SUPREME COURT OF YUKON

MEDIA SUMMARY

***Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 58**
***Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 59**

This media summary does not form part of the Reasons for Judgment. It is prepared for the assistance of members of the media and the public. The judgment of the Court is the sole authoritative description of the decision of the Court and the reasons for that decision.

In these two companion actions brought against the Attorney General of Canada ("Canada"), Ross River Dena Council ("RRDC") seeks a number of declarations with respect to Crown conduct between 1870 and 2002.

In S.C. No. 05-A0043 ("the '05 Action") the Court is asked to consider the obligations imposed by the 1870 *Rupert's Land and North-Western Territory Order* ("the *1870 Order*") enacted by the British Privy Council.

In S.C. No. 06-A0092 ("the '06 Action") the Court is asked to consider the conduct of the parties in the context of the negotiations towards RRDC's Final and Self-Government Agreements.

Although the Actions are distinct, Canada's conduct throughout the land claims negotiation process that started in 1973 is relevant to whether the honour of the Crown has been upheld, which, in turn, is relevant to Canada's liability for an historic breach. Accordingly, in 2015, the decision in the '05 Action was suspended until the argument of the '06 Action was complete.

THE '05 ACTION

In this action, RRDC makes claims about Canada's conduct in relation to an area of approximately 35,380 km^2, which is located within the boundaries of two group traplines on RRDC's traditional territory.

This Action focuses on the meaning of a particular provision of the *1870 Order* with respect to that area, namely an undertaking that:

> [U]pon 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. ("the relevant provision")

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The *1870 Order* forms part of the Constitution of Canada. It was enacted by an Order-in-Council of the Imperial British Privy Council and sets out the terms under which the newly formed Dominion of Canada assumed control of Rupert's Land and the North-Western Territory. The geographical boundaries of the North-Western Territory include present-day Yukon.

The Court was asked to interpret the relevant provision and determine the obligations, if any, it imposes on Canada. The Court was also asked several specific questions about whether the provision should have given rise to a land freeze of the area in question, whether it conferred the character of Lands reserved for Indians under the Constitution on the area, and whether portions of the *Yukon Act* are of no force and effect because of it.

The Court concludes that the relevant provision, today, creates a constitutional obligation upon Canada to consider and settle RRDC's claim for compensation for lands required for purposes of settlement within the group traplines, and that this obligation was breached by Canada from at least 1969-1973.

Interpretation of the relevant provision

The Court applies the modern principle of statutory interpretation, as articulated by Professor Ruth Sullivan in *Sullivan on the Construction of Statutes*. The modern principle has three dimensions. The first is the grammatical and ordinary sense of the words, the second is the legislative intent of the statute, and the third is compliance with established legal norms. As well, provisions in constitutional documents must be given a large, liberal and progressive interpretation, and where a constitutional provision applies to Aboriginal peoples, it must be read with any doubt or ambiguity resolved in their favour. (paras. 24-40)

Ordinary meaning

The ordinary meaning of the relevant provision is that it creates a mandatory constitutional obligation on Canada to consider and settle the claims of Indian tribes, including the Kaska, to compensation for their lands required for the purposes of settlement. (paras. 41-53)

Legislative intent

The legislative intent behind the relevant provision was determined after considering evidence from two historical experts about the context in which was enacted.

Dr. Paul McHugh is a professor at the Faculty of Law at the University of Cambridge in England. He was called as a witness for Canada to describe 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 the time it was enacted. Dr. McHugh testified that, although the

Crown recognized the land rights of Indian tribes, recognition and enforcement of those rights, including through treaty negotiations, was a matter of Crown discretion and not because of any legal obligation. Indian land rights at that time were not considered enforceable in court, i.e. justiciable. In reaching his opinion, Dr. McHugh considered the language of the *1870 Order* and the process leading to its enactment, as documented in various pieces of correspondence between British and Canadian officials. (paras. 55-109).

Dr. Theodore Binnema is a professor in the History Department at the University of Northern British Columbia. He was called as a witness for Canada to give evidence about the history of Indian policy in Canada with a focus on the negotiations leading to the *1870 Order* and the relationship of the *Order* to the development of treaties. His evidence was that, despite the wording of the relevant provision, there were no equitable principles that had "uniformly" governed the relationship between the British Crown and Aboriginal peoples, and the practice of entering treaties was not uniform across within North America or Great Britain's colonies. In North America, the Royal Proclamation of 1763 set out standards by which land-transfer treaties were to be conducted, however there was no legal obligation to obtain Aboriginal title through land purchase. Nevertheless, after Confederation, the Canadian government continued a policy of entering into treaties with First Nations in most newly acquired territories. Dr. Binnema gave evidence that the relevant provision was "composed [in] such a way as to promise virtually nothing" and was intended to offer as little as possible in order to acquire as much as possible. With respect to the Yukon, the Canadian government had no intention of entering into a formal treaty with the Indians because the region did not seem likely to become agriculturally important or subject to significant and long-term resource extraction. Canada deemed it best to leave the First Nations people as subsistence hunters and trappers, subject to some minimal level of supervision by the Canadian government. In 1953, land was set aside for the Ross River Dena First Nation because of mining development in the region, but it was not made an official reserve (paras. 110-137).

The Court concludes that the historical evidence demonstrates that, in 1867-1870, neither the British Privy Council nor the Canadian Parliament would have intended that the relevant provision create a legally enforceable obligation. Rather, it was intended to be a general statement of assurance by Canada and a moral, but not a legal, obligation (paras. 138-140).

Compliance with established legal norms

Four legal norms are identified by the Court as being potentially determinative of whether the relevant provision imposes obligations on Canada: the honour of the Crown; the judicial preference for progressive interpretation of constitutional documents; the generous and liberal interpretation to be given to constitutional documents affecting Aboriginal peoples; and respect for minority rights as a foundational constitutional principle (paras. 141-154).

The "equitable principles"

Despite the evidence from Drs. McHugh and Binnema that the procedures and protocols emanating from the Royal Proclamation were not necessarily uniform or enforceable, there were "usual" practices and procedures that nearly invariably led to treaty making in "carefully regulated" circumstances.

As well, modern jurisprudence recognizes the Royal Proclamation as a "fundamental document upon which any just determination of original rights rests", and "the defining source of the principles governing the Crown in its dealings with the Aboriginal people of Canada".

The "equitable principles" referred to in the relevant provision of the *1870 Order* ought to be interpreted today as those principles emanating from the Royal Proclamation, and they specifically contemplate a duty to treat (paras. 155-166).

Conclusion

The ordinary meaning of the relevant provision is capable of creating a constitutional obligation on Canada to enter into treaty negotiations and suggests that the obligation continues today. In contrast, the historical evidence is relatively clear and compelling that the provision was meant to communicate a moral, but not legal, obligation. However, the established legal norms recognized today tip the balance in favour of the Court's conclusion that the relevant provision ought to be now interpreted as one giving rise to a legally binding constitutional obligation. The four norms identified are all culturally important, recognized, protected in law and widely shared (paras. 167-170).

The post-Confederation conduct of Canada with respect to treaty-making was applied inconsistently to the Yukon. Treaties should have been sought when Yukon lands were opened up for settlement. With respect to the lands in question, there are four points in time when resource development and exploitation became potential factors: the construction of the Canol pipeline (1942-1944); mining development leading to land being set aside for RRDC (1953); the construction of the Robert Campbell Highway (late 1960s-1971), and; the opening of the Faro mine by Cyprus Anvil Mining Corporation (1969). The constitutional obligation arising under the relevant provision would have been triggered no later than 1969 (paras. 171-183).

Remaining questions

Should the provision have given rise to a "land freeze"?

Canada was under no obligation to consider and settle RRDC's land claim at the time the territory was transferred into its control in 1870. Rather, Canada assumed responsibility for any claims that would arise during the course of settlement. Modern jurisprudence does not require a land freeze before land claims are settled. The Supreme Court of Canada has confirmed that the Crown can manage lands over which there is a claim to Aboriginal rights and/or title,

subject to the Crown's duty to consult and, if required, accommodate the asserted Aboriginal rights and interests (paras. 184-206).

Are the lands in the area "Lands reserved for the Indians"?

For lands to be so reserved, there must be a "very formal expression of the will of the sovereign" and there is no such expression within the *1870 Order.* There is no evidence that demonstrates an intention that all the lands within Rupert's Land and the North-Western Territory be reserved for the Indians (paras. 207-221).

Are ss. 19(1) and 45(1) of the *Yukon Act* of no force and effect?

RRDC argues that the provisions of the *Yukon Act* allowing for land and resource development are of no force and effect because of the relevant provision. The *Yukon Act* is subject to the Crown's constitutional obligations and its provisions are not necessarily inconsistent with any RRDC rights under the *1870 Order.* The territorial government must comply with the same duties owed by the federal government in its dealings with Aboriginal people, including the duty to consult and accommodate (paras. 222-236).

Declaratory relief

The following declarations were granted (para. 239):

a. that the commitment made by Canada in 1867 and accepted by Her Majesty in the *1870 Order,* to settle the claims of the Indian tribes of the North-Western Territory, including the claims of RRDC and other Kaska, "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with aborigines", is still in force today;

b. this commitment is part of the Constitution of Canada and binding on Canada;

b.i. this commitment engages the honour of the Crown and the honour of the Crown was not upheld by Canada in respect of this commitment over the period from at least 1969 to 1973;

b.ii Canada made a good faith attempt to consider and settle RRDC's land claim from 1973 to 2002*, and its efforts in that regard have upheld the honour of the Crown and have ameliorated its liability for the breach.
(*see the '06 Action)

THE '06 ACTION

In this action, RRDC claims that Canada breached its duty to negotiate RRDC's comprehensive land claim with due diligence and in good faith. RRDC seeks various declarations in this regard, as well as some incidental relief with respect to debts arising from money loaned by Canada for the treaty negotiations.

Within this decision, the Court gives a chronology of the land claims process as it involved RRDC and answers 18 discrete questions posed by counsel for RRDC. The Court concludes that RRDC failed to prove that Canada negotiated in bad faith during the modern-era negotiations with RRDC since 1973.

The Court finds that by providing for interim protection of parcels of RRDC land between 1974 and 2017, Canada took reasonable steps to protect RRDC's claimed Aboriginal title and interest in land (Issue #1, at paras.33-41; Issue #3, at para. 43).

The Court also finds that Canada honoured the various instruments and agreements it entered into in the course of treaty negotiation, including the Kaska Framework Agreement and the 1989 Agreement in Principle (Issue #4, at paras. 44-55).

It is consistent with the honour of the Crown for Canada to insist upon the Umbrella Final Agreement (UFA) as the only basis on which it will negotiate RRDC's claims to its traditional territory. This is so because RRDC was involved in the negotiations leading up to the adoption of the UFA as the template for Yukon First Nations' Final Agreements, primarily through the Council for Yukon Indians ("CYI") and its predecessor, the Yukon Native Brotherhood. It is reasonable for Canada to take the position that it would only negotiate with RRDC on the basis of the UFA, given that the UFA emerged through negotiations over several years in a Yukon-made, unique process and forms the basis of the 11 existing Final Agreements with Yukon First Nations (Issue #5, at paras. 56-73).

The UFA was validly ratified, even though the parties did not reach an agreement on the processes for ratification prior to the time when the UFA itself was ratified. Section 2.2.8 of the UFA required that the parties negotiate the ratification processes each would use and that the processes would be agreed to at the same time as the parties respectively sought to ratify the UFA. The ratification processes used by each of the three parties to the UFA were collectively authorized implicitly by the signing of the UFA (Issue #6, at paras. 74-148). Canada did not knowingly mislead the Court about the ratification process in this action. Although Canada filed affidavits setting out two specific dates at which a ratification agreement had supposedly been obtained, these affidavits were corrected as soon as Canada received further information in accordance with the Rules of Court (Issue #7, at paras.149-172).

Canada's conduct with respect to negotiating a Final Agreement with RRDC is consistent with the honour of the Crown. Canada did not abandon negotiations with RRDC towards a Final Agreement in 2002. The Court finds that, despite substantial efforts made by Canada and RRDC to conclude an agreement, the decision to stop negotiating in 2002 was mutual. As well, correspondence continued to be exchanged between Canada and RRDC between 2003 and

2007, and, in 2007, RRDC and Canada continued negotiations in the context of the British Columbia Treaty Commission process. Canada has also contacted RRDC, as recently as 2013, about negotiating a land governance regime on its lands set aside (Issue #8, at paras. 173-266).

The honour of the Crown was similarly upheld in Canada's conduct with respect to the devolution of administration and control of lands to the Yukon on April 1, 2003. Both RRDC and CYI (now CYFN) were consulted throughout the devolution discussions. The Yukon government has assumed the constitutional obligations formerly held by the federal Crown in exercising Crown power (Issue #9, at paras. 267-290).

Conclusion and relief

RRDC has failed to establish that Canada approached the negotiations towards RRDC's comprehensive land claim in a manner inconsistent with the honour of the Crown. The Court finds that Canada acted reasonably and fairly in the context of the negotiations. There was no duty on Canada to reach an agreement with RRDC.

Canada admits that it has a constitutional duty to negotiate RRDC's land claim in good faith. Based on this admission and its decision in the '05 Action, the Court grants a declaration that Canada has a constitutional duty to negotiate with due diligence and in good faith towards a settlement of RRDC's claims to compensation for lands within the Kaska traditional territory which have been or may be required for purposes of settlement. This does not mean that there is a duty to reach an agreement, as the concept of good faith negotiation does not go that far.

RRDC's relief with respect to debts due to Canada for land claim negotiation funding is denied as the issue was not argued. However, Canada's submissions indicate that Canada is not seeking to enforce their repayment at the present time.