MEDIA BRIEFING NOTE
***Ross River Dena Council v. The Attorney General of Canada* (2012 YKSC 4)**

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This is a decision in the first phase of the trial of two actions commenced by Ross River Dena Council (RRDC). Specifics about these actions can be found in *Ross River Dena Council v. Canada (Attorney General)*, 2007 YKSC 65. At issue in this decision is the interpretation of a provision in a Schedule to the 1870 *Rupert's Land and North-western Territory Order (UK)* ("the *1870 Order"*), which states 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."

Throughout the judgment this is referred to as "the relevant provision".

Two questions were before the Court:

1) Were the terms and conditions referred to in the *1870 Order* 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? (In other words, is the relevant provision legally enforceable or "justiciable"?)

2) If the terms and conditions referred to in the *1870 Order* concerning "the claims of the Indian tribes to compensation for lands required for the purposes of settlement" gave rise to obligations capable of being enforced by this Court, are those enforceable obligations of a fiduciary nature? (In other words, does the relevant provision create fiduciary obligations for Canada?)

The Court answers both questions in the negative.

Background

The *1870 Order* brought Rupert's Land and the North-western Territory (which includes present-day Yukon) into the Dominion of Canada. While the Order came from the Imperial Parliament in the UK, it incorporates terms from an Address made by the newly-formed Canadian House of Commons and Senate.

The address known as the *1867 Address* contains the relevant provision, and it is Schedule A to the *1870 Order*. The *1870 Order,* including the *1867 Address*, can be found at www.justice.gc.ca/eng/pi/const/lawreg-loireg/p1t31.html.

The *1870 Order* is referenced in the Schedule to the *Constitution Act, 1982* and is part of the Constitution of Canada.

RRDC is part of the Kaska Nation, which is an Indian band within the meaning of the *Indian Act* and an 'Indian tribe' for the purposes of the *1870 Order* and *1867 Address.* RRDC claims Aboriginal rights and title within the land that was transferred to Canada by the *1870 Order*.

In this trial, the Crown called Dr. Paul G. McHugh as a witness to give an expert opinion on the historical context of the 1870 Order. He was specifically asked to comment on whether the relevant provision was intended to be legally enforceable at the time of its enactment and on the immediate impact, if any, that the *Order* would have had on the status and rights of Aboriginal peoples in the transferred territories (paras. 81, 83).

Question 1: Justiciable obligations?

RRDC's statutory interpretation arguments

The modern principle of statutory interpretation has three dimensions: 1) textual or ordinary meaning; 2) legislative intent; 3) compliance with established legal norms.

Courts take a flexible approach to constitutional interpretation in order to respond to changing social needs and public expectations. When constitutional documents that relate to Aboriginal people are being interpreted, courts prefer a generous and liberal interpretation and ambiguities should be resolved in favour of Aboriginal peoples. However, analysis must be anchored in the historical context of a provision.

RRDC made four arguments about how the relevant provision should be interpreted. These were:

i) a 'simple reading' or 'ordinary meaning' argument (paras. 27-35);
ii) a 'larger statutory scheme' argument (paras. 36-39);
iii) an argument about statutes dealing with the same or related subject-matter (paras.40-70); and
iv) an 'administrative interpretation' argument, specifically with respect to the post-*1870 Order* treaties (paras. 71-77).

The Court finds that each of the arguments neglects to take into account the historical context and the legislative intent behind the *1870 Order.* Because the modern principle of statutory interpretation requires a consideration of legislative

intent, which RRDC failed to address, none of its interpretation arguments were accepted (see also para. 136).

Canada's evidence of Parliamentary intention and historical context

Dr. McHugh's evidence and opinion is set out at paras. 84-107. He said that Crown negotiations with Aboriginal peoples in the Imperial and colonial eras were "undertaken as a matter of executive grace rather than from any legal imperative compelling treaty-making". The relations "engaged Crown beneficence and guardianship but they were never regarded as justiciable or enforceable by legal process" (para. 84). It was not until the 1970s that courts developed the common law doctrine of Aboriginal title, and it was at this point that collective land rights and associated Crown obligations became justiciable (para. 85).

A brief history of the Hudson's Bay Company (HBC) in Rupert's Land and the North-western Territory, and its ensuing role in the transfer of these territories is set out starting at para. 86. Prior to their transfer, Rupert's Land and the North-western Territory were under the purview of HBC pursuant to a licence granted by the Imperial Crown. In 1867, pursuant to s. 146 of the *British North America Act, 1867,* the newly formed Parliament of Canada delivered the address to the UK Parliament requesting transfer of the territories to the Dominion of Canada. Negotiations with the HBC ensued, successfully brokered by Earl Granville.

According to Dr. McHugh, the Granville negotiations focused mainly on Rupert's Land and the terms of surrender by the HBC. HBC wanted a 'clean exit' from any responsibilities it had vis-à-vis the Indian tribes (para. 97). Any duties assumed by the Canadian government in relation to Indians were couched in terms of a 'duty of protection' rather than a reservation of corporate or individual rights (paras. 97-100). There was no intention in the *1870 Order* to create a justiciable constraint on Canada with respect to the claims of the Indians and the duty to provide for and protect them. Clause 14 of the *1870 Order,* which indicates the Canadian government will dispose of claims of Indians to compensation for lands required for purposes of settlement, was aimed at the post-transfer rights and liabilities of HBC and not at creating legal obligations for the Dominion of Canada (para. 105). Canada was expected to act pursuant to a sense of high moral duty and responsibility, but did not assume a legal obligation. In this sense, the terms of the *1870 Order* were not intended to be justiciable.

RRDC challenged the expert evidence with academic articles supportive of its position (paras. 108-117) and by attempting to cast doubt on the impartiality or independence of Dr. McHugh (paras. 118-135). The Court rejects these challenges.

Conclusion on the interpretation of the relevant provision.

Dr. McHugh's expert opinion about the intention of Parliament at the time of the *1870 Order* is generally accepted by the Court. The *1870 Order* was not intended to have justiciable force and effect at the time of its drafting. The Court does not

see how it could have subsequently acquired legal force and effect (paras. 139-141, paras.147-151)

Requirement to negotiate treaties

Canada made an additional argument that the relevant provision could not create a positive obligation on the Crown to settle the claims of Aboriginal people, because whether and when to enter into a treaty is a matter of Crown discretion. The Court agrees and finds that the *1870 Order* did not and can not create an obligation to negotiate treaties (paras. 152-157).

Question 2: Fiduciary obligations?

Because the Court answers the first question in the negative, there is no legal obligation which could also be fiduciary in nature. However, the Court chooses to answer this question as well in anticipation of an appeal. The answer to this question is also 'no'.

A fiduciary relationship is one in which the relative legal positions of the parties is such that one party is at the mercy of the other's discretion. Where one party has an obligation to act for the benefit of another and that obligation carries a discretionary power, there is a fiduciary relationship.

While the Crown can stand as a fiduciary to Aboriginal peoples, the fiduciary duty does not exist at large. The creation of a fiduciary relationship depends (i) on the identification of a specific Aboriginal interest and (ii) on the Crown's undertaking of discretionary control in relation to that interest, which must be "private" in nature (paras. 168-169).

The Court finds that RRDC's asserted interest is not a specific, private law interest capable of creating a fiduciary obligation.

RRDC has also not established that the Canadian government undertook discretionary control of the territory for the benefit of RRDC. In annexing the territories, the government was acting in the best interests of the public at large, not in the interests of RRDC.