SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v. The Attorney General of Canada,* 2012 YKSC 4

Date: 20120131
S.C. No. 05-A0043
06-A0092
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA
(on behalf of and as the representative for
Her Majesty the Queen in Right of Canada)

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh	Counsel for the Plaintiff
Suzanne M. Duncan and Maegan M. Hough	Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] On July 15, 1870, over 7.5 million square kilometres of British North America – Rupert's Land and the North-western Territory – were incorporated into the young Dominion of Canada pursuant to the *Rupert's Land and North-western Territory Order (U.K.)*, 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9 (the "*1870 Order*"). This vast area, composed largely of boreal forest, tundra and prairie, now amounts to nearly

75% of Canada's land mass.[1] One of the principal issues in this dispute is the interpretation of a passage found in Schedule A to the *1870 Order*, as part of an Address to her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, dated December 16 and 17, 1867 (the "*1867 Address*"):

> "And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

I refer to this throughout as "the relevant provision".

[2] This is the first phase of the trial in this matter.[2] The parties agreed in case management that the following threshold issues would be tried at the outset. I will refer to them as Questions #1 and #2, and they are as follows:

1. Were the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement" intended to have legal force and effect and give rise to obligations capable of being enforced by this Court?

2. If the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement", gave rise to obligations capable of being enforced by this Court, are those enforceable obligations of a fiduciary nature?

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[1] Frank J.Tough, "Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory" (1992) 17:2 *Prairie Forum* (Special Issue, Native Studies).

[2] There are actually two separate actions, however they are closely related. Action #05-A0043 was commenced June 22, 2005, and Action #06-A0092 was commenced October 16, 2006. These are referred to by the parties respectively as "the '05 Action" and "the '06 Action". The parties agreed in case management to an order that both actions would be tried together and any evidence and rulings in one action would be applicable to the other.

[3] The defendant (“Canada” or alternatively “the Crown”) successfully resisted an objection by the plaintiff, Ross River Dena Council (“RRDC”), to the admissibility of expert opinion evidence tendered by Canada to assist in determining Question #1 (see reasons cited as 2011 YKSC 87). Following my ruling on that objection at the commencement of this trial, Dr. Paul G. McHugh was qualified, without further objection from RRDC, as an expert legal historian, qualified to research and interpret historical documents from an historical perspective and to provide opinion evidence in the areas of the historical, political, legal and social context surrounding the creation of the *1870 Order*, and the historical Crown-Aboriginal relations during that time.

[4] For the reasons which follow, I answer both of the above questions in the negative.

FACTUAL BACKGROUND

[5] The following facts are not in dispute, and are taken almost verbatim from the Outline of RRDC's Argument:

1. RRDC is a band within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5.
2. RRDC and its members are a part of the Kaska tribe of Indians.
3. The Kaska tribe of Indians - now known to the Crown as “the Kaska” or “the Kaska Nation” - is one of the Aboriginal peoples of Canada. More importantly for the purposes of these actions, the Kaska tribe of Indians is one of the Indian tribes referred to in the *1867 Address*.
4. The Kaska claim as their traditional territory a tract of land which includes what is now the southeastern part of the Yukon Territory, as well as adjacent lands in the Northwest Territories and British Columbia, as shown

on the map attached to the Statement of Claim as Schedule “A”. The issues in these actions concern only the portion of the Kaska’s claimed traditional territory located in the Yukon.

5. The portion of the Kaska’s claimed traditional territory located in the Yukon was, prior to 1870, part of the North-western Territory referred to in s. 146 of the *Constitution Act*, 1867, formerly the *British North America Act, 1867* (the “*BNA Act*”).

6. In adopting the *1867 Address*, the Canadian Parliament invoked s. 146 of the *BNA Act* to unite Rupert’s Land and the North-western Territory with Canada, and to grant the new Parliament of Canada authority to legislate for the welfare and good government of the new Territories.

7. The North-western Territory, including the portion of the Kaska’s claimed traditional territory located in the Yukon, was admitted into Canada on July 15, 1870, pursuant to the combined effect of the *1870 Order* and s. 146 of the *BNA Act*.

8. Shortly after the acquisition of Rupert’s Land and the North-western Territory in 1870, Canada began a process of negotiating treaties with certain of the Aboriginal peoples occupying those lands: *Treaty No.1* was concluded in 1871 and the last of the numbered treaties, *Treaty No. 11*, was concluded in 1921. Those treaties are today referred to as the post-Confederation treaties.

9. In a “Communiqué” released on or about August 8, 1973, the Canada’s Minister of Indian of Affairs and Northern Development announced the federal government’s new comprehensive land claims policy.

10. RRDC’s claims to Aboriginal title and rights in the Kaska traditional territory in the Yukon formed part of the claims of the Yukon Indian people, which were the first comprehensive claims accepted by Canada for negotiation in 1973 under the new claims policy.

11. In 1981, Canada’s Minister of Indian Affairs issued a land claims policy statement which confirmed that since 1973 the federal government has operated under a policy that acknowledges Native interests in certain land areas claimed and allows for the negotiation of settlements of claims where these interests can be shown not to have been previously resolved.

12. Canada’s comprehensive land claims policy, published in 1986 under the authority of the Minister of Indian Affairs, confirmed that the basis for the policy was the fulfillment of the treaty process through the conclusion of land claim agreements with those Aboriginal peoples of Canada that continue to use and occupy traditional lands and whose Aboriginal title has not been dealt with by treaty or superseded by law.

13. To date, the claims of the Kaska (and thus RRDC) to compensation for lands required for purposes of settlement have not been resolved.

QUESTION #1 – JUSTICIABLE OBLIGATIONS?

1. The General Principles of Statutory Interpretation

[6] The first question posed by the parties is:

> "Were the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement" intended to have legal force and effect and give rise to obligations capable of being enforced by this Court?"

[7] In her text *Sullivan on the Construction of Statutes*, 5th ed. (Markham: Lexis Nexis Canada Inc., 2008), Professor Ruth Sullivan, at page 1, refers to the "modern principle" of statutory interpretation. This was first described by Elmer Driedger, more than 30 years ago, in the first edition of his text, *Construction of Statutes*, where he stated:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[8] The modern principle has been cited and relied upon in innumerable decisions of Canadian courts, and in *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21, it was declared to be the preferred approach of the Supreme Court of Canada. See also: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at paras. 26 and 27.

[9] Professor Sullivan describes the three "dimensions" of the modern principle, at pages 1 and 2 of her text. The first dimension is the textual meaning or ordinary meaning, which she notes that Driedger calls the "grammatical and ordinary sense of the words."

[10] The second dimension is legislative intent. Professor Sullivan states that this aspect of interpretation is captured in Driedger's reference to "the scheme and object of the Act and the intention of Parliament."

[11] The third dimension of the modern principle is compliance with established legal norms. Professor Sullivan notes that these norms are part of the "entire context" in which

the words of an Act must be read, and that they are also an integral part of legislative intent.

[12] At page 3 of her text, Professor Sullivan concludes as follows:

> "The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases." (italics already added, my underlining)

At the end of the day, says Professor Sullivan, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is "appropriate…reasonable and just" (p. 3).

[13] In an earlier version of the same text, Professor Elmer Driedger said this about legislative intent:

> "…The "intention of Parliament" is, in a sense, a fiction. It is not an intention formulated by the mind of Parliament, for Parliament has no mind; and it is not the collective intention of the members of Parliament for no such collective intention exists. The only real intention is the intention of the sponsors and the draftsmen of the bill that gave rise to the Act; but that is not the intention of Parliament. The "intention of Parliament" can only be an agreement by the majority that the words in the bill express what is to be known as the intention of Parliament."
> *The Construction of Statutes*, *2nd ed.* (Toronto: Butterworths, 1983)

The "majority" presumably refers to the majority of Parliament.

[14] At page 8 of the 5th edition, Professor Sullivan speaks further about the relative weight to be given to the dimension of parliamentary intention:

> "Similarly, if the legislature's intention seems clear and relevant to the problem at hand, a pragmatic judge will assign it significant weight. How much weight depends on
>
> - Where the evidence of legislative intent comes from and how cogent and compelling it is
> - How directly the intention relates to the circumstances of the dispute to be resolved.
>
> If the evidence of intention comes from a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor appropriately receives considerable weight."

2. Principles of Interpretation Applicable to Constitutional Documents Relating to Aboriginal People

[15] One of the leading cases in this area is *R. v. Blais*, 2003 SCC 44. There, the Supreme Court of Canada was faced with the question of whether Métis are "Indians" within the meaning of a constitutional document, the Manitoba *Natural Resources Transfer Agreement* (the "*NRTA*"). As a starting point, the Court considered the applicable principles of interpretation at paras. 16-18:

> "[16] …[W]e turn to the issue before us: whether "Indians" in para. 13 of the *NRTA* include the Métis. The starting point in this endeavour is that a statute -- and this includes statutes of constitutional force -- must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290).

> [17] The *NRTA* is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure "for individuals the full benefit of the [constitutional] protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. "At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [constitutional provision] was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344. This is essentially the approach the Court used in 1939 when the Court examined the historical record to determine whether the term "Indians" in s. 91(24) of the *British North America Act, 1867* includes the Inuit (*Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104).
>
> [18] Applied to this case, this means that we must fulfill -- but not "overshoot" -- the purpose of para. 13 of the *NRTA*. We must approach the task of determining whether Métis are included in "Indians" under para. 13 by looking at the historical context, the ordinary meaning of the language used, and the philosophy or objectives lying behind it."

[16] At para. 37, the Court in *Blais* referred to the principle that ambiguities should be resolved in favour of Aboriginal peoples and, in such cases, a generous and liberal interpretation is to be preferred over a narrow and technical one (the "ambiguity principle"). One of the authorities in support of that principle is *R. v. Nowegijick*, [1983] 1 S.C.R. 29, at p. 36, where the court stated:

> "… Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

[17] At paras. 39 and 40 of *Blais*, the Court referred to the “living tree” principle as a fundamental tenet of constitutional interpretation. This doctrine was enunciated by Lord Sankey L. C. in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), with reference to the *BNA Act.* Because of the potential importance of this principle in the case at bar, I will quote fully from para. 40 of *Blais*:

> “This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power": *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 , *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344; see Côté, *supra*, at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.” (my emphasis)

[18] This reference to Binnie J.’s comment in *R. v. Marshall* was reiterated by the Supreme Court in *Mitchell v. Canada (Minister of National Revenue- M.N.R.)*, 2001 SCC 33, at para. 39.

[19] In his text, *Constitutional Law of Canada*, 5th ed. Supplemented, looseleaf, (Toronto: Carswell, 2007), Peter Hogg discusses the living tree principle within the “doctrine of progressive interpretation”. At page 15-48, he notes that this doctrine is one

of the means by which the *BNA Act* has been able to adapt to the changes in Canadian society, in that the words of the *Act* are continuously adapted to new conditions and new ideas. However, Professor Hogg specifically links this doctrine with "the general language used to describe the classes of subjects (or heads of power)" in ss. 91 and 92 of the *BNA Act*. He notes that, in this context, such language is "not to be frozen in the sense in which it would have been understood in 1867."

[20] Professor Hogg continues on, stating more broadly at page 15-50:

> "Needless to say, the doctrine of progressive interpretation does not liberate the courts from the normal constraints of interpretation. Constitutional language, like the language of other texts, must be "placed in its proper linguistic, philosophical and historical contexts". Nor is the original understanding (if it can be ascertained) irrelevant. On the contrary, the interpretation of a constitutional provision "must be anchored in the historical context of the provision". All that progressive interpretation insists is that the original understanding is not binding forever. If new inventions, new conditions or new ideas will fairly fit within the constitutional language, contemporary courts are not constrained to limit their interpretations to meanings that would have been contemplated in 1867 (or whenever the text was created)."

[21] In a similar vein, the Northwest Territories Court of Appeal in *Yellowknife Public Denominational District Education Authority v. Euchner*, 2008 NWTCA 13, at paras. 62 and 63, referred to the need for a flexible approach to constitutional interpretation in order to respond to changing social needs and public expectations, while still giving due consideration to the language actually used by the constitutional drafters:

> "A constitution must be capable of responding to changing social needs and legitimate public expectations. Otherwise, what might have been suitable for an earlier time and vastly different society would prohibit interpretations rooted in the reality of the present. And yet old problems may invite new solutions and old solutions may not have contemplated new problems. Accordingly, a purposive approach is required

> when interpreting a constitutional document: *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136 (P.C.); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155-156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344; and *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at 709-711. In addition, if alternate interpretations are reasonably available, then preference should be given to the interpretation that best accords with constitutional norms and values, including *Charter* values.
>
> That said, the language actually used and stated by the constitutional drafters must be carefully weighed and measured, having regard to the historical context of the document. A constitutional document "should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 394. In the context of denominational school rights, as stated by Beetz J. in *Greater Montreal Protestant School Board v. Quebec (Attorney General), supra*, at 401, "[a]s a constitutional text, s. 93(1) may deserve a 'purposive' interpretation but, in so doing, courts must not improperly amplify the provision's purpose." (my emphasis)

[22] The case of *Reference re Same-Sex Marriage*, 2004 SCC 79, cited by the Northwest Territories Court of Appeal above, is an example of the Supreme Court applying the living tree doctrine. However, the Court characterized it as a "head of power" case and, as such distinguished it from *Blais*. At para. 30 of the *Reference*, the Court stated:

> "…it is submitted that the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44. That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here." (my emphasis)

[23] *Reference re Employment Insurance Act (Can.)*, *ss. 22 and 23*, 2005 SCC 56, is also a "head of power" case, and the Supreme Court makes some interesting comments

about the need for an evolving interpretation of the Constitution while giving due regard for the original intent of the drafters. At para. 45, the Court stated:

> "On the one hand, no constitutional head of power is static. On the other hand, the evolution of society cannot justify changing the nature of a power assigned by the Constitution to either level of government. These two statements are not contradictory. As Professors H. Brun and G. Tremblay write:
>
> [TRANSLATION] Ultimately, however, there is no inconsistency between dynamic interpretation and adherence to the original intent of the framers: in order for something to evolve, it must have a starting point. See *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at pp. 180-87. *To determine the original intent of the framers, it is obviously necessary to start with a generous reading of the words they used, taken in their strictly legal context. That context may also be expanded by having regard to elements "extrinsic" to it that are more historical than legal in nature.* [Emphasis added.] (*Droit constitutionnel* (4th ed. 2002), at p. 207)" (my emphasis in italics)

3. The Arguments of the Parties

[24] RRDC argues that a proper interpretation of the relevant provision leads to the conclusion that it was intended to have legal force and effect and gives rise to obligations capable of being judicially enforced. For the sake of simplicity, I will treat Question #1 as asking whether the relevant provision was intended to be "justiciable", by which I mean whether it was intended to have enforceable legal effect reviewable by this Court. RRDC's statutory interpretation argument essentially has four components:

1. The "simple reading" or "ordinary meaning" argument;
2. The "larger statutory scheme" argument;
3. The "related legislation" (*in pari materia*) argument; and
4. The "administrative interpretation" argument.

[25] Canada's response focuses on the intention of Parliament at the time of the enactment of the relevant provision and relies heavily on expert evidence about the historical context of the provision. In short, Canada submits that the relevant provision was not intended by the Imperial Parliament to be justiciable, and that the modern principle of statutory interpretation leads to the conclusion that the relevant provision is not justiciable today.

[26] Having heard the lengthy and complex arguments put forward by the parties, I feel it is appropriate to say in beginning my analysis that Question #1 is one of the "hard", if not "hardest", cases referred to by Professor Ruth Sullivan above (see para. 12 above).

a) The Statutory Interpretation Arguments

(i) The "Simple Reading" or "Ordinary Meaning" Argument

[27] RRDC argues that the relevant provision of the *1870 Order* was given legal effect by s. 146 of the *BNA Act, 1867*, and that as result of the application of s. 2 of the *Colonial Laws Validity Act, 1865*, and the later application of s. 7(1) of the *Statute of Westminster,* 1931 (now the *Constitution Act, 1931*), the relevant provision has constitutional force and effect.

[28] In *Summerside (City) v. Maritime Electric Co. Ltd.*, 2011 PECA 13, the Prince Edward Island Court of Appeal referred with approval to what Professor Sullivan noted in her text about the "ordinary meaning" dimension of the modern principle (para. 18):

> "*Sullivan on the Construction of Statutes* 5th ed. at pp. 25-26 addresses what is meant by "ordinary meaning." The author adopts the meaning given to that phrase by Gonthier J. in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] S.C.J. No. 114; [1993] 3 S.C.R. 724 at 735. According to the author, Gonthier J. found that "ordinary meaning" is the "natural meaning which appears when the provision is simply read through."

[29] RRDC notes that the relevant provision is set out in an Order in Council which was authorized by s. 146 of the *BNA Act*, and therefore must be read together with that section, which states:

> "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada…to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf **shall have effect** as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." (my emphasis)

[30] For ease of reference, I will also include here the relevant provisions of the *1870 Order* and the *1867 Address*. A copy of the *1870 Order* in its entirety is available at:

www.justice.gc.ca/eng/pi/const/lawreg-loireg/p1t31.html

[The *1870 Order*]

> "Whereas by the "*British North America Act*, 1867," it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such terms and conditions in each case as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland:
>
> And whereas by an Address from the Houses of the Parliament of Canada, of which Address a copy is contained in the Schedule to this Order annexed, marked A, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with the Dominion of

Canada, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government upon the terms and conditions therein stated:

…

It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory…”

[The *1867 Address*]

“…

We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of the Dominion of Canada, in Parliament assembled, humbly approach your Majesty for the purpose of representing:

That it would promote the prosperity of the Canadian people, and conduce to the advantage of the whole Empire, if the Dominion of Canada, constituted under the provisions of the "*British North America Act, 1867*," were extended westward to the shores of the Pacific Ocean.

That the colonization of the fertile lands of the Saskatchewan, the Assiniboine, and the Red River districts; the development of the mineral wealth which abounds in the region of the North-West; and the extension of commercial intercourse through the British possessions in America from the Atlantic to the Pacific, are alike dependent on the establishment of a stable government for the maintenance of law and order in the North-Western Territories.

That the welfare of a sparse and widely scattered population of British subjects of European origin, already inhabiting these remote and unorganized territories, would be

materially enhanced by the formation therein of political institutions bearing analogy, as far as circumstances will admit, to those which exist in the several Provinces of this Dominion.

That the 146th section of the *"British North America Act,* 1867" provides for the admission of Rupert's Land and the North-Western Territory, or either of them, into union with Canada, upon the terms and conditions to be expressed in addresses from the Houses of Parliament of this Dominion to your Majesty, and which shall be approved of by your Majesty in Council.

That we do therefore most humbly pray that Your Majesty will be graciously pleased, by and with the advice of your Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good Government; and we most humbly beg to express to Your Majesty that we are willing to assume the duties and obligations of government and legislation as regards these territories.

That in the event of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction.

And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

All which we humbly pray Your Majesty to take into Your Majesty's most gracious and favorable consideration.

…" (my emphasis)

[31] RRDC argues that the relevant provision is one of the “terms and conditions” that the *1870 Order* incorporated and that s. 146 confirms that the provision had effect “as if… enacted by the [Imperial] Parliament…”.

[32] Further, because of s. 2 of the *Colonial Laws Validity Act*, 1865 and s. 7(1) of *The Statute of Westminster*, the Government of Canada was not competent to enact laws inconsistent with Imperial legislation applicable to Canada. These sections respectively read:

> “2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.”
>
> and
>
> “7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts*, 1867 to 1930, or any order, rule or regulation made there-under.”

[33] Finally, because the *1870 Order* is part of the *Constitution Act, 1982*, as one of the orders identified in the schedule attached to that *Act* and referenced under s. 52(1)(c), it continues to have constitutional and justiciable effect today.

[34] The linkage between these various provisions is helpfully summarized by the Federal Court of Appeal in *Singh v. Canada (A.G.)*, [2000] 3 F.C. 185, at para. 15:

> “…[T]he supremacy of the Constitution was established well before 1982 and even before Confederation in 1867. Canada recognized the British Parliament as the proper authority for enactment of our Constitution down to and including 1982 when section 52 of the *Constitution Act*, *1982* was adopted.

> It was a legal doctrine of the British Empire that imperial laws (that is, enactments of Westminster) applying to a colony were supreme over colonial laws. This position was codified by statute, the *Colonial Laws Validity Act*, *1865*[15], section 2 of which provided that:
>
> > 2. Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such laws may relate ... shall be read subject to such Act ... and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> The *British North America Act*, *1867* [30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5]], was an imperial law extending to the colony of Canada and its supremacy was thus assured as long as Westminster was the recognized legislative authority for Canada in constitutional matters. While ordinary Canadian laws were freed from the application of the *Colonial Laws Validity Act*, *1865*, and thus from the paramountcy of British laws, by the *Statute of Westminster*, *1931*, the latter statute preserved the supremacy in Canada of the *B.N.A. Acts* over local laws. It is no accident that a new supremacy clause was inserted in subsection 52(1) of the *Constitution Act*, *1982*. Subsection 52(2) of that *Act* partially defines the *Constitution of Canada* to include the legislation listed in the Schedule to the *Act*. The *Colonial Laws Validity Act*, *1865* is not so listed. To avoid any uncertainty as to the continuing supremacy of the Constitution it was therefore necessary to insert subsection 52(1) to provide that:
>
> > 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[35] Canada admits that the *1870 Order* (and thus the relevant provision) is part of the Constitution of Canada and that the constitutional effect of the relevant provision, if any, is subject to interpretation by this Court. However, Canada argues that RRDC's interpretation of the relevant provision essentially ignores the legislative intent and

historical context that are necessary for the proper application of the modern principle. Canada submits that, when those dimensions of the modern principle are given their due weight, there can be no question that the relevant provision was not intended to be justiciable either in 1870 or today.

(ii) The Larger Statutory Scheme Argument

[36] RRDC argues that since the *1870 Order* is part of the larger Constitutional scheme, the principle of interpretation that presumes harmony, coherence and consistency between statutes dealing with the same subject matter leads to the conclusion that the relevant provision was intended to have the same legal force and effect as the rest of the Constitution. This principle is set out in *Bell ExpressVu*, cited above, at paras. 26 and 27:

> "In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings…
>
> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "*Statute Interpretation in a Nutshell*" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the

> scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd*., [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter…"

[37] Canada argues that there are many different provisions of the Constitution that serve a variety of purposes and were intended to have different effects. For example, Canada points to s. 91(24) of the *BNA Act*, which confers jurisdiction over “Indians and lands reserved for the Indians” to the federal Parliament. This section does not require Parliament to take any steps to exercise that jurisdiction, and indeed, the same could be said of the other heads of power under s. 91.

[38] It is also trite to observe that not all of the provisions in the *1870 Order* were intended to be justiciable. I understood RRDC's counsel to concede that this is the case for the majority of the provisions in the *Order*, many of which are duplicative and were presumably included for the sake of completeness, and to ensure that all of the matters pertinent to the transfer of the two territories and the surrender by the Hudson’s Bay Company were referenced.

[39] Thus, once it is accepted that some parts of the *1870 Order* and the Constitution are not justiciable, the argument that the relevant provision is justiciable simply because it is part of the *1870 Order* becomes less persuasive. Rather, it seems to me that one needs to examine each provision individually, using the modern principle of statutory interpretation, in order to determine whether it has force and effect. Since such an analysis involves an examination of legislative intent and historical context, some evidence is required. On the evidence put before me, the conclusion I come to below is

that the relevant provision was not intended to be justiciable. RRDC's argument about the larger statutory scheme does little to cause me to re-examine this conclusion.

(iii) Other Statutes Dealing with the Same or Related Subject Matter ("in pari materia")

[40] The primary legal instrument which RRDC relies upon for this portion of its argument is the Royal Proclamation of 1763, which it says must be read together with the *1870 Order*. The import of this legal instrument is summarized by the Supreme Court of Canada in *Guerin v. Canada*, [1984] 2 S.C.R. 335, at para. 99 (Q.L.):

> "The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, supra, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present Indian Act, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41."

[41] In his text, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), Gerard La Forest, Q.C. (as he then was) helpfully summarized the essential provisions of the Royal Proclamation at page 110:

> "In summary the Proclamation makes the following provisions regarding the lands it reserves for Indians: the Indians are not to be molested or disturbed in their possession of such lands; the various colonial governors are not to give grants of such lands; private individuals are not to

> purchase lands from the Indians; if any persons have settled on such lands, they are to leave them; and if the Indians wish to dispose of such lands, they may only be purchased in the king's name [as written] after a meeting of the Indians for that purpose has been held by the governor of the colony where the land is located (or in a proprietary government, in the name of the proprietaries in accordance with the directions of the king or the proprietary)."

[42] In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, Laskin J., concurring with Hall J., at p. 394, said this about the Royal Proclamation:

> "…This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne J. in *St. Catherines Milling* case at p. 652 as the "Indian Bill of Rights". Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories....
>
> In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests…"

[43] In *Chippewas of Sarnia Band v. Canada (Attorney General),* [2001] 1 C.N.L.R. 56, the Ontario Court of Appeal referred to the Royal Proclamation as "an expression of the royal prerogative" (para.186). Interestingly, *Chippewas* is a case where Canada's expert witness in the case at bar, Dr. McHugh, similarly testified as an expert for the Crown. In the present case, Dr. McHugh was cross-examined about certain passages in *Chippewas* relating to the import and effect of the Royal Proclamation. For example, his attention was drawn to para. 198, where it was stated:

> "…little turns in this case on whether the surrender provisions per se of the Royal Proclamation had the force of

> law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed."

[44] Dr. McHugh agreed with these statements. However, later in his cross-examination, he qualified his agreement with other portions of the *Chippewas* decision. For example, the Court of Appeal noted, at para. 201, that the Royal Proclamation "has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the Aboriginal people of Canada." Dr. McHugh and RRDC's counsel had the following exchange about that quotation:

> "Q Okay, thank you. And do you agree that as the Court of Appeal found, the Royal Proclamation has been, I'm quoting here:
>
> > … has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealing with the Aboriginal people of Canada.
>
> A I think that's a very broad open-ended sentence that, in terms of legal history, needs considerable more detailing, which the Court is not doing there.
>
> Q So you don't agree that the proclamation has been cited as the defining source of the principles?
>
> A It's not a question of my disagreeing or agreeing so much as recognizing that that is a statement that needs considerable -- considerable texturing.
>
> Q Would you agree -- I don't -- we don't have time –
>
> A For example, "It has been consistently cited in the case law from the earliest times…." Well, if one looks at the pathways, okay, that suggests that there is a consistent body of

> jurisprudence, of case law. There isn't. There is only a sprinkling of cases which refer to the Royal Proclamation, and then in a variety of ways. So that is a court judgment; it's not an historical account of how the Royal Proclamation was viewed at any given time within Canada, because the Royal Proclamation is a legal instrument with a history of interpretation…"[3]

[45] Dr. McHugh continued to opine about the Court of Appeal's passage as follows:

> "Q The Court clearly concluded that the principles and the proclamation should have been followed and weren't.
>
> A Well, the word is principles.
>
> Q Yes.
>
> A Principles are not rules. Principles -- you see, we're getting into an argument here about -- I'm resisting the suggestion that you're making it historically. There was a perception that they were externally enforceable standards that could be brought to bear against the Crown for the conduct of its relations with First Nations. That is a suggestion you are making, it seems to me, and that I'm resisting, in the period that we're looking at, because historically there was no perception that there were externally enforceable standards that could be brought to bear against the Crown. That is not occurring historically. Now, if we fast forward a hundred years.--[4]

[46] It should also be noted that, the Royal Proclamation was referred to in *Guerin* as a "policy" with respect to the sale or transfer of the First Nations interest in land.[5]

[47] RRDC submits that, in accordance with the principle of interpretation that presumes harmony, coherence and consistency between statutes dealing with the same subject matter, the *1870 Order* must have been intended, like the Royal Proclamation of 1763, to have legal force and effect and give rise to enforceable obligations. However, the evidence of Dr. McHugh on this point, which I discuss below and find to be credible,

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[3] Transcript, November 22, 2011, pp. 135-136.
[4] Transcript, November 22, 2011, p. 136.
[5] See para. 40 above.

casts doubt on the current justiciability of the Royal Proclamation, notwithstanding its inclusion in the Constitution of Canada*,* at s. 25.

[48] The other enactments relied upon by RRDC as being closely related to the relevant provision in the *1870 Order* are:

1. The *Temporary Government of Rupert's Land Act*, (*1869*), 32-33 Victoria, c. 3 (Canada);
2. The *Dominion Lands Act* of 1872 (S.C. 1872, c. 23);
3. The Orders in Council of 1875, disallowing certain land legislation in the province of British Columbia; and
4. The Ontario and Québec *Boundaries Extension Acts* of 1912.

[49] The Canadian Parliament enacted the *Temporary Government of Rupert's Land Act* in 1869, when it appeared probable that Rupert's Land and the North-western Territory were going to be transferred to Canada. Section 5 of that *Act* states:

> "All the Laws in force in Rupert's Land and the North-Western Territory, at the time of their admission into the Union, shall so far as they are consistent with "the British North America Act, 1867,"- with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, - and with this Act, - remain in force until altered by the Parliament of Canada, or by the Lieutenant Governor under the authority of this Act."

RRDC argues that the Canadian Parliament's recognition that the laws in the two territories would only remain in force insofar as they were "consistent with…the terms and conditions" of their admission as approved by the Queen under s. 146 is support for the view that the terms and conditions of admission so approved were understood to have constitutional force and effect. I agree that the "terms and conditions" of the admission of the territories into the Dominion of Canada did, by virtue of s. 146 of the *BNA Act*,

become part of the Constitution of Canada. However, although it is necessary for a provision to be part of the Constitution in order for it to have constitutional effect, its mere inclusion is not sufficient to conclude that it has justiciable constitutional effect.

[50] Section 42 of the *Dominion Lands Act* of 1872 stated:

> "None of the provisions of this Act respecting the settlement of agricultural lands, or the lease of timber lands, or the purchase and sale of mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."

This legislation was enacted in 1872, about two years after the acquisition of the two territories under the *1870 Order*. RRDC argues that s. 42 supports the view that the Canadian government understood that the extinguishment of Aboriginal title was required before lands acquired under the *1870 Order* could be available for settlement, agriculture, forestry or mining. RRDC further argues that this legislation helps to explain why the Canadian government embarked on the post-Confederation treaty process shortly after acquiring the two territories.

[51] As Canada's counsel properly points out, it is difficult to compare another statutory instrument with the one at issue, without also doing a statutory interpretation analysis of that other statutory instrument pursuant to the modern principle. That, in turn, involves more than simply looking at the words of the statutory instrument. It requires an analysis of the entire context of the statutory instrument, including the aspects of legislative intent and historical context. I have little or no evidence to pursue such an analysis with respect to s. 42 of the *Dominion Lands Act*. What evidence there is comes from Dr. McHugh, and he disagreed with the suggestion by RRDC's counsel that s. 42 can be seen as evidence of the Parliament of Canada's understanding of the duties it undertook in *1870 Order*.

Rather, Dr. McHugh referred to s. 42 as a "prophylactic" provision preventing a particular class of land (i.e. that to which Indian title had not yet been extinguished) from coming under the "fairly rigorous regime" for the management of public lands. While Dr. McHugh agreed that the provision was consistent with the executive's "protection function" with respect to lands still subject to Indian title (to be discussed further below), he did not agree that the provision rendered the extinguishment processes justiciable.[6]

[52] RRDC's counsel argued that that Dr. McHugh's expert opinion on the interpretation of the *Dominion Lands Act* should be ruled inadmissible on the principle that expert evidence should not be allowed on domestic legislation. However, I can hardly give weight to this submission when it was RRDC's counsel who elicited this evidence in cross-examination.

[53] RRDC also relied upon an Order in Council, dated January 23, 1875, by which the federal Cabinet accepted the recommendation of the Minister and Deputy Minister of Justice that "*An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia*", which had been enacted by the provincial Legislature, be disallowed on the grounds that it failed to respect the rights of the Indians in that province. The relevant passages of the Report of the Minister and Deputy Minister of Justice for Canada to the Governor General, dated January 19, 1875, are as follows:

> "The undersigned believes that he is correct in stating that with one slight exception as to land in Vancouver Island surrendered to the Hudson Bay Company, which makes the absence of others the more remarkable, no surrender of lands in that province have ever been obtained from the Indian tribes inhabiting it, and that any reservations which have been made, have been arbitrary on the part of the government, and without the assent of the Indians

[6] Transcript, November 22, 2011, p. 89.

> themselves, and though the policy of obtaining surrenders at this lapse of time and under the altered circumstances of the province, may be questionable, yet the undersigned feels it his duty to assert such a legal or equitable claim as may be found to exist on the part of the Indians.
>
> There is not a shadow of doubt that from the earliest times, England has always felt it imperative to meet the Indians in council and to obtain surrenders of tracts of Canada, as from time to time such were required for purposes of settlement."(emphasis added)

[54] Then, after quoting at considerable length the provisions of the Royal Proclamation of 1763 relating to Indian lands, the Minister of Justice went on to write that:

> "It is not necessary now to inquire whether the lands west of the Rocky Mountains and bordering on the Pacific Ocean, form part of the lands claimed by France and which if such claim were correct, would have passed by cession to England under the treaty of 1763, or whether the title of England rests on any other ground, nor is it necessary to consider whether that proclamation covered the land now known as British Columbia.
>
> It is sufficient, for the present purposes, to ascertain the policy of England in respect to the acquisition of the Indian territorial rights, and how entirely that policy has been followed to the present time, except in the instance of British Columbia.
>
> . . .
>
> The determination of England as expressed in the proclamation of 1763, that the Indians should not be molested in the possession of such parts of the Dominion and Territories of England as, not having been ceded to the King, and reserved to them, and which extended also to the prohibition of purchase of lands from the Indians, except only to the Crown itself – at a public meeting or assembly of the said Indians to be held by the governor or commander-in-chief - has, with slight alterations, been continued down to

> the present time either by the settled policy of Canada, or by legislative provision of Canada to that effect, and it may be mentioned that in furtherance of that policy, so lately as in the year 1874, treaties were made with various tribes of Indians in the North-west Territories, and large tracts of land lying between the Province of Manitoba and the Rocky Mountains were ceded and surrendered to the Crown, upon conditions of which the reservation of large tracts for the Indians, and the granting of annuities and gifts annually, formed important consideration…" (my emphasis)

[55] RRDC argues that the foregoing is evidence that the decision by the Government of Canada to disallow British Columbia's land legislation was made on the grounds that it failed to respect "the legal or equitable rights" of the Indians in that province, as well as "the policy of England in respect to the acquisition of the Indians territorial rights", as expressed by the Royal Proclamation of 1763. RRDC further argues that this is consistent with its view that the relevant provision in the *1870 Order* was intended to be justiciable.

[56] Once again, I am troubled about the relative lack of evidence, apart from the Report just referred to, regarding the historical context of the 1875 Order in Council.

[57] Further, there were contrary views expressed by Dr. McHugh in cross-examination. For example, he emphasized that the two law officers referred to "such legal or equitable claim as may be found to exist on the part of the Indians." He also highlighted the repeated use of the word "policy" with respect to the extinguishment of Aboriginal title, which suggests it was a matter exclusively within the Crown prerogative. He further noted that, notwithstanding the language used by the two law officers, there was no pattern of matters of Aboriginal title being enforced in courts at that time and that

this particular Report was “not indicative of a general understanding” in that regard.[7] Finally, Dr. McHugh opined that the eventual exercise of the power of disallowance under s. 90 of the *BNA Act* by the Government of Canada was entirely consistent with his views, discussed below, about the “protective duty assumed by the Dominion” under the *1870 Order*.[8]

[58] Canada’s counsel underscored these points by noting that the government chose to use the “political tool” of disallowance rather than seeking a judicial remedy in court.

[59] RRDC also relies upon the *Boundaries Extension Acts* of 1912, whereby the Canadian government transferred to Québec and Ontario certain parts of Rupert’s Land that had been transferred to Canada under the *1870 Order*. RRDC’s counsel advises me that the two *Acts* are virtually identical. Section 2(c) of the *Québec Boundaries Extension Act*, *1912* provides that the extension of the boundaries of the province was made subject to the following condition:

> “That the province of Quebec will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders.”

[60] The meaning of this provision was considered in *Kanatewat v. James Bay Development Corporation*, [1973] Q.J. No. 8 (S.C.). In that case, the Cree and Inuit of northern Québec petitioned the Québec Superior Court for an injunction to halt the construction of the James Bay hydroelectric project. The petitioners were successful, and an interlocutory injunction was granted on November 15, 1973. On November 21, 1973,

[7] Transcript, November 22, 2011, p. 95.
[8] Transcript, November 22, 2011, p. 98.

six days later, the Québec Court of Appeal allowed an appeal on the basis of the "balance of convenience" aspect of the test for an interlocutory injunction (*Kanatewat v. James Bay Development Corporation*, [1974], Q.J. No. 14).[9] The Supreme Court of Canada subsequently granted leave to appeal. However, that appeal became moot and was discontinued as result of the conclusion of *The James Bay and Northern Québec Agreement* in November 1975, which was effectively a land claim agreement with the Cree and Inuit.

[61] RRDC places great reliance on the trial judgment of Mr. Justice Malouf. At para. 63, Malouf J. stated:

> "This legislation clearly shows that the Province of Quebec agreed to recognize the rights of the Indian inhabitants in the territory described in the said *Act* to the same extent and also agreed to obtain surrender of such rights in the same manner that the Government of Canada had prior thereto recognized such rights and obtained surrender thereof. This obligation is a clear and a precise one…" (my emphasis)

[62] Malouf J. then went on to discuss the pre-Confederation period of Canada and the impact of the Royal Proclamation of 1763. At para. 83 he referenced the relevant provision in the *1870 Order*:

> "The Orders in Council, Resolutions, Addresses and Legislation referred to, all clearly show that the authorities therein mentioned recognized that the Indians had a right and title to the land. When the Imperial Crown transferred Rupert's Land to Canada, the Canadian Government undertook to settle the claims of Indian tribes to compensation for lands required for the purposes of settlement in conformity with equitable principles. In order to give effect to this undertaking, the Government of Canada entered into treaties with the Indians whenever it desired to obtain lands for purposes of settlement. When the Canadian Government decided to extend the boundaries of the

[9] There is a typographical error regarding the date of this decision in some case reports indicating it was decided on November 21,1974.

> Provinces of Quebec and Ontario to include additional portions of Rupert's Land it obliged the Provinces of Quebec and Ontario to assume similar obligations towards the Indians…" (my emphasis)

[63] Malouf J. then concluded, at para.107:

> "…It has been shown that the Government of Canada entered into treaties with Indians whenever it desired to obtain lands for the purposes of settlement or otherwise. In view of the obligation assumed by the Province of Quebec in the Legislation of 1912 it appears that the Province of Quebec cannot develop or otherwise open up these lands for settlement without acting in the same manner that is, without the prior agreement of the Indians and Eskimo." (my emphasis)

[64] Notwithstanding that the decision of Malouf J. was overturned by the Québec Court of Appeal, RRDC's counsel stressed that the ratio of the Court of Appeal decision was on the issue of the balance of convenience. I take counsel's word on that, as only two of the five opinions in the case report are produced in English and I regrettably am unable to read those in French. Further, RRDC's counsel argued that the spirit of Malouf J.'s reasoning was later vindicated by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where Dickson C.J. and LaForest J., stated, at paras. 49 and 50 (Q.L.):

> "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.; see *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); see also the *Royal Proclamation* itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); *Calder*, supra, per Judson J., at p. 328, Hall J., at pp. 383 and 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul*,

> [1988] 2 S.C.R. 654. As MacDonald J. stated in *Pasco v. Canadian National Railway Co*., [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."
>
> For many years, the rights of the Indians to their Aboriginal lands -- certainly as *legal* rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, Aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "Aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see *The Quebec Boundaries Extension Act*, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government." (my underlining)

[65] RRDC argues that s. 2 (c) of the *Québec Boundaries Extension Act* shows that Parliament understood that the terms on which Canada had acquired Rupert's Land and the North-western Territory legally obligated Canada to respect the rights of the Indian inhabitants of those lands and obtain surrenders of any lands required for the purposes of settlement, in the manner set out in the Royal Proclamation. Further, just as the rights of

the Indian inhabitants of northern Québec were constitutionally protected, so too are the rights of the Indians in Yukon under the terms of the *1870 Order*.

[66] Canada's response to this argument is as follows: Firstly, Canada submits that there is little or no evidence about the legislative intent or historical context surrounding the enactment of the *Québec Boundaries Extension Act*. For example, it is immediately apparent that s. 2(c) uses the word "will" in two key respects, i.e. "will recognize the rights of the Indian inhabitants" and "will obtain surrenders of such rights". Dr. McHugh opined that it is important to look closely at the terminology used in such legislation and emphasized the distinction between what a government "will do" and what it "shall do".[10] The former terminology, he said, is more consistent with an acceptance of duty under the executive prerogative, and the latter is more consistent with justiciable rights.

[67] Secondly, Canada's counsel submitted that this legislation was enacted 42 years after the *1870 Order*, at a time when the concept of Aboriginal "rights", in a justiciable sense, was starting to emerge in the Canadian legal context. However, notwithstanding that, the judges on the Québec Court of Appeal in *Kanatewat*, as late as 1973, made comments indicating scepticism about the justiciability of Aboriginal rights and title. To quote the English decisions in *Kanatewat*, Owen J.A. stated, at paras. 20 and 24:

> "The claims made on behalf of Respondents are not at all clear as to the nature of the rights which are invoked as justification for the interlocutory injunction sought. These rights are at different times referred to in different terms such as hunting, trapping and fishing rights, personal and usufructuary rights, a right to exclusive use and occupation of the territory, or real rights. They are claimed over a territory varying from all of Northern Quebec to the area contemplated by Bill 50. From the point of view of time the claims vary from one that they have been exercised "since prehistorical times" to one that they were created in 1912.

[10] Transcript, November 22, 2011, p. 101.

…

> Putting matters in their most favourable light from the point of view of Respondents I would say that, at this stage, their alleged rights are not clear, and that accordingly it is necessary to consider the balance of convenience and inconvenience as between the parties in deciding whether an interlocutory injunction should be granted."

[68] Further, Kaufman, J.A., said this at para. 220:

> "As Mr. Justice Owen points out, rights are either clear, or doubtful, or non-existent. Here, the rights invoked by the Respondents are far from clear, and indeed there is serious doubt about the existence of any right or title which might give rise to the relief claimed - a fact which clearly emerges from the notes prepared by Mr. Justice Turgeon."

[69] Finally, with respect to the Supreme Court's comment about the *Québec Boundaries Extension Act* in *Sparrow*, Canada's counsel submits that the Court was clearly deciding the case in the modern era of Aboriginal law, by which time ss. 25 and 35 of the *Constitution Act*, *1982* had been enacted, and a host of interpretive principles specific to the s*ui generis* nature of Aboriginal law were starting to take hold.

[70] I generally agree with Canada's position in this regard. I would add that there does not appear to have been the type of evidence before Malouf J. in *Kanatewat* that I have here on the intention of Parliament at the time of the enactment of the *Québec Boundaries Extension Act*. Further, the wording of s. 2(c) of that *Act*, is more clear (e.g. the reference to Indian "rights") than the comparatively "loose and general language" used in the relevant provision: see *Euchner*, cited above, at para. 78. Thus, I conclude that the probative value of the *Boundaries Extension Act* to the question of the justiciability of the relevant provision in *1870 Order* is significantly less than what was suggested by RRDC's counsel.

(iv) Administrative Interpretation

[71] In this part of its argument, RRDC focuses on the post-Confederation treaty process that Canada entered into following the *1870 Order.* It submits that the principle of interpretation that administrative policy and interpretation are entitled to weight in a statutory interpretation analysis makes relevant the executive acts undertaken by the Government of Canada in the treaty process. Professor Ruth Sullivan, at page 621 of *Sullivan on the Construction of Statutes*, discusses this principle:

> "Administrative interpretation is the interpretation given to legislation after it has been enacted by persons, other than judges, who are charged with the administration or enforcement of legislation."

At pages 626-627, Professor Sullivan quotes from Dickson J. (as he then was) in *Nowegijick*, cited above:

> "Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation."

This principle was also applied in *Winnipeg Airports Authority Inc. v. Ellis Don Corp*., 2010 MBQB 259, at paras. 32 and 33.

[72] RRDC essentially adopts what Malouf J. said in *Kanatewat*, at para. 89:

> "…In order to open up the land for settlement or otherwise make use of the land, the Government of Canada recognized that it was necessary to obtain the consent of the Indians and this consent was obtained through treaties. How else can these treaties be interpreted? If the Indians had no title to the land, why were all these treaties with the various tribes concerning territory in various areas of the country entered into. It is quite clear that in order to extinguish the Indian right, title and interest in the land, the Canadian Government found it necessary to enter into treaties with the Indians and furthermore that their title to the land was at the very least a

> personal and usufructuary one including rights of hunting, fishing and trapping."

In other words, submits RRDC's counsel, the Government of Canada's negotiation of treaties in the west and northwest, virtually on the heels of the enactment of the *1870 Order*, must be viewed as evidence of Canada's recognition that it had a legal, and therefore justiciable, obligation to do so before opening up the lands for settlement.

[73] Canada's response to this argument is as follows: First, it submits that there is no evidence explaining why the Canadian government embarked on the post-Confederation treaty process shortly after acquiring Rupert's Land and the North-western Territory. Canada argues that the intention of the Canadian government in entering into post-Confederation treaties cannot be inferred, and that specific evidence needs to be presented to establish that the treaties flowed from the *1870 Order*.

[74] Second, Canada's counsel points to a number of examples from the documentation in evidence where land was opened up for settlement without obtaining any surrenders from the Indians concerned. For example, in the *Report from the Select Committee on Aborigines* (*British Settlements*), G.B.P.P. 1837, #425, there is evidence of a blacksmith using coal from a seam near Fort Edmonton, evidence of "cultivation" near Fort Cumberland and Fort Norman, and evidence of domestic cattle at "most forts", at a time before the negotiation of treaties in those areas.

[75] Third, Canada relies upon testimony from Dr. McHugh that the treaty negotiation process was underway prior to the *1870 Order*. As examples, he cited the 1858 Robinson Treaty, and the 1862 Manitoba Treaty.[11] Dr. McHugh said that the effect of Imperial legislation in the 1860s was to transfer the locus of the "protective duty" from the Imperial

[11] Transcript, November 21, 2011, p. 17.

Government in London to Canada, so that Canada assumed the authority to manage relations with the Indians. In other words, the post-Confederation treaties were not negotiated out of any sense of legal or justiciable obligation on the part of the federal government, but rather the negotiations reflected a continuation of the Crown's conception of a high political trust and sense of honour to treat. At the time the *1870 Order* was enacted, said Dr. McHugh, the Government of Canada would not have feared the risk of court action by the Indians, in the event it opened up land for settlement without negotiating treaties.

[76] Finally, Canada points to the recent decisions of the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74. In both cases, submits Canada, the Supreme Court held that the federal government was not prohibited from taking steps to manage the lands at issue prior to treaties being completed, for example, through issuing forest licenses or approvals for mining development. In particular, in *Haida*, at paras. 26 and 27, the Court wrote:

> "Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
>
> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting

> these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable." (my emphasis)

[77] I generally agree with Canada's submissions on this point. While there may be a certain appealing logic to RRDC's argument here, it is still largely a conclusory one.

b) Canada's Evidence of Parliamentary Intention and Historical Context

[78] Dr. McHugh is a "University Reader-in-Law" at the University of Cambridge, and has been so designated since 2004. He has been a teaching member of the Faculty of Law, Cambridge, since 1986. He obtained his LL.B. (Honours), First Class, from Victoria University, in Wellington, New Zealand, in 1980. He then obtained his LL.M. from the University of Saskatchewan in 1981, having completed a thesis entitled "*The Management of Native Lands in Canada and New Zealand: A Comparison*". He subsequently obtained his Ph.D. from Cambridge in 1988, where he presently teaches constitutional law and property law. His *curriculum vitae* lists some 44 publications, including one in 1998 entitled "*The Common Law Status of Colonies and Aboriginal Rights": How Lawyers and Historians Treat the Past*".[12] He is also credited with having published four short monographs and has authored numerous academic essays including

[12] (1998), 61 Sask. L.Rev. 393.

one, also from 1998, entitled "*Aboriginal Identity and Relations in North America and Australasia*".[13]

[79] As I understand it, Dr. McHugh has published a total of four books. The most recent is entitled "*Aboriginal Title*", published September 5, 2011, by Oxford University Press. In 2004 he authored the text "*Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self- Determination*". He has been the recipient of some seven awards for publications and contributions to legal education.

[80] In the past five years, Dr. McHugh has been retained as an independent expert for the New Zealand Ministry of Justice, the Province of British Columbia and Justice Canada. He has appeared before a Parliamentary Select Committee in New Zealand in 2004 and the Waitangi Tribunal in that country in 2010. He has presented papers at numerous conferences and colloquia as a legal historian. As I noted above at para. 43, he also provided expert evidence for Canada in the *Chippewas* case.

[81] Dr. McHugh was asked by Canada to provide an expert opinion on the historical context of the *1870 Order* to assist this Court in determining the intention of Parliament in including terms about Aboriginal peoples. He was also asked to address the legal understanding of the Crown's role at the time of the *1870 Order* and to provide an account of how the *Order* would have been understood as a legal instrument at that time.

[82] In preparing to provide his expert opinion, Dr. McHugh reviewed 536 documents provided by Canada and 33 documents which he obtained independently. These documents consist of a mixture of articles, historical documents, legislation, and case

[13] In Ken S. Coates and P.G. McHugh, eds. *Living Relationships (Kokiri Ngatahi); The Treaty of Waitangi in the New Millennium* (Wellington: Victoria University Press, 1998).

law. All of the documents reviewed by Dr. McHugh, together with his written expert opinion, are in evidence in this trial.

[83] More specifically, Dr. McHugh was asked to consider whether the relevant provision in the *1870 Order* was intended to be legally enforceable at the time of its enactment, and to report on the impact, if any, that the *Order* would have had on the status and rights of Aboriginal peoples in the transferred territories at that time.

[84] Dr. McHugh's expert opinion is essentially that the legal basis of Crown relations with Aboriginal peoples was formed in the Imperial era and carried over to colonial and then to early national times when jurisdictional competence was transferred from the Imperial Parliament to the new Parliament of the Dominion of Canada. At paragraph 10 of his Report, he states:

> "…The Crown recognized the land rights of tribes and negotiated for their cession but these practices were undertaken as a matter of executive grace rather than from any legal imperative compelling this treaty-making. These relations engaged Crown beneficence and guardianship but they were never regarded as justiciable or enforceable by legal process - a possibility that the state of legal art could not admit (until the late-twentieth century). The reference to those 'equitable principles' in the Addresses and instrumentation for the transfer of Rupert's Land and the North-western Territories in the 1870 Order in Council was not intended or contemplated at that time to change the received position of non-justiciability."

[85] This "received position" was described in greater detail by Dr. McHugh as follows:

> "…In the late-nineteenth century (and for most of the twentieth), the Crown's relations with tribes in respect of their land "rights" were conceived as a matter of non-justiciable executive grace in the sense that the "trust" and "guardianship" duties avowed by the Crown, including the practice of obtaining formal cessions of their land, were regarded as having a high moral character not enforceable directly through court process…It was not until the courts

> developed the common law doctrine of Aboriginal title from the 1970s onwards that those collective land rights and associated Crown obligations became justiciable. There is no evidence that the 1870 transfer was designed to or seen at that time as changing that position." [14]

[86] The path to Dr. McHugh's conclusions begins with the recognition that, from the earliest days of English settlement of the New World, British relations with Aboriginal tribes were managed under the authority of "royal warrant".[15] A Canadian example of a royal warrant is the 1670 charter granted by the Crown to the Hudson's Bay Company ("HBC"), which granted proprietary rights to HBC over the vast watershed lands of the Hudson Bay basin and entitled HBC to the exclusive right to trade and govern within that territory. The territory became known as Rupert's Land. The territory to the west and north of Rupert's Land became known as the North-western Territory (with the exception of the land that became the colony of British Columbia).[16]

[87] Dr. McHugh testified that a subsequent problem of competition in the fur trade between the HBC and the more latterly incorporated North-western Company was resolved by the Imperial Parliament amalgamating the two entities in 1821. The reorganized HBC received a Crown grant, or "Licence", to trade and otherwise represent the Crown in dealings with the Aboriginal populations of Crown territories not included in the HBC's charter or in any other colonial jurisdiction. That meant that the North-western Territory came under the aegis of the HBC (including what is now known as the Yukon Territory).[17]

[88] In 1838, the License was renewed for a period of 21 years.

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[14] McHugh opinion, at para. 9.
[15] McHugh opinion, at para. 27.
[16] McHugh opinion, at paras. 11 and 12.
[17] McHugh opinion, at para. 13.

[89] In 1849, Vancouver Island was made a colony, and the mainland colony that would become British Columbia followed in 1858.

[90] Dr. McHugh reports that in the late 1850s, the HBC was facing many pressures, such as the influx of settlers from the east and the south, mineral discovery and exploitation, the rise of the Red River community in what would become the province of Manitoba, and technological advances, such as the telegraph.[18]

[91] According to Dr. McHugh, a debate arose over whether there should be a second renewal of HBC's license, as the Government of the Province of Canada took the position that the lands held by the HBC should be transferred to it, in whole or in part. Chief Justice Draper communicated this to the Imperial Parliament in 1857, and this led to an inquiry by a Special Committee of the House of Commons, which recommended a negotiated settlement between the HBC and the Province of Canada in order to transfer the territories. Some attempts to negotiate followed, without result. The HBC License expired in 1859.[19]

[92] Dr. McHugh writes that the issue of the transferring the HBC territories to the Province of Canada resurfaced in the mid-1860s with the prospect of Confederation. In 1865, the Province of Canada sent representatives to the Imperial Parliament to urge for the transfer of the HBC territories. The Imperial government was sympathetic and enacted s. 146 of the *BNA Act*.[20] It was pursuant to this that, in December 1867, during the first session of the new Canadian Parliament, the House of Commons and Senate

[18] McHugh opinion, at para. 13.
[19] McHugh opinion, at para. 13.
[20] McHugh opinion, at para. 14.

adopted an address to request the transfer of Rupert's Land and the North-western Territory to the Dominion (the *1867 Address)*.[21]

[93] According to Dr. McHugh, Prime Minister John Macdonald believed that the *1867 Address* would secure the Canadian government the governance rights of the HBC, leaving HBC's proprietary rights to be determined by Canadian courts. However, the Governor of the HBC protested against the proposed unilateral annexation by Canada and the prospect that the Company's rights would subsequently be adjudicated by courts appointed by the Canadian government. The Colonial Office of the Imperial government sympathized with HBC, and took the position that HBC's agreement and Imperial legislation were needed to authorize the transfer.[22] Negotiations between the HBC and Canada ensued until, eventually through Earl Granville[23], an agreement was reached on the surrender of Rupert's Land. The *Rupert's Land Act* was enacted in 1868 to authorize the transfer.[24]

[94] Dr. McHugh opined that the negotiations surrounding the transfer of the territories mainly focused on Rupert's Land and the terms of surrender by HBC. He notes that the surrender agreement, which dealt with Rupert's Land, meant that a second Joint Address from the Parliament of Canada was required, and this was issued on May 29 and 31,1869. It repeated the request for the transfer of the North-western Territory, on the terms and conditions of the *1867 Address*, and requested the transfer of Rupert's Land,

[21] McHugh opinion, at para. 14.
[22] McHugh opinion, at para. 16.
[23] Granville George Leveson-Gower, 1815-91.
[24] McHugh opinion, at para. 16.

subject to the terms and memoranda attached to the second Address.[25] With respect to Rupert's Land, Point 8 of an attached memorandum dated March 22, 1969 states:

> "It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government and that the Company shall be relieved of all responsibility in respect of them."[26] (my emphasis)

[95] Clause 14 of the *1870 Order* was based upon para. 14 of HBC's deed of surrender of Rupert's Land.[27] Clause 14 states:

> "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of responsibility in respect of them." (my emphasis)

[96] The second Address also includes the following acknowledgment:

> "That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer, and we authorize and empower the Governor- in-Counsel to arrange any details that may be necessary to carry out the terms and conditions of the above agreement."

[97] Dr. McHugh testified that the HBC wanted a "clean exit" with respect to any responsibilities it exercised *vis-à-vis* the Indian tribes under the 1670 charter. He explained this was the reason for the repeated references in the *1870 Order* to HBC being "relieved of all responsibilities in respect of" the claims of Indians. Further, to the extent that the situation of the Indian tribes featured explicitly in the negotiations, Dr.

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[25] The second Address is included in Schedule "B" to the *1870 Order.*
[26] McHugh opinion, at para. 17.
[27] Attached as Schedule "C" to the *1870 Order.*

McHugh took the position that it was couched in terms of a duty of "protection" being transferred from the Imperial Crown to the Canadian Government.[28]

[98] Dr. McHugh opined that it was understood in 1870 that there was a "different shade of meaning" between the "reservation" of individual or corporate rights, on the one hand, and the "protection" of a certain class of Her Majesty's subjects, on the other:

> "*Reservation* of rights entailed a hard justiciable form of legal coverage whereas *protection* entailed a softer non-justiciable form reliant upon benign executive discretion." (his emphasis)[29]

[99] An example of this distinction is arguably found in the *1867 Address* where, just prior to the relevant provision, the following paragraph appears:

> "That in the event of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction." (my emphasis)

[100] Dr. McHugh places a great deal of emphasis on a despatch from Earl Granville, dated April 10, 1869, to the Governor General of Canada. He views the despatch as a key piece of evidence from a very prominent individual in the negotiations preceding the *1870 Order*. This despatch, Dr. McHugh says, conclusively shows that there was no intention by the parties to create a justiciable constraint on the Dominion of Canada with respect to the claims of the Indians and the duty to provide for and protect those Indians. I will deal with this despatch shortly, but some context will assist in its interpretation.

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[28] McHugh opinion, at para. 21; see also the Resolution dated May 28, 1869, which states: "That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer." (my emphasis)

[29] McHugh opinion, at para. 21.

[101] Earl Granville held various cabinet offices in the Imperial government between 1851 and 1886[30]. As the Colonial Secretary in Prime Minister Gladstone's first cabinet in 1868, Granville held a post of considerable prestige. Dr. McHugh described him as being at "the outset of a brilliant political career as a tactful, velvet-glove strategist" whose role in the HBC surrender can be seen:

> "…in retrospect as an early and vitally necessary preliminary step in…the smooth facilitation of transfer of Rupert's Land and the Northwestern Territory after several years of inconclusive dealing…".[31]

[102] When the negotiations between the HBC and the Canadian delegates on the transfer of the territories became deadlocked, Earl Granville intervened on behalf of the Imperial Government. He suggested terms to the parties in what is now seen to have been a 'take it or leave it' offer, in that he threatened to have the Judicial Committee of the Privy Council review the matter, if either party rejected the terms.[32] Indeed, that offer, set out in a March 1869 letter from Sir Frederick Rogers, found its way into Schedule B of the *1870 Order* and was the basis for the terms of HBC's deed of surrender as well as the 15 "terms and conditions" specified in the operative portion of the *1870 Order*.

[103] Following Sir Roger's letter in Schedule B of the *1870 Order* is a memorandum dated March 22, 1869, authored by G. Cartier, S. Northcote and W. McDougall. This memorandum details the agreement between the delegates of the Canadian Government and the directors of the HBC. Item 8 states:

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[30] Ged Martin, Report for the Department of Justice, Government of Canada, Re: *Manitoba Métis Federation et al. v. A.G. Manitoba and A.G. of Canada.*
[31] McHugh opinion, at para. 25.
[32] Frank Tough, Jim Miller, and Arthur Ray, "*Bounty and benevolence": a Documentary History of Saskatchewan Treaties*, March 15, 1998, Report for the Office of the Treaty Commissioner, Saskatoon, Saskatchewan.

> "It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them." (my emphasis)

[104] Following the agreement between the Canadian government and the HBC, on April 10, 1869, Earl Granville wrote his despatch to the Governor General of Canada. In it he touched upon the issue of the claims of the Indian tribes:

> "On one point, which has not been hitherto touched upon, I am anxious to express to you the expectations of Her Majesty's Government. They believe that whatever may have been the policy of the Company, and the effect of their chartered right upon the progress of settlement, the Indian tribes, who form the existing population of this part of America, have profited by the Company's rule. They have been protected from some of the vices of civilization: they have been taught, to some appreciable extent, to respect the laws and rely on the justice of the white man, and they do not appear to have suffered from any causes of extinction beyond those which are inseparable from their habits and their climate. I am sure that your Government will not forget the care which is due to those who must soon be exposed to new dangers, and, in the course of settlement, to be dispossessed of the lands which they are used to enjoy as their own, or be confined within unwantedly narrow limits.
>
> This question had not escaped my notice while framing the proposals which I laid before the Canadian Delegates and the Governor of the Hudson's Bay Company. I did not, however, then allude to it, because I felt the difficulty of insisting on a definite conditions without the possibility of foreseeing the circumstances under which these conditions would be applied, and because it appeared to me wiser and more expedient to rely on the sense of duty and responsibility belonging to the Government and people of such a country as Canada. That Government, I believe, has never sought to evade its obligations to those whose uncertain rights and rude means of living are contracted by the advance of civilized man. I am sure that they will not do so in the present case, but that the old inhabitants of the country will be treated with such forethought and

> consideration as may preserve them from the dangers of the approaching change, and satisfy them of the friendly interest which their new governors feel in their welfare." (my emphasis)

[105] Dr. McHugh interprets this despatch as clearly indicative that the negotiations with HBC had not focused explicitly upon the position of the Indians. He further infers "strongly if not unmistakably" that clause 14 in the operative portion of the *1870 Order*, quoted above at para. 95, was aimed at the post-transfer rights and liabilities of the HBC and was not aimed at erecting legal obligations relative to Indian lands that would subsequently become binding upon the Dominion of Canada.[33]

[106] Dr. McHugh also opines that in the second paragraph of the Granville despatch, Granville was adverting to the continuance by the Canadian government of the long-standing Imperial policies over Aboriginal affairs, following the transfer of those responsibilities from London to the Canadian government. Dr. McHugh further states that Granville was almost certainly referring to the Robinson Treaties and related transactions that Canada had conducted for the Indian lands surrounding the Great Lakes. Thus, Granville expected that the equitable principles that had been applied in Canada, first by Imperial officers, and then by the Canadian government upon assumption of the responsibility for Indians, would be extended to the soon-to-be annexed territories.[34] In conclusion on this point, Dr. McHugh states at paragraph 24 of his Report:

> "…This Granville put in terms of an expectation falling upon the honour of the Canadian government rather than it being a legal stipulation inserted into the transfer. This makes it plain that if the parties had viewed the reference to "equitable principles" as entailing the creation or recognition of a justiciable obligation then it would have been acknowledged explicitly as such. Rather, the British authorities and HBC

[33] McHugh opinion, at para. 22.
[34] McHugh opinion, at paras. 23 and 24.

> regarded the transfer as only creating legal rights for HBC. Whereas the outcome of the transfer for the HBC itself was a hard set of legal rights (‘reservations’), for the Indian tribes their ‘protection’ was transferred from the aegis of the HBC as grantee of Rupert’s Land and sometime administrator of the NorthWest Territory [as written] to Canada."

[107] Dr. McHugh’s report continues on to examine the broader historical context of relations between Aboriginal peoples and the Imperial Crown, to demonstrate that what he said was happening in Canada around the time of the *1870 Order* was consistent with the driving themes of those relations elsewhere in the Victorian era. He also analyzes some of the early case law, such as *R. v. St. Catharines Milling and Lumber Co.* (1887), 13 S.C.R. 577, and concluded:

> “…The case-law shows that native peoples were regarded as holding all the legal capacities of the settlers so far as the protection of their individual person and personal property were concerned. Where, however, they claimed certain collective rights - to land most especially - the legal enforcement of those rights (against squatters or trespassing stock, to give the strongest examples) was a matter for the Crown. That is, the Crown acted as legal protector of native peoples collective or, to use the modern term, Aboriginal rights.” [35] (my emphasis)

c) RRDC’s Challenges to the Expert Evidence

[108] RRDC called no witnesses in this phase of the trial. However, RRDC's counsel did refer me to a number of academic articles in evidence in support of his argument that the relevant provision is presently justiciable. First among these is a monograph by Dr. Kent McNeil entitled *Native Claims in Rupert's Land and the North-western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982). The article begins with the premise that the *1870 Order* "recognized the existence of aboriginal land claims in Rupert's Land and the North-western Territory, and

[35] McHugh opinion, at para. 47.

placed a constitutional obligation on the Canadian government to settle those claims." (my emphasis). Dr. McNeil then continued on to examine the nature and extent of that obligation. At pages 9 and 13, Dr. McNeil referred to the relevant provision and its reference to equitable principles, saying at page 19: "In addition to placing an obligation on the Canadian government to settle Indian claims, the *1867 Address* also lays down a standard which the government must adhere to." (my emphasis). At pages 20 and 21, Dr. McNeil suggests that this standard is the procedure outlined in the *Royal Proclamation.* At page 36, he concludes:

> "… Since the [*1870 Order*] imposed a constitutional obligation on Canada to settle Indian, and probably Inuit and Métis claims, it follows that it would be beyond the competence of Parliament and the provincial legislatures to abrogate or derogate from the rights on which those claims were based without first reaching a settlement with the aboriginal peoples involved. On the basis of this approach, federal laws…would be inoperative to the extent that they are inconsistent with unsurrendered aboriginal rights in Rupert's Land and the North-western Territory."

[109] Of course this language strongly suggests, without specifically stating, that the relevant provision was justiciable from the time of its enactment as part of the *1870 Order.*

[110] In a subsequent essay in his book *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), Dr. McNeil continued to explore the fiduciary responsibilities of the federal government towards Aboriginal peoples[36]. At page 327, Dr. McNeil once again examined the relevant provision and, at page 330, concluded that the inclusion of the provision in the *1870 Order* "imposed a constitutional obligation on the Canadian

[36] Essay entitled "Fiduciary Obligations and Federal Responsibility for Aboriginal Peoples".

Government to resolve land claims in both territories before opening the lands up to settlement." However, the focus of the article was the undertaking contained in the May 28,1869 Resolutions and the 1869 Address, that "it will be the duty of the Government [or, in the Address, "our duty"] to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer" of the two territories. Dr. McNeil referred to this as the "protection" undertaking and suggested that it was "a term or condition for the admission of both territories" to the Dominion of Canada (p.331), and that it created "a legally enforceable obligation" (p.333).

[111] RRDC's counsel cross-examined Dr. McHugh about this latter essay[37], and asked him whether he agreed with Dr. McNeil's opinion that the *1870 Order* created a "constitutional obligation" on the Canadian government to resolve land claims in the territories before opening land up for settlement. Dr. McHugh replied that he is very familiar with the work of Dr. McNeil, and suggested that he was providing a contemporary legal conclusion, rather than an historical one. Further, under the contemporary legal approach, Dr. McNeil ignored the distinction between "duties" and "obligations" of government, and collapsed the two terms together. However, if Dr. McNeil's opinion was offered as an historical conclusion, then Dr. McHugh disagreed, stating that, in the late 19th century, the *1870 Order* would not have been viewed as a constitutional obligation in the manner suggested by Dr. McNeil.

[112] RRDC's counsel next cross-examined Dr. McHugh about an article by Professor Frank Tough, entitled *Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory,*

[37] Transcript, November 22, 2011, pp.65-68.

from 1992[38]. In the article, Professor Tough examined the circumstances surrounding the acquisition of the two territories under the *1870 Order*, including the despatch of Earl Granville, and particularly the passage I emphasized above at para.104. At page 240 of his article, Professor Tough stated:

> "By reducing Indian title to a sense of duty, the negotiations did not have to reconcile the two differing claims to Rupert's Land. During the negotiations, the serious consideration of Indian title would have led to a comparison of the HBC claim to Rupert's Land and Indian entitlement. Clearly, the question of Indian title was not a mere oversight; there was a deliberate effort by the Imperial government to confine Indian entitlement to a policy status."

Dr. McHugh described this language as "tendentious", because the Imperial government was not "reducing Indian title ":

> "…There wasn't any active reduction going on, there wasn't any active confinement going on, beyond what was the established position already. Now, we might not like that, but that's – that's how they saw it."[39]

[113] Next, Dr. McHugh was asked about a paragraph in the Tough article immediately following a reference to the relevant provision, which referred to a letter from George Cartier and William MacDougall (Canada's delegates in the HBC negotiations) to the Colonial Office dated February 8, 1869. Professor Tough stated at p. 240:

> "The Canadian delegates reiterated the terms of the Address of 1867 during the negotiations and added that three points "were the only terms and conditions which, in the opinion of the Canadian Parliament, it was expedient to insert in the Order in Council, authorized by the 146th section."

[38] See footnote 1.
[39] Transcript, November 22, 2011, pp. 68-69.

This letter from Cartier and McDougall paraphrased the three undertakings in the *1867 Address* and then included their relevant remarks:[40]

> "1st. That Canada should undertake the duties and obligations of Government and legislation in respect of those territories.
>
> 2nd. That the legal rights of any Corporation, Company or individual within the territory should be respected, and that provision should be made for that purpose by placing those rights under the protection of courts of competent jurisdiction.
>
> 3rd. That the claims of the Indian tribes to compensation for lands required for purposes of settlement should be considered unsettled, in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.
>
> The above were the only terms and considerations which, in the opinion of the Canadian Parliament, it was expedient to insert in the Order in Council authorized by the 146th section." (my emphasis)

[114] Dr. McHugh made a number of comments relating to the relevant provision and Professor Tough's remarks above:

> A "…Now, the words used there for the lands required, the claims of Indian tribes compensation will be, "Will be," not "Shall be," shall be does appear elsewhere, will be considered and settled in conformity. Now, there are two verbs there, "Considered," and "Settled."
>
> Q Yes.
>
> A Now, for those words to have any meaning, "Consideration" means that there is the capacity to decide whether or not you're going to accept, modify, reject, spurn the claims. If they're going to be considered, yeah, so I'm saying that that verb will be considered and settled –
>
> Q Mm-hmm.
>
> A -- in parts that there is this discretion, as understood, at that time, right. So "Will be considered and settled." So if we look at this letter –

[40] Exhibit 2F, Tab 327.

Q Yes.

A -- and we see that on -- Mr. Tough referred to the terms and conditions, yet, the delegates say, the above, “Those three,” that appear on the first Address, were the only terms and considerations.

Q Yes.

A So adverts to the verb, “Considered.”

Q Right.

A He does not use the word, “Conditions,” the -- the above were the only terms and considerations, which in the opinion of the Canadian Parliament, it was expedient to insert in the order and council authorized by the 146 section, that is to say, the first Address. So that conclusion of Professor Tough does not square with the words being used by the delegates. They used the word, “Considerations.”

Q Yes.

A And the verbs “Considered” and “Settled” does appear in the Address itself. So it is open, at least, to argue that at that time, the position of tribes was a consideration.

Q Yes.

A Not an obligation, a duty, yeah, and that -- that’s how I read it. To me, the evidence of how the thinking was occurred at that time is plain. But if he’s trying to argue a legal, contemporary legal position, that of course is law office history and it’s a different way of doing things. It’s legal, contemporary legal interpretation, but it’s not historical interpretation, yeah. And both equally viable and valid activity, just they’re not the same …”[41]

[115] It is also interesting to note that Cartier and MacDougall seem to have made a distinction between the "legal rights…under the protection of courts", in referring to the second undertaking in the *1867 Address,* and their reference to the relevant provision, which contains no such language.

[41] Transcript, November 22, 2011, pp. 70-71.

[116] RRDC's counsel also relied upon a 1998 report co-authored by Frank Tough, Jim Miller, and Arthur Ray, entitled *"Bounty and benevolence": A Documentary History of Saskatchewan Treaties*[42]. This is a more lengthy piece, involving a number of topics about Crown-Aboriginal relations ranging from before 1800 into the 20th century. The authors included a section on the transfer resulting from the *1870 Order* and, at page 94-95, they spoke about the relevant provision as follows:

> "For the negotiators, the question of Aboriginal rights was never central to the surrender agreement, although the interest in the rights of the Indigenous inhabitants of the Hudson's Bay Company Territory were involved in the transfer. However, with the transfer of Rupertsland [as written], the Aboriginal title concept can be traced back to the Address of 1867 to the Queen. This Address called for the annexation of the territories and the resolution of the company claims in a court. The question of Indian title was raised in the third term of the Address of 1867:
>
> > [the relevant provision was quoted here]
>
> This commitment did not change in the course of the talks in 1868-69. The Canadian delegates reiterated the terms of the Address of 1867 during the negotiations and added that these three points "were the only terms and conditions which, in the opinion of the Canadian Parliament, it was expedient to insert in the Order in Council, authorized by the 146th section. Clearly, the Canadian position acknowledged compensation for what Prime Minister John A. Macdonald would later describe as Indian title.
>
> Overall, the negotiations concerning the transfer did not take a hard look at Indian title…."

[117] I have a couple of problems with RRDC's reliance upon this article. First of all, it was never put to Dr. McHugh in cross-examination. Second, it appears that the authors repeated the error spotted by Dr. McHugh earlier regarding the incorrect use of the word

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[42] Office of the Treaty Commissioner, *"Bounty and benevolence": A Documentary History of Saskatchewan Treaties*, by F. Tough, J. Miller and A.J. Ray (Saskatoon: Office of the Treaty Commissioner, 1998).

"conditions", rather than the word "considerations", which was used by Cartier and MacDougall. Accordingly, I give this article little weight.

[118] Although RRDC's counsel extensively cross-examined Dr. McHugh on other points, much of that cross-examination resembled legal argument, with RRDC's counsel attempting to persuade Dr. McHugh to accept his interpretation of certain legal instruments, events or case law. RRDC's counsel submitted (but not until his reply to Canada's closing submissions) that Dr. McHugh's evidence should be given little weight because he has been shown to be not independent or impartial and because his evidence was influenced by the exigencies of the litigation: see *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, at paras. 100 and 101. RRDC's counsel cites three reasons in support of this suggestion:

(i) Dr. McHugh made concerted attempts to avoid admitting that the views expressed by Justice Strong in the *St. Catharines Milling* case were contrary to his central theory that no one at the time of the *1870 Order* would have thought that the relevant provision would have been legally enforceable;

(ii) Dr. McHugh was inconsistent in his willingness to accept the general principle that the surrender of Indian lands was supposed to occur before those lands were opened for settlement; and

(iii) Dr. McHugh was unwilling to admit that the "equitable principles" referred to in the relevant provision were those emanating from the Royal Proclamation of 1763.

[119] I will deal with each of these criticisms in turn.

(i) Justice Strong in St. Catharines Milling

[120] RRDC's counsel cross-examined Dr. McHugh about certain passages from Justice Strong's judgment in *St. Catharines Milling*, including this one at page 613:

> "…Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an expressed positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th subsection of section 91, as well as the 109th section and the 5th subsection of section 92 of the *British North America Act*, must be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments." (my emphasis)

[121] Counsel suggested to Dr. McHugh that Justice Strong's statements in this passage about the enforceability of the territorial rights of Indians in Canadian courts were directly contrary to those expressed by Dr. McHugh in his expert Report, and particularly at para. 46 where he wrote:

> "The above New Zealand material supplies a strong parallel showing how during the nineteenth century and the period straddling Imperial through colonial competence, the legal conceptualization of Aboriginal land was bound into notions of a non-justiciable high executive trust. This was also the position taken in Canada. Unlike the Native Lands Acts in New Zealand, the 1870 transfer, with no more than an indirect reference to the 'equitable principles' surrounding cession of Aboriginal lands, was not specifically framed as a legal transposition and transmutation of the original title..."

[122] The cross-examination on this point proceeded as follows:

> "Q Now, paragraph 46. Would you agree with me that

Justice Strong's decision in dissent is contrary to your first two sentences here?

A Well, I'll -- I will go here, there, counsel, if you could explain to me where this is leading, because we're remembering that Strong is in dissent, and there are issues about what he meant by enforceability, subject to all the caveats that I have expressed, if you could carry on.

Q I'm not sure that I understand that answer. You're agreeing with me that Justice Strong's reasons in dissent are contrary to what you state in the first two sentences here?

A I'm saying that Justice Strong is in dissent and that he -- he -- yeah, so he's -- yeah, he's -- he's -- yeah, okay, I'll go with that."[43]

[123] Therefore, Dr. McHugh agreed, without evasiveness, that Strong J.'s opinion was contrary to his own. As well, Dr. McHugh further conceded on cross-examination that the Indian land rights were enforceable, but only through the agency of the Crown in exercising its protective duties:

"Q "…[Strong J.] wrote "These territorial rights of the Indians were strictly legal rights," and I'm asking you if his views in that regard are contrary -- his views in dissent in that regard are contrary to the position you express in your report about the enforceability of those territorial rights?

A If by enforceable, you mean they could be enforceable by agency of the Crown, I [indiscernible] if he was technically vested, and it's perfect -- that's what I've been arguing throughout my report, that the title to Indian lands being vested in the Crown, the Crown taking the protective duties enforces it vicariously, as it were, under the [mantle] of its ownership. So -- so in that indirect sense, enforcement, but it is through agency, through the intermediary of the Crown that enforcement is occurring, and to the extent that enforcement is being conceptualized at that time, it is in that way, through the agency of the Crown, because it's had -- if you could explain to me how it might be enforced other

[43] November 22, 2011, pp. 83 and 84.

than via the Crown, because –

Q We'll come to that.

A Thank you."[44]

[124] Ultimately, regardless of how contrary Justice Strong's views are to Dr. McHugh's, Dr. McHugh also stressed that Justice Strong's judgment was a dissent and that, in the course of the *St. Catharines* case from trial through to the Judicial Committee of the Privy Council in England, a total of sixteen judges were involved, with fourteen of those judges taking the view that "the tenure of the Indians was a personal and usufructory right, dependent upon the good will of the Sovereign", to use the words of Lord Watson in the judgment of the Privy Council.[45]

[125] Thus, I accept Dr. McHugh's opinion that Justice Strong's dissent was "not representative of the prevailing view at that time".[46] I would also note that Dr. McHugh did not attempt to suggest that the prevalent view of the non-justiciability of Aboriginal rights in the nineteenth century was universal or monolithic.[47] On the contrary, he acknowledged that there were one or two cases in Canadian courts on Aboriginal "customary law" issues, but that these cases were not routine.[48] Further, he was very careful to point out that there were occasions when arguments were made about the capacity of natives to enforce their rights, but that there was "no pattern of that happening."[49]

[126] For the foregoing reasons, I give little weight to RRDC's argument regarding Justice Strong.

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[44] Transcript, November 22, 2011, p. 83.
[45] (1888), 14 App. Cas. 46 (J.C.P.C.), para. 6 (Q.L.).
[46] Transcript, November 22, 2011, p. 82.
[47] Transcript, November 22, 2011, pp. 94-95 and p. 148.
[48] Transcript, November 22, 2011, p. 76.
[49] Transcript, November 22, 2011, p. 94.

(ii) Surrender Before Settlement

[127] The second reason RRDC urges me to find that Dr. McHugh was not independent or impartial is based on an assertion that Dr. McHugh resiled from a concession he made when being cross-examined about the *Chippewas* case in the Ontario Court of Appeal. Dr. McHugh said that he had "no difficulty with" what the Court of Appeal said at para. 198 of the case, which is as follows:

> "In the light of our findings on the evidence before us that whatever the formal legal status of the Royal Proclamation subsequent to the passage of the *Quebec Act*, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender (see paras. 57-65 above), little turns in this case on whether the surrender provisions per se of the Royal Proclamation had the force of law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed."

[128] RRDC's counsel submitted that Dr. McHugh made concerted efforts to avoid admitting that, in principle, the surrender of Aboriginal lands is supposed to occur for purposes of settlement, because it was not helpful for the Crown's case.

[129] My examination of the record does not reveal the "concerted efforts" counsel referred to. Immediately after stating that he had "no difficulty" with para. 198, the cross-examination proceeded as follows:

> "Q Okay, thank you. And do you agree that as the Court

of Appeal found, the Royal Proclamation has been, I'm quoting here:

> … has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealing with the Aboriginal people of Canada.

A I think that's a very broad open-ended sentence that, in terms of legal history, needs considerable [as written] more detailing, which the Court is not doing there.

Q So you don't agree that the proclamation has been cited as the defining source of the principles?

A It's not a question of my disagreeing or agreeing so much as recognizing that that is a statement that needs considerable -- considerable texturing.

Q Would you agree -- I don't -- we don't have time –

A For example, "It has been consistently cited in the case law from the earliest times…." Well, if one looks at the pathways, okay, that suggests that there is a consistent body of jurisprudence, of case law. There isn't. There is only a sprinkling of cases which refer to the Royal Proclamation, and then in a variety of ways. So that is a court judgment; it's not an historical account of how the Royal Proclamation was viewed at any given time within Canada, because the Royal Proclamation is a legal instrument with a history of interpretation. One cannot say that the Royal Proclamation is -- the interpretation application of it is carved in stone any more than one can say that the interpretation of the Charter has an enduring and particular -- or the 5th Amendment in America, has an enduring interpretation. So for an historian, who is asked to answer the question of how people thought in a particular period, you are asking me to -- this is a court judgment from the 20th Century. It is not the words or the setting in Upper Canada of the 1830s of how the Royal Proclamation was viewed at that time. So -- so we need to distinguish an historical inquiry from -- what this court is doing is rendering a legal judgment about the status or otherwise of an argument about unextinguished Aboriginal title in Sarnia at the turn of the 20th Century. See –

Q The Court clearly concluded that the principles and the proclamation should have been followed and

weren't.

A Well, the word is principles.

Q Yes.

A Principles are not rules. Principles -- you see, we're getting into an argument here about -- I'm resisting the suggestion that you're making it historically. There was a perception that they were externally enforceable standards that could be brought to bear against the Crown for the conduct of its relations with First Nations. That is a suggestion you are making, it seems to me, and that I'm resisting, in the period that we're looking at, because historically there was no perception that there were externally enforceable standards that could be brought to bear against the Crown. That is not occurring historically…"[50]

[130] And later, the cross-examination on this issue proceeded as follows:

"Q But you just told me that you agreed with what the Court of Appeal set out in paragraph 198, and it said:

We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement ….

A Land available for settlement in the sense of before a Crown grant would issue.

Q Yes.

A And making lands available for settlement, making it before a Crown grant would issue. But frequently, there were settlers going in, encroachment, deals being made directly with the chiefs, all kinds of activity, because settlers are disputatious; they were an unruly mob.

Q Yes.

A And it was the Crown's job to try and clean things up and come between Crown and First Nations.

Q Yes.

[50] Transcript, November 22, 2011, pp. 135-136.

> A And treaties were part of their -- part of the process by which they tried to mop things up, and then also accommodate the demand for settlement. So we're not talking about a nice, neat, ordered frontier; we're talking about something that's human, that's very messy, and full of highly acquisitive activity, by white settlers in particular."[51]

[131] In my view, this evidence does not support the proposition by RRDC's counsel that Dr. McHugh was either inconsistent or avoiding the principle of Indian surrender prior to settlement.

(iii) The "Equitable Principles"

[132] The final reason RRDC urges me to find that Dr. McHugh's evidence is not independent or impartial is that he avoided admitting that the "equitable principles" referred to in the relevant provision of the *1870 Order* were those emanating from the Royal Proclamation of 1763.

> "Q …[Y]ou've agreed with me that the principles were one of a public meeting to obtain the consent for the purchase of the lands –
>
> A No, I haven't agreed with that, that that's what equitable principles meant at all, because what you are saying, that equitable principles are synonymous with the Royal Proclamation or a particular type or form of treaty-making. Equitable principles, there was the practice and that was the usual procedure, but, again, you are suggesting that equitable principles supposes a uniform standard, procedure that had to be followed, an externally enforceable standard. That's not how it was being conceived. It was internally monitored and regulated by the Crown, but equitable principles did not mean there had to be a public meeting, that there had to be notice given, and that there had to be particular officers present. These were protocols and they were procedures that the Crown followed, in other jurisdictions as well, in exercise of its duty of protection, and they had a high ceremonialism which was in their manifestation of

[51] Transcript, November 22, 2011, pp. 137-138.

> sovereignty, not of justiciable requirements imposed against the Crown. That's not how they were conceived then."[52]

[133] There is a good deal of overlap between this point and the previous one RRDC raised ('surrender before settlement') going to Dr. McHugh's independence and impartiality. That said, I am simply unable to find as a fact that Dr. McHugh ultimately disagreed with counsel that the "equitable principles" in the relevant provision of the *1870 Order* were not those emanating from the Royal Proclamation. While I try to avoid lengthy quotations from evidence in a judgment, it seems necessary on this point to capture the full flavour of the cross-examination about the equitable principles. What follows should also be read together with the above quotes touching on the Royal Proclamation:

> "Q …The question I'm trying -- or the questions that I'm asking you are to get your evidence on what the equitable principles, which have uniformly governed the British Crown, are. Now, you say there wasn't equitable principles, not any uniformity, but the use the -- they refer to equitable principals which uniformly governed the British Crown.
>
> A That's right. Fair dealing, and they would -- they would summon the chiefs and they would have these meetings, there would be the high ritualism. But it wasn't said in terms of a code of procedure, which is -- which is the suggestion how I'm reading your question.
>
> Q Well, no, because –
>
> A And equitable principles was not regarded as a code required meticulously to be followed, that if it was not or if it was transgressed or somehow breached, that the Crown could be impugned in its own courts for its management of that particular transaction.
>
> Q I'm –
>
> A That is -- that is how I'm reading the questions that you're giving me –

[52] Transcript, November 22, 2011, p. 138.

Q But I keep –

A -- and I'm suggesting that that is an unhistorical –

Q -- I keep saying to you I'm not asking you that.

A -- an unhistorical approach to how the Crown regarded its position.

Q I'm not asking you, Dr. McHugh, please take me at my word, I'm not asking you about your views on the enforceability of these provisions right now. I'm asking you for your views as to the meaning of the words used, and -- and I don't understand why you would disagree with me that the equitable principles which have uniformly governed the British Crown are the principles expressed in the proclamation, and the –

A Usually, yes –

Q Eh?

A -- but they -- I'm not -- I'm not disagreeing with that at all. They were most usually -- the procedures almost invariably -- the procedures set out in the Royal Proclamation.

Q You could agree with me, because what we're trying to interpret here is what the Canadian Houses of Parliament had in mind when they said that the settlement would be in conformity with the equitable principles which uniformly govern the British Crown, and I don't dispute your view. In fact, there is authority to support it, that the Proclamation doesn't provide a lot of detail, makes some large statements, but doesn't provide a whole lot in the way of detail as to how they're to be implemented.

A Well, counsel, you're jumping there from a legal conclusion and a historical one.

Q Okay, but would you agree with me that the commons, the house of -- the Canadian House of Commons and the Senate had in mind the principles, the core principles in the Royal Proclamation when they said that the settlement would be in conformity with the equitable principles which have uniformly governed the British Crown in its dealing with the –

A There was an expectation that the procedures in

Upper Canada, which were generally in line with the Royal Proclamation, will be continued, of course, here, yeah.

Q Yeah, okay. So that this could be construed as a reference, the equitable principles are the principles in the Royal Proclamation.

A Now, that is -- that is a another leap. That is a another leap, because the Crown has this internally monitored discretion…

…

Q …What I want to know, as your view as a legal historian, as to what equitable principles did the Canadian Senate and House of Commons have in mind when they said that the settlement would be in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the Aborigines, and in -- what -- did they have, when they were talking about the equitable principles which uniformly govern the Crown in its dealings with the Aborigines, did they have in mind the principles in the Royal Proclamation of 1763?

A They would have had in mind fair dealing for transactions for cession, such as those in the Royal Proclamation But they wouldn't have regarded -- the status of the Royal Proclamation is problematic, but –

Q I'm not asking you about the status of the Royal Proclamation.

A Okay.

Q I appreciate your views on that, it's -- I'm trying to, because -- I'm -- if I -- I don't understand what other equitable principles that uniformly govern the British Crown. Given the stature of the proclamation in those days, and given that it's seemed to have been an effective policy for the Crown –

A And it continued to be because there was a continuance of treaty-making. So it continued to that extent but the suggestion that I'm reading from your questions, counsel, is that the Crown's hands were tied to treaty-making, that it had to make treaties. And that's not how that particular clause would have been regarded or operational -- regarded as

operationalizing at that time, though treaty-making was the invariable practice and it followed, there was a high executive discretion, you've got to remember that, self-monitoring…

…

Q But, again, my question is, is does their conduct -- the very people that drafted this undertaking said, "We will consider settling in conformity with the equitable principles that uniformly govern the British Crown." When they got the lands on those terms and conditions, they immediately embarked upon the post-confederation treaty process, and does that -- can you agree with me that that supports the view that the equitable principles that they're talking about here are the principles expressed in the Royal Proclamation?

A I agree with most of that, but there is a suggestion in there that they embarked upon the treaty-making because they -- because they'd given -- they'd given the promise that they would make treaties.

Q No, they said that they would –

A That [they] would settle the claims in conformity with. What they'd accepted and what they'd asked for and obtained was the jurisdictional competence, and they have given an assurance they would follow the previous pattern, and it was an assurance to the Imperial Government, which historically had had a strong and retained control of that.

Q Mm-hmm.

A So the [assurance], but I'm resisting your suggestion that there was a feeling that they were making the treaties because of the stipulation, a stipulation given, that the treaties were caused by the -- or directly felt as compelled by the [1870] order, because they weren't; they were regarded as the continuation of a -- the continuance of a protective duty, the locus transferred from London to Canada.

Q I recognize I haven't had much success up to this point, but I'll say once again, I'm not talking about the enforceability of the provisions. I'm trying to establish whether you agree with me that the equitable principles that uniformly govern the British Crown, that the Canadian Parliament had in mind was the principles expressed in the Royal Proclamation, and that their subsequent embarkation, immediately, on

> the post-confederation treaty process supports that interpretation of these words. I'm not asking you about their enforceability.
>
> A Well, as I said, I agree with -- to the extent, with a caveat, which you said is not needed to be there, on enforceability. It was expected, and they did continue the treaty-making, so I would say yes."[53] (my emphasis)

[134] My interpretation of this evidence is that Dr. McHugh was ultimately prepared to agree that the equitable principles which the Canadian Parliament had in mind when it drafted the relevant provision in the *1867 Address* were those principles expressed in the Royal Proclamation. However, he repeatedly attempted to qualify that answer by opining that the equitable principles should not be viewed as "a uniform…externally enforceable standard" or a "code of procedure", but rather that they reflected a pattern of "fair dealing for transactions for cession" of Indian lands.

[135] Therefore, I am unable to agree with the suggestion by RRDC's counsel that Dr. McHugh avoided admitting that the equitable principles were those emanating from the Royal Proclamation.

d) Conclusion on the Interpretation of the Relevant Provision

[136] RRDC's statutory interpretation argument focuses on the textual 'simple reading' or 'ordinary meaning' of the words in the relevant provision and the legislative context of the *1870 Order*. However, RRDC has virtually ignored the legislative intent dimension of statutory interpretation that requires this Court to consider the intention of the Canadian Parliament when the *1867 Address* was drafted and the intention of the Imperial Parliament when the *1870 Order* was enacted. This, in my respectful view, is fatal to RRDC's argument.

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[53] Transcript of November 22 2011, pp. 138-141.

[137] Further, RRDC's statutory interpretation argument hinges largely on the words "shall have effect" in s. 146 of the *BNA Act*. The argument is that these words must mean that the relevant provision, being one of the "terms and conditions" of the *1867 Address*, can only be understood as being imbued with legal force and effect. However, Dr. McHugh clarified, in answering one of my questions during his cross-examination, that the words "shall have effect" should be understood as applying to the assumption by Canada of the Imperial Crown's jurisdiction over Aboriginal affairs, including the aspect of executive discretion, and not as an acceptance of a duty, the performance of which would be subject to court oversight.[54]

[138] I generally accept Dr. McHugh's expert opinion evidence as probative of the intention of Parliament at the time the relevant provision in the *1870 Order* was drafted. I also concur with the Northwest Territories Court of Appeal in *Euchner*, cited above, that the*1867 Address* and the *1870 Order* contain "extremely loose and general language" and that this accurately describes the language of the relevant provision. I further agree with what the Court of Appeal said at paras. 76 and 77 of that decision, although in *obiter dicta*:

> "We have concluded that it is the second part of the *1867 Address* that outlines the terms and conditions of the land transfer. Parliament's obligations, if any, relate only to its agreeing to govern and legislate for the territories, protect legal rights through courts of competent jurisdiction and settle Aboriginal land claims. Indeed, it must be understood that the "conditions" themselves are expressed in general terms only and required specific enactments of Parliament to be lawful: s. 91 of the *Constitution Act, 1867*. In other words, even if some parts of either or both the *1870 Order* and the *1867 Address* could be construed as terms and conditions obliging Parliament to enact legislation, the precise content of that legislation would still fall wholly within Parliament's

[54] Transcript, November 22, 2011, pp. 126-127.

> discretion, there being no intention to constrain the exercise of that legislative authority.
>
> In fact, the *1870 Order* confers on Parliament "full power and authority to legislate for the future welfare and good government of the said Territory". Parliament's power to legislate is not expressed to be subject to any terms and conditions. At the time of Confederation and for many decades thereafter, the concept of justiciability in our Parliamentary democracy had not yet evolved. Within its legislative authority, Parliament was supreme and the notion that the courts could intervene and question the merits of legislation passed by Parliament within its legislative competency was not part of Canada's legal landscape." (my emphasis)

[139] Having generally accepted Dr. McHugh's expert opinion evidence that the relevant provision was not intended to have justiciable legal force and effect "at that time", I am left struggling to discern any reason how or why the relevant provision could have subsequently acquired legal force and effect in order to be enforceable in this Court.

[140] Dr. McHugh allowed that, notwithstanding his opinion as an historian that the relevant provision was not intended to be justiciable at the time of its inclusion in the *1870 Order*, this Court would not be precluded from finding that it has legal force and effect today. I specifically asked Dr. McHugh whether he knew of any examples in Canada or elsewhere where a provision has been found by a court not to have legal effect at the time of its enactment, but because of the evolution of law over time, it took on legal effect. Dr. McHugh answered with the example of *Liversidge v. Anderson* [1942] AC 20, as an example of the dynamics of interpretation, however I regret to say that I did not find the answer to be particularly helpful.

[141] The doctrine of progressive interpretation, referred to above, seems to have been primarily employed in the context of "heads of powers" cases, with a view to ensuring that

words which were drafted in 1867 may be imbued with fresh meaning in order to address modern problems. When the legality or justiciability of a specific constitutional provision is at issue, I am unable to see how the progressive interpretation doctrine could or would apply. Certainly, RRDC offered no argument in that regard.

[142] The "honour of the Crown" was referred to briefly by RRDC's counsel in its statutory interpretation argument. However, the argument was not developed beyond submitting that "the honour of the Crown is involved in the interpretation of the *1870 Order*".

[143] In the ’05 Action, the honour of the Crown is pled in relation to an allegation that Canada’s conduct as a fiduciary in relation to RRDC has often failed to uphold this honour. Similarly, in the ’06 Action, the concept is raised in the context of allegations about Canada's conduct during the negotiations towards a land claims settlement.

[144] That said, the principle of the honour of the Crown is now so firmly entrenched in Aboriginal law that it presumably should be considered in every dispute between the Crown and Aboriginal peoples, and enforced where appropriate. I say that because of the nature of the language used by the Supreme Court of Canada about this principle.

[145] In *R .v. Badger*, [1996] 1 S.C.R. 771, Cory J., at para. 41, stated:

> "… [T]he honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned…" (my emphasis)

[146] In *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, McLachlan C.J., speaking for the Court, referred to this passage at para.16 and

reaffirmed its importance by stating, "The honour of the Crown is always at stake in its dealings with Aboriginal peoples… It is not a mere incantation, but rather a core precept that finds its application in concrete practices." McLachlan C.J. then continued, "The honour of the Crown gives rise to different duties in different circumstances…" (para.18), and later, "The honour of the Crown also infuses the processes of treaty making and treaty interpretation…"(para.19). Finally, at para.20, she stated: "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims… Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfill its promises"… This promise is realized and sovereignty claims reconciled through the process of honourable negotiation…".

[147] Precisely how the honour of the Crown impacts upon the analysis of whether the relevant provision was intended to be and is currently justiciable is not entirely clear. Certainly, one must begin with a generous and liberal interpretation of the language used: *R v. Sparrow*, cited above, at p.18. Further, one must take a purposive approach to the interpretation of a constitutional document such as the *1867 Address.* In *R.v, Van der Peet*, [1996] 2 S.C.R. 507, Chief Justice Lamer stated, at paragraph 21:

> "…In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers": Hunter, supra, at p. 155…"

[148] At the same time, I am cautioned by the more recent case of *R. v. Blais,* cited above at paras. 15-17, that I am "not free to invent new obligations foreign to the original purpose" of the relevant provision, that I must not "overshoot" that original purpose, and that I must place the relevant provision in its "proper linguistic, philosophic and historical context". *Blais* also warns against confusing generous rules of interpretation with "a vague sense of after-the-fact largess".

[149] Dr. McHugh's evidence, as a legal historian, was not significantly challenged on cross-examination. The contrary academic authorities relied upon by RRDC, who opined that the relevant provision created a justiciable constitutional obligation upon Canada, appear to have reached their conclusions through the lens of a contemporary legal analysis as lawyers. As Dr. McHugh explained in his testimony and in his report, the lawyer and the historian use the past for different ends. The lawyer uses the past to solve pressing legal problems in the present, whereas the historian is focused on understanding how people solved their problems in the past. This is an important distinction, and it is best explained by Dr. McHugh in his text, *Aboriginal Title, The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011), at p. 274:

> "The engagement between law and history occurs in two senses. There is, first of all, the role and presence of law in the past – what is normally regarded, at least in academic circles, as legal history. This involves the disinterested retrieval and recounting of a past that is specifically or, rather, primarily legal in character. Basically, it is an inquiry into how law has operated in the past. The other form entails the use of the past and contemporary legal fora, such as courts and statutory or extra-statutory land claims processes, in which those past events are presented for contemporary resolution. This will usually be a generalized past though one that may include legal dimensions looking at the historical use and role

> of law in the processes of dispossession and marginalization of the tribal claimants. Basically, it is concerned with the role of the past in today's law. If the main interest of the first, or what might be called 'disinterested legal history', is with the past for its own sake, the second is concerned with the present day addressing and redressing of historical processes in which law is often implicated, if not inculpated. In that these contemporary claims-resolution processes often look at the historical role of law, it can be said that there is overlap between them. Aboriginal claims, made as they are in a pressing legal present, necessarily comprise and reprise elements of the legal past, but, as I will explain, one has to be very cautious about characterizing the narratives these processes produce as disinterested legal history. The reconstruction of the legal past and contemporary claims-settlement processes involves groups with distinct interest in the eventual outcome and no necessary interest in the past for its own sake."[55]

[150] In 1870, the notion of Crown prerogative and executive grace, which Dr. McHugh said imbued the nature of Crown-Aboriginal relations at that time, also involved the honour of the Crown. Dr. McHugh opined, and I accept, that the honour of the Crown would not have been considered a justiciable principle at that time and in the specific context of the *1870 Order.* Today, the principle of the honour of the Crown is clearly justiciable. Is the contemporary principle capable of breathing life into the relevant provision in such a way as to render it currently justiciable and enforceable in this Court? Perhaps, but the argument, if there is one, was not pursued by RRDC.

[151] In the result, I find the evidence of legislative intent in this case to be cogent and compelling and I assign it significant weight. Accordingly, I answer Question #1 in the negative.

e) The Requirement to Negotiate Treaties

[55] Exhibit 2A, Vol.1,Tab 4.

[152] Although my conclusions above are sufficient to dispose of the first question, I will now address an argument Canada raised which, if correct, would also lead to the result that the relevant provision is not justiciable. Canada argued that the relevant provision does not create a positive obligation on the Crown to settle claims for compensation of Aboriginal people, including RRDC:

> "…at a particular time, in a particular manner, or on certain terms. The fact that the Crown chose to enter into treaties in some parts of Canada after Confederation does not mean that the Crown was required to do so everywhere or anywhere. Whether or at what time to enter into treaty is a matter of Crown prerogative. Consequently, the Court cannot order the Crown, on the basis of the 1870 Order or any other basis to enter into a treaty with Aboriginal people or otherwise "settle" with them."[56]

[153] In *Perry v. Ontario*, [1998] 2 C.N.L.R. 79, the Ontario Court of Appeal held that, in an Aboriginal law context, there was no legal duty upon Canada to negotiate treaties with Aboriginal communities. At paras. 84, 87 and 88 (Q.L.), the court stated:

> "…Although the courts have always encouraged litigants to settle their differences out of court, there is nothing in statute or case law that requires the parties to these proceedings to do so. What case law there is negates such an obligation…
>
> …
>
> We agree that, while practicality may dictate that the parties negotiate, the Constitution does not. Our task is not to determine whether Ontario would be wise or kind to negotiate, but whether it is constitutionally required to do so…
>
> …
>
> There can be no question that the government must act in a fiduciary capacity with respect to Aboriginal people. However, the scope of this fiduciary obligation, as it has so far been developed, does not include a legal duty to negotiate with Aboriginal communities." (my emphasis)

[56] Canada's Outline, p. 2.

[154] In his text, *Native Law* (Toronto: Carswell: 1994), Jack Woodward, one of Canada's leading practitioners of Aboriginal law, succinctly wrote at page 411, "The Crown is not obliged to enter into treaty negotiations with a First Nation."

[155] Despite the persuasiveness of these authorities, RRDC's counsel submitted that these and others relied on by Canada all pre-date the *Haida Nation* case, which imposed a requirement to negotiate treaties. Counsel points to two passages by McLachlin C.J. in *Haida Nation*, at paras. 16 and 20 as support for that proposition.

> "[16] The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> …
>
> [20] Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate." (my emphasis)

[156] Despite RRDC's proposition, if the Chief Justice of Canada intended to change the law in such a radical fashion, I believe she would have said so explicitly. I interpret the verb "requires" in the first sentence of para. 20 above as referring to the 'just' resolution of claims, but not that the Crown is under a 'requirement' to negotiate *per se*. I find support for this interpretation by going to the passages in *Sparrow* cited by McLachlin C.J. in that same paragraph. There, the Court was quoting from Professor Lyon in "An Essay on Constitutional Interpretation" (1988), as follows:

> "…Section 35 calls for a just settlement for Aboriginal peoples…It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown." (my emphasis)

[157] Accordingly, I agree with Canada that the relevant provision in the *1870 Order* cannot create an obligation to negotiate treaties and that Canada retains the discretion to decide if, when, and how to negotiate, as a matter of Crown prerogative.

QUESTION #2 – FIDUCIARY OBLIGATIONS?

[158] The second question posed by the parties is:

> "If the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23rd, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement", gave rise to obligations capable of being enforced by this Court, are those enforceable obligations of a fiduciary nature?"

[159] Since my answer to the first question above is in the negative, technically there is no need to answer the second question, because there are no "enforceable obligations" which could be of a fiduciary nature. However, in the event that I am wrong in my conclusions regarding the first question, and in anticipation that this matter will be appealed, I will attempt to provide an answer to Question #2 as well.

1. *Guerin v. Canada*

[160] *Guerin*, cited above, is one of the seminal cases from the Supreme Court of Canada on the fiduciary relationship between the Crown and Aboriginal peoples. RRDC relies heavily on this case in arguing Question #2. In *Guerin*, the Musqueam Indian Band, located in Greater Vancouver, surrendered 162 acres of reserve land to the Crown on the understanding that the Crown would lease it to an exclusive golf club on the Band's behalf on terms previously agreed to by the Band. The Crown leased the land to the golf club on less favourable terms. The Band sued the Crown for, among other things, breach of fiduciary duty, and the Supreme Court held that a fiduciary duty existed between the Band and the Crown because the Band was prohibited by statute from directly transferring its interest in the reserve land to a third party. Any sale or lease of the reserve land could only be carried out after a surrender had taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility in the Royal Proclamation of 1763 and it is currently recognized in the surrender provisions of the *Indian Act*. The surrender requirement and the responsibility that it entails are the source of a distinct fiduciary obligation owed by the Crown to the Indians. RRDC's counsel points to several passages in *Guerin* in support of his argument that the enforceable obligations arising under the relevant provision in the *1870 Order* are of a fiduciary nature. For example, Dickson J. (as he then was), speaking for the majority, said this at paras. 83 and 84 (Q.L.):

> "In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the

> Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of Aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except under surrender to the Crown."

[161] Further, at para. 90, Dickson J. stated:

> "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized Aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, at pp. 410-11 (the *Star Chrome* case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation."

[162] At paras. 98 through 100, Dickson J. spoke of the history of the requirement of a "surrender" before Indian land could be alienated, beginning with the Royal Proclamation, and later codified in s. 18(1) of the *Indian Act*. He described the "historic responsibility" that the Crown has taken in assuming discretion to act on behalf of the Indians and protect their interests in transactions with third parties. At paras. 101 and 102 he stated:

> "This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."

[163] RRDC's counsel argues that the relevant provision in the *1870 Order* constitutes a unilateral undertaking by the Crown, which meets the test in *Guerin*, affecting "the Indian tribes whose interests and well-being [were] involved in the transfer" of the two territories.[57] The government assumed an obligation to consider and settle the claims of those Indian tribes "to compensation for lands required for purposes of settlement in conformity with the equitable principles" that govern the British Crown in its dealings with Aboriginal peoples. That obligation, says counsel, carries with it a discretionary power, namely the power to determine when the lands at issue are "required for purposes of settlement". Accordingly, concludes RRDC's counsel, the Canadian government is a fiduciary to the Indian tribes in question.

[164] Notwithstanding Dickson J.'s comment that the Indian interest in reserve land is the same as that in land with unrecognized Aboriginal title, it is clear that the ratio of *Guerin* turned on the Crown's obligations arising from the surrender. It also appears that

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[57] *1870 Order*, Schedule B, *Second Address*, p. 12.

Dickson J.'s reference to the "Indian interest in the land" was related to his comment in the immediately preceding paragraph that the Indians interest in their land "is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision." I do not understand Dickson J. to be suggesting that a fiduciary obligation can attach to lands where the claim to Aboriginal title remains unproven. I find support for this interpretation in a number of subsequent cases from the Supreme Court of Canada and other courts, through which the principles of the law of fiduciary duty have been further refined.

2. Limits to the Duty

[165] In *Wewaykum Indian Band v. Canada*, 2002 SCC 79, two Bands each claimed interests in the other's reserve lands created in the late 1800s and early 1900s. The Bands alleged that the Crown breached its fiduciary duty when allocating and recording the reserves. The Supreme Court of Canada held the Crown had a fiduciary duty in the creation of the two reserves, but that it had not breached that duty on the facts of the case.

[166] At para. 80, Binnie J. spoke of the *sui generis* relationship between the Crown and Aboriginal peoples and the vulnerability of the latter to the risks of government misconduct or ineptitude. He also observed that the hallmark of a fiduciary relationship is that the relative legal positions of the parties are such that one is at the mercy of the other's discretion. At para. 81 he wrote:

> "But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with

> land, which has generally played a central role in Aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with Aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*." (my emphasis)

[167] Binnie J. continued with this theme of limitation to fiduciary obligations at para. 83:

> "…I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and Aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation." (my emphasis)

3. The Two-Part Test

[168] At para. 85 of *Wewaykum*, Binnie J. seems to suggest a two-part test for the creation of a fiduciary obligation:

> "I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, **and** the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below." (my emphasis)

[169] This two-pronged requirement for a fiduciary obligation was repeated in *Haida Nation*, at para. 18:

> "The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245,

> 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > ..."fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests." (my emphasis)

(a) Specific Aboriginal Interest

[170] In *Haida Nation*, the unproven Aboriginal rights and title were insufficiently specific to give rise to a fiduciary duty. In both *Wewaykum* and *Guerin*, very specific Aboriginal interests, akin to private law interests, were identified.

[171] In *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, Vickers J. came to a conclusion similar to that in *Haida Nation* on the question of a fiduciary duty. At para. 1305, he stated:

> "In the pre-proof stage, where Aboriginal rights and title have not yet been proven, the "Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title": *Haida Nation* at para. 18."

[172] In *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447, Satanove J. dealt with an action commenced by members of the Lax Kw'alaams Indian Band for declarations respecting their claim to a right to fish on a commercial scale in a coastal area of north-west British Columbia. On the question of fiduciary duty, Satanove J. concluded, at para. 525:

> "In the case at bar, I have already found as a fact that firstly, the plaintiffs have not established an Aboriginal right to harvest and sell Fish Resources and Products on a commercial scale. Therefore, there is no cognizable Aboriginal interest to which a *Wewaykum* type of fiduciary duty can attach…" (my emphasis)

[173] An appeal by the Lax Kw'alaams Band to the British Columbia Court of Appeal was dismissed (2009 BCCA 593). At para. 77, the Court of Appeal stated:

> "…Once a claim to an existing Aboriginal right protected by s. 35(1) of the *Constitution Act* has failed, it is not open to the Aboriginal group to assert a fiduciary duty on the part of the Crown to found the same right, nor could it be inconsistent with the honour of the Crown not to do so. Whether exclusive or in common with others, the Lax Kw'alaams' assertion of a constitutionally-protected right to fish commercially failed. There is thus no cognizable right on the part of the Lax Kw'alaams nor anything approaching a "private law duty" owed to them by the Crown which could give rise in this case to rights that are different from the rights of other Canadians. Nor are we concerned in this case with the assumption of a "high degree of discretionary control" assumed by the Crown over the lives of the Lax Kw'alaams, as referred to in *Wewaykum, supra,* para. 79." (my emphasis)

[174] A further appeal to the Supreme Court of Canada was also dismissed (2011 SCC 56). At para. 72, the Court commented on the absence of a specific factual basis for the creation of a fiduciary duty:

> "Here there is no treaty. The trial judge held there was no promise. The Crown, she found, never intended in the process of allocating reserves to grant the Lax Kw'alaams *preferential* access to the fishery. They were to be treated in the same manner as other fishers. She found that this intention was made clear to the Lax Kw'alaams and that the Crown never made any undertaking by word or conduct to the contrary (paras. 515 and 517). The Lax Kw'alaams' arguments based on fiduciary duties or the honour of the Crown necessarily fail in the absence of any substratum of relevant facts on which to base them." (italics already added, my underlining)

[175] Further, the relevant provision must be read in context. The *1867 Address* contains a good deal of language connoting its public law objectives. For example, the second paragraph states:

> "That it would promote the prosperity of the Canadian people, and conduce to the advantage of the whole Empire, if the Dominion of Canada…were extended westward…"

The *1867 Address* then continues in the fourth paragraph:

> "That the welfare of a sparse and widely scattered population of British subjects of European origin, already inhabiting these remote and unorganized territories, would be materially enhanced by the formation therein of political institutions..."

And in the sixth and seventh paragraphs:

> "That we do therefore most humbly pray that Your Majesty will be graciously pleased…to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good Government; and we most humbly beg to express to Your Majesty that we are willing to assume the duties and obligations of Government and legislation as regards to these territories.
>
> That in the effect of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of Courts of competent jurisidiction…"

The next paragraph of the *1867 Address* is, of course, the relevant provision.

[176] In *Guerin*, at para. 104, it was noted that fiduciary duties generally arise only with regard to obligations originating in a private law context, and that public law duties, which involve an exercise in discretion, do not typically give rise to a fiduciary relationship.

[177] This theme was again dealt with by the Supreme Court in *Wewaykum*, at para. 96, where the Court stated that the Crown can be no ordinary fiduciary, as "it wears many hats and represents many interests, some of which cannot help but be conflicting."

[178] More recently, in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, McLachlin C.J., delivering the judgment of the Court, addressed the situation of the Crown acting as a fiduciary at para. 44:

> "Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178." (my emphasis)

[179] Later in *Elder Advocates*, McLachlin C.J. noted that the government, "as a general rule, must act in the interest of all citizens" (para. 49) and that, in order to create a fiduciary obligation, the affected interest of an individual "must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement" (emphasis already added, at para. 51).

[180] Thus, even assuming the relevant provision in the *1870 Order* created enforceable obligations, in order for this Court to find that those obligations are of a fiduciary nature, RRDC bears the onus of establishing that, at the time of the undertaking, there was a

specific, cognizable Indian interest in the claimed Territory,[58] which was known to the Canadian government, and was in the nature of a private law interest. RRDC has failed to meet this onus.[59]

b) Discretionary Control

[181] In the alternative, if I am wrong in holding that RRDC has failed to establish on a balance of probabilities a cognizable Indian interest arising from the relevant provision, then I would nevertheless find that RRDC has failed to establish an undertaking by the Canadian government to forsake the interests of other groups and individuals and to act in RRDC's best interests when exercising discretionary control over the Territory. It is evident from the wording of the *1867 Address* that the Canadian government was acting in the best interests of the Canadian public at large in seeking to annex Rupert's Land and the North-western Territory. No Aboriginal peoples participated in the negotiations preceding the annexation. Further, there is no evidence that the Canadian government was relinquishing its interests in favour of RRDC's in seeking the annexation, which *Elder Advocates* holds is an "essential" component of a fiduciary undertaking (see para. 178 above). Rather, it seems clear from the context of the *1867 Address* that the Canadian government did not intend to undertake to act on behalf of, and in the best interests of, any particular group, including RRDC.

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[58] Fresh Amended Writ of Summons, para. 10.

[59] Nor has RRDC proven that it holds Aboriginal rights or title to the Territory. RRDC's counsel submitted that Canada admitted, at para. 56 of its Reply to Notice to Admit, that RRDC has Aboriginal title. The alleged admission is as follows: "...in the Government of Canada's comprehensive land claims policy published in 1986 under the authority of the [defendant Crown's] Minister of Indian Affairs, it was confirmed that the basis for the Government of Canada's comprehensive land claims policy was the fulfillment of the treaty process through the conclusion of land claim agreements with those Aboriginal peoples of Canada that continue to use and occupy traditional lands and whose Aboriginal title has not been dealt with by treaty or superseded by law." Thus, taken in context, RRDC's submission is simply not credible. If RRDC believes that it has proven it has Aboriginal title to its claimed Territory, then there would be little need for the within Actions.

[182] My conclusions in this regard are supported by the comments of the Yukon Territory Court of Appeal (as it then was) in *Penikett v. Canada*, [1988] 2 W.W.R. 481, which is an authority binding up this Court.[60] In *Penikett*, the Yukon government challenged the *Meech Lake Accord* on the grounds that it had been excluded from the negotiations leading up to the *Accord*. One of the grounds for the challenge was that the Government of Canada breached a fiduciary obligation with respect to the residents of the Yukon Territory in agreeing to the *Accord* without their participation. Interestingly, the Yukon government relied upon the *1870 Order* as one of the sources of the alleged fiduciary obligation. At p. 499, the Court stated that:

> "The respondents [the Yukon government] can only succeed if they are owed a private duty law or public law duties which, different from the usual case, give rise to a fiduciary relationship."

[183] Later, at pp. 500-501, after addressing the submission of the Yukon government that the fiduciary obligation arose from the *1870 Order*, the Court of Appeal referred to the relevant language in the *1867 Address* and concluded:

> "The order adopted by its terms the 1867 Address of the Senate and House of Commons requesting the union of Rupert's Land and the North-Western Territory with Canada. The address, after requesting the union, went on to say:
>
> > …and to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to your Majesty that we are willing to assume the duties and obligations of government and legislation as regards those territories.
>
> The address continued to say that in the event of agreement to the transfer of the region that:

[60] This case is incorrectly cited in some case reports as a decision of the British Columbia Court of Appeal.

> …the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction.

> We think the matter leaves no room for doubt. The language of the *Address* can only be characterized as creating governmental obligations. There is a total lack of evidence of an intention on the part of the Federal Government to assume a fiduciary obligation." (my emphasis)

(The "governmental obligations" referred to are those related to the general governance of the new territories, and not any "justiciable obligations" relating to Aboriginal peoples in particular.)

4. Conclusion on Question #2

[184] If the relevant provision in the *1870 Order* gives rise to legally enforceable obligations, then those obligations are not of a fiduciary nature. Thus, I answer Question #2 in the negative.

COSTS

[185] Costs have not yet been spoken to. If the parties are unable to agree on the issue, they may return before me to make further submissions.

Gower J.