



Robinson Huron Treaty LITIGATION FUND

FACT SHEET

THE SUPREME COURT OF CANADA'S DECISION IN RESTOULE

Background

On July 26, 2024, the Supreme Court of Canada unanimously affirmed that Canada breached treaties with the Anishinaabe of the Upper Great Lakes and that the Crown has a legal duty to negotiate compensation for its breaches of treaty.

The Supreme Court of Canada unanimously upheld the lower courts' finding that the Crown dishonourably breached its Treaty obligations by failing to consider increasing annuities when it could do so without loss. However, the Court declined to impose a damages award immediately, instead emphasizing the discretionary nature of the Crown's obligation and directing the parties to negotiate honourable compensation.

The Supreme Court of Canada interpreted the meaning of the augmentation promise and set out the law for how the honour of the Crown interacts with the implementation of the augmentation promise. This interpretation and the Crown's duty to diligently implement the augmentation promise will be critical to the negotiations for the go-forward.

The Supreme Court emphasized the importance of the Anishinaabek principles of Respect, Responsibility, Reciprocity, and Renewal to the Treaty and its implementation by the Crown. These principles must be considered when implementing the augmentation promise through a framework set out by the Supreme Court.

It is difficult at this phase to know how Canada and Ontario will consider these principles, and the broader framework set out by the Supreme Court until negotiations begin with the Crowns. Further, the Constitutional Review of the RST case may provide further guidance to RHT and the Crowns.

Atikameksheng

Anishnawbek

Aundeck Omni

Kaning

Batchewana

First Nation

Dokis First Nation

Henvey Inlet

First Nation

M'Chigeeng

First Nation

Magnetawan

First Nation

Mississauga

First Nation

Nipissing

First Nation

Ojibways of

Garden River

Sagamok

Anishnawbek

Serpent River

First Nation

Shawanaga

First Nation

Sheguiandah

First Nation

Shesheganing

First Nation

Thessalon

First Nation

Wahnapitae

First Nation

Wasauksing

First Nation

Whitefish River

First Nation

Wiikwemkoong

Unceded Territory

Zhiibaahaasing

First Nation



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What did the Supreme Court say about the augmentation promise?

The Supreme Court of Canada considered the interpretation of the Augmentation Clause, and the nature and content of the Crown's obligations to give effect to that clause, and remedies for breach of that obligation. It concluded that the Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss, and if it can do so, identified an obligation on the Crown to "exercise its discretion and decide whether to increase the annuities and, if so, by how much". The Court was clear that the discretion is not unfettered, it is to be "exercised liberally, justly, and in accordance with the honour of the Crown".

In discussing the nature of the discretion afforded the Crown, the Court reflected on the various considerations at play:

The amount by which the Crown might increase the annuity is a polycentric and discretionary determination that will inevitably reflect many social, economic, and policy considerations that may change over time, affecting the frequency and nature of net revenue and annuity calculations.

The Court provided a non-exhaustive list of factors for consideration when reviewing the Crown's exercise of discretion for past results, many of which would likely be considered in the context of increasing the annuity on the go-forward, including:

1. the nature and severity of the breaches;
2. the number of Anishinaabe and their needs;
3. the benefits the Crown has received from the treaty territory and its expenses over time;
4. the wider needs of other Indigenous populations and non-Indigenous populations of Ontario and Canada; and
5. the principles and requirements flowing from the honour of the Crown, including the duty of diligent implementation of its sacred treaty promise to share the wealth of the land if it proved profitable.



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What did the Supreme Court of Canada say about collective rights of the Robinson Huron Treaty Anishinaabek?

The Supreme Court held that the trial judge was wrong to characterize the annuity promise as having two components: an individual annuity and a collective annuity. In the Court's view, the annuity promise was to pay annuities on a collective basis, with a "soft cap" valued as the aggregation of \$4 per individual. On the amount of the annuity, the Court held that the Crown was bound to increase the annuity up to \$4 per person when the economic circumstances warranted, as was done in 1875, and that the Crown has a discretion to increase the annuity further, which the Crown must exercise if the economic conditions are such that the Crown can do so without incurring a loss. The Court held that the Crown had breached its duty to exercise this discretion.

The Court made no order requiring that compensation be paid to individual citizens of the 21 First Nations of the Robinson Huron Treaty, nor did it mandate a specific method of distribution. Instead, it issued the following important clarifications:

- The Robinson Huron Treaty establishes a collective right, not dual individual and collective rights.
- Historical per capita payments were a method of administration, not a legal entitlement to individual rights compensation.
- Annuity rights belong to the First Nations as a whole, referred to as the "Chiefs and their tribes."
- The Crown's discretion to increase annuities must be exercised honourably, liberally, and justly, while engaging in an ongoing relationship with the Anishinaabe nations based on the values of respect, responsibility, reciprocity and renewal and is subject to judicial review.

The Court strongly condemned the Crown's history of failing to live up to its obligations under the Robinson Treaties. However, the Supreme Court of



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Canada concluded that the Crown should be provided with an opportunity to exercise its discretion under the Augmentation Clause. This approach recognized that “while it is not the business of the courts to force the Crown to exercise its discretion in a particular way, it is very much the business of the courts to review exercises of Crown discretion for constitutional compliance”. As such, the Court directed the Crown to “meaningfully” and “honourably” engage with the RST Plaintiffs to “repair the breach of its constitutional obligations” and set out the process to remedy the Crown’s breaches of the Robinson Treaties. This direction only applied to the RST Plaintiffs because the RHT Anishinaabek reached a negotiated settlement with the Crowns for \$10B in past compensation.

Why isn’t 100% of the Settlement funds being paid to individuals?

While the Supreme Court of Canada noted that the annuity payments have historically been paid directly to individuals on a per capita basis, the Court did not make an Order requiring the 100% payment of past breaches of annuity payments to individual First Nation Members. In fact, the Court explicitly rejected the idea that annuity rights under the Treaty are purely individual. While it recognized that payments were historically made to individuals, it stated this was not legally determinative.

Rather, the Supreme Court of Canada noted that the Treaty relationship needed to be repaired and renewed. The Court left room for the parties to negotiate a settlement for the Crown’s breaches, thereby restoring the honour of the Crown, and advancing the goal of reconciliation. The Supreme Court of Canada acknowledged the \$10 billion settlement that was reached between the Lake Huron Plaintiffs, Ontario, and Canada for past breaches of the augmentation promise. The Supreme Court acknowledged that the Settlement Agreement for past compensation would take effect regardless of the outcome of the appeal at the Supreme Court. Based upon the proof that Canada and Ontario settled with the Lake Huron Plaintiffs, the Court further encouraged Canada, Ontario and the Superior Plaintiffs to also reach a negotiated settlement.



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How does the Settlement Agreement handle compensation?

The Settlement Agreement, reached after extensive negotiation, provided a fair and final resolution of past breaches from 1850 to the present. The Settlement Agreement was designed to balance collective and individual interests. It allows First Nations to decide how to use their share, within a fair and structured formula:

- 39% is equally distributed among all participating First Nations.
- 55% is based on each First Nation's population.
- 5% is set aside for collective community initiatives.
- 1% goes to living former members no longer on the band list or Sudbury general list living individuals.

Under the Settlement Agreement, each First Nation's Chief and Council has the legal authority to decide how its portion of the Settlement funds will be used, in line with its customs, laws, and governance processes. Their responsibilities include:

- Deciding whether and how much to allocate to per capita distributions.
- Ensuring funds are used for collective interest priorities like future annuities litigation, Anishinaabemowin language revitalizing, elders and youth supports, environment, infrastructure, etc.
- Acting with fiduciary responsibility, meaning they must use the funds for the benefit of the community as a whole and future generations.

This reflects a balanced approach that respects both individual compensation and collective advancement.

How have other courts applied the Supreme Court of Canada's decision

There are other court cases across Canada relating to treaty annuity payment. Some of these cases referred to the Supreme Court of Canada's comments on the historical method of payment to individuals. In particular, lawyers inaccurately argued that the Supreme Courts comments on historical payments



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of annuities made to individuals amounted to a statement on the law. In a recent case, the Federal Court of Canada made the following statement:

First, the Plaintiffs misinterpret *Restoule* by overemphasizing its discussion of “individual payments.” A full reading of *Restoule* reveals that its reference to individual disbursements is merely an observation about historical payment methods and administrative practices, not a statement about the legal nature of the annuity rights. The Supreme Court makes it clear that, notwithstanding the individual manner of payment, the annuity rights themselves are collective and made to the “Chiefs and their tribes”: *Restoule* at para 196. Hence, while the Plaintiffs correctly observe that annuity payments have in practice been made to individuals, this does not transform Canada’s treaty obligations on annuities into a purely individual right in law.

Will Courts intervene in how the Settlement funds are used?

No. Once the Settlement Agreement was given effect under a Partial judgment of the Ontario Superior Court of Justice on February 26, 2024, the court’s jurisdiction is now limited to supervising its implementation. Courts will not revise or interfere with the terms of a settlement that was reached in good faith between sophisticated parties (First Nations and representatives of the Crowns) and approved by the court. Any challenges to the terms had to be filed by March 27, 2024; after that, the agreement stands as final and binding.

Paragraphs 184 to 194 of the Supreme Court of Canada’s decision in *Restoule* cannot be read in isolation

The Supreme Court of Canada found that the annuity payment is a collective right. Recently, the Federal Court of Canada noted the danger of relying on a few paragraphs of the Supreme Court’s decision in isolation. The Federal Court stated that some have misinterpreted *Restoule* by overemphasizing its discussion of “individual payments.” The Federal Court noted that a full reading



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of *Restoule* reveals that references to individual disbursements are merely observations about historical payment methods and administrative practices. Those statements were not about the legal nature of annuity rights. The Supreme Court makes it clear that, notwithstanding the individual manner of payment, the annuity rights themselves are collective and are owed to the “Chiefs and their Tribes” (*Restoule*, para 196). Therefore, the practice of individual payments does not transform Canada’s treaty obligations into individual rights of citizens of First Nations.

The Crown is required to pay annuities to the Robinson Huron Treaty Anishinaabek on a Nation-to-Nation basis in the past and into to future

The Supreme Court of Canada stated that the Augmentation Clause obliges the Crown to pay annuities to the Anishinaabe “Chiefs and their Tribes.” The reference to “the amount paid to each individual” should not be read as creating a separate obligation to pay individuals. The obligation to pay is created by the earlier language in the Consideration Clause, which expressly provides that the perpetual annuity is “to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each summer.” This interpretation is consistent with the practice of paying the annuity to the First Nations in the years following the signing of the Treaty but unilaterally stopped by Canada in breach of the nation-to-nation obligation.

Conclusion

The Supreme Court upheld a large part of Justice Hennessy’s Stage 1 decision, including the importance of the Anishinaabek legal principles of Respect, Responsibility, Reciprocity, and Renewal.

The Supreme Court also set out a framework for the implementation of the augmentation promise, however, this framework will need to be discussed at greater length through negotiations with the Crown, or through further litigation.

Finally, the Supreme Court recognized the collective nature of Treaty rights and entrusted First Nations to manage compensation for past Crown breaches of



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the Robinson Huron Treaty in accordance with their laws, customs, and governance. The Supreme Court decision in this regard is consistent with what the 21 First Nations argued at all levels of Courts and have implemented. This decision confirms the decisions of the 21 First Nations in implementing the Settlement Agreement and provides a clearer path for the go-forward annuities resolution by negotiation or litigation.

Summary: Key Takeaways of Supreme Court of Canada case

- ✓ This case gives a road map to correct the harms caused by Canada and Ontario in misinterpreting the annuity obligation in the *Robinson Huron Treaty of 1850*.
- ✓ The *Robinson Huron Treaty of 1850* is a nation-to nation agreement and must now be resolved by the nations on a go-forward basis.
- ✓ Annuity rights are a collective right and made to the “Chiefs and their tribes” for the benefit of the Robinson Huron Treaty Anishinaabek, including future generations.
- ✓ The Court’s reference to individual annuity disbursements was merely an observation about historical payment methods and administrative practices. This practice was in violation of the *Robinson Huron Treaty of 1850*
- ✓ While annuity payments have, in practice, been issued to individuals, and will continue a \$4.00 payment to individuals until the go-forward annuity case is resolved in court or negotiation. This practice does not convert Canada’s treaty obligations into an individual right, nor does it create an obligation to pay an annuity to individuals.
- ✓ In essence, the SCC decision confirmed that Robinson Huron Treaty Anishinaabek’s decision making process in RHTLF by speaking favourably about settlement reached with Canada and Ontario.
- ✓ Chief and Council have authority to balance *per capita* payments with collective interests and benefits.
- ✓ The Settlement Agreement is final and binding and received favourable comment from the Supreme Court of Canada.