

A SPECIAL REPORT

Treaty Interpretation in the Age of *Restoule*

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ABSTRACT

After over a century of attempts to compel the Crown to honour the 1850 Robinson-Huron and Robinson-Superior Treaties. Anishinaabe Plaintiffs in the *Restoule* Case have made advancements in Ontario courts in the re-consideration and re-interpretation of these foundational historic treaties. At issue in the most recent years of the litigation has been the “augmentation” clause relating to treaty annuities; more specifically, the Crown’s failure to increase the annuity payments. The Special Report begins with a discussion between Rachel Arsenaault and Ogimaa Duke Peltier on the context of that failure, the rationale for litigation, and attempts to bring Indigenous protocols into the court. In “Interpreting Historic Treaties: *Restoule* at the Ontario Court of Appeal,” Tejas Madhur, Blair Feltmate, and Brianna McCann offer an overview of the legal history that was outlined in the trial decision and on appeal. They provide a more precise look at how the Ontario Court of Appeal applied a textual analysis of the historical promises of the Robinson Treaties. In “Trial by Ishkode: Treaty Remedies in *Restoule*,” David Gill and Kaelan Unrau offer an analysis of the relationship between Anishinaabe and Canadian law that comes to a confluence of sorts in the *Restoule* case. Lastly, this Special Report ends with a Conclusion by Robert Janes, Q.C. who illustrates that with *Restoule*, there is a change; it marks a departure from the colonial vision of treaties towards a re-interpretation that could result in a genuine engagement with Indigenous perspectives on historic treaties in the courts.



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Return of the Treaty

by Christina Gray & Hayden King

A long-overdue innovation in treaty interpretation is happening in Ontario courts. For the first time in a very long time, First Nation interpretations of a “historic” treaty – the Robinson Treaties – are finally being heard and taken seriously.

The *Restoule* case is a culmination of advocacy by the Anishinaabe in the Robinson Treaties’ areas to have their rights upheld. This case was formally brought in 2001 by the Anishinaabe Plaintiffs (as represented by Treaty beneficiaries) but is the result of attempts to bring to light treaty injustices soon after the Robinson-Huron and Robinson-Superior Treaties (Robinson Treaties) were signed between the Anishinaabe and Crown.

Prior to Confederation, the Crown recognized that to secure land for western expansion, treaties had to be made with Indigenous peoples. The Crown abided by the law set down by the *Royal Proclamation of 1763*, which required that consideration and compensation be paid for cessions of land.¹

As settlers stretched over the Great Lakes and into the Western edges of Anishinaabe territory, the Crown sought to capture the Northshore of Lakes Huron and Superior. The Anishinaabeg and Crown entered into the Robinson Treaties.

These Treaties are a bridge between the land purchases and “blank” treaties that dominated what is now Southern Ontario (Upper Canada Treaties) and the more expansive Numbered Treaties that would shape the country that followed. The Robinson Treaties were the Canadian proto-treaty.

Despite that, they also included a unique clause that doesn’t appear in later treaties: an “augmentation” clause relating to treaty annuities. The augmentation clause is the primary disputed issue in court today. But more specifically, the Crown’s failure to increase the annuity payments is the focus at the Ontario Superior Court of Justice, Court of Appeal, and soon perhaps the Supreme Court of Canada (unless there is a negotiated settlement before then).

The history of annuity payments for the beneficiaries of the Robinson Treaties are long and fraught. Despite the inclusion of the augmentation clause, the annuity payments increased only once: In 1875, from \$1.70 for the Huron and \$1.60 for the Superior beneficiaries, respectively, to \$4. Anishinaabeg chiefs also began petitions for arrears for the increase to annuity payments between 1850 to 1874.²

The Plaintiffs in the case brought Anishinaabe law and legal principles as part of the factual evidence at the Ontario Superior Court of Justice. The Plaintiffs and Canada asked the Court to consider Anishinaabe law and legal principles in the “common intention analysis.” Indeed, the law and legal principles associated with “Mino Bimaadiziwin” and “ishkode,” for example, persist to this day, according to the trial judge. The Plaintiffs impressed upon the Court that the treaties are relational agreements that incorporated the concept of sharing the benefits of the land.³

The Ontario Crown has taken a different interpretation of the Treaties. At the Ontario Court of Appeal, Ontario argued the smaller annuity was justified through time because of a clause in the Treaty that gave the province discretion to increase it. Ontario’s argument is based on a transactional and unilateral view of the Robinson Treaties. Given that governments and courts have erred on the side of Crown discretion in the past, many were surprised when Justice Hennessy – after looking at the circumstances and intentions in 1850 – held that the Treaty was a collective promise to share in the revenues of the territory with the collective, and the Crown was obliged to increase the lump sum annuity if the economic circumstances of rising revenues were met.⁴ This issue was upheld by the Court of Appeal.

While there is a third part of the case still to come, if it does at all, the decisions to date signal a shift in treaty interpretation. This is the subject of this joint JFK LLP and Yellowhead Special Report on *Restoule*, which offers multiple and equally compelling analyses of treaty interpretation in *Restoule*.

The Special Report begins with a discussion between Rachel Arsenault (doctoral student, York University) and Ogimaa Duke Peltier (Chief, Wiikwemkoong Unceded Territory). "Accountability and Ceremony in a Canadian Court: Interview with Ogimaa Peltier on the *Restoule* Case" offers further context to the litigation. Ogimaa Peltier shares his perspective on the actions of past and present chiefs to hold the Ontario and Canadian government accountable to the terms of the Robinson Treaties. Despite attempts to raise awareness to bring about meaningful change for Treaties' beneficiaries of the Robinson Treaties, they ultimately had to resort to litigation to uphold the honour of the Crown. Peltier also offers key insights into how Anishinaabek law and ceremony have played a central role in the court processes.

Next, in "Interpreting Historic Treaties: *Restoule* at the Ontario Court of Appeal," Tejas Madhur, Blair Feltmate, and Brianna McCann (JFK Law LLP) provide an overview of the legal history that was outlined in the trial decision and on appeal. They provide a more precise look at how the Court of Appeal applied a textual analysis of the historical promises of the Robinson Treaties. This is a careful review of the appellate court's interpretation of the trial judge's approach in remedying the issue concerning the augmentation clause.

In "Trial by Ishkode: Treaty Remedies in *Restoule*," David Gill (doctoral student, University of Victoria) and Kaelan Unrau (JFK Law LLP) offer an analysis of the relationship between Anishinaabe and Canadian law that comes to a confluence of sorts in the *Restoule* case. More specifically,

they interpret some of the challenges and constraints with legal remedies, such as with damages and declarations, while considering Anishinaabe law. These are the unique issues that are brought to light through trans-systemic litigation and the treaty itself, as illuminated in the case at hand.

Lastly, this Special Report ends with a hopeful Conclusion by Robert Janes, Q.C. Janes illustrates that with *Restoule*, there is a change; it marks a departure from the colonial vision of treaties, which ultimately exists as a legal fiction. Treaty perspectives are, after all, based on those telling the story, and for the Crown, the story is about submission and the cession of land. However, Indigenous peoples' perspective in the history of treaty-making includes sharing, respect, and autonomy. These concepts, Janes argues, have now made their way into treaty interpretation with immediate and lasting impacts.

While this Special Report ends on a hopeful tone, it's also important to note that bringing forward issues of treaty injustices in the courts is a costly and time-consuming process.

In many cases, as in this one, all of that time and money ultimately leads back to the negotiating table; the place courts have insisted these discussions actually belong. Perhaps Crowns will heed that advice this time around. But in the meantime, we offer this Special Report about treaty interpretation in the time of *Restoule*.

“ The Robinson Treaties of 1850 are very clear, in our opinion, that the annuity should be augmented and should have been augmented on an annual basis since 1875, which is the last time it was increased. Throughout the court hearing, the general public and society expressed their own frustration with the government’s inability and unwillingness to live up to the terms of the Robinson Treaties and many other treaties across the country. We have attained a wide range of support from municipalities and their leaders, calling upon the provincial government to honour this treaty and the wishes of the Anishinabek peoples.

- OGIMAA (CHIEF) PELTIER,
WIKWEMKOONG UNCEDED TERRITORY



PART ONE

Accountability and Ceremony
in a Canadian Court: An Interview with
Ogimaa Peltier on the *Restoule* Case

by Rachel Arsenault



As the third stage of the *Restoule* trial draws near, set for fall 2022, Ojibwe and Odawa doctoral student, Rachel Arsenault, sat down with Ogimaa (Chief) Peltier (both from Wiikwemkoong Unceded Territory) to discuss the *Restoule* case.

With over a decade and a half of experience in this litigation, Ogimaa Peltier imparts knowledge from this important court process. The *Restoule* litigation stands as an act by the Anishinabek to hold the Crown accountable for failing to honour their promises in the Robinson Treaties. Ogimaa Peltier ends by offering advice for other First Nations (and lawyers) seeking to bring similar litigation including in organizing and supporting such complex litigation.

Can you speak about where you're from and how you're involved in the *Restoule* case?

I'm a member of the Anishinabek Nation, and Wiikwemkoong is part of that Nation. Wiikwemkoong represents three tribal nations of the Anishinabek: Ojibwe, Potawatomi, and Odawa. I've served the community as a council member since 2006 and elected as Chief since 2012. Wiikwemkoong has the largest number of beneficiaries of the Robinson-Huron Treaties within its membership. Leadership decided that we needed to be part of the *Restoule* case based on the sheer number of our community's beneficiaries.

I have a number of roles related to the *Restoule* case. I am a beneficiary of the Robinson-Huron Treaty of 1850. I am a named litigant in the *Restoule* case; I am also appointed as a Trustee for Wiikwemkoong First Nation with the Robinson Huron Treaty Litigation Fund, where I also provide guidance as a member of the Litigation Management Committee. Lastly, Ogimaa Dean Sayers [Chief of Batchewana First Nation] and I act as spokespersons as well.

What led you and the other Nations to commence this litigation, and how did you manage to form a consensus to move forward together?

The primary motivating factor was to hold the Crown, as represented by both the Canadian and Ontario governments, accountable to the Robinson-Huron Treaty of 1850.

At various times since about 1850, our leaders made petitions for treaty implementation. Our leaders articulated that the Crown needs to live up to the terms of the Robinson Treaties. In this case, the leadership had petitioned the Queen, the British Crown, the Government of Canada, the Governor General of Canada, the Lieutenant Governor of

Ontario, the Prime Minister, and Premiers. But absolutely nothing came from the petitions.

We raised awareness not only among the beneficiaries but also with the governments and the public. But there wasn't political will by the Crown to address their shortcomings of not adhering to the Treaty terms. So, it was decided that the signatories would establish a litigation trust and bring forward a court action against the Crown on behalf of all the beneficiaries.

The leadership, through many discussions, had considered bringing this court action in the past few decades. We also sought advice through ceremonies – or sought guidance through ceremony by using the gifts that were given to Anishinabek people. It was there [through ceremony] that all the signatory First Nations came together to establish a litigation trust and provide the authority to our legal representatives in order to provide notice and submit the court action.

In regards to the Anishinabek interpretation of the Robinson Superior and Huron Treaties ("Robinson Treaties"), what was the purpose of the annuity?

The leadership in the late 1840s had observed that there was increasing settlement occurring, and, in fact, there was mining activity that was commencing in both Bruce Mines and Mica Bay on the shores of Lake Superior. Some of the Chiefs at the time took it upon themselves to address the illegal operation of this mining activity by evicting a company that was operating the Mica Bay mine, this is known as the Mica Bay Incident. The Quebec Mining Company then lodged a complaint with the Crown, and then the Crown established the Vidal Anderson Commission of 1849 to investigate and to provide a report to the Crown on what the next steps could be.

Under the terms of the *Treaty of Niagara of 1764*, an invitation was sent to all the First Nation leaders in the Lake Huron and Lake Superior region to come together in Sault Ste. Marie and discuss a treaty. During those discussions, some of our leaders, namely Chiefs Shingwaukonse and Nebenaigoching, had put forward a proposal to include a treaty as part of the terms and conditions. This proposal included an annuity – a yearly payment to beneficiaries of the Treaty. Chiefs Shingwaukonse and Nebenaigoching and other leaders had knowledge of treaties in other locations in Canada and the U.S.; including their agreed upon annuity payments provided to First Nations as part of those treaty agreements.

The initial annuity requested was dismissed because the Crown was broke at the time and believed the Anishinabek territory was not valuable. Instead, the Chiefs, who were sophisticated negotiators, negotiated for a lower annuity

payment and included an augmentation promise or escalator clause for the annuity in the Robinson Treaties of 1850. The annuity was to be augmented (increased) if the land was used more productively and the Crown could afford to increase the annuity without incurring a loss.

The proposal that was put forward by Chiefs Nebenaigoching and Shingwaukonse was an annuity of \$10, and yet what was ultimately provided was an annuity of about \$1.60 per beneficiary a year. This annuity was augmented once to \$4.00 in 1875, and has not been increased since, despite significant wealth being generated from the territory.

What is the Anishinabek understanding of the Robinson Treaties annuities provision?

Our understanding is that the annuity itself was inserted into the Robinson Treaty to allow for economic development, which could support settlement of the area as well as providing significant benefits to the Anishinabek peoples. The mining and forestry activity within the territory is and has been significant, with the Crown governments benefitting substantially from those activities.

Can you speak to how Anishinabek law and ceremony has factored into the case and how receptive the Crown was to it?

Ceremony has played an important role. We have great respect for the gifts that were given to our people by the Creator, and we continue to use those with the guidance needed. And through our submissions, our written submissions, and expert witness testimonials, Anishinabek law played a significant role in guiding our view that we wished to express to the court.

I was quite happy with how the Ontario court and their officials welcomed our ceremonies – not only into the court but also running concurrently with the court. Each of the court hearings started with a pipe ceremony every morning. We also had a fire lit for our sweat lodge. The judge and the lawyers from both Crowns and our leadership joined in a sweat lodge ceremony prior to the court hearings. I'm not positive, but I do believe that may have been the first time in the history of court proceedings that Anishinabek law and ceremonies played a prominent role as part of those court hearings.

The judge and the Crown lawyers have participated in most, if not all, of the ceremonies we held. We have observed many of them offering their tobacco to the fire during court proceedings. They also participated in our sunrise ceremonies.

Ultimately, the first stage decision clearly articulated that Anishinabek law is parallel and equal to the common law and requires consideration when interpreting Anishinabek cases that are heard before the court.

How has this case and its outcome (so far) affected your view of the courts, the Crown, and settler society?

This particular case has really opened up my eyes to how the courts work for our people. I have observed the Crown take separate positions where the federal government has followed through with the political messaging from its government. For example, stating that reconciliation is the most important priority of the Canadian government – we've seen evidence of that taking place – whereas the provincial government has taken the opposite approach in choosing to continue a court process where they have not yet seen a decision in its favour.

The Robinson Treaties of 1850 are very clear, in our opinion, that the annuity should be augmented and should have been augmented on an annual basis since 1875, which is the last time it was increased. Throughout the court hearing, the general public and society expressed their own frustration with the government's inability and unwillingness to live up to the terms of the Robinson Treaties and many other treaties across the country. We have attained a wide range of support from municipalities and their leaders, calling upon the provincial government to honour this treaty and the wishes of the Anishinabek peoples.

If you had one piece of advice for a First Nation or lawyers thinking about bringing a case like this, what would it be?

I would say that they would require having full discussions with First Nation leaders, their people, and build that consensus that they want to continue to see the legal process acted on until the very end. First Nations would also need the necessary resources available to them to ensure that the legal approach is fully funded but also for it to be guided by ceremony.

PART TWO

Interpreting Historic Treaties:
Restoule at the Ontario Court of Appeal

by Tejas Madhur, Blair Feltmate, and Brianna McCann



On November 5th, 2021, the Ontario Court of Appeal (the “Court of Appeal”) released its long-awaited decision in *Restoule v Canada (Attorney General)*, 2021 ONCA 779 (“*Restoule*”). For all those interested in treaty and Aboriginal rights, this case shares unique insights into how modern courts can interpret specific historic treaty provisions.

The article below seeks to provide clarity on the legal history that led to the *Restoule* decision, parse out what courts will consider when interpreting historic treaty provisions, and highlight the deep dive into treaty-making history that courts undergo to make sense of historical promises. Ultimately, we find that an integrated relationship between the courts’ textual, historical, and cultural analysis is a necessary component of treaty interpretation. This approach grounds the analysis in the treaty document while allowing space to examine the common understanding of the parties. The review of the parties’ common understanding is necessary to hold the Crown accountable for the promises made during treaty-making.

ROBINSON TREATIES

The Court of Appeal’s *Restoule* decision is centred on the relationships entered into by way of two Treaties: The Robinson-Huron and Robinson-Superior Treaties. The Robinson Treaties were made in 1850 between the Crown and Anishinabek north of Lake Huron and Lake Superior, and are named after William B. Robinson, the Treaty Commissioner who negotiated the Treaties on behalf of the Crown. In the words of the Court of Appeal, the Robinson Treaties “cover a territory that includes the current communities of Thunder Bay, Sault Ste. Marie, and North Bay, among others.”

The Robinson Treaties contain several clauses that set out the terms that the Anishinabek and Crown agreed upon in 1850. These clauses were the subject of interpretation in the *Restoule* case at both the Ontario Superior Court of Justice and the Ontario Court of Appeal. In each of the Robinson Treaties, the Crown agreed to make a one-time payment and a perpetual annuity payment to the Anishinabek in exchange for the “surrender, cede, grant and convey” of specified areas of land to the Crown. Since 1875, the annuity payment has been \$4 (£1) per person under both Robinson Treaties, despite 146 years of the Crown benefitting from resource extraction on Anishinabek lands.

UNDERSTANDING RESTOULE

To understand this decision, we have to step back and understand how this case has made its way through the Ontario courts since 2001.

In 2001, representative groups of beneficiaries of the Robinson-Huron Treaty and the Robinson-Superior Treaty,

alongside the Chief and Council of Red Rock First Nation and the Whitesand First Nation (referred to throughout as the “Beneficiaries”), commenced an action against the Government of Ontario (“Ontario”) and the Government of Canada (“Canada”).

In this action, the Beneficiaries claimed that they were owed an increase in the annuity payments paid by the Crown under the Robinson Treaties. The Robinson Treaties promised an increase of payments *if and when* the territory the Anishinabek had ceded produced an amount that enabled “the Government of this Province, without incurring loss, to increase the annuity hereby secured to them.” This quoted passage forms part of the augmentation clause, a unique legal mechanism in these Treaties that allowed for annuity payments to increase over time, which developed into the central issue in this case. The augmentation clause includes a statement that “the amount paid to each individual shall not exceed the sum of one pound,” which is \$4 per individual.

Due to the procedural and substantive complexity of the case, the trial judge, Justice Hennessy, split the trial into three stages. We are only dealing with the first two stages (the third is to come in October 2022). Stages 1 and 2 dealt with treaty interpretation, focusing heavily on the augmentation clause.

After hearing arguments from all sides, the trial judge determined that the reference in the augmentation clause to a maximum of \$4 per person applied only to **individual** annuities payments and did not preclude a **collective** amount that could exceed the individual cap.

Simply put, the entire purpose of the augmentation clause was to offset the low sum available to pay the “Chiefs and their Tribes” by promising a share of the future wealth of the territory, if and when such wealth would be realized.

This decision was favourable to the Anishinabek but unsatisfactory to Ontario. Ontario therefore launched an appeal of the trial judge’s decision. On appeal, Ontario argued that the trial judge erred in the interpretation of the Robinson Treaties. Primarily, they argued that the Crown had unfettered discretion on whether or not to make any increase in annuity payments under the augmentation clause. A five-member panel of the Court of Appeal (Strathy C.J.O., Lauwers, Hourigan, Pardu and Brown J.J.A.) heard Ontario’s appeal in April and June 2021, and their decision was released in November 2021.

On the matter of treaty interpretation, the Court of Appeal upheld the trial judge’s decision in favour of the Beneficiaries. A majority of the Court of Appeal (three of

five Justices) held that the trial judge did not err in her interpretation of the Robinson Treaties. A minority of the Court of Appeal (two of five Justices) disagreed with the trial judge's approach to treaty interpretation but also rejected the majority of Ontario's arguments, ultimately deciding in favour of the Beneficiaries.

On the specific issue of annuity payments, the Court of Appeal stated that the trial judge's approach to potential remedies should be adjusted to ensure that payments are distributed in a manner consistent with the augmentation clause in the Robinson Treaties.

Ontario has responded to this decision by filing leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. But will it succeed? That is to be determined, but understanding the Court of Appeal's reasoning for rejecting Ontario's original appeal might offer insights into how the Supreme Court of Canada may side.

PRINCIPLES OF HISTORIC TREATY INTERPRETATION

When courts interpret Treaties (both historic and modern), they look to the principles of treaty interpretation as set out in the Supreme Court of Canada decision in *R v Marshall*, [1999] 3 SCR 456 ("*Marshall*"). The trial judge applied former Chief Justice McLachlin's two-step test in *Marshall*, which instructs judges to:

(1) examine the words of the treaty clause at issue to determine their facial meaning, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences; and

(2) consider the meaning or different meanings which have arisen from the wording of the treaty right against the treaty's *historical and cultural* backdrop [emphasis ours].

When the case was first brought before the courts, the trial judge applied the Marshall analysis to the augmentation clause. The Court of Appeal was then tasked with examining the trial judge's interpretation of the augmentation clause.

THE COURT OF APPEAL'S "AUGMENTATION CLAUSE" ANALYSIS

At issue in the *Restoule* case was how the augmentation clause was meant to function and whether and how the annuity payments would (or could) be increased.

Ontario took the position that the power to increase annuities was "unfettered" (i.e. they could apply the augmentation clause as they saw fit). Their position was based on four (4) arguments: (1) that the augmentation clause is entirely discretionary (an argument focusing solely on certain wording in the text); (2) that the issue is not justiciable (or not capable of determination based on law or legal principles); (3) that there was a factual error made by the trial judge relating to the role of "discretion";

and (4) that the honour of the Crown, in this case, engages only procedural duties when requested by Treaty First Nations to exercise discretion, and does not require the imposition of fiduciary duties.

To understand how the courts will interpret Treaties, we look solely to the first argument, the textual argument, made by Ontario and dismissed by the Court of Appeal.

The Court of Appeal categorically rejected the textual argument that the augmentation clause is entirely discretionary. Ontario contended that the text of the Treaty confers "unfettered discretion on the Crown" to apply the augmentation clause as they saw fit rendering the entire augmentation clause discretionary and subject to the "*graciousness*" of the Crown [emphasis ours].

The Court of Appeal looked directly to the augmentation clause's text to make sense of what the Crown had promised to the Anishinabek under the Robinson Treaties. They held that the "graciousness clause" applied only to the **per person annuity** and not the **collective annuity**. The majority of the Court of Appeal clarified that "Crown compliance with the augmentation clause is mandatory" if the ceded territory produces sufficient revenue to allow for an increase in annuity payment without the Crown incurring a loss. To come to this conclusion, the Court of Appeal looked to the structure of the language, the ordering of the text, and the specific wording of the clause.

We highlight this section of the Court of Appeal's analysis to show how a court will look to the finer details of the language in a Treaty, even a historic one, to understand the intentions and promises of the parties. Textual analysis is a key component of Treaty interpretation that will then be supported by a cultural and historical assessment.

CULTURAL AND HISTORICAL ASSESSMENT

When the trial judge analyzed the augmentation clause, she looked directly to its cultural and historical backdrop – referencing elder testimony, historical reports, and expert reports from a variety of sources – to inform her interpretation. In summary, she made three (3) determinations:

1. the Treaties were a collective promise to share the revenues from the territory with the collective (the Crown and the Robinson-Huron and Robinson-Superior Anishinabek);
2. the Crown was obliged to increase the lump sum annuity so long as an economic condition was met – that the Crown was financially capable of providing the increased annuity without economic strain; and

3. the reference to \$4 in the augmentation clause was a limit only on the amount that may be distributed to individuals.

In coming to these conclusions, the trial judge “acknowledged that the Crown was in a dire financial situation [in 1850] but knew that it needed the consent of the Anishinabek to fully access the wealth and benefits of the territory.” The trial judge took the reality of the times into account in determining the common intention of the parties. This approach was affirmed by the majority of the Court of Appeal. Importantly, the common intention analysis is intended to bring to bear both Crown and Anishinabek interpretations. Ontario’s textual analysis overlooks the goal of understanding the common intention of the parties and does not properly take into account the necessary historical context. An approach that braids the textual analysis with the historical context permits a greater focus on what the Anishinabek were truly agreeing to rather than what was directly recorded in the text. This approach helps mitigate the risk that the Crown’s perspective (as the transcriber and, in many cases, the translator of the document) would be given greater weight.

CONCLUSION

This case provides a clear example of the interplay between the textual, historical, and cultural analysis required in treaty interpretation. The relationship between these three components is necessary for treaty interpretation as it permits an understanding of the treaty that can be grounded in the document’s words and informed by the common understanding of the parties at the time.

The Robinson Treaties are the only Treaties in Canada that formally contain a written augmentation clause. Other Treaties (including modern Treaties) hold the Crown to different forms of fiscal obligations.

To implement Treaties in a manner informed by the honour of the Crown, parties need to fulfill their treaty promises in a manner that mirrors the ongoing relationship between the signatories. The legal requirement attached to the honour of the Crown is that it carries a duty of diligent implementation.

Of course, the final word isn’t in yet. While the initial implications of *Restoule* are promising, the Supreme Court of Canada may wish to weigh in, as they do for many cases dealing with issues of public importance such as this one. Furthermore, the Stage 3 trial level hearing on the apportionment of liability between Ontario and Canada is set for later this year. For now, it is significant that a Canadian appeal court has held that the Robinson Treaties are not being implemented diligently and that the Crown is in violation of the terms of the augmentation clause.

PART THREE

Trial by Ishkode:
Treaty Remedies in *Restoule*

by David Taylor Gill and Kaelan Unrau



During one especially cold and dark winter, Nanabozhoo changes into a winter hare and seeks out two young girls, tricking them into catching him. The girls bring Nanabozhoo to their father's house, where ishkode (fire) brightly burns. Before long, the people become skeptical of the hare, and Nanabozhoo flees for safety, catching a spark on his fur in the process. Racing through the snow and arriving at his home, still smouldering, Nanabozhoo is met by his grandmother. She hurries forward to assist him but takes a moment to light her own ishkode from the hare's scorched back before smothering the flames.⁵

Canadian law tends to approach relationships – whether between individuals, corporations, or even sovereign Nations – through a particular framework of rights, duties, and remedies. Legal remedies play an important role in the treaty context, given the unique character of the treaty relationship and the constitutional protections afforded to treaty rights.

But what legal remedies does Canadian law recognize for the breach of a treaty? And are treaty breaches even something that the law is able to remedy? Finally, in the case of treaties made between the Anishinaabeg and the Crown, how might Anishinaabe legal concepts, such as ishkode, inform the way in which the treaty relationship is approached in the Canadian courts?

In what follows, we discuss two types of legal remedies engaged by the recent *Restoule* case – “damages” and “declarations” – and describe how they have been employed in the treaty context to date. We also raise larger questions around the nature of treaty obligations and the degree to which these obligations transcend strictly legalistic understandings. In the end, we suggest that the *Restoule* proceedings can be viewed as an instance of “trans-systemic litigation” by incorporating both settler and Anishinaabe legal processes.

COURT REMEDIES: DAMAGES AND DECLARATIONS

The *Restoule* decision tells us that, under the 1850 Robinson-Huron and Robinson-Superior Treaties, the Anishinaabe beneficiaries have a right to increased annual payments where the Crown can so afford.⁶ The case is a complicated one, both legally and factually, and so it has been broken up into three separate “phases.” The first two phases, already concluded, addressed the interpretation of the Robinson Treaties and the (unsuccessful) arguments by the federal and provincial governments for why the claim should not go forward. The issues to be considered in phase three, which has yet to take place, are: (1) has the Crown breached the Treaties? and (2) if so, how should that breach be remedied?

Remedies for breach of treaty can take several forms. But two common types, both of which arise in *Restoule*, are known as “damages” and “declarations.”

Damages

Damages consist of court-ordered monetary payments made from one party to the other. As a general rule, the main function of damages is to provide equivalent compensation for the legal wrong or breach of duty at issue. Sometimes this can be straightforward, such as when someone fails to repay a loan in a fixed amount. But calculating damages becomes considerably more difficult when the wrong or benefit is not monetary in kind. For instance, how does one compensate for the pain and suffering caused by a car crash? Or the desecration of a forest on account of illegal logging? Courts, for their part, admit that assessing damages “is not a science and [that] trial judges must do the best they can.”⁷

The Robinson Treaty beneficiaries in *Restoule* are claiming damages for breach of treaty. In particular, they are seeking the value of the annual payments that the Crown should have paid under the Robinson Treaties, as properly interpreted. But in addition to damages, the claimants are also seeking various “declarations” from the court.

Declarations

Unlike orders for damages, declarations are not directly coercive; they do not expressly mandate that a party must do or refrain from doing anything. Instead, declarations can be understood as formal judicial pronouncements as to the state of the law or the parties’ legal relationship. The specific declarations sought by the *Restoule* claimants include the following:

- a declaration that the Crown breached its treaty obligations and failed to act honourably by failing to increase the annual payments;
- a declaration that the Crown breached its duty to consult with the claimants on the appropriate manner and amount by which the payments should have been increased; and

- a declaration that the Crown has a continuing duty to monitor, record, and report financial and economic information on revenue under the Treaties.

Does this mean that declarations are more bark than bite, so to speak? And if so, do declarations achieve anything in practice? The answer, as we will see, may lie somewhere in the middle.

HOW DECLARATIONS WORK IN PRACTICE

Declarations are typically meant to avoid disputes by clarifying the law. Suppose that two individuals embroiled in a conflict each want to act lawfully (please suspend your disbelief for a moment) but disagree as to what exactly the law requires. If so, then a declaration can serve as the lodestar to guide parties' treatment of each other. One can appreciate how declarations might serve this function where the parties have a good faith desire to abide by the law. But declarations can also guide future conduct even where the parties' intentions are less than pure. Let us call this the "naming and shaming" aspect of declarations. Simply put, many people view unlawful conduct as morally shameful, and the desire to avoid that shame can exert a powerful if indirect force in the court of public opinion. Relying on good intentions or feelings of shame may provide little solace when it comes to treaty promises. What happens when a party – namely, the state – flouts a court declaration? What recourse is available to the injured party?

It is not unheard of for the Crown to disregard a constitutional declaration. In the case of *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, the Supreme Court of Canada considered a *Charter* challenge brought by Little Sisters – a gay and lesbian bookstore in Vancouver – against customs officials for the wrongful targeting of their imported materials.⁸ The Court agreed that the relevant customs legislation had been applied in a manner that violated the free speech and equality rights of the claimant. Rather than striking down the legislation or enjoining the officials to act (or not act) in certain ways, the Court opted to issue a broad declaration as to how the legislation ought to be henceforth applied.

Justice Iacobucci of the Court, dissenting in part, would have struck down the applicable parts of the legislation. As for the (in)sufficiency of a declaration, he noted:

Declarations are, in many cases, an appropriate constitutional remedy. ... [They] are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government. However, declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance.⁹

Justice Iacobucci's cautions turned out to be prescient. Several years later, Little Sisters returned to court, alleging

that customs officials were ignoring the declaration.¹⁰ But the bookstore lacked the funds needed to continue the litigation, and the claim was abandoned.

Some constitutional litigants may be better resourced than Little Sisters. Where that is the case, the litigants could try to use the state's non-compliance to ground a further claim for more directly coercive relief, such as damages or an injunction requiring the state to act (or not act) in specific ways. But this can be time-consuming, dispiriting, and prohibitively costly.

Nonetheless, declarations in the Indigenous rights context have occasionally sparked fruitful talks and negotiations between Indigenous groups and the settler state. Take, for instance, the recent case of *Yahey v British Columbia* (often referred to simply as "*Blueberry*").¹¹ On June 29, 2021, the Supreme Court of British Columbia declared that the Province had breached its treaty obligations under Treaty 8 to the Blueberry River First Nations by causing or permitting an unacceptable degree of industrial development. Since then, the First Nations and British Columbia have negotiated an initial agreement on existing development permits and restoration funding, including:

- \$35 million for Blueberry River First Nations to undertake activities to heal the land; and
- an additional \$30 million to support protecting the First Nations' way of life.¹²

In short, declarations can and do achieve tangible results in practice. But they have distinct limitations. Among other things, declarations can be narrow or ambiguous in scope and difficult to enforce even in the face of blatant defiance.

Declarations also exist within a legal framework that tends to view relationships in terms of rights, duties, and remedies. When it comes to sacred nation-to-nation agreements such as the Robinson Treaties, which integrate this legal framework but also extend beyond it, does it make sense to turn to the settler courts for enforcement?

[How might we try to approach treaty remedies from a more Anishinaabe-focused perspective?](#)

AN ANISHINAABE APPROACH TO REMEDIES?

Fire, or *ishkode*, has an important place within Anishinaabe law. As recorded in the *Restoule* trial decision, "fire was a metaphorical term that could refer to the place where a family lived (where smoke arose), to any small gathering of several extended families, to large confederacies of multiple smaller fires, or, more broadly, to a nation or people."¹³

When Nanabozhoo stole fire from another family, he was marked by his connection to that family. Willingly given or not, the fire that Nanabozhoo took placed him in a relationship with the hearth from which it came, and it

changed him in the process. Anishinaabe scholar Heidi Stark describes the story of Nanabozhoo as an expression of the Anishinaabe law of treaty-making:

When a nation enters into an alliance or treaty, it retains its separate, distinct identity in the same way that the hare retains his white fur in the winter. Nonetheless, a nation is also marked or shaped by its alliances with other nations in the same way that the hare in this story is marked by the quest for fire, having brown fur in the summer. Interestingly, both fur colors help hares to adapt and blend into their changing environment.¹⁴

Related to *ishkode* is the concept of the gift. Within Anishinaabe law, gifts given and received between the *ishkoden* of different families, cultures, and nations are not merely contractual obligations or debts to be repaid. Certainly, the material exchange of benefits, such as tools, lands, or moneys, has its own immediate importance. But the greater significance lies in gifting as a rhetorical device; while gifts are material, they also serve as a metaphor for the *relationship* created and confirmed by the exchange.

Ethnohistorian Heidi Bohaker argues that when Anishinaabe leaders asked their British allies for kettles and baby clothes, they were “asking for material confirmation of the alliance’s terms.”¹⁵

Far from being mere land purchase agreements, then, the treaties between Anishinaabeg and British representatives involved the practice of Anishinaabe law through inviting the British Crown “into the Anishinaabe practice of governance through alliance, into a network of relationships that were grounded in the structures of Anishinaabe families.”¹⁶

If the scope of the treaty relationship is so broad, then why is the scope of potential remedies, in terms of both damages and declarations, so narrow in the *Restoule* case? One possible answer comes from Anishinaabe scholar Aaron Mills, who, taking a critical view of the liberal legal tradition, contends that First Nation-Crown treaties are simply not amenable to court-ordered remedies. As Mills argues in his essay “What is a Treaty? On Contract and Mutual Aid”:

[A] treaty isn’t even the sort of thing capable of giving rise to a legal remedy. Treaties aren’t legal instruments; they’re frameworks for right relationships: the total relational means by which we orient and reorient ourselves to each other through time, to live well together and with all our relations within creation. They have a legal quality in the sense that they constrain behaviour and they are at once political, social, economic, spiritual, and ecological. They’re how we constitute ourselves as communities of communities, across our difference.¹⁷

Mills provides us with one way of approaching treaties from an Anishinaabe legal perspective. As he describes it, his aim is to avoid the “constitutional capture” that comes with the recognition of Anishinaabe law by the liberal legalism of the Canadian state. But as is the case with the law – whether Anishinaabe or Canadian – there is always another story.¹⁸ Indeed, while Mills criticizes other approaches, he also recognizes alternatives for defining the relationships between Anishinaabe and Canadian legal orders in the treaty context.

One alternative is to view the *Restoule* proceedings as giving form to the relational frameworks described by Bohaker and Mills. Such an approach has been suggested by John Borrows, who characterizes *Restoule* as “trans-systemic litigation.”¹⁹ The juxtaposition of Anishinaabe law with Canadian legal proceedings in the case, both in and out of the courtroom, has been unprecedented. Among other things, the parties agreed:

- to hold the hearings not only in state courtrooms but also in several Anishinaabe communities;
- to recognize certain ceremonies, such as smudging, at the opening and closing of hearings;²⁰ and
- to engage, along with the trial judge, in Anishinaabe education on “Sweet Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff, and Eagle Feather presentations, and Feasts” focused on *mino bimaadiziwin*, or how to lead a good life.²¹

This trans-systemic framework extended to the written decision of the trial judge, who invoked the Anishinaabe legal principles of kinship, reciprocity, and *ishkode* to understand the treaty relationship. Those principles – and the “total relational means” (to borrow Mills’ phrase) for which they stand – may not be reflected in the formal legal remedies considered in the case. But they are arguably implicit in the manner by which the proceedings have been carried out to date.

Heidi Stark tells the story of the woman who married a beaver as an important source of Anishinaabe treaty law.²² In this story, a young woman marries a rich being who provides for her every need. While the woman stays with her partner, her people enjoy great success in hunting beavers. Although they seem to kill many beavers, the beavers do not die but simply return home, delighted by the tobacco and clothing provided by the people.

The woman’s partner and children visit the people, returning home laden with many gifts – the same kettles, plates, knives, and tobacco that are used in hunting beaver. Her entire family grows to love the people. Finally, she recognizes that she has been living in a beaver lodge all along, and that her partner and children are all beavers.

After some time, the woman returns to her people and shares the wisdom she has learned – to disrespect a beaver means foregoing their gifts. To love the beavers means beavers would willingly give up their gifts, and those gifts would multiply, as would the love of the beavers who allowed themselves to be killed and reborn to give again.

Even if Mills is correct insofar as the Anishinaabe law of treaty cannot provide a substantive remedy, that does not mean that treaties between the Anishinaabe and Canada are incapable of doing so. The Treaty – like the *Restoule* litigation – is trans-systemic and must be honoured based on a meeting of the two legal orders. The Anishinaabe law treaty relationship is contingent on the Canadian people reciprocating the gift of the use of Anishinaabe land with a commensurate gift. Without that gift, the treaty does not exist at all.

The Anishinaabe law treaty-as-right-relationship is an ongoing response to, and contingent on, a Canadian law determination of what gift is sufficient to fulfill Canada's own obligations. As the trial judge recognized, "The Plaintiffs did not ask the court to apply Anishinaabe law."²³ The role of Anishinaabe law precedes the *Restoule* litigation itself, and consists in asking "for material confirmation of the alliance's terms,"²⁴ an Anishinaabe legal process of confirming a right relationship. This request triggers a determination by Canada of what remedy is necessary to fulfill its treaty obligations, a matter internal to Canadian law.

There is no question on the part of the Canadian Crown as to whether a treaty exists; to deny treaty altogether would be inconsistent with the Canadian claims of sovereignty. Treaties are how the Canadian state discharges the legal duty of the honour of the Crown to reconcile pre-existing Anishinaabe sovereignty with assumed Crown sovereignty.²⁵ It is a given under Canadian law that the Anishinaabe side of a treaty has already been delivered (or continues to be delivered).

The question remaining under Canadian law is what sort of gift is sufficient for the treaty to exist. Canadian law cannot provide Anishinaabe relationality as a remedy – but what it can do is decide what remedy will reciprocate the Anishinaabe's treaty gift.

Restoule is Canada considering its own treaty promise, and whatever remedy results is a matter internal to Canadian law. The Court is tasked with quantifying the appropriate gift to vindicate Canada's promise and affirm the treaty relationship. That determination is a prerequisite to engaging with Mills' conception of Anishinaabe treaty law as a framework for right relationship.

However, Anishinaabe law is also relevant in the Canadian law process. Canadian law requires taking "the Indigenous perspective" into account when determining the rights and obligations flowing from treaties.²⁶ Anishinaabe law will therefore inform the interpretation of Canada's internal legal view of its obligations. Canadian law requires this inquiry into Anishinaabe law and politics to determine the Treaty partners' common intention and Canada's resulting treaty obligations.

The trans-systemic nature of the treaty is what makes the remedy provided more than money and more than a contractual relationship. As discussed above, Canadian law alone can only provide a quantitative, procedural or declaratory remedy – but as treaty partners, Canadians are marked by *ishkode*. They cannot take without repaying their debt according to Canadian law and cannot repay that debt without incurring Anishinaabe law obligations to keep a right relationship with Anishinaabe people. Like the woman who married a beaver, they can wake up and realize they are always already in a relationship with the Anishinaabeg and that their material treaty obligations under Canadian law are only the beginning of what treaty requires.

CONCLUSION

Looked at from one angle, *Restoule* falls squarely within the Canadian legal framework of rights, duties, and remedies, with the claimants seeking both damages and declaratory relief. Yet the case, as an instance of trans-systemic litigation, may extend beyond these rigid (albeit powerful) categories. If so, then the remedies available under Canadian law – notwithstanding their shortcomings – could act as material confirmation of the terms of the alliance. They may serve as a reminder that all parties, including the settler courts, must orient and reorient themselves within the framework of the Treaties.

Whether through friendship or trickery, Canada has taken Anishinaabe fire, and has been marked in the process.

" It is a change that has come from the hard work of the Anishinaabe leaders, elders, and people who were willing to confront the court with their true history and insist that it be heard. While its immediate effect will be fiscal, *Restoule's* deeper effect will be in changing the law's understanding of what treaties really are.

Of course, each treaty and each Indigenous Nation has its own history and relationship with the Crown. But perhaps this case represents the beginning of a change. If we all commit to building on that good work, it may even embody what the treaty relationship in Canada has needed for many years: A hopeful, honest re-interpretation.

- ROBERT JANES, Q.C.



An Honest Court

by Robert Janes, Q.C.

***Restoule* marks a watershed moment for Canada. A court has finally been honest about what the treaty relationship was meant to be: A pact between peoples built on the hope of sharing and benefiting from the land without giving up who they were. It was a pact rooted in the belief that the newcomers could be trusted to be honourable as the world changed.**

The treaty relationship in Canada has been fraught. In most of Canada, colonial society and institutions (including the judiciary) view the treaties as the moral and legal foundation for the dominant political, economic, and legal structures. The subjugation of Indigenous peoples and their lands and resources to the insatiable appetites of Canadian society is justified by the view that the treaties embody Indigenous consent to that state of affairs. In this view, the Crown procured the Indigenous peoples' cession of vast tracts of lands for promises of ever-declining annuities, transitory harvesting rights, and a scattering of reserve land representing a tiny fraction of the Indigenous peoples' territories.

Even when Canada tells itself that story, it recognizes that these promises were not kept or were kept in an ungenerous or miserly manner unbecoming the honour of the Crown. Reserve lands were set aside slowly and in smaller quantities than promised. Reserves were compromised to open mines or develop hydroelectricity with little thought given to the needs of Indigenous peoples. Harvesting rights were denied, or if they were recognized, they were later compromised as logging, settlement, and mining consumed the landscape. Promises of agricultural support – largely hollow in the boreal forests of the Canadian Shield – were not upheld. Promised relief and medical care were not provided or were provided too late. Education, rather than enriching Indigenous peoples keen to learn, was used as a tool to destroy culture and rend families. The history of the treaties – even as the Crown understood them – is a history of broken promises.

The colonial perspective on the great treaty-making process that stretched back to the Treaty of Niagara and continued into the twentieth century is flawed from its very foundations. One only needs to read the notes taken by government officials and the reports of negotiators like Alexander Morris to know that there is something wrong with this picture. The cold, harsh words of cession,

submission, and consent contained in the treaty documents prepared by the Crown cannot be reconciled with the spoken words of generosity, benevolence, and brotherhood spoken at the great treaty councils. As Morris spoke to the Chiefs at the Treaty Six Treaty Council, he described his vision of the treaty relationship:

I see gardens growing and houses building; I see them receiving money from the Queen's Commissioners to purchase clothing for their children; at the same time I see them enjoying their hunting and fishing as before, I see them retaining their old mode of living with the Queen's gift in addition.²⁷

This contrast is even sharper when we listen to and respect the knowledge of the Indigenous peoples whose vision and understanding of the treaty is radically different from the legal fictions on which Canada has rested. Far from a story of submission and cession, Indigenous peoples tell a history of sharing, respect, and autonomy.

The Indigenous history – passed down through families and Nations – is one of hope and partnership where the Indigenous peoples of the land would partner with the newcomers to make everyone better off.

Indigenous peoples were not blindly giving up their lands for others to exploit and grow wealthy from. Indigenous peoples were not giving up millennia of autonomy to submit to a foreign sovereign. They were not giving up the resources and lands that made them rich and sustained their families, societies, and cultures for as long as they could know. Theirs is a history of generosity and partnership. This history makes the Crown's many breaches of faith with Indigenous peoples all the more bitter. Not only did Canada betray the words of the treaties as written: Canada abandoned the promises and the hope of everyone being better off.

But in *Restoule* we see a change. We saw the court recognizing that Anishinaabe ceremony and protocol are as important as the ceremonies of the Queen's courts. We saw the court hearing the testimony of the elders about the meaning of the treaties. We saw the court recognizing the legitimacy of the Anishinaabe perspective on the treaty's meaning and truly incorporating this into the legal interpretation of the treaty.

WHAT IS THIS CHANGE?

It is the change from a colonial vision of treaties as mere instruments designed to sweep away millennia of Indigenous occupation to something of a shared vision of treaties meant to maintain Indigenous culture, society, and autonomy on their own lands. This vision would have Indigenous peoples and newcomers sharing the wealth of the land rather than concentrating wealth in the hands of the few.

It is a change that has come from the hard work of the Anishinaabe leaders, elders, and people who were willing to confront the court with their true history and insist that it be heard. While its immediate effect will be fiscal, *Restoule's* deeper effect will be in changing the law's understanding of what treaties really are.

Of course, each treaty and each Indigenous Nation has its own history and relationship with the Crown. But perhaps this case represents the beginning of a change. If we all commit to building on that good work, it may even embody what the treaty relationship in Canada has needed for many years: A hopeful, honest re-interpretation.

ENDNOTES

¹*Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at para 78.

²These are part of the decision at the Superior Court of Justice, *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701, at paras 288 to 292.

³*Ibid*, at para 560.

⁴*Ibid*, at paras 3 and 534.

⁵This telling comes from Heidi Kiiwetinepinesiiik Stark's account in "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada" (2012) 36:2 *American Indian Quarterly* 119.

⁶Or as the Court phrased it: "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 ... if net Crown resource-based revenues from the Treaty territory permit the Crown to do so without incurring loss": *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at Appendix A: Amended Stage One Judgments (Court of Appeal for Ontario).

⁷*Henley Capital Corporation v Cable Atlantic Inc*, 2006 CanLII 23250 at para 3 (Court of Appeal for Ontario).

⁸*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.

⁹*Ibid* at para 258.

¹⁰See *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.

¹¹*Yahey v British Columbia*, 2021 BCSC 1287.

¹²British Columbia Ministry of Indigenous Relations and Reconciliation, News Release, "B.C., Blueberry River First Nations reach agreement on existing permits, restoration funding" (7 October 2021), online: <news.gov.bc.ca/releases/2021IRR0063-001940>.

¹³*Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 22 [*Restoule #2*].

¹⁴Heidi Kiiwetinepinesiiik Stark, "Marked by Fire", *supra* note 1 at 122.

¹⁵Bohaker, *supra* note 1 at 101.

¹⁶*Ibid*.

¹⁷Aaron Mills, "What is a Treaty? On Contract and Mutual Aid" in *The Right Relationship: Reimagining the Implementation of Historical Treaties* 208 at 225.

¹⁸As Borrows often reiterates: "beware the danger of a single story."

¹⁹John Borrows, "Lecture on Anishinaabe Constitutional Law" delivered at the University of Victoria, 2019.

²⁰*Restoule v Canada (Attorney General)*, 2018 ONSC 114 at para 9.

²¹*Restoule #1*, *supra* note 9 at para 610.

²²Heidi Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 *American Indian Culture and Research Journal* 145-164 at 145-146. This version of the story originates with an Anishinaabe named kagige pinasi, who relayed it to an anthropologist in 1904.

²³*Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at para 13.

²⁴Bohaker, *Doodem and Council Fire*, 101.

²⁵*Restoule v. Canada (Attorney General)*, 2018 ONSC 114, *supra* note 16 at paras 476-481.

²⁶*Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at para 13.

²⁷Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Prospero Books, 2000) at 231.

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