

Summary Of The Supreme Court Of Canada Restoule Judgment

On July 26, 2024, the Supreme Court of Canada (“**SCC**” or “**Court**”) issued its decision in *Ontario (Attorney General) v. Restoule* (2024 SCC 27) (“**Restoule**”). In this decision, the Court confirmed that the Crown (Canada and/or Ontario) must compensate the Lake Superior Anishinaabe signatories (“**RST Nations**”) of the Robinson Superior Treaty (“**RST**”) for past breaches of the augmentation promise (e.g. promise to increase the treaty annuity).

This summary explains the Court’s decision in the *Restoule* case and how it applies to the RST Nations. Please note, however, that this is a brief and high-level overview of a complex and lengthy judgment. While it touches on key aspects of the decision, it does not cover every detail or nuance.

The key take-aways from the Court’s *Restoule* case includes:

1. **The Core of the Augmentation Clause.** The most important aspect, or “core” of the treaty augmentation promise is that it is a sacred promise by the Crown to share in the wealth of the treaty territory with the Robinson Superior Nations if the land were to prove profitable to the Crown.
2. **Collective Entitlement.** The annuity is a collective entitlement. The Court agreed with the trial court’s finding that the annuity is payable to the “Chiefs and their Tribes”. The reference in the RST to the \$4 amount paid to individuals does not create a separate obligation to pay individual band members, but rather places a condition on the Crown’s obligation to augment the collective annuity. Therefore, past compensation is owed to the bands collectively, not to individual members.
3. **The Core of the Duty in implementing the sacred promise.** The Crown has a duty to diligently implement the augmentation promise. This means that they must, from time to time consider whether there is sufficient wealth received by them from the treaty territory that will permit them to increase the annuity. The Crown then must make a decision on what increase, if any, is to be paid. This decision is called an exercise of the Crown’s discretion. The frequency of the Crown’s assessment must also align with the honour of the Crown.

4. **Discretion is Not “Unfettered”.** The Crown's discretion on whether to increase the annuity and, by how much, is not absolute, and can be challenged in court. The basis of the challenge can be that the discretion was not exercised diligently, honourably, liberally, or justly, and that it was not made in accordance with the honour of the Crown.
5. **Breach of the Augmentation Clause.** By not increasing the annuity payments beyond a single increase in 1875, (which was based on \$4 per person), the Crown has breached the treaty augmentation promise. The Court called the nature of the breach “egregious”, and they decided that the breach has left the RST Nations with an “empty shell of a promise”
6. **Negotiations for Past Compensation.** The Court ordered the Crown to engage in a 6 month engagement and negotiation process with the RST Nations, ending on January 26, 2025, to try to come to an agreement on the amount of compensation for past breaches. While the Court has given the RST Nations the ability to extend the 6 month engagement and negotiation deadline, the Crown cannot make a similar request.
7. **Obligation to pay even if there is no agreement.** If the parties cannot reach an agreement by January 26, 2025, the Crown is required to exercise its discretion to determine an amount for past compensation that is just and honourable. At that time, the Crown must then ensure payment is made within a reasonable period, allowing time for necessary legislative approvals. In other words, the RST beneficiaries will not have to wait for a court to conduct its review process to receive an augmented annuity payment.
8. **Factors that must be considered in deciding on the amount of past compensation.** When engaging with the Anishinaabe over the 6 months, and if the Crown is required to exercise its discretion concerning the past compensation amount, the factors that the parties must consider are:
 - The Crown’s longstanding failure to diligently fulfill the Augmentation Clause since 1875. Compensation for past breaches must reflect the severity and egregious nature of those breaches and redress the harms occasioned by the Crown’s neglect of its treaty promises.
 - The number of Anishinaabe treaty beneficiaries and their needs.
 - The benefits the Crown has received from the territory and its expenses during the relevant timeframe.
 - The wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada.

- The principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise to share in the wealth of the land if it proved profitable.
9. **Judicial Redress and Remedies.** If no settlement agreement is reached, and if the Superior Plaintiffs are unhappy with the compensation amount determined by the Crowns, they have the right to ask the court (the trial judge, Madame Justice Hennessy) to review both the engagement process the Crown took part in for the 6 months, the compensation amount decided upon by the Crown, and the Crown's reasoning behind the compensation amount. If Justice Hennessy concludes that either the process was flawed or the amount of compensation is not honourable, she can either order the Crowns to redo the process or set the amount to be paid by the Crown.
10. **Judgment Applicable to Treaty Beneficiaries:** The Court's judgment is applicable to the First Nation signatories of the RST, who are beneficiaries of the RST, which currently includes Fort William First Nation, Michipicoten First Nation, Gull Bay First Nation (Kiashke Zaaging Anishinaabek), Red Rock Indian Band, Whitesand First Nation, and Animbiigoo Zaagi'igan Anishinaabek. Those First Nations who have outstanding Aboriginal title claims are considered contingent treaty beneficiaries and may only become entitled to receive increased annuity payments if and when they adhere to the treaty, or a court declares that they are treaty beneficiaries. These contingent treaty beneficiaries include Biigtigong Nishnaabeg, Biinjitiwaabik Zaaging Anishinaabek, Bingwi Neyaashi Anishinaabek, Netmizaaggamig Nishinaabeg, Long Lake No. 58 First Nation, and Pays Plat First Nation.
11. **Future Implementation of the Annuity Augmentation Clause:** The Crown cannot continue to act dishonourably and with complete discretion in determining when and how the annuity Augmentation Clause is to be implemented. The Crown must exercise its discretion, including as to how often it turns its mind to increasing the annuity, diligently, honourably, liberally, and justly, while engaging in an ongoing relationship with the Anishinaabe based on the principles of respect, responsibility, reciprocity and renewal.

If the Crown fails to act honourably and justly in exercising its discretion in the future, the RST Nations may call upon a court to review the process the Crown used in exercising its discretion and/or the augmentation amount the Crown decides upon.

Fighting For Fairness: RST First Nations Take Canada And Ontario Back To Court Over Broken Treaty Promises

On January 27th, 2025, the provincial and federal governments determined an amount of compensation to pay the RST First Nations for the breaches of the Crown's obligations to increase annuities under the Robinson Superior Treaty since 1850. The RST First Nations say that the \$3.6 billion compensation determined by the governments for past breaches was not liberal, just, honourable, or justified, and does not comply with the governments' obligations pursuant to the *Constitution*. The RST First Nations are taking the governments of Canada and Ontario back to court.

What do the RST First Nations want?

The RST First Nations are asking the court to review how the federal and provincial governments decided on the \$3.6 billion compensation for breaking the treaty annuity promise. They say:

- **The governments didn't adequately engage their treaty partners** – Instead of negotiating meaningfully, government officials refused the RST First Nations proposal for collaborative decision making; instead acting unilaterally in a process that was intended to repair the treaty relationship.
- **The compensation amount (\$3.6 billion) is only a fraction of the wealth generated from the territory over 175 years** – The government's compensation is less than what's fair, compared to the wealth it gained over 175 years. Officials from Canada and Ontario disregarded key evidence presented by the RST First Nations, including taxation revenue from resource development industries that prospered on the resources of the Superior treaty territory. While Canada ignored this evidence entirely, Ontario assigned arbitrary revenue amounts that fall short of the governments' actual taxation revenue from the treaty territory.
- **The compensation amount is based on the RHT settlement** – The federal and provincial governments improperly relied on a recent settlement with the Robinson Huron Treaty First Nation to limit compensation to the RST First Nations, even though the circumstances and needs for each treaty group are vastly different.

The court will decide if the governments acted in a manner consistent with their treaty and Constitutional obligations. The RST First Nations are asking the court to order the governments to:

- Pay them an amount of compensation that is just and honourable, as decided by the court or, alternatively, by the governments with guidance from the court.
- Fully cover their legal costs.

This Constitutional Review is about more than just money. It's about holding the governments accountable for broken treaty promises and setting down guiding principles to ensure the RST First Nations share in the wealth of their land, as promised under the Robinson Superior Treaty.

The hearing for the Constitutional Review is scheduled to be heard at the Thunder Bay, ON, courthouse during the weeks of June 2 through 6 and June 9 through 13, with additional time for hearing on June 18, 19 and 20, 2025, if necessary.