Cassels

Righting the Wrongs of the Past: The SCC Weighs in on Crown Duties and Interpretation of Historic Treaties with Indigenous Peoples

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Background & Executive Summary

On July 26, 2024, the Supreme Court of Canada (the SCC) released its highly anticipated decision in *Ontario (Attorney General) v. Restoule* (the Decision).[1] The Decision represents a significant development in the law of treaty interpretation in Canada.

The SCC considered the interpretation and implementation of an augmentation clause (the Augmentation Clause) contained in the Robinson-Huron Treaty and the Robinson-Superior Treaty (the Treaties) signed in 1850 between the Anishinaabe of the upper Great Lakes (the Plaintiffs) and Canada and Ontario (the Crown Defendants).

The Decision centered on whether the Augmentation Clause required the Crown Defendants to periodically assess an increase to the annuities under the Treaties and if so, whether a failure to increase the annuities breached the Treaties. The SCC also considered the appropriate standard of review for treaty interpretation, whether the honour of the Crown imposed any fiduciary duties or a duty to diligently implement treaty promises obliging the Crown Defendants to increase the Treaties' annuities and, if so, how such an obligation should be given effect.

While these issues may appear at first blush to be narrow and fact-specific, the SCC's reasons shed significant light on the law of treaty interpretation more generally.

The SCC unanimously concluded that:

1. the honour of the Crown requires the Crown Defendants to diligently fulfill their treaty promises;
2. under the specific Treaties which were the subject of the litigation, the Crown Defendants have a duty to consider, from time to time, whether they can increase the annuities without incurring loss;
3. where they can do so, the Treaties require that the Crown Defendants exercise their discretion and decide whether to and by how much they should increase the annuities; and
4. the Crown Defendants had breached the Augmentation Clause of the Treaties, therefore breached

the Treaties themselves.

Notably, in reaching this decision, the SCC also clarified the following significant issues:

1. the interpretation of historic treaties by the Crown is reviewable on a standard of correctness; and
2. the Crown does not have a *sui generis* fiduciary duty in respect of all Aboriginal and treaty rights.

A more detailed overview of the facts and the SCC's decision is set out below. Cassels lawyers acted as confidential advisors to one of the interveners in this case.

Facts

In 1850, the Crown negotiated and signed the Treaties with several Anishinaabe First Nations, providing for the surrender of a large portion of their territory in northern Ontario. In exchange, the Crown agreed to provide the Plaintiffs continued hunting and fishing rights, a lump sum payment, and a promise to pay a perpetual annuity. A unique feature of the Treaties was the Augmentation Clause, which provided for increases in the annuity payments where revenues from the Treaty territories allowed the Crown to do so without incurring loss.

In 1875, the annuities under both Treaties were increased. This was the first and only time the annuities under either of the Treaties were increased. In 2001 and 2014, the Plaintiffs commenced two claims against the Crown Defendants seeking, among other things, declaratory and compensatory relief relating to the interpretation, implementation, and alleged breach of the Augmentation Clause. The two actions were subsequently tried together in the following stages:

- Stage 1 – motion for summary judgment to address the interpretation of the Treaties;
- Stage 2 – motion for summary judgment to address defences of Crown immunity and limitations issues; and
- Stage 3 – damages and allocation of liability among the Crown Defendants.

The appeals to the Ontario Court of Appeal and the SCC concerned only stages one and two, as no decision has yet been issued by the trial judge on the stage three issues.

The Decision

The Standard of Review

The SCC first dealt with the issue of treaty interpretation, holding that treaties are "solemn promises," or *sui*

generis agreements, governed by special rules of interpretation.[2] The Decision confirms that treaty rights must be interpreted in accordance with the honour of the Crown.[3] Further, the SCC cited the principles for interpreting treaties outlined in *Marshall* and the two-step approach to interpreting historic treaties.[4]

The SCC then held that the standard of review for treaty interpretation is correctness on the basis that treaties are constitutionally protected, nation-to-nation agreements. They engage the honour of the Crown, and their interpretation has significant precedential value.[5] The SCC noted, however, that the factual findings underpinning the interpretation of treaties attract deference and are reviewable only for palpable and overriding error.[6]

Crown Duties

The Decision laid out the difference between *ad hoc* and *sui generis* fiduciary duties that the Crown may owe to Indigenous peoples. *Ad hoc* fiduciary duties arise as a matter of private law and require utmost loyalty to the beneficiary and *sui generis* fiduciary duties are unique to the Crown-Indigenous relationship, flow from the honour of the Crown, and permit the Crown to balance competing interests.[7] An *ad hoc* fiduciary duty will only arise as between the Crown and Indigenous peoples "where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary"[8] and there is a clear intention for the Crown to forsake the interests of all others in favour of the alleged beneficiary.[9] A *sui generis* fiduciary duty will arise where there is a Crown undertaking of discretionary control over a specific or cognizable Aboriginal interest.[10]

The SCC held that there was no evidence the Crown Defendants undertook to act in the best interest of the Plaintiffs and to forsake the interests of all others in favour of the Plaintiffs sufficient to establish an *ad hoc* fiduciary duty.[11] The SCC has been clear in its jurisprudence on section 35 of the *Constitution Act, 1982* that "reconciliation" involves not only the Crown reconciling with Indigenous peoples for past wrongs but also reconciliation by the Crown of Indigenous and non-Indigenous interests.[12]

Further, the SCC held that interests derived from treaties themselves, and not from a standalone Aboriginal interest, cannot be characterized as a "specific and cognizable" Aboriginal interest sufficient to ground a *sui generis* fiduciary duty.[13] Finally, where an Aboriginal group cedes their interests in land, such as in the Treaties, there can be no undertaking by the Crown to assume discretionary control over that interest in land on behalf of the Aboriginal group.[14]

Although the SCC found that no specific fiduciary duties apply to the Augmentation Clauses, the honour of the Crown still requires that the Crown Defendants meet their duty to diligently fulfill treaty promises.[15] The duty of diligent implementation requires that the Crown take a broad and purposive approach to the interpretation of a treaty promise and act to diligently fulfill it. The duty of diligent implementation imposes more than mere procedural obligations that speak to how the Crown's obligations must be fulfilled; it requires that the Crown perform its obligations in a way that pursues the purpose behind the underlying

treaty promise itself.[16]

Limitations

The Decision confirmed that Ontario's limitations legislation does not apply to the Plaintiffs' claim.[17] The SCC affirmed that a claim for breach of treaty can be neither an action "on the case" nor an "action of account" and is accordingly not statute-barred by the 1990 *Limitations Act*.[18] In so doing, the SCC held that the action "on a case" is not appropriately characterized as a catch-all cause of action or basket clause capturing any claim not expressly mentioned in the limitations legislation and that a claim for breach of an Aboriginal treaty is fundamentally different from an and action in tort or contract.[19] The SCC also reiterated the *sui generis* nature of treaties and that, although the relationship between the Crown and Indigenous peoples is fiduciary in nature, no specific fiduciary duty is engaged to bring the claim within the scope of actions of account.[20]

The Interpretation of the Treaties and the Augmentation Clauses

The SCC found that a proper interpretation of the Augmentation Clauses led to the conclusion that the Crown Defendants had a mandatory duty to consider, from time to time, whether they could increase the annuities without incurring loss.[21] Where the Crown Defendants can increase the annuities, they must exercise their discretion and decide whether to do so and by how much.[22] However, this discretion is not unfettered; it is justiciable and reviewable by the courts, and must be exercised liberally, justly, and in accordance with the honour of the Crown.[23]

The SCC agreed with the Crown Defendants' own concessions that they had breached the Augmentation Clauses, and by extension, breached the Treaties themselves.[24]

Remedies

The SCC directed the Crown Defendants to engage in an ongoing relationship with the Plaintiffs based on the Anishinaabe values of respect, responsibility, reciprocity, and renewal.[25] The SCC found that the Plaintiffs had "been left with an empty shell of a treaty promise" for almost a century and a half and issued declaratory relief in the form of six declarations.[26] However, the SCC also found that simple declarations alone would be insufficient to remedy the Crown Defendants' longstanding and egregious breach and to restore the honour of the Crown.[27]

To repair the treaty relationship, sufficiently vindicate the Plaintiffs' treaty rights, and meaningfully advance reconciliation, the SCC directed the Crown Defendants to enter negotiations with the Plaintiffs to increase the annuities retrospectively and to address compensation for the breach of the Treaties. Failing a settlement, the Crown will be required to exercise its discretion honourably to determine an amount of compensation which will be reviewed by the courts.[28] The SCC provided six months for the Crown and

Plaintiffs to negotiate a settlement.[29]

Although the SCC noted that determining compensation is a polycentric and discretionary policy decision better left to the executive branch of government after weighing "the solemnity of [the Crown Defendants'] obligations to the Anishinaabe and the needs of other Ontarians and Canadians, Indigenous and non-Indigenous alike," the compensation amount, and the process through which it is arrived at, will be subject to review by the courts.[30] The Decision provided several factors that a reviewing court should consider in the event such a review was necessary, but also advised that "courts should exercise considerable caution before intervening."[31]

Takeaways

Several key takeaways can be gleaned from the Decision:

- Historic treaties are to be interpreted according to the principles and the steps laid out by the SCC in *Marshall*.
- Interpretation of historic treaties by the Crown will be assessed by an appellate court on the standard of correctness, though the facts underlying the interpretation are subject to deference to the trial judge.
- Historic treaty interpretation and decisions from courts related thereto are key to meeting the goals of reconciliation, and reviewing courts should ensure that such impactful decisions are sound.
- The Crown may owe fiduciary duties to treaty beneficiaries depending on the circumstances of the treaty and the promises contained therein. The question of what fiduciary duties – if any – flow from treaty promises was previously murky, making this clarity a welcome development in the law.
- Limitations legislation is itself limited in how it may bar claims for breaches of historic treaties, particularly where declaratory relief is sought.

The Decision is a reminder that Crown promises to Indigenous peoples must be discharged honourably and that, while such exercises of Crown discretion may be indeed justiciable, the courts will prefer negotiated solutions. The SCC ordered the Crown Defendants to engage in honourable negotiations with the Plaintiffs and only after such negotiations fail to produce honourable and constitutionally-compliant outcomes, will the trial judge be empowered to intervene and determine final settlement of the issues and appropriate damages in stage three.[32]

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[1] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 [*Decision*].

[2] *Decision* at para. 70.

[3] *Decision* at paras. 71, 73, & 96.

[4] *Decision* at paras. 79—81; *R. v. Marshall*, [1999] 3 SCR 456 at paras. 78 & 82—83.

[5] *Decision* at paras. 87, 99, 103—113, & 119.

[6] *Decision* at para. 114.

[7] *Decision* at para. 222.

[8] *Decision* at para. 228 citing *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 44 [*Williams Lake*].

[9] *Decision* at para. 231.

[10] *Decision* at para. 234.

[11] *Decision* at paras. 229 & 231—232.

[12] *Decision* at para. 296; See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 1 & 63; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 20, 32—33, & 50; *R. v. Sparrow*, [1990] 1 SCR 1075 at 1109; *R. v. Van der Peet*, [1996] 2 SCR. 507 at para. 31; *Delgamuukw v. British Columbia*, [1997] 3 SCR. 1010 at para. 186.

[13] *Decision* at para. 237.

[14] *Decision* at paras. 245 –246.

[15] *Decision* at paras. 10 & 228—247.

[16] *Decision* at paras. 253, 258 & 261.

[17] *Decision* at paras. 10, 203, & 217.

[18] *Decision* at paras. 206—217.

[19] *Decision* at paras. 208 & 210.

[20] *Decision* at paras. 210 & 215—216.

[21] *Decision* at paras. 10 & 196.

[22] *Decision* at paras. 10 & 196.

[23] *Decision* at paras. 196.

[24] *Decision* at paras. 10 & 247.

[25] *Decision* at paras. 18 & 197.

[26] *Decision* at paras. 11, 271, & 305.

[27] *Decision* at paras. 11, 271, 283, & 286—287.

[28] *Decision* at paras. 11, 283, 288, & 290.

[29] *Decision* at paras. 11 & 305.

[30] *Decision* at paras. 12, 294, 296.

[31] *Decision* at paras. 294 & 309.

[32] *Decision* at paras. 298—299.
