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Article

Anishinaabe Law at the Margins: Treaty Law in Northern Ontario, Canada, as Colonial Expansion

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Abstract
In 1850, 17 years before the Dominion of Canada was created, colonial officers in representation of Her Majesty the Queen, concluded Treaty Numbers 60 and 61 with the Anishinaabe Nation of Northern Ontario. The Robinson Treaties—so named after William Benjamin Robinson, a government official—include land cessions made by the Anishinaabe communities in return for ongoing financial support and protection of hunting rights. The land areas included in the treaty are vast territories that surround two of Canada's great lakes: Lake Superior and Lake Huron. These lands were important for colonial expansion as settlements began to move west across North America. The treaties promised increased annual annuity payments "if and when" the treaty territory produced profits that enabled "the Government of this Province, without incurring loss, to increase the annuity hereby secured to them." This amount has not been increased in 150 years. This article reviews *Restoule v. Canada*, a recent Ontario decision brought by Anishinaabe Treaty beneficiaries who seek to affirm these treaty rights. A reading of the Robinson Treaties that implements the original treaty promise and increases annuity payments would be a hopeful outcome of the *Restoule v. Canada* decision for it would be the implementation of reconciliation. In addition, the Restoule decision has important insights to offer about how Indigenous law can guide modern-day treaty interpretation just as it guided the adoption of the treaty in 1850. The Robinson Treaties are important for the implementation of treaty promises through Indigenous law and an opportunity to develop a Canada in which Indigenous peoples are true partners in the development and management of natural resources.

Keywords
Anishinaabe Nation; Canada; Restoule; Indigenous law; Northern Ontario; Robinson Treaties; treaty law

Issue
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1. Introduction

In 1850, 17 years before the Dominion of Canada was created, colonial officers in representation of Her Majesty the Queen, concluded Treaty Numbers 60 and 61 with the Anishinaabe Nation of Northern Ontario (Government of Canada, 1850a, 1850b). The Robinson Treaty for the Lake Superior region was signed at Sault Ste. Marie, Ontario, between Anishinaabe Chiefs inhabiting the Northern Shore of Lake Superior from Pigeon River to Batchawana Bay. The Robinson Treaty for the Lake Huron region was also signed at Sault Ste. Marie, Ontario between Anishinaabe Chiefs inhabiting the Northern Shore of Lake Superior from Batchawana Bay to Sault Ste. Marie and the Anishinaabe Chiefs inhabiting the eastern and northern shores of Lake Huron from Sault Ste. Marie to Penetanguishene to the height of land. Together these mirror treaties are known as the Robinson Treaties. The Robinson Treaties—so named after William Benjamin Robinson, a government official who led the negotiations, drafting and signing of the treaties—include land cessions made by the Anishinaabe communities in return for ongoing financial support and protection of hunting rights. The land areas included

in the treaty are vast territories that surround two of Canada's great lakes: Lake Superior and Lake Huron. These lands were important for colonial expansion as settlements began to move west across North America. The Robinson Treaties include an annual annuity payable to beneficiaries under the treaty for an amount of $4 per person that was to be reviewed annually. The treaties promised increased payments "if and when" the territory the plaintiffs had ceded produced an amount that enabled "the Government of this Province, without incurring loss, to increase the annuity hereby secured to them" (Government of Canada, 1850a, 1850b). This amount has not been increased in 150 years.

The Robinson Treaties are just two treaties of over seventy that were concluded between 1701 and 1923 in the colonization of Canada (Government of Canada, 2013). Treaties were concluded between the British colonies of North America, beginning in the 1700s with historic peace and friendship treaties, with upper Canada Land Surrenders, and Williams, Robinson and Douglas treaties following thereafter. Post-confederation, the Government of Ontario concluded eleven numbered treaties covering large tracks of land across six provinces and territories in Canada (Olthius Kleer Townshend LLP, 2018, p. 52). Treaties are agreements that are concluded on a nation-to-nation basis with the First Peoples' of Turtle Island (known also as North America), though they are not adjudicated in Canada as a treaty under principles of international law, but as a unique type of treaty agreement that is recognized and affirmed in Canada's constitution. Sections *35*(1) and *35*(2) of the Constitution protect Aboriginal treaty rights by providing the following statement: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed….In this Act, Aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada" (Constitution Act, 1982). Treaties contain solemn promises whose nature is sacred (*Nowegijick v the Queen*, 1983, p. 36). Yet, despite the longstanding recognition of the centrality of treaty law to Canada's legal framework, the Canadian government at all levels continues to show reticence, at best, contempt, at worst, in recognition of treaty promises made by the government and owed to Indigenous beneficiaries.

This article reviews *Restoule v. Canada*, a recent decision from the Ontario Superior Courts that concerns land in Northern Ontario, Canada (*Restoule v. Canada (AG)*, 2018a). *Restoule* is a treaty interpretation case brought by the Anishinaabe Treaty beneficiaries that seek to affirm treaty rights which indicate that an annual annuity payment owed to treaty signatories be increased. Furthermore, it is argued that this amount ought to be increased commensurate with resource development in the lands of the treaty. By way of background information, the Restoule litigation has been divided up into three stages. Stage one involved the interpretation of the treaties; stage two considered the Crown's defences of Crown immunity and limitations; and stage three, which has yet to be heard, will determine the remaining issues, including damages and the allocation of liability between Canada and Ontario. This article focuses on stage one concerning the interpretation, implementation, and alleged breach of the treaties' annuity provisions. Stage one has been heard at the Superior Court with the decision released in 2018, and by the Ontario Court of Appeal, with the decision released in 2021. The Ontario Court of Appeal decision addresses claims in both the first and second stages of the litigation. On the 23rd of June 2022, the Supreme Court of Canada granted leave to appeal to the Attorney General of Ontario (*Ontario (AG) v. Restoule*, 2022).

Close reading of the Robinson Treaties—and the Indigenous law that guided their creation—offer an opportunity to develop a Canada in which Indigenous people's laws are centered in the interpretation of treaties. I argue that the *Restoule v. Canada* trial at the Superior Court of Justice was conducted in such a way that it embodies how Indigenous law can and ought to be utilized to guide the interpretation of treaties. In this way, I argue that the decision has the potential to be a breakthrough case in how Canada responds to and respects its' treaty obligations, recent appeals to the Supreme Court of Canada notwithstanding. Importantly, the *Restoule v. Canada* decision demonstrates an approach to Indigenous rights litigation that adopts legal procedure guided by Indigenous law, which in turn guides the arguments and analysis concerning the Aboriginal law of treaty interpretation. I argue that this approach of Indigenous law as procedure is a distinct approach to treaty interpretation that ostensibly relies on and argues Aboriginal law, while simultaneously enacting Indigenous law. My comments in this article are those of an outsider as I am trained as a common and civil lawyer, and not in Indigenous law. I hope that readers will take my comments about Indigenous law, treaty interpretation, and Anishinaabe law with caution and in the spirit of humility.

2. Treaty Interpretation in the Margins of Aboriginal and Indigenous Law

In this article, I discuss Aboriginal law and Indigenous law. Aboriginal law refers to the law created by Canadian courts and legislatures and thus refers to the legal relationship between Indigenous persons and the Crown. Key sources of law in the area of Aboriginal law include Section 35 of the Constitution Act (1982), the Indian Act (1985), and jurisprudence interpreting and implementing the same (Collis, 2022). Aboriginal law is to be distinguished from Indigenous law, which refers to Indigenous peoples' own legal systems (J. Borrows, 1996, 2005; L. Borrows, 2016; Young, 2021). It should be remembered that "presumptions that Section *35*(1) claims are the only recourse available to Indigenous litigations should be

avoided" (Young, 2021, p. 31; see also J. Borrows, 2017) and there is a growing movement across Canada to revitalize Indigenous law and Indigenous legal systems (Gunn & O'Neil, 2021). Particularly notable in this regard is the important work of Indigenous law centres such as the Indigenous Law Research Unit housed at the University of Victoria's Faculty of Law and the Mino-Waabandan Inaakonigewinan Indigenous Law and Justice Institute housed at Bora Laskin Faculty of Law, Lakehead University. The *Restoule v. Canada* decision was argued on the basis of Aboriginal law, specifically treaty law, and not based on Indigenous law. As I will proceed to argue, however, Indigenous law was present throughout the legal proceedings.

Treaty rights are recognized and affirmed in the Canadian constitution. The exercise for Canadian courts is one of interpretation of treaty documents, which can range from historical treaties signed pre-confederation, to historical numbered treaties signed in the years after confederation, through to modern treaties such as the Tla'amin Final Agreement which was concluded as recently as 2014 (Government of Canada, 2014). Treaty interpretation is guided by the Supreme Court of Canada which established in *R. v. Marshall* (1999, paras. 82–87; see also *Restoule v. Canada (AG)*, 2018a, paras. 395–397) that treaties are to be interpreted through, first, the identification of any ambiguities and misunderstandings arising from linguistic and cultural differences, and second, the consideration of possible meanings of the text against the treaty's historical and cultural context (*Restoule v. Canada (AG)*, 2018a, paras. 395–397). Principles of treaty interpretation require that efforts be made to understand the historical record and give effect to the common intention of the parties. There are nine principles of treaty interpretation which are to guide the court in their interpretation of rights and obligations that are contained in a treaty (*R. v. Marshall*, 1999, para. 78). A key principle among these is the requirement of choosing "from among the various possible interpretations of the common intention the one which best reconciles the interests of both parties at the time the treaty was signed" (*R. v. Marshall*, 1999, para. 78; see also *Restoule v. Canada (AG)*, 2018a, para. 397).

Identifying the "common intention" (*R. v. Marshall*, 1999, para. 14) between Indigenous signatories and the British Crown is a troubling task in a colonial context which often misrepresented the words of Indigenous signatories, with colonial officers saying one thing to communities when working towards adoption of a treaty, and recording a different point on the written treaty document. Though differences between spoken negotiations and written records may be due to the colonial officers' norms and practices in the drafting of legal documents which largely followed European style (Walters, 2001), it is foolish to overlook practices of obfuscation. Distinctions between the written treaty document and information about negotiations and understandings between treaty signatories have particular significance for the interpretation of so-called land cession clauses. Writing on Treaty No. 8, which covers lands of the provinces of Alberta, Saskatchewan, British Columbia and parts of the Northwest Territories, René Fumoleau argues that historical record indicates that land was not discussed between treaty signatories though there is a treaty clause which indicates that "Indian…title and privileges" is granted to "Her Majesty the Queen and Her successors forever" (Fumoleau, 2004, p. 107). Of this discrepancy between historical record and contents recorded in Treaty No. 8, Fumoleau (2004, p. 107) writes:

> The haste of the Treaty Commissioner in securing Indian signatures on a piece of paper removes any illusions that the Treaty was a contract signed by equal partners. How to characterize it remains a question, but the fact remains that Government officials in Ottawa, who drafted the terms of the Treaty, had little knowledge or comprehension of Indians, or their way of life in the Northwest. Given the extreme physical hardships which the Indians had experienced through many winters, it is no wonder that the prospect of supplies and cash was a deciding factor for them in accepting the treaty.

The inclusion of land-cession clauses, particularly in historical treaties, remains of concern. Given such inconsistencies between the historical record of treaty negotiations and the final written treaty, the modern-day interpretation of treaties requiring that courts reconcile competing interpretations is a difficult task. Importantly, in its origin, treaty interpretation is neither common or civil law, nor Indigenous law, but both. Mark Walters explains that this legal interpretation requires "the reconstruction of the normative universe occupied by colonists and aboriginal peoples from ambiguous written sources and (where they exist) aboriginal oral histories,'' representing:

> A monumental interdisciplinary, cross-cultural project in which historical, ethnohistorical, and anthropological interpretations must be consolidated from a legal perspective that somehow reconciles aboriginal and non-aboriginal viewpoints. (Walters, 2001, p. 79)

The result of this is a complex process in treaty interpretation cases such as *Restoule v. Canada*, whereby the trial record is built by parties building huge historical records in court, with expert witnesses contributing knowledge of linguistics, anthropological information, history, and others to create an understanding of the intention of both parties at the time the treaty was created. In the *Restoule v. Canada* matter, a particularly important set of knowledge brought to court was oral testimony provided by Anishinaabe Elders. The hearing of Elder testimonies was facilitated by a court order establishing a procedure for taking Elder evidence (*Restoule v. Canada (AG)*,

2018c) which established rules for ensuring that Elders were treated with respect as they gave their testimony on Anishinaabe laws. In addition, the Court permitted the live streaming and archiving of the trial proceedings (*Restoule v. Canada (AG)*, 2018b). These two procedural aspects of *Restoule v. Canada* strengthened the factual record used to interpret the Robinson Treaties and resulted in a rich account of Anishinaabe law and teachings, detailed information about Anishinaabe governance protocols, and how they were present throughout the signing of the Restoule Treaties (along with colonial government protocols), Elders testimony given in Anishinaabemowin (Ojibwe language), and about the ongoing importance of Anishinaabemowin.

3. Implementing the Treaty

Treaties can contain a variety of provisions, typically these would include sections concerning land rights, hunting rights, provisions for healthcare and education, and annual annuity payments payable to Indigenous signatories. The annuity clause contained in the Robinson Treaties is unique among treaties in Canada. The annuity clause contains language that indicates the amounts paid under the treaty will increase—be augmented—under certain circumstances.

The issue in *Restoule v. Canada* is on interpreting the augmentation clause in order to determine amounts owed to beneficiaries under the treaty, whether this annuity amount is to be increased, and how to calculate the same. The augmentation clause reads as follows:

> 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 plaintiffs argue that this augmentation clause promises an increase in the amount of the annuity payments paid by the Crown to be calculated based on a promise contained in the Robinson Treaties. Furthermore, that the increased payments are to be calculated "if and when" the territory the plaintiffs had ceded produced an amount that enabled "the Government of this Province, without incurring loss, to increase the annuity hereby secured to them." The plaintiffs argue that the parties entered into the treaties with the common intention of sharing the wealth generated from the natural resource activities in the territory and that the annuity augmentation clause was meant to implement this intention by allowing the Crown to use its discretion to increase the annuity with the expansion of natural resource activities in the territory.

The Crown argues that the augmentation clause explicitly precluded payments above "the sum of one pound" (or $4) which the treaty beneficiaries had received since the last increase in 1875 and that the Crown does not have a mandatory duty to increase the annuity further.

4. A Matter of Interpretation

At both the Ontario Superior Court of Justice and the Ontario Court of Appeal, the Anishinaabe beneficiary plaintiffs to the Robinson Huron and Robinson Superior Treaties were successful in their claims for an increase in the annuity payments. The Attorney General of Ontario has received leave to appeal to the Supreme Court of Canada (*Ontario (AG) v. Restoule*, 2022).

Concerning the substantive matter of interpreting the annuity clause the trial judge, Justice Hennessy, applied the *R v. Marshall* test and found that the patent ambiguities to the treaty text were many (*Restoule v. Canada (AG)*, 2018a, p. 398). As is often the case with historical treaties, the lack of details contained in the Robinson Treaties means that there is a misunderstanding that goes to the core of the treaty concerning how wealth benefits from the treaty territories shall be shared (*Restoule v. Canada (AG)*, 2018a, para. 398). Justice Hennessy determined there were three competing interpretations of the augmentation clause:

1. One interpretation is that the Crown's promise was capped at $4 per person; in other words, once the annuity was increased to an amount equivalent to $4 per person, the Crown had no further liability (*Restoule v. Canada (AG)*, 2018a, para. 459).
2. A second interpretation is that the Crown was obliged to make orders ("as Her Majesty may be graciously pleased to order") for further payments above $4 per person when the economic circumstances permitted the Crown to do so without incurring loss (*Restoule v. Canada (AG)*, 2018a, para. 460).
3. A third interpretation, which includes the second interpretation, is that the treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met. The reference to £1 (equivalent to $4) in the augmentation clause is a limit only on the amount that may be distributed to individuals (*Restoule v. Canada (AG)*, 2018, para. 461, 2021, para. 76).

After a lengthy investigation into the histories of the signing of the treaties, the trial judge concluded that the

third interpretation captured the common intention that best reconciles the parties' interests. This conclusion was based on the historical and cultural context of the negotiation and signing of the Robinson Treaties. The factual record showed the centrality of the Anishinaabe perspective on treaty signing which was and remains guided by concepts of respect, responsibility, reciprocity, and renewal, which are found in governance structures, and alliance and political relationships (*Restoule v. Canada (AG)*, 2018a, para. 411). A history of treaty relationships between the Crown and Anishinaabe, as seen in the Covenant Chain alliance and Wampum belt, indicated a mutual understanding of the sacred agreement of the treaty (*Restoule v. Canada (AG)*, 2018a, discussed throughout the decisions; see also in particular paras. 412–423).

An important part of the historical record was that the Robinson Treaties annual annuity amount was less than was being offered in treaties contemporaneously signed. It was found that the entire purpose of the augmentation clause was to offset the low sum immediately offered to the "Chiefs and their tribes" by promising a share of the future wealth of the territory "if and when" such wealth proved to be forthcoming. The trial judge determined that the "if and when" model upon which the augmentation clause was based was central to the understanding, aspiration, and intent of both the Anishinaabe and the Crown (*Restoule v. Canada (AG)*, 2018a, paras. 466–475). As it allowed a treaty to be concluded though, the colonial government did not have money to pay for it. Augmentation of treaty monies in the future captured the idea that the relationship between the parties was seen by the Anishinaabe to be reciprocal and inviting constant renewal while being a pragmatic approach to the financial limits faced by the colonial government.

Analysis was guided by the principle of honour of the Crown as a principle central to treaty interpretation. All parties agreed that the honour of the Crown bound the Crown, but exactly how it was to be engaged was the subject of dispute (*Restoule v. Canada (AG)*, 2018a, paras. 476–477). The trial judge found that honour of the Crown in relation to the Robinson Treaties means that the Crown has the obligation to diligently implement the terms of the treaty with honour diligence and integrity (*Restoule v. Canada (AG)*, 2018a, para. 538). Specifically, the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warranted.

The Superior Court trial decision, a positive outcome for the Anishinaabe Treaty signatories, was appealed by the Ontario government (*Restoule v. Canada (AG)*, 2021). The Government of Ontario argued that the correct treaty interpretation did not obligate the Crown to augment the annuity payment and that, instead, any increase ought to be at the discretion of the government. The Appeal Court unanimously rejected the majority of the arguments raised on appeal (*Restoule v. Canada (AG)*, 2021, para. 7). It affirmed the importance of honour of the Crown as a central principle of Aboriginal law requiring the Crown to act honourably in its dealings with Indigenous peoples (*Restoule v. Canada (AG)*, 2021, para. 87). The majority of the court determined that the honour of the Crown requires the Crown to increase the annuities as part of its duty to implement the treaties diligently (*Restoule v. Canada (AG)*, 2021, paras. 87, 250, 508; justices in agreement as to the duty to increase the annuities were Lauwers and Pardu, JJA, in para. 250, joined by Hourigan, JA, in para. 508). However, the majority also found the general guidance offered by the trial judge concerning how to calculate the owed increase in annuity payments was incorrect. The trial judge had held that increase in the annuity payment was to be calculated based on a "fair share" of net Crown revenues (*Restoule v. Canada (AG)*, 2018a, paras. 555–561). This finding was deleted from the Superior Court judgement (*Restoule v. Canada (AG)*, 2021, para. 94).

The final major distinction between the decision on first instance and on appeal was on the central issue of interpretation of the annuity clause. The majority agreed with the lower court. Justices Lauwers and Pardu (JJA), with Hourigan (JA), found that "the Treaties were a collective promise to share the revenues from the territory with the collective; in other words, to increase the lump sum annuity so long as the economic condition was met" (*Restoule v. Canada (AG)*, 2018a, para. 461; see also *Restoule v. Canada (AG)*, 2021, para. 121). They came to this agreement noting that the trial judge correctly applied the principles of treaty interpretation which are guided by common intention, the text, and the historical context of the treaty (*Restoule v. Canada (AG)*, 2021, paras. 105–106). Chief Justice Strathy and Justice Brown (JA), writing in dissent on this point, found that there had been errors of law resulting in an unreasonable interpretation of the treaty promises. In their analysis, they offered a fourth interpretation of the augmentation clause which is in addition to the three interpretations discussed in the reasons of the Superior Court. The fourth interpretation that they offered would find that the augmentation clause meant the following:

> The plain meaning of the augmentation clause is that the annuity was a perpetual one in the stated amount, payable to the Chiefs and their Tribes. It would be increased if economic conditions warranted. The maximum increase would be "capped" at £1 ($4) per person or such further sum as "Her Majesty may be graciously pleased to order." (Government of Canada, 1850a, 1850b)

Essentially the amount listed of $4 was interpreted to be a placeholder only, which could be increased at the discretion of the Crown. This fourth interpretation was mentioned in the trial court reasons but was not pursued (*Restoule v. Canada (AG)*, 2018a, paras. 455–456, 2021, paras. 451–458). Chief Justice Strathy and Justice

Brown (JA) found that the trial judge had erred by not taking into account the "plain meaning of the Treaties' texts and the only interpretation of the Treaties that reconciled the parties' intention in a manner consistent with the historical record" (*Restoule v. Canada (AG)*, 2021, para. 363). Central to this point is the language contained in the treaty text, which states "Her Majesty's graciousness," which would indicate that the Crown could act with discretion.

This split notwithstanding, all justices agreed that there is an obligation on the Crown to increase the annuity payment. Just how that increase will be calculated has not yet been decided.

5. Future of the Litigation

Restoule v. Canada is an important case for the development of Section *35* jurisprudence on treaty interpretation and for Aboriginal law jurisprudence that relates to the lands of the Anishinaabe of Robinson Superior and Robinson Huron Treaties. At the time of writing, the final calculation of the augmentation clause for fulfillment of the Crown obligations vis-à-vis the annuity payment has not been made (as of April 2023, the parties were going through negotiations to settle; see "Robinson Huron Treaty," 2022). In addition, leave to appeal has been granted to Ontario by the Supreme Court of Canada. A central piece of uncertainty is the standard of review for treaty interpretation.

The dissent at the Court of Appeal was written by the chief justice of Ontario. They would find that any increase in the amount of the annual annuity payment through the augmentation clause was discretionary. To come to this conclusion, they had to find that the trial judge had incorrectly interpreted the treaties, and importantly that this interpretation was the "product of an extricable error of law" (*Restoule v. Canada (AG)*, 2021, para. 386), based on the standard of review of correctness and not a standard of review of deference. On this question of the standard of review for treaty interpretation, a third judge joined to make it a majority on this specific point. That is to say that Justice Lauwers switched to concur with Chief Justice Strathy and Justice Brown (JA) that the standard of review was as to *correctness* on the question of law.

The distinction between correctness and taking a deferential standard is important. The distinction is between accepting the trial judge's reading of facts as they gave meaning to the principles of the treaty compared to taking a correctness standard that limits the review to a narrower examination of the law. Taking a deferential standard for review would take into account the substantive and lengthy process of hearing evidence and considering the full factual record as is required for treaty interpretation cases and limit review to circumstances where there was a "palpable and overriding error" only. Thus, a standard of deference recognizes the work that occurred at trial towards the compilation of a huge factual record compiled at trial, the collection of hours of Elder testimony and the first-hand witness to the Indigenous law that guided the legal proceedings. Whereas taking the correctness standard limits review to the narrower examination of law, and here the Chief Justice found that there was a possible interpretation of the treaty promise that could be found based on the plain meaning of the treaty text. This is to say that the chief justice found that the treaty could be interpreted on the basis of the words in the treaty text alone. The question of standard of review for treaty interpretation is a point on which there is a real complexity in the Court of Appeal reasons and something that will arise again, either in *Restoule v. Canada* as the matter proceeds or in other treaty interpretation cases.

Increasing annual annuity payments as is owed under the terms of the Robinson Treaties will be instrumental to effecting meaningful reconciliation. Achieving this requires that the Supreme Court maintain a fulsome approach to treaty interpretation, as the *R v. Marshall* cannons of treaty interpretation require. An equally important aspect of the decisions, if not more important, is the role of Anishinaabe law. Indigenous law and tradition was utilized as a procedural touchstone throughout the Ontario court proceedings, though the case was not argued based on Anishinaabe law. This approach suggests a third way in which legal matters concerning Indigenous communities in Canada may be argued: In addition to, first, Aboriginal law, which is an amalgamation of the colonial legal systems of common and civil law along with Indigenous law, and second, Indigenous law, for which there is ongoing work to revive, in *Restoule v. Canada* the third approach relies on Indigenous law and custom to guide Court interpretation of a historical treaty. This third approach acts as a revival of Indigenous legal tradition and a reaffirmation of treaty obligations as a modern-day reading of the Robinson Treaties is guided by the Indigenous custom and process that occurred at the signing of the original treaty.

6. Indigenous Law and Tradition as Procedure

Restoule v. Canada was argued on the basis of treaty rights contained in and affirmed by the Canadian constitution, and not on the basis of Indigenous law. As was explained in the Superior Court decision: "The Plaintiff First Nations ask the court to interpret the Treaties' long-forgotten promise to increase the annuities according to the common intention that best reconciles the interests of the parties at the time the Treaties were signed" (*Restoule v. Canada (AG)*, 2018a, para. 2). Thus the analysis focused on the principles of treaty interpretation which require that treaties be liberally construed, guided by the honour of the Crown, understood through unique cultural and linguistic differences between the parties (*R. v. Taylor and Williams*, 1982), and any ambiguities be resolved in favour of the Indigenous signatories. This is to say that the analysis in *Restoule*

v. Canada focused on substantive Aboriginal law, not Indigenous law.

Despite this direction, Indigenous law was present throughout the proceedings. The role of Indigenous law in *Restoule v. Canada* was explained in the following way:

> The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective. The Plaintiffs did not ask the court to apply Anishinaabe law. Rather, the Plaintiffs and Canada submit that the court should take respectful consideration of Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis. (*Restoule v. Canada (AG)*, 2018a, para. 13)

Anishinaabe law and traditions were present throughout *Restoule v. Canada* proceedings and were used to guide the trial court, though they were not directly at issue. Aspects of court proceedings that incorporated Anishinaabe law and traditions include:

1. The trial court sat in a location with hearings held throughout the treaty territories, including in Thunder Bay and Baawaating (Sault Ste Marie), which is the location where the Robinson treaties were signed.
2. Cultural practices were adopted to guide proceedings. There was an education on Sweat Lodge ceremonies and Sacred Fire teachings were lit. All of the people involved in the trial, at different times, were involved in these ceremonies and teachings. This included counsel, the presiding judge, Judge Hennessey, community members, and Elders (*Restoule v. Canada (AG)*, 2018a, para. 10).
3. Testimony from Elders concerning Anishinaabe protocol, histories, and laws were centered in the trial process. There were over 30,000 pages of primary sources filed under a joint book of primary documents from both parties to the matter (*Restoule v. Canada (AG)*, 2018a, para. 11).
4. The Court participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts (*Restoule v. Canada (AG)*, 2018a, para. 610).

As a result of these practices, the *Restoule v. Canada* report, court-admitted evidence, and court records contain voluminous teachings of Anishinaabe law and legal traditions, and often information that was once teachings from Elders. The trial court decision in particular details the depth of work that all involved in the matter did to introduce a trans-systemic approach to conducting the trial. Justice Hennessy notes in the trial court decision that, "from the outset, there were occasions when Anishinaabe ceremony came into the courtroom and the court process, through witnesses, counsel, and members of the host First Nations" (*Restoule v. Canada (AG)*, 2018a, para. 602). The collective reliance on these Anishinaabe laws and procedures was not possible "without the cooperation and joint effort of counsel and the parties." Developing a detailed historical record is needed for treaty interpretation cases as the law of treaty interpretation requires that the context in which a treaty was signed be examined. In *Restoule v. Canada*, the depth to which the trial court centered Anishinaabe traditions is beyond that which we have seen in the past, and a signal of how to conduct proceedings moving forward.

The above examples demonstrate the centrality of Anishinaabe practices to the *Restoule v. Canada* court proceedings showing ways in which Anishinaabe law, cultural practices, and ceremonies can be brought to bear on legal proceedings in colonial courts. When viewed together these actions suggest more than singular iterations of Indigenous cultural practices, and law, but instead they represent a substantive and ongoing body of Indigenous law and governance (Doerfler et al, 2013). This body of Indigenous law and governance has existed in the Anishinaabe communities since deep time through to the first colonial encounters between Anishinaabe communities and they are reflective of practices which were used to guide the signing of the Robinson Treaties in 1850. For example, throughout the *Restoule v. Canada* trial, sacred fires were lit. Council fires are a central part of Anishinaabe governance, serving both as a physical place where council met and fires were lit, and also as a metaphor: "When Anishinabek spoke about their councils, they used the word fire, or *ishkode*, as a metaphor for governance" (Bohaker, 2020, p. 118). As a governance structure, council fires are physical places whereby alliances were made, complex arrangements of gift giving were actioned, relationships are built and reciprocal obligations are reaffirmed. As a metaphor, *ishkode* is an evocative reminder of the way in which fire changes and marks that which it touches (Stark, 2012, pp. 121–122). Heidi Bohaker describes the importance of the practice of maintaining a sacred fire at the *Restoule v. Canada* trial as follows: "Fire keepers…ensured that a central symbol of Anishinaabek law was present on the land, adjacent to the court building, burning twenty four hours a day, for the duration of the trial" (Bohaker, 2020, p. xxx). The presence of sacred firers at trial in 2017 mirrored the presence of a burning council fire at the signing of the Robinson Treaties in 1850 (The Royal Commission on Aboriginal Peoples, 1996, p. 110).

The trial proceedings in *Restoule v. Canada* gain particular importance when the central role of *ishkode* to Anishnaabe law and governance structures is revealed. Likewise, the sacred pipe was a central part of the protocol at the council fires at the negotiations and signing of the Robinson Treaties to the extent that "it is obvious that the various proceedings initiated by…[treaty commissioner] W. B. Robinson could not have begun or

ended without a pipe ceremony" (The Royal Commission on Aboriginal Peoples, 1996, p. 109). Later in the trial, the evidence provided by Elder Fred Kelly was, on the Grandfather Pipe ceremony, taught by bringing the pipe into the courtroom and providing detailed teachings on the same (FirstTel Communications Corp., 2017). That the council fire and sacred pipe were present at the signing of the Robinson Treaties and then again present at the *Restoule v. Canada* trial is not simply the sharing of cultural practices or information about laws, but instead an enactment of laws. These court proceedings are more than court ordered exceptions to the conduct of the trial, and instead a reaffirmation of laws that both parties took up at the signing of the Robinson Treaties.

7. Statements of Anishinaabe Law

The substantive content of Indigenous law was not before the court in *Restoule v. Canada* and never at issue. At the trial, Anishinaabe law was recognized and affirmed, and findings of facts about Anishinaabe law were not appealed by any parties to the matter. The Superior Court decision started with the statement that "recognition of Anishinaabe sovereignty…survived the unilateral declaration of Crown sovereignty" (*Restoule v. Canada (AG)*, 2018a, para. 72). That the existence of Anishinaabe law was not at issue from the perspective of any of the parties involved in the matter is alone deeply significant for it recognizes that Canada is a legally pluralistic context (L. Borrows, 2016). The *Restoule v. Canada* Court of Appeal decision followed this approach and did not dispute any reference to or reliance on Anishinaabe law.

Though this case matter was not argued on the basis of Anishinaabe law, it was brought into court by the expert opinion of elders who gave hours of oral testimony. Within Aboriginal legal and cultural traditions, Elders are the knowledge keepers who carry the teachings of histories, relationships and the land, teachings of law, and governance practices. These teachings are central to aiding treaty interpretation matters as they provide information about what would have been the intention and understanding of Indigenous treaty signatories. This taking of these expert opinions, or more correctly, teachings, was facilitated by the adoption of a procedure for taking elder evidence (*Restoule v. Canada (AG),* 2018c). The adopted protocol, the "Elder Protocol," detailed what practices should be adopted when taking testimony from Elders, guiding principles, and guidance for counsel on working with Elders. The guiding principles are:

1. Court Rules must be applied flexibly to take into account the Aboriginal perspective.
2. Rules of procedure should be adapted so that the Aboriginal perspective, along with the academic historical perspective, is given its due weight.
3. Elders who testify should be treated with respect.
4. Elder testimony and oral history should be approached with dignity, respect, creativity and sensitivity, in fair process responsive to the norms and practices of the Aboriginal group and the needs of the individual Elder testifying (*Restoule v. Canada (AG)*, 2018c, p. 1).

Practices adopted by Elders included affirming the truth of their testimony, holding an eagle feather (not an oath nor a solemn affirmation), carrying out a smudging ceremony before the start of hearings, arrangement of seating to be in a circular or semi-circular fashion (rather than in a traditional hierarchical European courtroom setting) and to have a sacred fire continually burning during trial proceedings (*Restoule v. Canada (AG)*, 2018c, p. 2). Lastly, procedures, as they are related to the interaction between Elders and legal counsels, were amended to be responsive to Aboriginal law and protocol in the courtroom. Examination of Elder testimonies can be difficult as communication may occur in modes that are uncommon in European trials. For instance, mechanisms utilized may include storytelling and teachings, as well as the use of sacred objects and prayer. These practices would not ordinarily be the form taken when non-Indigenous witnesses and experts give evidence, and would otherwise be subject to adversarial court processes. A central piece of the adopted Elder Protocol is the acknowledgment that the taking of Elder testimony has historically been poorly handled in colonial courts. The protocols instruct parties to be flexible in relation to European court formalities recognizing that its typically adversarial nature is not in accord with the taking of expert testimony from Elders. For example, during the examination-in-chief, counsel was allowed to sit next to the Elder giving testimony as a way to provide support and this support was particularly helpful for those Elders providing testimony who were hearing impaired. Meanwhile, counsel for the defendants was allowed to choose to defer objections to Elder testimony without prejudice so as to not interrupt the Elder (where ordinarily an objection must be made contemporaneously to the testimony).

8. Conclusion

The *Restoule v. Canada* matter is ongoing. At the time of writing the three stages of the litigation have not been completed; stages one and two have been appealed to the Supreme Court of Canada and stage three—which is the calculation of damages—has not yet been heard. From the courts which have heard parts of the litigation, there is a consensus that the Robinson Treaties contain an obligation that the Crown increases the annual annuity payments and that this obligation is grounded in the principle of honour of the Crown. Looking ahead, two aspects of *Restoule v. Canada* will be important. These are the standard of review for treaty interpretation and the calculation of the increased annuity

amount. How these aspects will be resolved remains to be seen.

The outcome of the three stages of the *Restoule v. Canada* matter will have a direct impact on the beneficiaries of the Robinson Treaty who are parties to the matter. Giving meaning to the "solemn promises" contained in the treaty requires that there be meaningful consideration, and, then, implementation of the treaty annuity payment which was written so as to connect to resource extraction carried out in what is now Northern Ontario. The gamble taken by the original treaty signatories was on the future earnings of the Ontario Government, and now, the annuity payment must reflect that amount. It is likely that the dissent at the Ontario Court of Appeal, which argues against a finding that the standard of review is deferential but adopts, instead, correctness on a matter of law, will be an important aspect of the Ontario Government's argument before the Supreme Court. The dissent's interpretation would have any annuity payment increase be at the discretion of the government.

Regardless of the ultimate outcome of *Restoule v. Canada*, the matter also represents significant strides in how Indigenous law is utilized within the Canadian legal system. As jurisprudence develops on the topic of treaty interpretation, the recognition of Anishinaabe sovereignty in how legal proceedings are conducted will have significant ramifications. Such an approach requires that Indigenous sovereignty be foregrounded in the analysis of treaty rights. It highlights the importance of Indigenous laws and protocols and provides tools for addressing legal matters through a pluralistic lens. As was explained by Justice Hennessy in a statement of gratitude:

> During the ceremonies, there were often teachings, sometimes centered on *bimaadiziwin*—how to lead a good life. Often teachings were more specific (e.g., on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies). The entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. I believe I speak for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices. (*Restoule v. Canada (AG)*, 2018a, para. 610)

The "modern exercise of ancient practices" demonstrated throughout the *Restoule v. Canada* trial proceedings is not simply an example of Anishinaabe culture, nor a record of past laws. Instead, the practice of Anishinaabe law used to guide legal proceedings and the detailed accounts of Anishinaabe law offered in the Elder teachings is a modern iteration of the law and governance that guided the initial signing of the Robinson Treaties in 1850. The replication of governance activities from the time of the signing of the treaties, in the modern courtroom is an enactment of Anishinaabe law. It highlights the governance structures that exist within Anishinaabe communities and preserves the right to rely on Indigenous law in the future to decide matters related to Robinson Treaty lands. This reaffirmation also retains the possibility of strengthening or renewing claims to sovereignty and self-governance for the Anishinaabe community. Though *Restoule v. Canada* concerns treaty rights, Anishinaabe law would certainly not be limited to treaty matters. The clear statement from the court recognizing Anishinaabe law lays the foundation for that future.

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Conflict of Interests

The author has no conflicts of interest to declare.

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