Robinson Huron Treaty Annuity Case Decided in Favour of the First Nations
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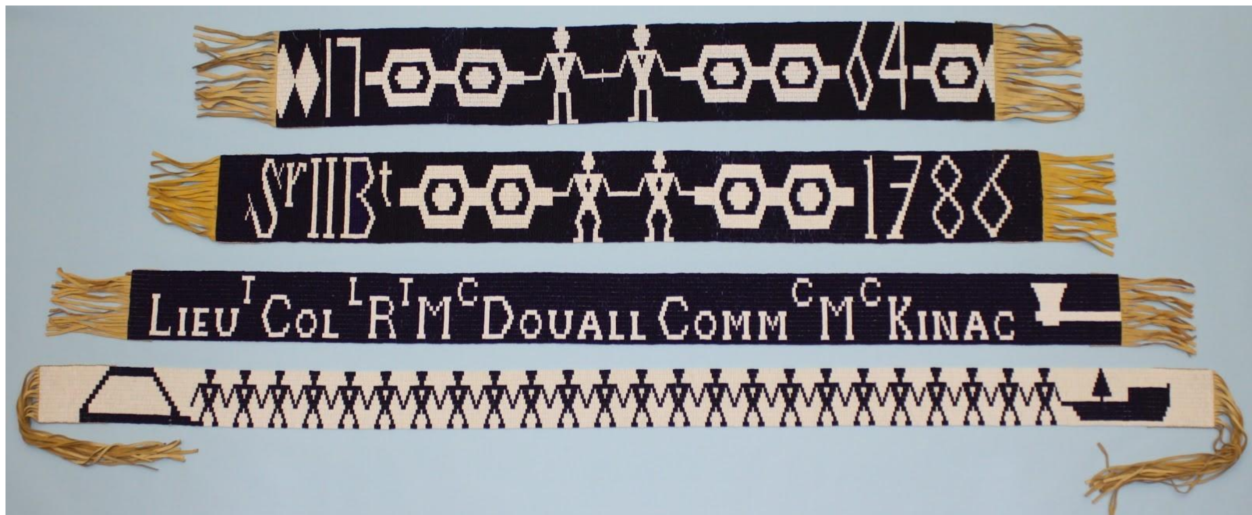
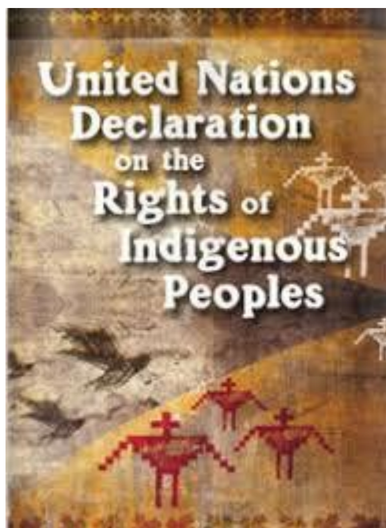
COURT DECISION
APPEAL PROCESS
CURRENT NEGOTIATIONS
ANISHINAABE SOVEREIGNTY
NEXT STEPS





COURT DECISION

On December 21, 2018, Justice Hennessey released her Judgment in Stage 1 of the Robinson-Huron Annuities Claim. The Court ruled that the Crown has a mandatory and reviewable constitutional obligation to increase the annuity to reflect the economic value the Crown receives from the territory. The Court found that since 1850 the Crown has acted in a way that has seriously undermined their duty of honour, which left the Treaty's promises completely forgotten by the Crown.

> *[3] I find that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant. The economic circumstances will trigger an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss. The principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown the obligation to diligently implement the Treaties' promise to achieve their purpose (i.e. of reflecting the value of the territories in the annuities) and other related justiciable duties.*

A critical component of the Robinson-Huron Treaty is the 'annuity' provision. By entering into the treaty, the Chiefs, in 1850, agreed to share lands and resources with the newcomers and in return, the Crown promised to pay annuities which were to be increased throughout the years. Currently, treaty beneficiaries receive a mere $4.00 per year and there has been no increase since 1874.

> [560] *The Plaintiffs have argued vigorously and successfully that the Treaties were relational agreements that incorporated the concept of sharing the benefits of the land. (Decision of Justice Hennessy)*

The Treaty states that the annuities would increase if the resource revenue generated from the territory produced such an amount as to enable the increase without the Crown government incurring a loss. The Robinson Huron Treaty territory has generated major revenues from forestry, mining and other resource development activities -- yet annuities have not been increased. The annuity was intended to be the Lake Huron Anishinabe share of the wealth generated by revenues from the treaty.

The Court did not specify a percentage for the Anishinaabe share, but only that it was not subject to a limit. It expressed a preference for the parties to work this out amongst themselves in negotiations. Failing negotiations, the Court said that these matters can be determined as a matter of law, according to the principles of the honour of the Crown and

fiduciary obligations which impose on the Crown the obligation to give meaning and substance to, and to diligently implement, the Treaty's promise to augment the annuities.

The Court found that the reference to one pound ($4.00) in the augmentation clause is a discretionary limit only on the amount that may be distributed to individuals (which itself may be increased) and does not represent a limit on the overall increase to the lump sum annuities. The exercise in determining a compensation amount will be based on identifying what the revenue sharing arrangement should have produced for the Robinson-Huron collective interest. In the event that a settlement can be achieved the distribution of compensation will be done in accordance with a formula that distributes potential compensation to the First Nations involved in the litigation. It will be up to each First Nation to determine matters relating to any potential per capita distribution.

The issuance of the decision concludes phase 1 of the proceedings. The next phase dealing with the Crown assertions of technical defences will commence in 2019. The third phase will deal with determining compensation if the parties are not able to negotiate a settlement.

APPEAL PROCESS

The federal government decided not to appeal the decision, however, the Government of Ontario filed their Notice of Appeal. Ontario is appealing the decision based on their assertion of errors of fact and errors in the law including:

> by interpreting the Robinson Treaties in a manner that is inconsistent with the common intentions of the Treaty parties as disclosed by the evidence:
>
> in failing to accept that the $4 per-person figure set out in the Augmentation Clause should be indexed to mitigate the impacts of persistent inflation, pursuant to an implied term of the Robinson Treaties;
>
> transforming a discretion "Her Majesty may be graciously pleased to order" into a mandatory obligation;
>
> in concluding that the Crown is under an obligation to increase annuities, without limit, to reflect a "fair share" of net Crown revenues produced by the Treaty territories;

> in failing to take into account the Crown's intentions with respect to the annuity provisions of the Robinson Treaties, as disclosed by the evidence at trial; and
>
> in recognizing a fiduciary duty over any aspect of the Crown's Treaty annuity obligations under the Robinson Treaties.

The appeal will not be heard immediately. Ontario has indicated their willingness to achieve a negotiated settlement.

CURRENT NEGOTIATIONS

Justice Hennessy's decision did not set out what the compensation should be, rather the parties are encouraged to negotiate a compensation settlement by examining the revenues from the land and the expenditures of the government to regulate and administer the land through government operations:

> *[551] I find, that as a general principle for calculating net Crown revenues for the purpose of implementing the promise to increase the annuities, that Crown resource-based revenues arising directly or in a closely related way to the use, sale, or licensing of land (which could include the waters) in the Treaties' territories should be considered relevant. At the time of the Treaties, mineral and lumbering revenues were considered. Other analogous revenues should be considered both historically and in the future.*
>
> *[552] With respect to expenses, I find as a general principle that Crown expenses related to collecting, regulating, and supporting those revenues should form part of the consideration for the calculation of net Crown revenues.*
>
> *[554] The parties are encouraged to attempt to come to an agreement on specific revenue and expense categories to calculate the net Crown resource revenues of the territories. This should be possible after sufficient disclosure and consultation.*

This basically means that there has to be an effort to agree on and determine what constitutes revenues from the territory to come up with the Gross resource revenue and then the parties have to agree and determine what are reasonable expenses that can be charged as a cost against the revenue to come up with the net revenue or profit.

Thereafter, the parties have to agree and determine what is a fair share of the profit to be paid to the Robinson-Huron First Nations.

LAKE HURON ANISHINABE SOVEREIGNTY

The Court gave equal weight to the Anishinaabe and the Crown perspectives relating to the interpretation of the treaty. The court examined the terms of the treaty and the historical context, including the history of the Anishinaabe-Crown relationship from 1756 up to the Treaty Council in 1850. The Court characterized the relationship as a nation-to-nation relationship – one that was respectful of the sovereignty and land rights of the Anishinaabe – and that this was the basis upon which the parties entered into Treaty in 1850.

With regard to the Anishinaabe perspective, the Court recognized Anishinaabe principles of governance and Anishinaabe law, including the organizing principles of pimaatiziwin (sacredness of life) and gizhewaadiziwan (the way of the Creator, generosity), which encompass the Seven Sacred Laws of Creation. The Court underlined the importance of relationships under Anishinaabe law, and that the principles of respect, responsibility, reciprocity and renewal were fundamental to the Anishinaabe understanding of relationships, including the treaty relationship with the Crown.

In the decision, there are many statements from the judge that confirms the reality that the treaty is an agreement between two sovereigns:

> *[21] Like all organized societies, the Anishinaabe had their own system of governance that included governing laws and principles. The principles of governance were based on sacred laws, among other sources.*

and

> *There is nothing in the Treaty text, the Anishinaabe legal order, or the evidence to suggest that either nations' autonomy, jurisdiction, or the Anishinaabe's pre-existing web of relationships with creation were intended to be extinguished.*

The Robinson-Huron Treaty is part of Canadian law, especially through section 35 of the Constitution Act, 1982 which affirms treaty rights. It is primarily through the court process that the Canadian government can be compelled to live up to the commitments made in the treaty. International mechanisms do not have enforcement power that can be applied to

force the Canadian government to live up to their commitments. Furthermore, access to international mechanisms usually requires exhausting domestic legal avenues.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes and asserts that States must respect and implement their treaty relationships with indigenous peoples:

> *Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,*

and

> *Article 37*
>
> *1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.*
>
> *2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.*

The use of the court system is not the preferred avenue for resolving our dispute about the treaty and the UNDRIP calls for States or successor States such as Canada to work toward reconciliation including on the basis of existing treaties. Any future elaboration of the treaty relationship must establish an independent dispute resolution mechanishm. The Chiefs have been clear about our desire to negotiate on treaty matters on the basis of our respective laws, autonomy and jurisdictions. Indeed, that message has been voiced by our leaders since 1852 at least. Again, the court affirms that view and encourages the government to act honourably:

> *The Anishinaabe and the Crown now have an opportunity to determine what role those historic promises will play in shaping their modern treaty relationship. The pressures they faced in 1850 will continue to challenge them. However, in 1850 the Crown and the Anishinaabe shared a vision that the Anishinaabe and the settler society could continue to co-exist in a mutually respectful and beneficial relationship going into the future. Today, we arrive at that point in the relationship again. It is therefore incumbent on the parties to renew their treaty relationship now and in the future.*

NEXT STEPS

The negotiating teams from Canada, Ontario, the Robinson-Huron and the Robinson-Superior territories will be meeting in the next few weeks to have discussions about a negotiated settlement.

The preparations for phase 2 will also proceed so that phase 2 can take place in the fall of 2019.

We will continue to keep you, our citizens updated on all progress and key information of regarding the entire Claim's process.

FOR MORE INFORMATION PLEASE VISIT OUR WEBSITE AND FOLLOW OUR SOCIAL MEDIA ACCOUNTS

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