

ROBINSON HURON TREATY ANNUITIES CASE

Litigation Update: Appeal (Stage 1 & 2), Trial (Stage 3)
October 14, 2020

Background

The litigation of the Robinson Huron Treaty Annuities Case is progressing in three stages: Stage 1, Enforceability of Treaty annuity augmentation clause; Stage 2, Crown defences relating to Crown immunity and statute of limitations barring the case; and Stage 3, compensation. All three stages are actively advancing. Stages 1 and 2 are under appeal. Stage 3 is going to trial.

Stage 1: Appeal Hearing Scheduled for January 2021

The trial decision in Stage 1 was released in December 2018. The decision affirmed that the Crown has a legal, treaty and fiduciary obligation to increase the annuities above \$4 per person.

Ontario is appealing the trial decision on a number of issues including:

- the Judge erred in law by interpreting the treaty as requiring a mandatory increase above \$4.00 on the basis that she did not properly consider Crown evidence
- the Judge erred in ruling that the \$4.00 cap applied to the individual share of the annuity and not on the collective annuity
- the judge erred in finding a fiduciary obligation applied
- the judge erred in NOT finding that the Crown has total discretion regarding increases
- the Judge was wrong in NOT agreeing with Ontario that the \$4.00 should be indexed to inflation

Though the federal government did not appeal, they did file a factum which includes the following:

- Canada has not appealed the judgments of the Superior Court on the motions for partial summary judgment. Canada agrees with the judge's finding that the Crown has treaty obligations under the Robinson Superior and Robinson Huron Treaties (the "Treaties") to increase the promised annuity payments from time to time if net Crown resource-based revenues from the Treaties' territories permit.
- The Crown retains discretion with respect to the implementation and fulfilment of those obligations; but its discretion is not absolute. The Crown discretion is constrained by the terms of the Treaties, the duties of purposive interpretation and implementation flowing from the honour of the Crown, and the reconciliatory imperative of section 35 of the Constitution Act, 1982. Its exercise is also subject to review by the courts.

Dates for the hearing of the appeal were initially set for May 2020, but due to COVID-19, these were rescheduled for January 2021. The hearing schedule is as follows:

- January 5: Opening Statements
- January 11-14: Week 1
- January 18-21: Week 2

The stage one judgement is a solid judgement, well founded on the facts and application of precedent from the Supreme Court of Canada and other rulings from Superior Courts across the country.

Stage 2: Appeal Notice of Appeal Received & Hearing Scheduled

The decision in Stage 2 was released on June 26, 2020. Ontario had argued Crown immunity from liability for breaches of fiduciary duty prior to the enactment of the Proceedings Against the Crown Act in 1963. Justice Hennessy ruled against Ontario on this. The Judge also ruled against Ontario's argument that the treaty annuity claims were barred by limitations statutes.

Ontario filed its Notice of Appeal on August 14, 2020. Ontario claims that:

- The Judge erred in law by concluding that the Crown is not immune from claims for breach of fiduciary duty prior to 1963;
- The Judge erred in law by finding that Ontario's limitations legislation, and in particular, the Limitations Act, 1990, does not apply to the plaintiffs' claims;
- The Judge erred in her application of the principles of statutory interpretation contained in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 to this case, in particular, by finding that the *Nowegijick* Principles applied to the interpretation of statutes of general application where the statute may bear on a Treaty promise or an Aboriginal right; and
- the Judge erred in principle by relying upon and interpreting the principle of the honour of the Crown to render a provincial statute and common law rule inapplicable to the treaty claims.

Again, Canada did not appeal the stage 2 decision.

The hearing is scheduled for three days starting June 1, 2021.

Stage 3: Trial Preparation Underway, Hearing Scheduled for September 2021

Stage 3 of the trial is likely to be as complicated and lengthy as Stage 1, and equally important.

Issues

The main focus of stage 3 will be on remedies, including compensation for the Crown's failure to augment in the past. This will involve a number of issues, but the three main questions are as follows: (1) what are the *actual* net Crown revenues generated from resources in the Treaty territory from 1850 to present day, (2) what is the *value* of the resources in the Treaty territory, from which the Crown generated revenues in that period, and (3) what is the fair share of those revenues that ought to have been allotted to the RHT beneficiaries as augmented annuities from 1850 to the present? An additional issue is whether the federal Crown or the provincial Crown is liable to pay the compensation due to the RHT, although this will largely be a contest between Canada and Ontario.

Evidence: Documents and Experts

An extensive amount of evidence will be needed to determine these questions.

Discovery and production of documentary evidence is underway. To date the Crowns have provided us with over 6,000 documents and more will be arriving between now and the end of March 2021. Likewise, there will be documents received and gathered on Lake Huron Anishinaabe side that will need to be produced and provided to the Crowns. The management and organization of the documentary evidence is a sizable undertaking and we are working on technical solutions to ensure that the processing of incoming and outgoing documents goes as smoothly as possible.

The legal team has been busy researching, interviewing and retaining experts and other potential witnesses. The Crowns as well have retained some experts.

The experts have been in dialogue with each other about the issues. This is known as “hot-tubbing” and is a process by which the experts identify where they differ in their opinions on the issues.

There is an intention to gather information from Anishinabek experts and Elders to address compensation issues and to present their evidence to the court, including on the matter of a fair share of resource revenues.

Timetable

Stage 3 has been actively case managed by Justice Hennessy since 2019. A timetable was recently set down at a case management conference as follows:

- Now and Ongoing Economic experts hot-tubbing to narrow issues
- March 31, 2021 Final document production (with exception to new documents)
- April 15, 2021 List of agreed issues due
- May 9, 2021 Plaintiffs’ Expert Reports due
- July 9, 2021 Defendants’ Responding Expert Reports due
- August 9, 2021 Plaintiffs’ Reply Expert Reports due
- September 9, 2021 Trial Commences