Re-interpreting Law:

Analyzing the Relation Between the Canadian Legal System and Indigenous Legal Traditions

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ABSTRACT: This paper examines the outcome of the Canadian legal case of *Restoule v. Canada* in the Ontario Court of Appeal, determining that the Canadian state must determine how it can best meet its constitutional obligations of adequate treaty annuity payments to the Anishinaabe Nation. This case allows for a reconsideration of the relation between the Canadian legal system and Indigenous legal traditions. By examining the efficacy and saliency of various Indigenous legal traditions through the contextual scope of *Restoule v. Canada*, this paper extends an objective for the Canadian legal system to legitimize diverse Indigenous legal traditions so that it may better adjudicate the legal cases of Indigenous peoples. The four salient dimensions of Indigenous legal traditions I will explore are Gitksan conflict management, Haudenosaunee deliberative law, Hul'qumi'num Mustimuhw kinship and land relations, and Mi'kmaw customary law.

KEYWORDS: Constitutional law, Indigenous legal tradition, *Restoule v. Canada*

On November 5th, 2021, the Ontario Court of Appeal ruled on the Restoule v. Canada case that the Canadian government violated the terms of treaty annuity payments to 23 groups of the Anishinaabe Nation located in the Ontario region (Fine 2021). Under the Robinson Treaties of 1850, its Augmentation Clause set out the terms of treaty annuity (annual treaty) payments to be made from the agreement parties of the Crown to the Anishinaabe Nation, which would be augmented or increased to an appropriate share of the resource wealth developed economically within the ceded territory (Fine 2021). However, as this region has economically developed in the century and a half since the Robinson Treaties were signed, the annual treaty payment from the Crown to the Anishinaabe Nation has remained four dollars, as agreed upon in 1875 (Fine 2021).

As summarized by journalist Sean Fine (2021), the Court's decision emphasizes the Canadian state's massive legal violation of constitutional obligations regarding appropriate annual treaty payments to the Anishinaabe Nation. Restoule v. Canada calls on the Canadian legal system to determine fair compensation for the Anishinaabe Nation, but it does not need to make this decision independently (Fine 2021). Indigenous legal traditions share historical coexistence with the Canadian legal system, yet the former has not been given adequate legitimacy that would allow for effective support and interpretation in contemporary legal debates between Canada and Indigenous peoples, as seen in Restoule v. Canada (Fine 2021; Burrows 2010, 23). Therefore, would a stronger legitimation of Indigenous legal traditions alongside the Canadian legal system better position the Canadian state to be held accountable for its constitutional obligations of treaty annuity payments? I argue that centering Indigenous legal traditions in Restoule v. Canada can present effective strategies for addressing the financial accountability of the Canadian state to the Anishinaabe Nation (Fine 2021). In doing so, the necessity for Indigenous legal traditions to be better incorporated into Canada's legal system becomes evident (Napoleon 2013, 244).

Indigenous legal traditions stem from diverse contexts; the intent of this paper is not to separate them from their distinct cultural contexts (Morales 2018, 149). While Restoule v. Canada concerns deliberating treaty annuity payments specifically to the Anishinaabe Nation, there are 23 different groups within this Nation, each with their own distinct approaches to Anishinabek legal traditions (Fine 2021; Morales 2018, 149). As such, the Canadian legal system will be best equipped to respond to this case by considering Indigenous legal traditions from an equally diverse scope. By presenting how four dimensions of Indigenous legal traditions operate within their own contexts, I will consider how each dimension presents potential strategies that can be incorporated into the Canadian legal system for Canada to effectively address its constitutional obligations in Restoule v. Canada. The four salient dimensions of Indigenous legal traditions explored in this paper are: Gitksan conflict management, Haudenosaunee deliberative law, Hul'qumi'num Mustimuhw kinship and land relations, and Mi'kmaw customary law.

The Canadian state could utilize Gitksan legal traditions in conflict management to meaningfully address the dispute they created in violating constitutional obligations of treaty annuity payments to the Anishinaabe Nation (Fine 2021; Napoleon 2013, 238). Legal

scholar Val Napoleon (2013) details how the Gitksan people of northwest British Columbia apply their conflict management system using a decentralized format to resolve disputes as they arise (238). This decentralized format means that Gitksan conflict management relies on a lateral judicial process involving unanimous consensus from all members; this approach favours dispute resolution and shared accountability by Gitksan people over the outcomes of this approach (Napoleon 2013, 238). As a result, this system meaningfully affirms Gitksan legal traditions because conflict resolution is an aligning collective desire for the lawmaking community members (Napoleon 2013, 238). Processing disputes in this manner allows for a constructive approach to conflict management, which could inform the Canadian state in resolving the concerns of Restoule v. Canada (Borrows 2010, 38). Gitksan legal traditions in this case would involve both the Canadian state and the impacted Anishinaabe Nation and assist both in reaching a currently undetermined compensation amount for treaty annuity payment (Fine 2021; Napoleon 2013, 238). The objective is to incorporate shared responsibility in treaty annuity payment resolution (Napoleon 2013, 238). Using the approach of Gitksan conflict management maintains the Canadian state's responsibility to compensate the Anishinaabe Nation under Restoule v. Canada while better considering the needs of the wider Indigenous community (Napoleon 2013, 238).

Like Gitksan conflict management, deliberative law also requires further legitimation; it highlights that the Canadian state needs to better affirm a strong social relationship with the Anishinaabe Nation to fairly compensate the community under Restoule v. Canada (Fine 2021). Jurist and academic John Borrows (2010) explains how the Haudenosaunee people conduct their legal traditions using a practice of deliberative law, where legal decision-making is a dynamic, discussive process of reaching consensus between six Haudenosaunee groups (42). Haudenosaunee legal traditions in deliberative law are as much about the process as they are about the outcome of this legal methodology (Borrows 2010, 36). Specifically, Haudenosaunee deliberative law develops social capital and healthy relationships through trusting that all Haudenosaunee people will prioritize mutual legal obligations (Borrows 2010, 36). Borrows (2010) goes on to explain that better legitimating Haudenosaunee deliberative law in conjunction with the Canadian legal system can help the Canadian state work towards building genuine trust with the Anishinaabe Nation (36). This trust would allow the Canadian state to not only equitably resolve their compensatory wrongdoings in Restoule v. Canada, but also to invest in an anti-oppressive legal relationship going forward by continually meeting their constitutional treaty annuity payment obligations to the Anishinaabe Nation (Fine 2021; Borrows 2010, 36). Therefore, the legitimation of Haudenosaunee deliberative law within the Canadian legal system is part of an effective strategy for Canada to reconcile ongoing Anishinabek constitutional obligations (Borrows 36, 2010).

In addition to Gitksan conflict management and Haudenosaunee deliberate law, Indigenous legal traditions of kinship and land relations require greater legitimation alongside the Canadian legal system to better inform the Canadian state's response in Restoule v. Canada (Morales 2018, 152, 155). In her text, "Locating Oneself in One's Research," Indigenous legal scholar Sarah Morales (2018) presents these kinship and land relations as they are held by the Hul'qumi'num Mustimuhw, or Hul'qumi'num, and people of Vancouver Island (145). The Hul'qumi'num people rely on their extended community relations to form fundamental legal understandings regarding their connection to the landscape (Morales 2018, 152–153, 155). These community or kinship relations employ oral traditions to explain how the Hul'qumi'num people maintain legal management over their traditional territory and its resources (Morales 2018, 154–155). Understanding the interconnectedness of Hul'qumi'num kinship and territory better reveals the depth of sacred meaning articulated in their lived experiences. In other words, the intricacies of Hul'qumi'num Mustimuhw's legal jurisdiction in relation to land is best articulated through kinship ties within the community (155). By considering Hul'qumi'num Mustimuhw's kinship and land relations alongside the Canadian legal system, there is potential to articulate fair compensation for the Anishinaabe Nation in Restoule v. Canada (Fine 2021). This involves understanding how the Robinson Treaties have extended kinship relations between the Canadian state and the Anishinaabe Nation (Morales 152–153; Fine 2021). The Canadian state has economically exploited Anishinabek land resources without respecting their kinship relations to the Anishinaabe Nation, so treaty annuity payments must accurately compensate the Anishinaabe Nation for this exploitation (Fine 2021; Morales 2018, 1534).

The final aspect of Indigenous legal tradition that must be further legitimatized alongside the Canadian legal system is customary law. This legal tradition can assess how the Canadian state should address the communal needs of the Anishinaabe Nation to help them heal from the violation of their constitutional rights. L. Jane McMillan (2016), a legal anthropologist, describes how the Mi'kmaw people of Nova Scotia take on customary

law as it offers legal perspectives on how to best achieve restorative justice that holds wrongdoers accountable and allows victims to heal (198). Customary law reveals a process in which collaborative reconciliation guides the direction of the Mi'kmaw community moving forward from injustice (McMillan 2016, 198). For the Canadian state to comprehensively meet their constitutional obligations in Restoule v. Canada and avoid perpetuating injustices against the Anishinaabe Nation on their deserved treaty annuity payments, Mi'kmaw customary law provides a strategy of collaborative reconciliation between the two groups (Fine 2021; McMillan 2018, 198). Bringing Mi'kmaw customary law in more legitimate conversation with the Canadian legal system can demand that the Canadian state focuses not only on attempting to make the Anishinaabe Nation legally whole in financial terms, but also in terms of healing the relational rift between the two groups for ongoing reconciliation (McMillan 2018, 198). Mi'kmaw customary law affirms the Canadian state's commitment to achieving a restorative outcome with the Anishinaabe Nation through Restoule v. Canada (Fine 2021; McMillan 2018, 198).

Though the legitimation of these four aspects of Indigenous legal traditions within the Canadian legal system sets up an effective response for the Canadian state in Restoule v. Canada, it is not without critique. Aligning Indigenous legal traditions through further legitimation with the Canadian legal system is not necessarily a justifiable primary focus when considering Indigenous legal traditions and this case. The primary focus should instead be placed on best equipping the Anishinaabe Nation following the Restoule v. Canada decision to use Indigenous legal traditions to strategically bolster their advocacy against a potentially inadequate compensation order from the Canadian legal system (Fine 2021). Scholars Catherine Bell and Hadley Friedland (2019) state that the Canadian legal system continues to perpetrate judicial injustice against Indigenous people, as seen in limited legal processes of recognizing Indian Residential School abuse survivors, and ask why Indigenous legal traditions should be concerned with collaborating with this system (659-661). This is a valid critique regarding the delegitimization of Indigenous concerns by the Canadian legal system, but it does not eliminate the possibility for improvement within the Canadian legal system. Cree scholar and lawyer Tracey Lindberg (2015) forms a compelling response to this concern, explaining that the legal issues facing Indigenous peoples demand that an "Indigenous critical legal consciousness" (229) must be considered within the Canadian legal system (227, 230). The interests of the Anishinaabe Nation in Restoule v. Canada are best supported when Indigenous legal traditions contend directly with the reality of needing to work with the Canadian legal system while simultaneously demanding greater legal accountability from the Canadian state (Lindberg 2015, 231).

Another criticism contends that Indigenous legal traditions and the Canadian legal system are not compatible; this would mean that the further legitimation of the Indigenous legal traditions that I argue improve the Canadian state's accountability in Restoule v. Canada would be detrimental. Cree and Saulteaux scholar Gina Starblanket (2019), explains that previous considerations of diverse Indigenous legal traditions alongside the Canadian legal system have resulted in their repression by the Canadian legal system's prioritization of its own settler-state authority and jurisdiction (15). Where Indigenous legal traditions have been applied to treaty matters, they are often interpreted narrowly and one-sidedly and favour the legal order of the Canadian system (Starblanket 2019, 16). However, I believe it is still viable to legitimize Indigenous legal traditions alongside the Canadian legal system to develop a more effective decision on how the Canadian state will meet their constitutional obligations under Restoule v. Canada. The unacceptable treatment of Indigenous legal traditions in conjunction with the Canadian legal system is a historical reality. Indigenous legal traditions pre-date and foundationally inform the process and format of the Canadian legal system (Borrows 2010, 45), therefore meaningful contemporary collaboration would be valuable (24; 43). It is the responsibility of the Canadian state to help establish a Canadian legal system that intends to adequately serve Canadians and Indigenous peoples by giving Indigenous legal traditions greater priority. Therefore, the articulation and legitimation of Indigenous legal traditions alongside the Canadian legal system is a contemporary necessity. The resulting relationship of these two legal entities could better address Restoule v. Canada as a contemporary legal case that deserves thoughtful consideration from both a Canadian and Indigenous perspective (Fine 2021).

This paper has analyzed four aspects of diverse Indigenous legal traditions, highlighting how legitimizing these legal traditions within the Canadian legal system can support the Canadian state in more accurately determining their constitutional accountability under Restoule v. Canada. More authentic and robust collaboration between Indigenous legal traditions and the Canadian legal system allows for effective legal strategies in both this case and in future ones. Deciding the terms of fair compensation also has the potential to strengthen relations between the Canadian state and the Anishinaabe Nation.

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