Supreme Court of Canada Says Crown Must Adjust Treaty Payments: Ontario (Attorney General) v. Restoule

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In 1850 the Anishinaabe of Lake Huron and Lake Superior made treaties with the Crown. In exchange for ceding their land, the Anishinaabe received, among other things, the promise of annual annuity payments. At the time, the annual payments worked out to less than $2 per person; however, these treaties contained terms that have come to be referred to as “augmentation clauses”. The augmentation clauses provided that the Crown could exercise its discretion to increase the annual annuity so long as the Crown was not incurring a loss. The annual amount paid to each individual member was limited to £1, or “such further sum as Her Majesty may be graciously pleased to order”. This obligation was set out in the Robinson-Huron Treaty as follows:

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

The annuities were increased to $4 per person in 1875, but never increased since.

In 2001 the affected treaty beneficiaries launched a claim against Ontario and Canada seeking a declaration that the treaty payments ought to have been increased over time. They also looked for confirmation that the claim was not barred by Ontario limitation of actions law. Lastly, they looked to recover damages and sought quantification of those damages and an order as to how responsibility for payment of damages ought to be apportioned between Ontario and Canada. A big part of the claim was based on the benefit received by Canada

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and Ontario from the land that was ceded.

The issues were ultimately heard by the Supreme Court of Canada, whose unanimous decision written by Justice Jamal was delivered on June 26, 2024. By that time the Robinson-Huron beneficiaries had settled their claim against Canada and Ontario for $10 billion. The Robinson-Superior beneficiaries did not settle and claimed $126 billion in compensation.

On the limitation question, the Court decided that Ontario's limitations legislation does not apply to treaties; therefore, the claim by the First Nations was not statute-barred.

On the main issue of liability, the Court concluded that the Crown was under an obligation to live up to its obligation to diligently exercise proper discretion in applying the augmentation clauses and to consider increases to annual payments accordingly. The Court held that although the Crown did not have a fiduciary duty in favour of the treaty beneficiaries, it did have a duty under the treaties to fulfil its promises. For Canada and Ontario, to do otherwise would be contrary to the honour of the Crown and would render its treaty obligations "hollow". Canada and Ontario were therefore required to participate in a process to determine an amount to compensate the Robinson-Superior beneficiaries for the past breaches of the augmentation clause from 1875 to the present.

Given that the application of the augmentation clauses was described in the treaties as being discretionary, the Court did not determine damages for the breach of promise. The Court instead directed the Crown to exercise its discretion through honourable engagement with its treaty partners in arriving at the appropriate payment amount. The parties were given six months to complete that process.

The Court also held that the Crown's determination of the amount to be paid, through the executive branch of government, and its reasoning in making that determination would be subject to review by the courts. Court review would ensure that the Crown exercised its discretion in accordance with its treaty obligations and the constitutional principle of the honour of the Crown. Finally, if the parties did not come to agreement, the final determination of compensation could be referred back to the courts.

What this decision means outside of Ontario is the subject of much discussion and pending litigation. First, limitation of actions legislation differs between provinces. Some provincial limitation legislation has a "basket clause" which shuts the door on any claims brought after a certain period of time. Second, language varies between treaties. Most of Western Canada falls under the "numbered treaties" made between Canada and First Nations between 1871 and 1921. They are all similar in format, but there is variation in language.

For instance, Treaty 1 provides for annuity payments as follows:

> … pay to each Indian family of five persons the sum of fifteen dollars Canadian currency, or in like proportion for a larger or smaller family, such payment to be made

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> in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine or traps, at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash.

Treaty 7's language is different again:

> Her Majesty … will cause to be paid …, in cash, … to each Chief, twenty-five dollars, each minor Chief or Councillor …, fifteen dollars, and to every other …, five dollars; the same, unless there be some exceptional reason, to be paid to the heads of families for those belonging thereto.

What is abundantly clear is that this decision directs courts in Canada on how to interpret historic treaties. They are not to be interpreted in a strict, technical sense. Any ambiguities are to be interpreted in favour of the Indigenous peoples. The courts must be sensitive to differences in language and the meaning of the words to the parties at the time the treaty was signed. The correct interpretation should be the one that best reconciles the interests of both parties at the time that the treaty was signed. The process of interpretation must presume the honour of the Crown. The court should first consider the range of possible interpretations and then consider the interpretations in the historical context and cultural backdrop of the treaty. Treaties are to be considered nation-to-nation agreements.

The ongoing consideration and interpretation of treaties by the courts in Canada are likely to have profound implications on the sharing of resource wealth and on accounting for unmet historic obligations.

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