

BRIEFING NOTE

TO: National Claims Research Directors
FROM: Jody Woods, UBCIC Administrative Director and Research Director
DATE: May 16, 2023
RE: UBCIC Coalition of Intervenors in *Restoule* case at SCC

PURPOSE

To inform Research Directors about the UBCIC-led coalition to intervene in the *Restoule* case which will be heard by the Supreme Court of Canada later this year.

SUMMARY

From Mandell Pinder LLP's memorandum to UBCIC Chiefs Council, February 2023:

Intervention in *Restoule v Canada*:

In December of 2022, a Coalition comprised of UBCIC, Nlaka'pamux Nation Tribal Council, Chawathil First Nation, High Bar First Nation, Neskonlith Indian Band, Penticton Indian Band, Skuppah Indian Band, and Upper Nicola Band, was granted leave to intervene in the case of *Restoule v Canada*, which is set to be heard by the Supreme Court of Canada in 2023.

This case concerns the interpretation of the Robinson-Huron and Robinson-Superior Treaties of 1850 (the "Treaties"). Since 1875, the Crown has interpreted the Treaties to mean that annuity payments are capped at \$4/person, despite language promising to augment the annuities if the lands covered by the Treaties generate wealth. The issue in this case is the proper interpretation of the annuities clause in the Treaties.

The trial judge relied on the Indigenous Laws of the Anishinaabe plaintiffs as part of her analysis of the Treaties and determined that the parties to the Treaties had intended annuities to increase without a limit "if and when" the lands covered by the Treaties began to generate wealth. The Ontario Court of Appeal substantially upheld the trial judgement. Ontario appealed to the Supreme Court of Canada.

The Coalition's intervention builds on UBCIC's intervention in the case before the Ontario Court of Appeal and focuses on the vital importance of respectfully including Indigenous Laws and Legal Traditions in the interpretation of historical Crown promises made to Indigenous Peoples, including promises made outside the treaty context. In the Coalition's submission, when the Crown makes a promise to an Indigenous People, their understanding of that promise in the context of their laws and legal traditions must inform the interpretation of the meaning of the promise. The hearing of the appeal has yet to be scheduled.

BACKGROUND

Excerpted from Mandell Pinder LLP's memorandum to UBCIC Executive and Jody Woods, August 24, 2022:

Background: The *Restoule* Case

The *Restoule* case, which was brought by Anishinaabe peoples of the upper Great Lakes against the governments of Canada and Ontario, concerns the interpretation of the annuities clauses in the Robinson-Huron and Robinson-Superior treaties of 1850.

The case was divided into three stages. Stage one involved the interpretation of the annuity clause of the treaties and whether it required annuities to be augmented from time to time (annuities have been fixed at \$4/person since 1875). Stage two considered the Crown's defences of Crown immunity and limitations periods. Stage three, which has yet to take place, will determine the remaining issues, including damages and the allocation of liability between Canada and Ontario.

The trial court's decisions in stages one and two were significant victories for the Anishinaabe. In stage one, the court found that the terms of the treaties required the Crown to increase annuities when there has been economic growth to an amount that reflects the Indigenous beneficiaries' "fair share" of Crown revenues from the land dealt with under the treaties. The trial court's decision was particularly significant because of the court's reliance on Anishinaabe law, as explained by Elders and community leaders, to ascertain the intention of the treaty signatories at the time the treaties were made, including Anishinaabe principles of respect, responsibility and reciprocity. The decision also considers the Anishinaabe legal principle of renewal and affirms that a treaty relationship is an ongoing relationship. In stage two, the trial judge rejected Canada and Ontario's arguments that Crown immunity and provincial limitations legislation barred the claims.

On appeal, the Ontario Court of Appeal largely upheld the lower court's stage one and two decisions. A majority of the court found that the trial judge had correctly interpreted the treaties' annuity augmentation clause, although it found the use of the term "fair share" to be unhelpful and preferred the language of a promise "to share in the value of the land," or "revenue sharing." The majority also found that the honour of the Crown imposed a duty to diligently implement treaty promises, which obliged the Crown to increase the annuities, and that the Crown's discretion to augment the annuities is subject to court supervision (i.e. it is a "justiciable" issue).

While the court unanimously held that the trial judge had erred in finding that the Crown is under a fiduciary duty to implement the treaties' augmentation clause, this holding did not affect the outcome because a majority of the court found that the honour of the Crown required the Crown to implement the treaties' augmentation clause. The court unanimously dismissed the Crown's appeal of the stage two decision.

On June 23, 2022, the Supreme Court of Canada granted leave to Ontario to appeal and leave to the plaintiffs to cross-appeal from the order of the Ontario Court of Appeal.

Restoule's Implications for Indigenous Peoples

The Supreme Court agrees to hear only a fraction of the applications for leave to appeal it receives each year, and only where it considers that the issues on appeal are of public or national importance. The Court's decision to grant the application for leave to appeal in *Restoule* indicates that the case raises issues of public or national importance.

The *Restoule* case raises several important legal issues regarding treaty interpretation and the Crown's obligations to Indigenous peoples, including:

1. What is the appropriate approach to treaty interpretation in the context of this case and how should courts fill gaps in treaty texts? In particular, how do Indigenous legal orders in place at the time inform treaty interpretation?
2. What does the honour of the Crown require of the Crown in fulfilling treaty obligations?
3. Under what circumstances is the Crown under a fiduciary duty in the fulfillment of treaty obligations?
4. To what extent are issues regarding the fulfillment of treaty obligation justiciable (subject to court review)?
5. How does the principle of Crown immunity* and limitations legislation apply to claims for failure of the Crown to meet its treaty obligations?
6. What is the appropriate approach to granting remedies for failure by the Crown to meet its treaty obligations?

At this time, before any of the parties have filed their written arguments, it is not clear which issues will be pursued by the parties before the Supreme Court but there is no question that the case will present an opportunity for the Court to discuss the principles of treaty interpretation, including the role of Indigenous legal orders, the honour of the Crown and the nature of the Crown's legal obligations to Indigenous peoples, all issues of importance to every Indigenous group in Canada.

The Union previously intervened in the *Restoule* case when it was before the Ontario Court of Appeal. Before that court, the Union made the following submissions:

1. Treaty promises must be interpreted in light of the constitutional imperatives of reconciliation and the honour of the Crown as informed by the *United Nations Declaration on the Rights of Indigenous Peoples*.
2. The trial judge properly considered the Indigenous perspective informed by Indigenous laws. Treaties reflect mutual intentions of the parties, and the goal of treaty interpretation should be to look at the context and mutual understandings of the parties. Indigenous peoples could only have understood the treaty promises in the context of their own legal traditions.
3. The trial judge properly considered that the promises made between the Indigenous peoples and the Crown reflected commitments to a living relationship that both parties intended would endure over time.

4. The trial judge correctly assessed that it is necessary to look to the purposes for which the treaty promises were made, and then interpret the treaties as though the parties intended to fulfill those purposes.

* Crown immunity is a common law doctrine under which the Crown is immune from liability for certain legal claims. Crown immunity was abolished by statute as of certain dates (1963 for claims against Ontario at issue in this case) but there is uncertainty as to how Crown immunity applies to claims before that time.