"LANGUAGES, LAND, AND SOVEREIGNTIES: REVITALIZING INDIGENOUS LEGAL ORDERS" 2023 INDIGENOUS LAW CONFERENCE KEYNOTE ADDRESS

COFFEE AND CONVERSATION WITH THE HONOURABLE MADAM JUSTICE PATRICIA HENNESSY*, HOSTED BY PROFESSOR TENILLE E. BROWN**

CONTENTS

* Madam Justice Patricia Hennessy is a judge at the Ontario Superior Court of Justice, Northeast Region. After an early career in private practice and also working in public institutions she was appointed to the Superior Court of Justice in 1999. She has served on the board and been president of the International Association of Women Judges—Canadian Chapter, on the board of the Superior Court Judges Association of Ontario, the Council of the Canadian Superior Court Judges' Association, and the Education Committee for the Ontario Superior Court. She is actively engaged in local Mock Trials and Colloquium, the professional development conference for lawyers in northeastern Ontario. In 2011 Justice Hennessy received the Chief Justice Award for work in justice education and a doctorate of Laws Honoris Causa from Laurentian University. In 2014/2015 Justice Hennessy was judge in residence at Osgoode Hall Law School during her study leave. As part of her study leave activities, she worked with Anishinaabe students in high schools in Wikwemikong and M'Chigeeng on Manitoulin Island on a project called Exploring Justice/Making Law. Since then she has been involved provincially and nationally in judicial education projects on Indigenous law and legal orders.

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Abstract

Bora Laskin Faculty of Law, together with the Mino-Waabandan Inaakinogewinan Indigenous Law and Justice Institute,[1] hosted its third biennial conference on Indigenous law from January 26–28, 2023. This year's conference theme was "Languages, Land, and Sovereignties." The Indigenous Law Conference is a biannual student-focused conference hosted by the Bora Laskin Faculty of Law, which has the goal of bringing together law students from across Canada to discuss learning, teaching, and practising Indigenous law. At this years' conference, panels included teachings on topics such as practices of land-based learning, Ojibwa language teachings, self-governance, language rights, and the implementation of the United Nations Declaration on Indigenous Peoples.

Our opening keynote speaker for this years' conference was Madam Justice Patricia Hennessy of the Ontario Superior Court of Justice. Justice Hennessy was invited to talk about her work as presiding trial judge on the case *Restoule v Canada*, an Aboriginal treaty rights case. What follows is an edited version of Justice Hennessy's keynote talk, which took the form of a "Coffee and Conversation" hosted by Professor Tenille E. Brown.

I INTRODUCTION

Professor Tenille Brown [TB]: I am honoured to welcome Madam Justice Hennessy to the Bora Laskin Faculty of Law, Lakehead University. Our law school, Bora Laskin Faculty of Law, Lakehead University, is on the Robinson Superior Treaty lands, the traditional lands of Fort William First Nation, and the Ojibwe Odawa and Potawatomi Nations, collectively known as the Three Fires Confederacy. Today we will be talking about *Restoule v Canada*,[2] a Treaty rights case that concerns the Robinson Huron and Robinson Superior Treaties of 1850. Discussing our treaty relationship here in Thunder Bay is an important beginning for the conference. From this introduction centered on Treaty law, an area of law that in the jurisprudence often feels like an uneasy amalgamation of sovereignties, laws, and peoples, it is our hope the conference will move outwards into teachings and discussions about Indigenous laws, languages, and lands. I will begin by summarizing the *Restoule* matter before we move into conversation with Justice Hennessy.

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1. Mino-Waabandan Inaakonigewinan (Seeing Law in a Good Way) Indigenous Law & Justice Institute, online: *Bora Laskin Faculty of Law* <https://www.lakeheadu.ca/programs/departments/law/mino-waabandan-inaakonigewin>.

2. *Restoule v Canada (AG)*, 2018 ONSC 7701 (CanLII). [*Restoule* ONSC].

II CASE SUMMARY: *RESTOULE V CANADA (ATTORNEY GENERAL)*[3]

In 1850, seventeen years before the Dominion of Canada was created, colonial Officer William Benjamin Robinson in the representation of Her Majesty the Queen, concluded treaties number 60 and 61 with the Anishinaabek Nations of Northern Ontario.[4] The so-named "Robinson Treaties" concern vast territories surrounding two of the Great Lakes: Lake Superior and Lake Huron. The Treaty lands stretch in Northern Ontario from Pigeon River just west of Thunder Bay right up to the Quebec border. At the time of signing the Robinson Treaties these lands were important for colonial expansion as settlements began to move across North America. The need for a Treaty became apparent when mining began in the area encroaching on the traditional lands of the Anishinaabek Nations. The Robinson Treaties were concluded on September 9, 1850, in Bawaating (also known as Sault Ste. Marie). The Robinson Treaties contain a host of provisions concerning land, ongoing financial support in the form of an annuity payment, and protection of hunting and fishing rights. The annuity provision is unique among treaties in Canada as it contains language indicating that the amounts paid to the treaty beneficiaries will increase—or be augmented—under certain circumstances. The so-called augmentation clause states:

> [T]hat for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes . . . [I]n case the territory hereby ceded by the parties . . . 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 . . .[5]

The annuity amount has not been increased in 150 years. The issue in *Restoule* concerns interpretation of this augmentation clause. The plaintiffs argued that the parties entered into the Robinson Treaties with the common intention of sharing the wealth generated from the

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3. This section of the paper was written by Professor Tenille E. Brown to provide context for Madam Justice's keynote comments. The summary of the case, comments on the importance of the case, and any errors are attributed to Professor Brown alone.
For literature on *Restoule v Canada* broadly, see Tenille E. Brown, "Anishinaabe Law at the Margins: Treaty Law in Northern Ontario, Canada, as Colonial Expansion" (2023) 11:2 *Social Inclusion* 177; Haritha Popuri, "Appeal Watch: Crown Must Increase Annual Payments to Its Anishinaabe Treaty Partners in *Restoule v. Canada*" (December 14, 2021), online: *The Court* <http://www.thecourt.ca/appeal-watch-crown-must-increase-annual-payments-to-its-anishinaabe-treaty-partners-in-restoule-v-canada>.; Darcy Lindberg, "UNDRIP and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55:1 UBC L Rev 51.

4. See the full treaty texts online: "Copy of the Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown," online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028984/1581293724401>; "Copy of the Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Superior Conveying Certain Lands to the Crown," online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028978/1581293296351>.

5. *Ibid*.

natural resource activities in treaty land areas and the annuity clause was to be augmented where economic circumstances allowed.[6] The Crown for both Ontario and Canada argued that the augmentation clause concerned payments up to the sum of four dollars per person and thereafter any increase was discretionary.[7]

The *Restoule* matter has been heard in a trifurcated proceeding, which means that the trial was split into three separate stages. Stage one dealt with interpreting the treaty,[8] and this is the decision that we are going to be talking about today. Stage two considered Crown defences of immunity and limitations.[9] Stage three will focus on remedies and the allocation of liability between Ontario and Canada.[10]

A. SUPERIOR COURT OF JUSTICE: *RESTOULE V CANADA (ATTORNEY GENERAL)*, 2018 ONSC 7701

Stage one considered treaty interpretation. The court applied the principles of treaty interpretation summarized by the Supreme Court of Canada in *R v Marshall*.[11] These principles

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6. *Restoule* ONSC, *supra* note 2 at paras 363, 375.

7. *Restoule* ONSC, *supra* note 2 at paras 385, 390–391.

8. Stage one has been heard at the Superior Court with the decision released in 2018 *(Restoule, supra* note 2), and by the Ontario Court of Appeal with the decision released in 2021 (reported at *Restoule v Canada (AG)*, 2021 ONCA 779 (CanLII) [*Restoule* ONCA]). The Ontario Court of Appeal decision addresses claims in both the first and second stages of the litigation.
On June 23, 2022, the Supreme Court of Canada granted leave to appeal to the Attorney General of Ontario (reported at *Attorney General of Ontario, et al. v Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all Members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850, et al.,* (Ontario) (Civil) (By Leave), online: <https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/19427/index.do>).

9. *Restoule* ONSC, *supra* note 2.

10. The third stage litigation was set to begin in January 2023. This litigation was paused for settlement negotiations. These are ongoing. See Nick Dunne, "Billions Have Been Made on Robinson Huron Treaty Lands. First Nations Could Finally Get a Share" (March 14, 2023), online: *The Narwhal* <https://thenarwhal.ca/robinson-huron-treaty-explainer/>.

11. *R v Marshall*, [1999] 3 SCR 456 at para 78, per McLachlin CJ; *Restoule* ONSC, *supra* note 2 at paras 395–397.
The nine principles of treaty interpretation are:
1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation . . .
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories . . .
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed . . .
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed . . .
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties . . .
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time . . .
7. A technical or contractual interpretation of treaty wording should be avoided . . .

require that efforts be made to understand the historical record and give effect to the parties' intentions, choosing the interpretation that best reconciles the interests of both parties at the time the treaty was signed.[12]

In the course of the decision, Justice Hennessy highlights the importance of the historical and cultural context of the negotiation and signing of the Robinson Treaties. Anishinaabe perspectives guiding treaty signing were and remained principles of respect, responsibility, reciprocity, and renewal. The court found that the circumstances in which the Robinson Treaties were concluded showed that the annuity payment was less compared to annuity payments contained in other treaties contemporaneously signed. This lesser amount, coupled with the augmentation clause, was a strategic choice made by both the Crown and the Anishinaabe to respond to, on the one hand, the limited amount of money that the colonial government had for an annuity payment, and on the other hand, to ensure ongoing relationships with the promises of the treaty and the land.

The court held that the correct interpretation of the augmentation clause is that it states that where it was possible based on resource extraction there is a collective promise to share the revenues from the treaty territory with treaty beneficiaries, and in addition there is an individual annuity promise capped at $4 per person.[13]

B. ONTARIO COURT OF APPEAL: *RESTOULE V CANADA (ATTORNEY GENERAL)*, 2021 ONCA 779

The Ontario government appealed the Superior Court trial decision on treaty interpretation. The federal government did not appeal. On appeal it was unanimously held that the Treaty promise contained in the Robinson Treaties had been neglected for far too long. The majority agreed with Justice Hennessy's interpretation that the annuity payment had both a collective amount that was to be increased when revenue allowed it and, furthermore, this interpretation was based on the principle of the honour of the Crown, which requires there be an increase in the annuity payment.[14]

The minority judgment of the court of appeal is important as well. The minority judgment was written by Chief Justice Strathy, with Justice Brown writing in support. The minority disagreed with the trial court's interpretation of the augmentation clause. They offered an alternative interpretation, which would find that the annuity payment was interpreted correctly to be a $4 soft cap on the per capita annuity amount. Any increase in the annuity payment is at the Crown's discretion.[15] The minority grounded their analysis in the plain reading of the

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8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic . . .
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context." See *Marshall, ibid* at para 78 per McLachlin J.

12. *Marshall, ibid* at para 78; *Restoule* ONSC, *supra* note 2 at para 397.

13. *Restoule* ONSC, *supra* note 2 at para 459.

14. *Ibid* at para 411.

15. *Ibid* at paras 455–456; *Restoule* ONCA, *supra* note 8 at paras 451–458.

text, and in particular, the language included in the augmentation clause, which states that the augmentation clause is at "her majesty's graciousness."[16]

In [the opinion of Professor Brown], what is important to examine in the Court of Appeal decision is the standard of review for Treaty interpretation. On the standard of review, between correctness on the one hand and palpable and overriding error on the other hand, the minority judgment was joined by a third judge, Justice Lauwers, to form a majority. The majority on this point found that the standard of review is correctness. This distinction is important, because "correctness" is a lower standard of review. If the majority had found the standard of review was a "palpable and overriding error," there would be greater deference to the trial judge's findings in interpreting the Treaty. In [the opinion of Professor Brown], regardless of the outcome of the *Restoule* matter, the majority's holding that the standard of review is one of correctness is a concern for treaty interpretation because the trial record shows that a lengthy, careful, and responsive approach was taken when the trial court was taking evidence. At trial Justice Hennessy sat in community in different locations, heard evidence from many Elders and experts, and the case report shows there was a deep consideration of the handling of the historical record, which we'll hear more about today.

III QUESTIONS AND ANSWERS

TB: *Can you tell me about your experiences working as a judge that led you to presiding over the Restoule matter? Was Aboriginal law part of your judge training? How did you prepare for hearing the Restoule matter?*

Justice Hennessy: First, let me say, *miigwech*, to Tenille and Dean Jula Hughes,[17] and to the law school, it is a great pleasure to be here. I was born and raised in Northern Ontario and I'm thrilled to be at this law school and I think all of you who are students here are very, very lucky. It's great that you can learn about *Restoule*, a trial that began with ceremony on the Fort William First Nation.

From the beginning of my judicial career, I was very interested in working with students. I did a lot of work with high school students, including helping to establish mock trials for high school students in the Greater Sudbury Area to participate in. I noticed that schools on Manitoulin Island did not participate in the Sudbury district competition. So I reached out to one of the high schools, and there was this fantastic teacher who brought his students into the mock trial competition. I later learned that there was another high school on Manitoulin called Wasse-Abin in Wiikwemkoong, and I reached out to them and asked what they might want in terms of experiential learning. We worked together for a number of years on a variety of projects including career events and symposiums on sentencing.

I started to find that I wanted to put more time into these projects. But I have a trial schedule that takes precedence so I didn't actually have that much time to work with students. I also found that I was learning quite a bit from the students about their views of and their experience with the justice system. Ultimately, I wanted to spend more time with these students.

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16. *Restoule* ONSC, *supra* note 2 at para 460 [emphasis in original].

17. Dr. Jula Hughes, dean, Bora Laskin Faculty of Law, Lakehead University.

So, I applied for a study leave. During a judicial study leave, a judge works with a law school. What I wanted to do and what I believed was valuable work was to work with students from Wiikemkoong and M'Chigeeng.

I became a judge in residence at Osgoode Hall Law School. The Dean had one request for me. He wanted me to involve Osgoode students in my work on Manitoulin Island. So I did, and during one of the coldest Januarys in the history of the world, I brought the six law students to Manitoulin Island. It was an extraordinary experience from them. Neil Debassige and Alan Corbiere[18] were among the many who hosted us. We listened to stories at the Ojibwe Cultural Centre and at the school in M'Chigeeng. Neil suggested that we bring the Toronto law students ice fishing. We went in the dark before he went to work. We crossed Lake Mindemoya on four-by-fours. The wind was ripping our faces off. It was the beginning of a series of excellent cross-cultural experiences over three days. We visited the Art Gallery where acclaimed artist Leland Bell spoke about his work. The high school students from Wiikemkoong and M'Chigeeng [both on Manitoulin Island] were fantastic.

I also had a very formative experience at Osgoode itself during the leave. The school offered a three day Anishinaabe Law Camp.[19] Professor John Borrows and a number of his colleagues ran this land-based learning camp. Approximately forty Osgoode students and about five faculty members participated. The students slept on the floor of that community centre. I was billeted by a member of the community. It was three days of land-based teaching. It really was experiential learning on so many different levels. I continue to learn from my reflections on those experiences. I must admit that I did not succeed at most of what I thought I could accomplish in my study leave. But I learned more than I could ever imagine learning.

When I came back to work in 2015 from the study leave the Regional Senior Judge said, "Oh, we just received a letter from a lawyer, who wants a judge to case manage what he says is a Treaty case—do you want to take this file?" It was the *Restoule* case. So that's how it all began.

TB: *May I ask a follow-up question? When you're experiencing land-based teachings, what is the learning experience like?*

Justice Hennessy: Well, I start from the life of spending most of my leisure time in "the bush." I have spent my summers paddling, hiking, and kayaking around Northern Ontario. I have been in more lakes and rivers and hills than you can count. I have paddled on both Lake Huron and Lake Superior. So for me being outside is a place that makes me enormously comfortable and being in community with people who could also consider the water and the bush as sacred spaces, creating, teaching, and learning experiences was a very rich experience.

TB: *Thank you for taking that question. Land-based learning activities are a core aspect of the Bora Laskin Law School and I think it's a really enriching and important part of our work in this law school.*

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18. Dr. Alan Corbiere, assistant professor, Canada Research Chair in Indigenous History of North America, York University. Dr. Corbiere acted as an expert witness for the *Restoule* plaintiffs.

19. Anishinaabe Law Camp, online: *Osgoode Hall Law School* <https://www.osgoode.yorku.ca/programs/juris-doctor/experiential-education/anishinaabe-law-camp/>. On land-based learning generally, see John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2017) 15 YB of NZ Jur 15.

The second question brings us to the Restoule matter. You heard the matter as a trifurcated proceeding; where the issues were split up in three separate stages. The trial decision, stage one, dealt with treaty interpretation. Stage two dealt with issues of limitations and Crown liability. Both stages one and two have been appealed and are ongoing. Could you tell us about the current status of legal proceedings in the Restoule matter?

Justice Hennessy: As has been said, I'm currently sitting on stage three of this trial and therefore, I cannot speak about matters that are currently before me. So stage one was the interpretation stage. There was a long trial and it was appealed. Stage two was very technical. It was the defences', and it was also appealed. Stage three deals with the claim for compensation and Crown allocation. The compensation claim is very complex. It involves, first, competing economic theories and will likely require determinations of which revenues and which expenses are relevant to any calculation. It also includes the issue of what interest rate to apply to unpaid annuities. This third stage has been delayed for many different reasons, most significantly because of the pandemic lockdowns, which stopped it in its tracks. A lot of research was necessary, and the research is painstakingly done at the Canada and Ontario archives. Archive research was shut down during COVID lockdowns. Finally, we were to start two weeks ago and there was a request by the parties that we adjourn for a couple of weeks, while they attempted to reach a mediated resolution.[20]

TB: *There were occasions when Anishinaabe ceremony came into the courtroom and the court process through witness*

es, counsel, and members of the host First Nation. This could not have happened without cooperation from all persons involved in the case. In the decision you write about the Firekeepers, who tended sacred fires throughout the hearings, the importance of centrality of Elders, and the protocols and ceremonies that they brought to the courtroom. At conclusion in the decision you give special thanks to these contributions to the Restoule trial:

> To the many firekeepers who tended sacred fires throughout the hearing process from September to June in the full range of Northern Ontario weather, and to Elder Leroy Bennett of Sagamok Anishnawbek First Nation who conducted Smudge, Eagle Staff, and Pipe ceremonies and offered teachings to those who asked.[21]
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> . . .
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> The First Nations were warm and generous hosts when the court convened in their communities. As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. 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

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20. *Restoule* ONCA, *supra* note 8.

21. *Restoule* ONSC, *supra* note 2 at para 608.

> for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices.[22]

So, my question is, how did Indigenous traditions get incorporated into and guide the court in hearing Restoule?

Justice Hennessy: This question raises huge issues for judges and for lawyers. What we did was pretty new and responsive to the situation which presented itself. As we prepared for the stage one hearing to start in Thunder Bay, the plaintiffs' counsel invited us to participate with them in ceremonies on the Fort William First Nation. We discussed this invitation in a case conference. All of the lawyers agreed to accept the invitation. Once it was known that both Crown and plaintiff lawyers would attend, I also accepted the invitation. It was the beginning of a practice that continued from time to time throughout the trial. The First Nation also made an arrangement to host a fire at all times. All trial participants were welcome at the fire at any time. What happened to make this trial experience so rich could not have happened without the full cooperation of the Crown and First Nation counsel teams, the communities, and the leadership of those communities. As the judge, we never knows what goes on behind the scenes in a legal hearing. But these things could not have happened without real intentional decision making that Anishinaabe protocol, Anishinaabe ways of interacting, and Anishinaabe hospitality were going to be offered throughout the *Restoule* trial.

We heard evidence at the trial that the Treaty negotiations were a cross-cultural event which took place around a Treaty fire. The Anishinaabe plaintiffs created an opportunity for trial participants, witnesses, lawyers, court staff, and the judge to also appreciate a cross-cultural experience during this proceeding that focused on Treaty making. The Anishinaabe plaintiffs had been in contact with European settlers and colonial officials for some time. They were dealing with encroachments on their territory and were demanding that the colonial government respond to their complaints. From the colonial governments side, the officials brought their understanding of the common law and their understanding of the Royal Proclamation to a meeting with Chiefs and principal men. There was evidence that the two groups met around a Treaty fire or council fire.[23] The main colonial official, Mr. Robinson,[24] was well regarded by the Anishinaabe. He had been involved in the fur trade, he had learned some of the languages, and he was comfortable with the protocols. He was comfortable with ceremony and Anishinaabe protocol. He had travelled in the territory as a highly respected member of the colonial government. He was on the Executive Council, which was like the cabinet. He was a decorated military man, and his brother, became the first Chief Justice of Ontario, Beverly Robinson. He was known amongst the Anishinaabe leaders in the territory.

The evidence before me at trial was that the Treaty negotiations were a cross-cultural process. Some people could speak both English and Anishinaabemowin, plus there were respected interpreters. The colonial officials understood that the Chiefs met in lodges, and they also understood that the fire was important. They understood that Chiefs speak with their councils before they could make decisions. The colonial officials respected Anishinaabe protocols and ceremonies. At the same time as this historical evidence was bring heard, the

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22. *Restoule* ONSC, *supra* note 2 at para 610 [emphasis in original].

23. For more information about the importance of treaty fire as a governance tool see Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance Through Alliance* (Toronto: University of Toronto Press, 2020).

24. This is a reference to William Benjamin Robinson, the treaty commissioner tasked with signing the treaties now bearing his name.

plaintiffs' lawyers and their clients intentionally brought Anishinaabe protocol and ceremony. I understood that they were recreating council fire from the time of the Treaty signing. They were saying, if that's how the Treaty was made in the first place, and this court is where we come to figure out what that Treaty said today, then we can provide some of the same culturally significant protocols to the participants.

There is another way to interpret the incorporation of Anishinaabe traditions into the trial. And the other way to interpret it through the lens of hospitality. The first four weeks of the trial were scheduled to be heard in Thunder Bay. We had many, many, many case conferences to prepare for the enormity of the trial. There were tens of thousands of pages of historical documents. There were huge teams of lawyers, and there were all kinds of logistical and technical things that we had to figure out. As we were working out those details we received the invitation that I referred to earlier to attend ceremony at Fort William First Nation. I don't know about the lawyers involved in the trial, but I had never been invited to any full day of ceremony before this. When I got there with my colleagues, there were about thirty Chiefs and representatives from First Nations from both the Lake Huron territory and the Lake Superior territory. The lawyers and I all went into a sweat lodge, then we went to a spectacular feast, which was, to me, unbelievably generous. As guests we had brought no gifts, but we all went home with a gift and with teachings. There was drumming and singing and displays of regalia and sacred bundles. At the time, it was the beginning of the trial. Along with the legal teams, I just accepted all of this as a magnificent show of hospitality. I had no other way to interpret what this could be.

As the trial went on, the Huron plaintiffs had assigned a Knowledge Keeper and firekeepers to be at the trial all the time. There was always a teepee, and there was always a fire. That fire was there every day that the trial went on, and there were medicines at the fire, which was not unusual. If I went to the fire at lunch, there would be a Crown lawyer, defence lawyers, court reporter, witnesses, and members of the public. Anyone could go in the mornings and during court breaks. Through this we developed comfort with the Knowledge Keeper. One day, counsel asked if the Knowledge Keeper could bring his drum into the courtroom to sing a travelling song when we took a break in the proceedings. Then on our return he sang a welcome song. Another time counsel asked if a new pipe that had been made for the trial could be passed around the fire and we were all invited to the pipe ceremony. As the months went by, the Knowledge Keeper arrived with an Eagle Staff, and he said, this Eagle Staff has been made for this trial, and is it possible to put it behind the dais. At each stage and at each request counsel were asked their views. Every new step along the way only happened with the consent of all counsel.

All of the lawyers and witness' came from out of town, many from long distances. This was a nine month trial, we were all in this together. The counsel teams, from my perspective, developed a very healthy respect for one another. There was a sense of collegiality. So when we were invited in the middle of the winter to attend a Sweatlodge we all went. And there was a feast afterward. When we got invited to a pipe ceremony, we all went, and the witnesses who were around that day were also invited. From my perch as a Judge, it seemed like it was happening organically, but I now, of course, know that it was unfolding with intention and respect for the proper roles and boundaries. Maybe one day after I am retired, I will learn more about the perspectives of the different counsel to all these experiences.

TB: *That's wonderful. How long were you sitting for? How long was the trial?*

Justice Hennessy: The stage one trial phase started in September in Thunder Bay, where we spent the first month. Then we moved to two communities, first to Garden River, then Little Current. We spent the final months in Sudbury. When we were on Manitoulin, in Little Current and Garden River, the Elders from the near-by First Nations gave their testimony. Many other Elders and community members were able to attend the proceedings. In Garden River, we had the spectacular opportunity of listening to a 95-year-old woman, Elder Irene Stevens, who sadly has passed into the spirit world only this year. She struggled to understand the questions. Occasionally, her answers were responsive to the questions, but sometimes she recounted stories of her life in the community. She was absolutely charming. Elder Stevens told her beautiful stories and the most significant thing she said was, whenever someone said the treaty was signed in Sault Ste. Marie, she would remind us that in fact the Treaty had been signed in "*Bawaating*," which was the name that she had been taught. In the days that followed, when if someone said Sault Ste. Marie, she would remind us forcefully, "*Bawaating.*"

TB: *I just wanted to say that the Elder testimonies were recorded and they are archived online. All open access.*[25] *It's a really important collection of Anishinaabe law. The importance of protocols, ceremony and the records that have been created around Anishnaabe law are not directly captured in a typical case report. I think those pieces are really important parts of the Restoule decision.*

Justice Hennessy: Well, I might just comment on one thing, because, of course, you're all going to be lawyers soon enough and I want to tell you about how one lawyer approached his job. His job was to cross-examine the Elders on behalf of Canada. This lawyer was a very experienced Crown lawyer. He had been engaged in Aboriginal and Indigenous law cases since he was called to the bar. He had very deep experience in First Nation communities, and he held enormous respect for Elders. He was one of the lawyers who told the court that when we were about to have the Elders start as witnesses that he would like to follow the Federal Court protocol[26] and have the opportunity to meet with the Elders before they gave evidence. We made arrangements for this to happen. Therefore, the lawyer met most of the Elders for coffee and biscuits beforehand. On one particular day, an Elder from Manitoba was going to be speaking and giving evidence, and the night before the Garden River community held a feast for us. In the morning, we were back in our court in the community hall, and the Elder took the stand and started out by thanking the Crown lawyer for giving him tobacco. The Elder then asked the Crown lawyer to explain why he had done that. So here's the lawyer for Canada, being asked to explain himself before the evidence proceeds. So, the lawyer for the Minister of Justice explained,

> I offered tobacco to Elder Kelly. I live in southwestern Ontario. I went to Six Nations First Nations and I spoke to the Chief, and I explained to the Chief what I would be doing in the coming weeks. I asked him if I could bring some tobacco from his reserve community and bring it up to the Elder. Last night,

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25. The testimonies given at trial are all archived online: *Livestream* <https://livestream.com/firsttel/events/7857882>.

26. "Practice Guidelines for Aboriginal Law Proceedings," September 2021 (4th ed), online: *Federal Court* <https://www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20Sept-2021%20(ENG)%20FINAL.pdf>.

> during the feast, I quietly offered him this gift of tobacco from Six Nations and asked him if he would take questions from me today.[27]

I found this anecdote extraordinary, absolutely extraordinary. It was nothing the court did and it was nothing that the plaintiff's lawyers had planned. What we watched was a lawyer with certain experiences and teachings who decided how he would and should show respect to an Elder. He had done it quietly; no one had seen him, and no one else had known about it. That would have been exactly how he wished it to happen, but the Elder realized the significance of the offer of tobacco and wanted to bring teaching into court and into the record. And now this is part of the archival record.

TB: *That anecdote shows the importance of acting personally in how we practise law, which I don't think we speak enough about in law school; personal action and personal relations are a part of the practice of law.*

On a similar personal note, I wonder about what you see as the significance of this case for you, for your work, and for the legal community broadly. What would you like the conference participants here with us, the legal community, the teachers, and the students, to take away from the case?

Justice Hennessy: What's the importance of it? There are so many things. As I said at the outset, I have deep roots in Northern Ontario. I was born in Sudbury and grew up in Northern Ontario. I've lived and loved it here for a long time. We have what we call a family camp, a log cabin, built by my ancestors, in a Treaty territory that is so sacred to us as a family. This is where our extended family planted its roots, nourished three generations and where we continue to gather. I always knew that there was a reserve on the other side of the lake but we were not connected to anyone there. I didn't know anything about the community. Now I realize that I am connected to a history that is so much bigger, deeper, richer and more complicated than I ever knew. I thought my history was my French and the Irish ancestors travelling up the St. Lawrence—poor, desperately looking for jobs and ending up in Northern Ontario in the late 1800s, and that's as much as I knew. It's shocking to imagine that I had no conception of the European–Anishinaabe experience and how the territory developed and evolved during that time. I remember once asking about Crown land, asking "well, how did the Crown get Crown land? Who named it Crown land?" So this trial was a full graduate program in Northern Ontario history. I was humbled to have learned a history during the trial that was largely unknown to me beforehand, even though it was a history very closely connected in time and place to my own ancestors.

One of the things I appreciated was that this trial created an opportunity to put together the most comprehensive historical record of the Anishinaabe–settler meeting for Northern Ontario.[28] My understanding is that the documentary record collected for this trial had never before been all in one place. There were handwritten notes that were found for the first time, and there were discoveries of some documents that had been lost. For instance, the Chief's speeches at the Treaty council. There were many, many things found that are now collected and put together in one place. There will be no excuse for someone like me to say, "I don't know anything about how this came to be." That cannot happen anymore. No educational institution, no government, no professional association, no bar, no one can ever say, "Well, how

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27. This recollection is a paraphrase and not a direct quote.

28. *Supra* note 25.

would we know this?" This story is documented in all its complexity and richness. It is there to be heard through the witness testimony, through the documentary record that was found, and through the anthropological and historical witnesses who brought the record into one place. So that's one small thing out of this trial.

Another aspect of the trial was the openness to conduct the trial in a more open and inclusive manner, creating the full historical record. We cannot conduct every trial like this because it would cost a fortune in time and money. As a system, as a profession, we learned a lot. Our experience will give, not just judges, but give lawyers who are acting for communities, possibly some courage to be open to a way of interacting with the common law system.

I just want to be clear that the lawyers acting for the plaintiffs did not ever ask the court to apply Indigenous law or Anishinaabe law. I put that question to them in their submissions. Instead, they were asking for Aboriginal law of Canada to be applied to this case. Counsel submitted that that Anishinaabe law would have animated the minds of those people who were entering into a Treaty relationship with the colonial officials who were trained and operating in the common law tradition. This means the court was applying the common law to an interpretation of the Treaty, knowing that there may be a case down the line, and maybe one of you will be arguing it, where a court will be asked to apply not the common law, but Indigenous law for the interpretation of a treaty.

As you students now take Indigenous law courses you will be having interesting discussion with your clients and colleagues on how it will be part of the future legal proceedings. Bi-jural and multi-jural legal orders will likely form part of future considerations for processes inside and outside courtrooms. The profession will have to be ready to operate in multi-jural processes. I think that one could look at our process and say, we can do something that we haven't done before and the sky won't fall.

TB: *Thank you. I do read the case as being a roadmap for a path forward concerning treaty interpretation and working toward a truly plural legal context. Really, thank you so much for coming and for sharing your thoughts with us.*

I understand that you might be prepared to answer a few questions from our attendees.

Student Question 1: *Are you able to speak about your decision to adopt a special procedure for taking Elder evidence in the Restoule case? Why were the procedures adopted?*

Justice Hennessy: Thank you. So yes, yes. We adopted in our trial a procedure for taking Elder evidence. This was done by order of the court.[29] This procedure was based on the "Practice Guidelines for Aboriginal Law Proceedings" developed by the Federal Court.[30] The Federal Court does a lot of work in First Nations communities across the country, and they have developed a protocol for how to receive evidence from Elders. We adopted it, but we modified it for our use, and had we not had access to that protocol, we would have spent a huge amount of time inventing it. The protocol, as I understand it, was developed by a user committee at the Federal Court, which included Elders and community leaders. The Federal Court is a Superior Court constitutionally and it makes a huge amount of sense for other Superior Courts to adopt it. It means that when Courts receive Elder testimony, they have something that they can refer to and rely on.

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29. *Restoule v Canada (AG)*, ORDER (Procedure for Taking Elder Evidence), No. 2001–0673.

30. *Supra* note 26.

Student Question 2: *With the passage of so much time since Treaties were made, coupled with pressure on Indigenous communities to abandon their traditional practices, there's an enormous reliance on Elders to fill gaps in knowledge. As time passes, what can we do to continue to address gaps in knowledge?*

Justice Hennessy: Well, I'm not an expert in that, but I can tell you what I have observed, and what I have observed is so inspiring. Your generation is expressing a great deal of interest in Elders and Knowledge Keepers, and spending time learning and trying to be apprentices. I have encountered very, very generous Knowledge Keepers. As I said, we had a Knowledge Keeper with us throughout the entire *Restoule* trial. This was Leroy Bennett from Sagamok First Nation. He was with us the whole time, and he gave us important teachings within the various ceremonies. Sometimes he would just be at the fire, and there would be a teaching or an explanation. Recently we had a sweat and then a sunrise ceremony for the opening of stage three. We were introduced to another Elder, Elder Martina Osawamick. Knowledge keeper Leroy Bennett thought it important we include a woman amongst the Elders. Somehow, those two have connected, an older woman and a younger woman, and the younger woman is learning from an Elder. At that sunrise ceremony, there was a teaching on water and a teaching on strawberries and those were both performed by the women.

What I see is very encouraging—that there is a generation coming up who wants to learn, and they are doing their best to put themselves in a position with Elders and Knowledge Keepers to try and learn as much as they can. I see this also in efforts to learn the language, and language is the vehicle for learning meaning and culture.

Student Question 3: *Thank you for being with us. I think it's really cool that in the midst of a case that has so much application, you still have the time to speak to us.*

There's been a lot of discussion about developing better cultural competencies in the bar and judiciary. Could you give us a sense of whether and how that seems important to you, given your experience in Restoule, and where do you think we need to go next as a profession?

Justice Hennessy: That is such a good question. First of all, I want to say that I am very influenced, and have been for a long time, by a paper written by former Chief Justice of British Columbia, Justice Lance Finch. He wrote a paper addressed to judges called, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice."[31] In this paper Justice Finch talks about the duty to learn about our Indigenous neighbours. I have really taken that seriously. We cannot go around saying, "Well, I don't know anything about the Anishinaabe. I don't know anything about settler–Indigenous contact, or about the *Indian Act*." We have a duty to learn, and that duty never ends. It does not end when you leave law school. If you are a member of this profession, it does not end when you have already decided that you are going to specialize in a specific area of law. And it certainly does not end when you get appointed as a judge.

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31. Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," delivered at the "Indigenous Legal Orders and the Common Law" (British Columbia Continuing Legal Education Conference in Vancouver, November 2012) at 7, online: *British Columbia Continuing Legal Education* <http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648>.

What I also have in my hand is a copy of a speech given by the Chief Justice of Canada, Chief Justice Wagner, and he was speaking on the cultural competence of judges.[32] Chief Justice Wagner framed the requirement of cultural competence as an ethical principle. He said,

> Judges have a duty to continue their professional development. And this includes expanding our knowledge and understanding of social context issues that affect the administration of justice. Cultural competence is critical to access to justice and the rule of law; judges are encouraged to take advantage of opportunities to engage with and learn from the wider public, including communities with which they have little or no life experience.[33]

Chief Justice Wagner is saying that those communities or people with whom one has no experience are the communities one must engage with and learn from. To be a judge of this great country we call Canada—you cannot have it any other way. You cannot take—and I believe this—I cannot take that spectacularly beautiful, wonderful culture that I was brought up in, where my mother and father taught me French, Canadian and Irish tradition, history and culture and live with only that as my knowledge base as a judge. A judge needs to know from and about the communities that we serve, and I would say that there is the same duty on members of the bar. If there is going to be access to justice, every person should be able to walk into your office and seek advice. You might not be a specialist in any particular area or culture, but you understand something about their way of being in the world, their culture, where they come from. Now in Northern Ontario, that involves a lot of meeting and learning from our Indigenous neighbours. But it also means, as you well know, if you live in Thunder Bay, the newcomers to Canada, from Ukraine, Syria and Pakistan. If you live in Brampton, your neighbours are a whole different set of new Canadians. But that duty is seriously imposed on the profession at large by our ethical principles that we must go out of our way to take advantage of opportunities to engage with and learn from communities with which we have little or no life experience. In the case of our First Nations neighbours, that is an extra and added extraordinary duty.

Student Question 4: *Thank you so much. I'm wondering, how does it feel to be working through such a big decision? And what are you thinking as you're working through it?*

Justice Hennessy: Well, I had to write at the end of stage one. That stage of the trial was long, it ran from September until June. So, I will approach this stage similarly. I will focus on the questions as defined by the lawyers as they arise from the evidence, the submissions and the directions of the Court of Appeal.

What you are learning in law school is a set of skills that will take you through to do the biggest, most complex things in your legal career. You just keep working on the same skills. It is the discipline of law. It is the discipline of staying on top of things, organizing your materials, listening, of being humble enough to review, review, and review the evidence and the law. Usually, the case law will give you some directions on how to proceed. I am not saying it is easy, but it is not much more complicated as a system than doing the work you do. Now, it's bigger, but it's the same discipline.

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32. Remarks by the Right Honourable Richard Wagner, PC Chief Justice of Canada, "Ethical Principles and Cultural Competence: A Duty to Learn" (May 6, 2021), online: *Supreme Court of Canada* <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2021-05-06-eng.aspx?pedisable=true>.

33. *Ibid.*

As in every case, the judge's work is to apply the law to the facts. So, first I must make findings of fact, and then following the submissions, figure out how to apply the facts to the law. Stage one of *Restoule* was a very big project for me. In many ways it demanded what every big work assignment demands, put one foot in front of the other and keep going until you get it done.