishinaabe. Instead, the Court ordered the Crown to negotiate for six months and then set the amount of compensation owed. That amount and the process through which it is arrived at is judicially reviewable.

The factors that should be considered in determining compensation include (para. 271):

- the nature and severity of the breaches;
- the number of treaty beneficiaries and their needs;
- the benefits the Crown has received from the territory and its expenses over time;
- the wider needs of other Canadians; and
- the principles and requirements flowing from the honour of the Crown.

The Court also held that Ontario limitations legislation does not bar the claims. The limitations legislation applies only to a closed list of enumerated causes of action, none of which apply to treaty claims. Treaty claims are not based in tort or contract but on constitutional rights, which engage issues of public law rather than private law.

Why This Case Matters

The Crown has often ignored historic treaty promises or interpreted them in a way that minimizes the Crown's obligations to the detriment of Indigenous peoples. Not only does this decision reaffirm that treaty promises must be interpreted in a way that best reflects the common intention of both parties, it also confirms the plaintiffs are not statute-barred from bringing their breach of treaty claims. For historic grievances of Indigenous peoples, this is a significant decision.

One cause for concern is the Court's reliance on the constitutional nature of historic treaties to justify it in exercising a "wide latitude to correct errors" made by lower courts (para. 104). This wide latitude may signal to parties that trial is no longer the main event and encourage costly and prolonged litigation rather than negotiation. This would be unfortunate given the Court's repeated observation that reconciliation and a renewed treaty relationship are best achieved outside the courtroom (para. 303).

Finally, the financial implications of *Restoule* are enormous. The Huron Treaty plaintiffs reached a \$10-billion settlement prior to the release of this decision. The decision orders the Crown to determine an amount of honourable compensation owed to the Superior Treaty plaintiffs. It remains to be seen how the Crown will exercise its discretion regarding future increases to the annuity payment.