

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) Monday, the 26th day of
CHIEF JUSTICE)
GEOFFREY B. MORAWETZ) February, 2024
)

BETWEEN:

**Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and
Roger Daybutch, on their own behalf and on behalf of all members of the Ojibewa
(Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850**
Plaintiffs

- and -

**THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF
ONTARIO and HIS MAJESTY THE KING IN RIGHT OF ONTARIO**
Defendants

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION
Third Parties

- and -

THE TEME-AUGAMA ANISHNABAI
Added Party Plaintiff

PARTIAL JUDGMENT

Pursuant to Settlement Agreement

UPON THIS COURT ISSUING A REPRESENTATION ORDER, dated May 3, 2016, pursuant to Rule 12.08 of the *Rules of Civil Procedure*, on consent, that Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, are authorized to bring this proceeding, which concerns annuities under the Robinson Huron Treaty of 1850 (the "Treaty"), on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Treaty, except those that are members of the Temagami First Nation;

AND UPON THIS COURT ISSUING A PARTIAL JUDGMENT on June 17, 2019 after a summary trial into issues, related to the interpretation and justiciability of the annuity terms in the Treaty, identified by agreement of the parties, in a motion for summary judgment ("Stage One");

AND UPON THIS COURT ISSUING A FURTHER PARTIAL JUDGMENT on June 26, 2020, after a hearing into issues related to, *inter alia*, Crown defences of limitations and Crown immunity, identified in a motion for summary judgment ("Stage Two");

AND UPON THE COURT OF APPEAL FOR ONTARIO ISSUING AN ORDER dated November 5, 2021, affirming this Court's Stage Two partial judgment and amending this Court's Stage One partial judgment, as set out in **Appendix A**;

AND UPON THE ORDER OF THE COURT OF APPEAL, *inter alia*, affirming the
following paragraph of the Stage One partial judgment:

[2] THIS COURT ADJUDGES AND DECLARES THAT the principles governing the Treaty parties' implementation of the annuity provisions are to accord with this Court's determinations that:

- a) the Robinson Huron Treaty was negotiated by the Treaty parties around the Anishinaabe Council Fire at Bawaating (Sault Ste Marie) as a renewal of the ongoing relationship between the Anishinaabeg and the Crown grounded in the Covenant Chain alliance, and as a basis for continuing a mutually respectful and beneficial relationship going into the future; and
- b) the Treaty reflects the parties' common intention that their agreement was to allow both the Anishinaabeg and the Crown to realize the future opportunities and potential of the Treaty territory in a manner consistent with the Anishinaabe principles of respect, responsibility, reciprocity and renewal, and the intention of the Crown to act honourably, with justice or fairness, and with liberality or benevolence.

AND UPON THIS COURT ISSUING AN ORDER dated March 25, 2022, that the Teme-Augama Anishnabai and the Temagami First Nation (collectively, the "Teme-Augama Anishnabai"), are granted leave to intervene as an added party plaintiff pursuant to Rule 13.01 of the *Rules of Civil Procedure* in Stage Three of C-3512-14 and C-3512-14A;

AND UPON THIS COURT, ON JANUARY 30, 2023, WITH CONSENT OF THE PLAINTIFFS AND DEFENDANTS AND WITHOUT OBJECTION FROM THE THIRD PARTIES AND THE ADDED PARTY PLAINTIFF, ADJOURNING THE STAGE THREE TRIAL OF THIS ACTION on remaining issues in this action, including quantification, to enable the Plaintiffs and Defendants to engage in settlement negotiations with a view to Treaty renewal and reconciliation;

AND ON BEING ADVISED BY COUNSEL FOR THE PLAINTIFFS AND DEFENDANTS that they have reached a settlement on the compensation to be paid in respect of the Claim as defined in Articles 2.2 and 2.3 of the Settlement Agreement excerpted and set out in **Appendix B** (the "Claim for the Past");

AND ON READING THE AFFIDAVIT OF DUKE PELTIER, one of the Representative Plaintiffs in this Action, and a Trustee of the Robinson Huron Treaty Litigation Fund, whereby he solemnly affirms that:

- (1) the Representative Plaintiffs, on their own behalf and on behalf of all members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850, except those that are members of the Teme-Augama Anishnabai, have approved the Settlement Agreement; and

(2) the following 21 Lake Huron First Nations, who have Robinson Huron Treaty beneficiaries within their populations and are collectively successors to the signatories of the Robinson Huron Treaty of 1850, namely: Atikameksheng Anishnawbek, Aundeck Omni Kaning First Nation, Batchewana First Nation of Ojibways, Dokis First Nation, Henvey Inlet First Nation, Magnetawan First Nation, M'Chigeeng First Nation, Mississauga #8 First Nation, Nipissing First Nation, Ojibways of Garden River First Nation, Sagamok Anishnawbek, Serpent River First Nation, Shawanaga First Nation, Sheguiandah First Nation, Sheshegwaning First Nation, Thessalon First Nation, Wahnapiatae First Nation, Wasauksing First Nation, Whitefish River First Nation, Wikwemikong Unceded Indian Reserve No. 26, and Zhiibaahaasing First Nation (collectively, the "Lake Huron First Nations"), have approved the Settlement Agreement, in accordance with the procedures established in the Trust Indenture, which the said Lake Huron First Nations established to pursue the litigation and negotiation of the annuity action;

AND ON HEARING THE SUBMISSIONS OF COUNSEL for the Plaintiffs, the Defendants, and the Added Party Plaintiff;

AND ON BEING ADVISED BY COUNSEL for the Plaintiffs, the Defendants, the Added Party Plaintiff, and the Third Parties, that the Plaintiffs, the Defendants, and the Added Party Plaintiff consent to the form and content of this partial judgment, and the Third Parties do not oppose the form and content of this partial judgment:

THIS COURT ADJUDGES AND DECLARES THAT:

1. The Defendants shall pay to the Plaintiffs Ten Billion Dollars (\$10,000,000,000.00) inclusive of interest and costs in respect of the Claim for the Past, as follows:

- (a) The Defendant the Attorney General of Canada shall pay or cause to be paid to the Plaintiffs Five Billion Dollars (\$5,000,000,000.00), and,
- (b) The Defendant His Majesty the King in right of Ontario shall pay to the Plaintiffs Five Billion Dollars (\$5,000,000,000.00).

2. The payment under paragraph 1 is without prejudice to any rights, interests or claims that the Plaintiffs may have against Canada and Ontario or any one of them regarding future implementation or the failure to implement the augmentation promise under the Treaty, after the Effective Date as defined in Article 11.3 of the Settlement Agreement excerpted and set out in Appendix B.

3. This partial judgment shall be without prejudice to a Lake Huron First Nation's pursuit of other claims relating to the Treaty not captured within the definition of Claim, subject to Article 15.2 of the Settlement Agreement excerpted and set out in Appendix B.

4. This partial judgment is without prejudice to any claims that Teme-Augama Anishnabai may have against Canada or Ontario related to the causes of action in the Teme-Augama Anishnabai pleadings filed in this action, and any such claims and

causes of action that Teme-Augama Anishnabai may have against Canada and Ontario survive this partial judgment.

5. The compensation in paragraph 1 does not include any amount that may be due and owing to the Teme-Augama Anishnabai related to any claims the Teme-Augama Anishnabai may have under the Treaty or any claims or causes of action in the Teme-Augama Anishnabai pleadings filed in this action; and the Teme-Augama Anishnabai has no entitlement to claim any portion of the compensation in paragraph 1 or otherwise assert a claim against the Plaintiffs in relation to same.

6. The Plaintiffs shall discontinue with prejudice that part of the action relating to the Claim for the Past upon payment by the Defendants of the amount specified in paragraph 1, and shall file a fresh as amended statement of claim setting out the remaining issues in this action.

7. This partial judgment shall operate conclusively as an estoppel and bar in the event of any legal proceeding, action, suit, claim, specific claim, or demand whatsoever, whether in law, in equity or otherwise which may be brought by members of the Ojibewa (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850, including the Lake Huron First Nations and their past, present and future members, and their administrators, personal and legal representatives, trustees, successors and assigns (excluding the Teme-Augama Anishnabai), with respect to that part of the action relating to the Claim for the Past, discontinued with prejudice pursuant to paragraph 6 above, including, without limiting the generality of the foregoing, in the same manner and to the same extent they would operate as an estoppel and bar if the

claims had been finally disposed of on their merits by the courts in which they were brought.

8. Nothing in this partial judgment shall constitute or be deemed to constitute a waiver by the Plaintiffs or Defendants of any settlement privilege that the Plaintiffs or Defendants claim over the Settlement Agreement or any of their settlement negotiations.

9. The trial of remaining issues in this action is adjourned *sine die*.

A handwritten signature in blue ink, appearing to read "G.B. Morawetz C.J.", is written over a horizontal line.

G.B. Morawetz
Chief Justice

APPENDIX A: AMENDED STAGE ONE JUDGMENT

RESTOULE JUDGMENT (Huron Action)

(PARTIAL JUDGMENT - STAGE ONE - RELEASED JUNE 17, 2019)

THROUGH NOTICES OF MOTION for summary judgment brought in the within action the plaintiffs sought the following declaratory relief, and costs:

1. The plaintiffs move for a declaration that, considered apart from the pleaded defences based upon statutes of limitation, *res judicata*, *laches* and acquiescence, since 1850 the Crown has been and remains legally obligated under the Robinson Huron Treaty of 1850 to increase the annuity under the Treaty from time to time if the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss, and that the size of the increase of the annuity is not limited to an amount based on one pound per person.
2. The plaintiffs acknowledge that in addressing this motion, the parties were permitted to address and seek determination of particular issues, including:
 - a) the meaning and legal effect of the phrase "such further sum as Her Majesty may be graciously pleased to order" in the written text of the Treaty;
 - b) whether the revenues that are to be taken into account in determining whether "the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss" are restricted to Crown revenues from the territory;
 - c) whether gross or net revenues are to be taken into account in determining whether "the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss";
 - d) what principle or principles govern the determination of the amount of the increased annuities;
 - e) whether the provision that "the amount paid to each individual shall not exceed the sum of one pound provincial currency (\$4) in any one year, or such further sum as Her Majesty may be graciously pleased to order" should be indexed for inflation;

ON BEING ADVISED by counsel for the parties near the outset of the summary trial that there was no dispute regarding issues 2 (b) and 2 (c) noted above, and that in relation to those issues the parties were in agreement that the revenues that are to be taken into account in determining whether “the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss” are net Crown revenues from the territory;

AND ON BEING REQUESTED BY THE PARTIES to make determinations on issues 1, 2 (a), (d) and (e) above, as set out in the plaintiffs’ notices of motion, but without engaging in a line-by-line identification of relevant revenues and expenses in the public accounts of Canada or Ontario;

AND ON BEING REQUESTED BY THE PLAINTIFFS to make determinations under Issue 2 (d) above with respect to what types of Crown revenues and expenses are relevant for the purposes of Augmentation Clause, and on hearing submissions from counsel for the Attorney General for Canada (“Canada”) that such determinations should be deferred to the contemplated Stage 3 of this litigation, and from counsel for Her Majesty the Queen in right of Ontario and the Attorney General for Ontario, that the Court should make findings with respect to the intentions of the Treaty parties in 1850 regarding relevant revenues and expenses, but without reaching definitive determinations regarding relevant revenues and expenses on the limited evidence before the Court regarding modern public finances;

AND ON READING the pleadings, the text of the Treaty, the numbered exhibits entered, the affidavits, expert reports and historical documents, filed, and on hearing the oral testimony of the witnesses, and on reading and hearing the submissions of counsel for the parties, and for reasons released on December 21, 2018 (2018 ONSC 7701):

[1] THIS COURT ADJUDGES AND DECLARES THAT, considered apart from the pleaded defences based on statutes of limitation, *res judicata* and *laches*, including acquiescence, and without making a determination as to the respective responsibilities and liabilities of Canada and Ontario:

a) Pursuant to the Robinson Huron Treaty of 1850, the Crown is obligated to increase, and the First Nation Treaty Parties have a collective treaty right to have increased, from time to time, the promised annuity payment of £600 (or \$2,400) if net Crown resource-based revenues from the Treaty territory permit the Crown to do so without incurring loss, ~~with the amount of annuity payable in any period to correspond to a fair share of such net revenues for that period;~~

b) To fulfill its obligation in (a) above, the Crown:

i. is required to periodically engage in a process, in consultation with the First Nation Treaty parties, to determine the amount of net Crown resource-based revenues; and

ii. if there are sufficient Crown resource-based revenues, to permit the Crown to pay an increased annuity amount without incurring loss, is required to pay any such increase;

e) In fulfilling these obligations and requirements of the augmentation promise, the Crown is subject to the duties flowing from the honour of the Crown ~~and the fiduciary duty which the Crown owes to the First Nation Treaty parties;~~

d) The Crown must diligently implement the augmentation promise, ~~so as to achieve the Treaty purpose of reflecting in the annuities a fair share of the value of the resources, including the land and water in the territory;~~

e) The Crown shall, in a manner consistent with the honour of the Crown, consult with the First Nation Treaty parties to determine what portion, if any, of the increased annuity amount is to be distributed by the Crown to the individual Treaty rights holders in addition to the \$4 per person per year they are already being paid;

f) The augmentation promise is a Treaty right recognized and affirmed by s. 35 of the *Constitution Act*, 1982.

[2] THIS COURT ADJUDGES AND DECLARES THAT the principles governing the Treaty parties' implementation of the annuity provisions are to accord with this Court's determinations that:

a) the Robinson Huron Treaty was negotiated by the Treaty parties around the Anishinaabe Council Fire at Bawaating (Sault Ste Marie) as a renewal of the ongoing relationship between the Anishinaabeg and the Crown grounded in the Covenant Chain alliance, and as a basis for continuing a mutually respectful and beneficial relationship going into the future; and

b) the Treaty reflects the parties' common intention that their agreement was to allow both the Anishinaabeg and the Crown to realize the future opportunities and potential of the Treaty territory in a manner consistent with the Anishinaabe principles of respect, responsibility, reciprocity and renewal

and the intention of the Crown to act honourably, with justice or fairness, and with liberality or benevolence.

[3] THIS COURT FURTHER ADJUDGES AND DECLARES THAT:

a) The process adopted for purposes of determining the amount of net Crown resource-based revenues in a particular period must afford sufficient Crown disclosure of information to enable the First Nation Treaty parties and the Court, if necessary, to determine the amount of such net revenues;

b) For purposes of determining the amount of net Crown resource-based revenues in a particular period:

i. relevant revenues to be considered are 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 Treaty territory, including mineral and lumbering revenues and other analogous revenues as received by the Crown both historically and in the future, ~~but not including personal, corporate or property tax revenues,~~

ii. relevant expenses to be considered are Crown expenses related to collecting, regulating, and supporting relevant revenues, ~~but do not include the costs of infrastructure and institutions that are built with Crown tax revenues,~~

with these definitions to be applied as general principles that are subject to clarification and further direction by the Court in a future stage of this proceeding; and

e) Failing agreement amongst the parties, the principles to be applied for purposes of determining amounts [added text - to be disbursed pursuant to the augmentation promise from] ~~that are fairly and reasonably equal to a fair share of~~ net Crown resource-based revenues are subject to further direction by the Court in a future stage of this proceeding.

d) Where in the exercise of their duties to implement the augmentation promise the Crown exercises discretion, the discretion must be exercised honourably, such discretion is not unfettered and is subject to review by the Courts.

[4] THIS COURT FURTHER ORDERS AND ADJUDGES THAT the plaintiffs' alternative claim, supported by Ontario, that the Court should imply a Treaty term to provide for indexing of the promised annuity payment of £600 (or \$2,400), as augmented to an amount based on £1 (or \$4) per person, in order to protect the First Nation Treaty parties against erosion of the purchasing power of annuities due to inflation be, and is hereby, dismissed.

~~[5] AND THIS COURT FURTHER ORDERS AND ADJUDGES that the plaintiffs are hereby awarded their costs of this action to date, on the partial indemnity scale, without reserving to them any right to seek a higher level of indemnity at another time, and that pursuant to an agreement made between them, Canada and Ontario are each responsible to pay 50 per cent of such costs, and:~~

~~a) that subject to paragraph 4(b) below, the plaintiffs' costs of this action to date, including this motion, are hereby fixed in the total amount of \$9,412,447.50; and~~

~~b) that the plaintiffs may make further submissions to the Court with respect to the sum of \$303,775.00 they have claimed as further disbursements incurred by the Robinson Huron Trust. Should the plaintiffs make such further submissions, the defendants will be entitled to respond.~~

[6] THIS JUDGMENT BEARS INTEREST at the rate of three per cent (3%) per year commencing on December 21, 2018.

APPENDIX B: EXCERPTS FROM THE SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT FOR PAST COMPENSATION (ARTICLES 2.2, 2.3, 10.1, 11.3, 15.1 AND 15.2)

- 2.2 In this Settlement Agreement, "Claim" means any cause of action, suit, debt, demand, obligation or liability in law or equity or otherwise, made, or that could have been made, by the Robinson Huron Treaty Anishinaabek, any one of the Lake Huron First Nations or their Members, the Representative Plaintiffs, or any Annuitant, arising from any failure of the Crown to fulfill the Augmentation Promise, during the period from 1850 until the Effective Date, and includes the following as they relate to the Augmentation Promise:
- (a) Any obligation of the Crown under the Robinson Huron Treaty to increase the Annuity beyond the six hundred pounds promised in the Treaty and any corresponding Treaty right or entitlement of the Robinson Huron Treaty Anishnaabek to such increases;
 - (b) Any fiduciary duty on the part of the Crown to increase the Annuity beyond the six hundred pounds promised in the Treaty;
 - (c) Any duties flowing from the honour of the Crown with respect to any obligation to increase the Annuity beyond the six hundred pounds promised in the Treaty;
 - (d) Any duty to consult related to Crown conduct that had the potential to adversely affect the Augmentation Promise;
 - (e) Any duty to consult with respect to the appropriate manner and amount to increase the Annuity;
 - (f) Any duty to increase the amount of Annuity distributed to Annuitants, including any duty to consult with respect to whether and by how much to increase that distributive amount;
 - (g) Any obligation to index the Annuity to protect the Robinson Huron Treaty Anishnaabek against the erosion of the purchasing power of the Annuity due to inflation;
 - (h) Any obligation to monitor, record and report to the Robinson Huron Treaty Anishnaabek any financial or economic information, except to the extent that such information may be useful for the Robinson Huron Treaty Anishinaabek to make informed decisions with regard to negotiations related to the implementation of the Augmentation Promise after the Effective Date;
 - (i) Any obligation to provide an accounting of the net revenue from the Treaty territory;
 - (j) Any claims for a share of the net profits from the Treaty territory;

- (k) Any claims that the Past Compensation does not account for the correct Treaty territory; and
- (l) Any claims for pre and post-judgment interest up to 60 days after the issuance of the Partial Judgment contemplated in Article 11.0.

2.3 For greater certainty:

- (a) the scope of the term "Claim" and the scope of application or operation of Article 2.2 is strictly limited to the period 1850 until the Effective Date and does not include any claim that arises, or could be made, in relation to the failure of the Crown to implement or fulfill the Augmentation Promise after the Effective Date; and
- (b) the Parties have concluded this Settlement Agreement for Past Compensation notwithstanding the ongoing proceedings before the courts that may affect the interpretation of the Augmentation Promise. The definition of Claim in Article 2.2 shall be deemed to include any claims for the period 1850 to the Effective Date arising from the interpretation of the Augmentation Promise as determined by a court of competent jurisdiction in those proceedings.

10.1 This Settlement Agreement is deemed to be fully executed once it is signed, in the following order, by:

- (a) the Trustees of the RHTLF and the Representative Plaintiffs on Behalf of the Robinson Huron Treaty Anishinaabek;
- (b) the Minister on Behalf of Ontario; and
- (c) the Minister on Behalf of Canada.

11.3 The Effective Date of this Settlement Agreement is the date this Settlement Agreement is fully executed by the Parties in accordance with Article 10.1.

15.1 This Settlement Agreement shall be without prejudice to a Lake Huron First Nation's pursuit of other claims relating to the Treaty not captured within the definition of Claim.

15.2 To address any potential for double recovery, nothing shall preclude Canada or Ontario from raising in the assessment of any compensation that may be owed with respect to those other claims referred to in Article 15.1 that the Past Compensation that is distributed to a Lake Huron First Nation, pursuant to the Compensation Disbursement Agreement, derived from or related to the area under the other claim may be relevant to the assessment of that compensation, where that compensation is derived from natural resource revenues in the area of the other claim.