Appeal Court File No. C66455
Sudbury Superior Court File Nos.
C-3512-14 & C-3512-14A
Thunder Bay Superior Court File No. 2001 – 0673

COURT OF APPEAL FOR ONTARIO

B E T W E E N

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 (Anishinabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850

Plaintiffs
(Respondents)

- and -

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants
(Respondent & Appellants)

- and -

THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

Third Parties
(Respondents)

AND BETWEEN:

THE CHIEF and COUNCIL OF RED ROCK FIRST NATION, on behalf of the RED ROCK FIRST NATION BAND OF INDIANS, THE CHIEF and COUNCIL of the WHITESAND FIRST NATION on behalf of the WHITESAND FIRST NATION BAND OF INDIANS

Plaintiffs
(Respondents)

- and -

THE ATTORNEY GENERAL OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and the ATTORNEY GENERAL OF ONTARIO as representing her Majesty the Queen in Right of Ontario

Defendants
(Respondent & Appellants)

SUPPLEMENTARY NOTICE OF APPEAL

The appellants amend the notice of appeal dated January 21, 2019 in the following manner:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and the ATTORNEY

GENERAL OF ONTARIO (collectively, “Ontario”) APPEAL to the Court of Appeal from

the partial judgments of Justice Patricia Hennessy of the Superior Court of Justice dated December 21, 2018,[1] made at Sudbury.

ONTARIO ASKS: that paragraphs 1, 2, 3(c), 3(d) and 4 of the said judgments be set aside; that sub-paragraph 3(b)(ii) of the said judgments be amended so as to set aside the declaration that "relevant expenses … do not include the costs of infrastructure and institutions that are built with Crown tax revenues"; ~~to the extent that it conflicts with the propositions set out immediately below,~~ and that judgment be granted providing for further declaratory relief as follows:

(a) The "Robinson Superior Treaty", made on September 7, 1850, and the "Robinson Huron Treaty", made on September 9, 1850, (collectively, the "Robinson Treaties") require the Crown to pay perpetual annuities to the Indigenous Treaty parties in specified aggregate amounts - £500 and £600, respectively – and to increase the annuities in the circumstances and subject to the limits declared below;

(b) The Robinson Treaties include an implied term that requires the annuity figures stated in the Treaty texts to be "indexed" to mitigate the extensive erosion of purchasing power that has resulted from persistent inflation (the "Implied Term");

(c) In the event a Treaty territory produces sufficient net Crown revenues in a given year, the Crown must increase the annuities paid to an aggregate amount that equals $4 per person, as adjusted based on the operation of the Implied Term,[2] multiplied by the population of the First Nation Treaty parties. This is a mandatory Treaty obligation that does not turn on the exercise of Crown discretion;

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[1] The reasons for decision of the trial judge were released on December 21, 2018. The partial judgments that are the subject of this appeal were released on June 17, 2019 following extensive submissions to the trial judge regarding how they should be settled.

[2] Ontario takes the position that the Implied Term would take the one pound/$4 figure stated in the Treaty texts to approximately $120 today.

(d) The Robinson Treaties also reflect and provide for a Crown discretion regarding whether the annuities should be increased above $4 per person (as adjusted based on the operation of the Implied Term), and if so in what amount;

(e) The Crown must exercise this discretion from time to time and when requested to do so by one or more of the Treaty First Nations, and in accordance with a process that is consistent with the honour of the Crown;

(f) Net Crown revenues produced by the Treaty territories in a given year constitute a relevant factor that may be taken into consideration in the exercise of the Crown's discretion regarding whether annuities should be increased further and, if so, in what amount.

ONTARIO ASKS, in the alternative, that the said judgments be set aside in their entirety and that the issues determined by the said judgments be resolved through a new trial in the Superior Court of Justice.

THE GROUNDS OF APPEAL are as follows:

1. This litigation concerns the interpretation of the annuity provisions of the Robinson Treaties, which are in essence the same.

2. The key relevant provisions of the Robinson Huron Treaty read as follows:

> … for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes …
>
> …; they the said Chiefs and Principal Men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed …
>
> ……..

> 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 in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which 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 "Augmentation Clause"]*

3. The following propositions are not in dispute:

   a) Annuities paid under the Robinson Treaties were increased to $4 per person in or about 1875, in response to petitions from and on behalf of the Treaty First Nations, and have not been increased since;

   b) The revenues that are relevant for the operation of the Augmentation Clause are net Crown revenues produced by the Treaty territories;

   c) Prices rose and fell in what is now Canada in the 19th century, but persistent and sustained inflation was not an existing or recognized economic phenomenon in 1850 or for decades thereafter. Persistent and sustained inflation arose as an economic phenomenon decades after 1850 and has subsequently reduced the purchasing power the $4 annuity payments by more than 90%. It is reasonable to believe that persistent and sustained inflation will continue to devalue the purchasing power of the dollar in the future.[3]

4. The decision of the learned trial judge resulted from a "summary trial" held to determine the Treaty interpretation issues raised by the pleadings, as framed by matching notices of motion for judgment served by the plaintiffs in each action, seeking declaratory relief. The consideration of "technical defences" was deferred to a later

[3] Agreed Statement of Facts Regarding Inflation, Dec 7, 2017, Trial Exhibit 52. Ontario's position is that inflation has reduced purchasing power by more than 95%.

stage of the proceeding, as was allocation of Treaty responsibilities and potential liability as between Canada and Ontario, and calculation of damages if any.

5. While stated somewhat differently in the plaintiffs' notices of motion, the central issues to be determined in this first Stage of the litigation – as a matter of Treaty interpretation – were and remain:

a) Is the Crown under an obligation to increase annuities above $4 per person in the event the Treaty territories produce sufficient net Crown revenues?

b) If so, what principle or principles govern the determination of the amount of the increased annuities?

c) What is the meaning and legal effect of "such further sum as Her Majesty may be graciously pleased to order", in the Augmentation Clause?

d) Should the $4 per person amount stipulated by the Augmentation Clause be "indexed" to mitigate the effects of persistent inflation?

6. The overarching goal of treaty interpretation is to "choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties [Indigenous and Crown] at the time the treaty was signed."[4] It is beyond the appropriate role of the courts to amend a Treaty or otherwise deviate from the common intentions of the Treaty parties.

7. The trial judge erred in her interpretation of the annuities provisions of the Robinson Treaties. More particularly, the trial judge erred in law and made reviewable

[4] *R v Marshall* [1999] 3 SCR 456 at paras 14, Binnie J; at paras 78, 83, McLachlin J., as she then was, dissenting but not on this point (*Marshall No. 1*; *R v Sioui* [1990] 1 SCR 1025 at para 114; *R v Morris*, 2006 SCC 59 at para 18, Binnie J; at para 107, McLachlin C.J. dissenting).

errors of fact, 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, takes the courts outside their appropriate role, and is so ambiguous and complex that it is likely to foster ongoing litigation rather than reconciliation:

a) In finding that the $4 per-person figure stipulated in the Augmentation Clause relates exclusively to what amounts may be distributed to individuals, and has no relationship to the Crown's aggregate annuity obligations – a proposition that was not supported by credible evidence and is inconsistent with the historical record;

b) 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 – notwithstanding that recognition of such a term would advance reconciliation in a manner that respects the intentions of the Treaty parties;

c) In failing to recognize Crown discretion with respect to the possibility of annuities in excess of $4 per person (as increased to reflect the operation of the Implied Term), thereby transforming a discretion "Her Majesty may be graciously pleased to order" into a mandatory obligation;

d) In concluding and declaring (in paragraph 1 (a) of the partial judgments) that the Crown is under an obligation to increase annuities, without limit, to correspond to ~~reflect~~ a "fair share" of net Crown resource-based revenues from ~~produced by~~ the Treaty territories;

e) In concluding that it was a purpose of the Robinson Treaties to reflect in the annuities the value of the Treaty territories, and in subsequently declaring (in paragraph 1(d) of the partial judgments) that the Crown must "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" – in the absence of evidence indicating that the value of resources was discussed during the Treaty negotiations and without defining "the value of the resources";

f) In reaching ~~this~~ these conclusions without making findings with respect to principles that define a "fair share" as a matter of Treaty interpretation, or taking into account the fact that no such principles were agreed to or discussed during the Treaty negotiations, and thereby overreaching the institutional competency of the court.

g) 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;

h) In recognizing a fiduciary duty over any aspect of the Crown's Treaty annuity obligations under the Robinson Treaties, and in particular over the forensic exercise of determining net Crown revenues produced by the Treaty territories and in relation to the Crown's obligation to pay Treaty annuities.

8. The trial judge further erred in law and fact in declaring that "[f]or the purposes of determining the amount of net Crown resource-based revenues in a particular period: … relevant expenses … do not include the costs of infrastructure and institutions that are built with Crown tax revenues".

9. Such further and other grounds as counsel may advise and this Honourable Court permit.

NOTICE OF MOTION FOR LEAVE TO APPEAL COSTS

ONTARIO ASKS that leave be granted to appeal that part of the judgment which fixed the partial indemnity costs awarded to the plaintiffs. Ontario does not challenge the finding of the trial judge that the plaintiffs should be awarded their costs of the first stage of the litigation on the partial indemnity scale.

SHOULD LEAVE TO APPEAL BE GRANTED, ONTARIO ASKS that the judgment fixing the partial indemnity costs awarded to the plaintiffs be set aside, and in its place substitute awards fixing the costs awarded as follows:

(i) ~~(g)~~ For the *Restoule* plaintiffs (the "Robinson Huron plaintiffs"), reducing their claimable fees by 50%, and fixing costs at a rate of 67% of claimable fees, plus 100% of the disbursements awarded by the trial judge, for a total award of $5,094,724.55; and

(ii) ~~(h)~~ For the Red Rock and Whitesand First Nations (the "Robinson Superior plaintiffs") fixing costs for the hours found by the trial judge to be recoverable, at a rate of 67% of fees billed (excepting those fees and disbursements already the subject of an earlier costs award, and correcting an arithmetical error made in that respect), plus 100% of disbursements awarded by the learned trial judge, for a total award of $4,166,381.06.

THE GROUNDS OF APPEAL are as follows:

10. With respect to costs for Stage 1 of this litigation, the trial judge awarded the Robinson Huron plaintiffs $9,412,447.50 of the $9,716,223.50 claimed, and the Robinson Superior plaintiffs $5,148,894.45 of the $5,961,031.15 claimed.

11. Ontario does not challenge the finding of the trial judge that the plaintiffs should be awarded their costs for Stage 1 of this litigation on the partial indemnity scale (regardless of the outcome of this appeal), but challenges the quantum of the awards on several bases.

12. Rule 1.03(1) of the *Rules of Civil Procedure* stipulates that substantial indemnity fees are 1.5 times the amount that should be awarded on a partial indemnity basis. Costs calculated on a substantial indemnity scale cannot exceed full indemnity; therefore the maximum rate of recovery for fees generally available under partial indemnity should be no more than two-thirds of full indemnity - approximately 67%. More typically, partial indemnity leads to recovery of approximately 60% of fees billed for work reasonably performed, subject to the further requirement that costs awards should not exceed the reasonable expectations of the other parties.

13. The trial judge made the following errors in principle, resulting in costs awards that are plainly wrong:

a) Awarding costs to the plaintiffs on a partial indemnity basis at a rate of 85% of fees claimed, which is tantamount to an award of costs on a substantial indemnity basis; and

b) Failing to meaningfully scrutinize the costs claimed by the plaintiffs and failing to consider the reasonable expectations of the defendants in awarding costs to the Robinson Huron plaintiffs for over 28,000 hours of legal work without articulating any basis for dismissing Ontario's challenges to the reasonableness of those costs, where:

(i) the Robinson Huron plaintiffs did not provide a detailed breakdown of the legal work performed as called for by the *Rules of Civil Procedure*;

(ii) the time claimed was excessive and included work performed by lawyers from at least four law firms, and some of the twenty two lawyers for whom time was claimed never appeared in the litigation;

(iii) the number of claimable hours spent by Ontario for Stage 1 of this litigation, in both actions, was in the range of 12,000 hours; and

(iv) the number of claimable hours spent by the Robinson Superior plaintiffs for Stage 1, was in the range of 7,500 hours.

14. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE BASIS OF THE JURISDICTION OF THE COURT OF APPEAL IS:

1. The *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b);

2. This appeal is from a final order of a judge of the Superior Court of Justice, and no appeal lies to the Divisional Court;

3. Leave to appeal is not required for Ontario's appeal on the merits;

4. Ontario seeks to join an appeal with respect to costs under clause 133(b) of the *Courts of Justice Act* with its appeal as of right, pursuant to Rule 61.03.1(17).

October 18, 2019

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Appeal Court File No. C66455

Superior Court File Nos. C-3512-14, C-3512-14A & 2001–0673

RESTOULE, *et al*	- v. -	CANADA, *et al*	v.	RED ROCK FN, *et al*
RED ROCK FN, *et al*	- v. -	CANADA, *et al*		
Plaintiffs		Defendants		Third Parties

COURT OF APPEAL FOR ONTARIO

Proceedings Commenced at
Sudbury & Thunder Bay

SUPPLEMENTARY NOTICE OF APPEAL

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