

Robinson Huron Treaty Litigation Fund (RHTLF)

Main Purpose:

21 Lake Huron First Nations (identified below) formed the Robinson Huron Treaty Litigation Fund (RHTLF) in 2010 to assist the First Nations to pursue litigation and/or negotiations against Canada and Ontario for failing to increase annuities payments since 1874.

The RHTLF was created to undertake and pursue litigation and/or negotiations related to the Robinson-Huron Treaty Annuities Claim on behalf of the Settlers of the RHTLF and/or their members who receive or are entitled to receive annuities under the Robinson Huron Treaty of 1850, as well as others who receive or are entitled to receive annuities under the said Treaty.

Structure:

The RHTLF is comprised of 21 Trustees appointed by the First Nations Councils, each is mandated to represent their respective First Nations. Two (2) Trustees from each Sub-Region, as set out below, are appointed to the Litigation Management Committee (LMC) which guide and work with the Legal Team (Nahwegahbow Corbiere), the Chiefs and Trustees. The existing members of the LMC are: Mike Restoule, Chief Patsy Corbiere, Ogimaa Duke Peltier, Peter Recollet, Chief Dean Sayers and Angus Toulouse.

Manitoulin Island Sub-Region: Aundeck Omni Kaning, M'Chigeeng, Shequindah, Shesheganing, Whitefish River, Wiikwemikoong Unceded Territory, Zhiibaahaasing.

North Shore Sub Region: Batchewana, Garden River, Mississauga #8, Sagamok, Serpent River, Thessalon, Atikameksheng Anishnawbek.

Highway 69 Corridor Sub-Region: Dokis, Henvy Inlet, Magnetewan, Nipissing, Shawanaga, Wahnapiatae, Wasauksing.

The Robinson Huron Treaty 1850 was entered with the Crown, in 1850. The RHT1850 territory covers a large part of northeastern Ontario, from Sault Ste. Marie to Penetanguishene, and north to the height of land. The current RHT beneficiary population is approximately 30,000.

The Annuities Claim involves the **augmentation clause** of the Robinson Huron Treaty 1850 which states:

*"[...] should the Territory hereby ceded [...] at any future period produce such an amount as 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**"*

The RHT1850 Annuities **Statement of Claim**, which was launched by the RHTLF on **September 9, 2014**, involves a claim for resource revenues, against Canada and Ontario. Under the Treaty, the Crown promised to pay a perpetual annuity of 600 pounds (\$2,400.00), which in 1850, approximated \$1.60 per person. This was all that the Crown could afford at the time. However,

William Benjamin Robinson provided an additional incentive for the Anishnawbek Communities to enter Treaty if further wealth was generated in the territory. He included into the treaty text an augmentation clause which obligates the Crown to increase the annuity ***“to such further sums as Her Majesty may graciously be pleased to order”***. The annuity was increased once in 1874 to the current level of \$4.00 per person and has never been increased again.

In **July 2016**, the RHT Trust filed a **Notice of Motion for Summary Judgment** on part of the claim in the statement of claim:

The plaintiffs move for a declaration that [...] since 1850 the Crown has been and remains legally obligated under the Robinson Huron Treaty of 1850 to increase the annuity under the Treaty from time to time if the territory subject to the Treaty produced or produces an amount which would enable it to do so without incurring loss, and that the size of the increase of the annuity is not limited to an amount based on one pound per person.

Court hearings began on the Summary Judgment Motion on September 25, 2017

LEGAL ISSUES

Because of the failure by the Crown to live up to the terms and spirit and intent of the treaty, the Robinson Huron Treaty Chiefs have no other recourse than to enforce the treaty annuity provisions in a court of law. The plaintiffs (21 First Nations) have brought this action on behalf of the beneficiaries of the Robinson Huron Treaty.

The litigation is against both Canada and Ontario and they are crossclaiming against each other.

The Statement of Claim sets out two main causes of action:

1. "breach of treaty rights" (breaking of a treaty promise); and
2. "breach of fiduciary obligation" (failure to respect a legally binding obligation on the Crown arising from the unique First Nations-Crown fiduciary relationship).

Both involve asserting rights of First Nations protected by section 35 of the Constitution Act, 1982, which affirms treaty and aboriginal rights.

PHASE ONE

On December 21st, 2018, Justice Patricia Hennessy, of the Ontario Superior Court, ruled in favor of the RHT Plaintiffs. Her decision is ground-breaking in that it gives expression to the doctrine of reconciliation by interpreting and ordering the implementation of the Robinson Treaties in the context of the nation to nation relationship existent in 1850. It also gives meaning and force to Anishinaabe laws, to understand the common intention of the parties to the Treaty. Regarding the augmentation clause, Justice Hennessy held:

I find that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant. The economic circumstances will trigger

an increase to the annuities if the net Crown resource-based revenues permit the Crown to increase the annuities without incurring a loss. The principle of the honour of the Crown and the doctrine of fiduciary duty impose on the Crown the obligation to diligently implement the Treaties' promise to achieve their purpose (i.e. of reflecting the value of the territories in the annuities) and other related justiciable duties.

Justice Hennessy also stated:

The Anishinaabe and the Crown now have an opportunity to determine what role those historic promises will play in shaping their modern treaty relationship. The pressures they faced in 1850 will continue to challenge them. However, in 1850 the Crown and the Anishinaabe shared a vision that the Anishinaabe and the settler society could continue to co-exist in a mutually respectful and beneficial relationship going into the future. Today, we arrive at that point in the relationship again. It is therefore incumbent on the parties to renew their treaty relationship now and in the future.

Ontario has appealed the Stage One decision, but Canada has not. The appeal will be heard in January 2021. The appeal was scheduled for May 15, 2020, but the Covid-19 situation caused a postponement.

PHASE TWO

This part of the case is focused on Crown technical defenses of limitations and Crown immunity, as well as whether the Crowns (Ontario and Canada) are jointly and severally liable. A decision on Stage Two has been issued. Justice Hennessy, again, ruled in favour of the Robinson-Huron and Robinson-Superior First Nations, specifically, the Judge rejected the argument that the Crown is immune from the claim and that the claim is barred by the statute of limitations. The decision is very technical in nature, but the judge did make some general observations about Treaties:

[150] I find that the Robinson Treaties are not contracts for the purpose of the application of the limitations regime of the Limitations Act, 1990.

[151] The Treaties represent unique agreements by the Crown and the First Nations of the Lake Huron Territory and the Lake Superior Territory whose long-term goal was peaceful and respectful co-existence in a shared territory. Treaties are part of the constitutional fabric of this country. Simple contracts they are not. The Robinson Treaties did not start out as contracts nor did they somehow transform into contracts for the purpose of a statutory limitations defense.

[283] This century old dispute between the federal and provincial Crowns is one of the reasons why no increase has been made to the annuities for over 150 years. This delay has had enormous negative consequences for the plaintiffs, not the least of which is the cost and complications of litigating this dispute based on two centuries of evidence. It is the stage on which this dispute plays out.

PHASE THREE

This part of the case is scheduled for the spring and summer of 2021 and will deal with the matter of compensation and all remaining issues.

THE APPEAL BY ONTARIO

The federal government decided not to appeal the Stage 1 decision, however, the Government of Ontario filed their Notice of Appeal in January 2019. The Notice of Appeal asserts errors of fact and the law including:

- by interpreting the Robinson Treaties in a manner that is inconsistent with the common intentions of the Treaty parties as disclosed by the evidence:
- in failing to accept that the \$4 per-person figure set out in the Augmentation Clause should be indexed to mitigate the impacts of persistent inflation, pursuant to an implied term of the Robinson Treaties.
- transforming a discretion “Her Majesty may be graciously pleased to order” into a mandatory obligation.
- in concluding that the Crown is under an obligation to increase annuities, without limit, to reflect a “fair share” of net Crown revenues produced by the Treaty territories.
- in failing to take into account the Crown’s intentions with respect to the annuity provisions of the Robinson Treaties, as disclosed by the evidence at trial; and
- in recognizing a fiduciary duty over any aspect of the Crown’s Treaty annuity obligations under the Robinson Treaties.

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