SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v. The Attorney General of Canada*, 2015 YKSC 33

Date: 20150714
S.C. Nos.: 05-A0043
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh — Counsel for the Plaintiff
Suzanne M. Duncan — Counsel for the Defendant

RULING
(On Suspension of the '05 Action)

INTRODUCTION

[1] This is a procedural ruling following the continuation of the trial on Action 05-A0043 ("the '05 Action"). The trial is about the modern-day interpretation to be given to a provision in the *Rupert's Land and North-Western Territory Order* (reprinted in R.S.C. 1985, App.II. No.9) (the "*1870 Order*"), which is part of the Constitution of Canada. The *1870 Order* authorized the admission of Rupert's Land and the North-Western Territory into the new Dominion of Canada on July 15, 1870. The relevant provision states:

> … 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.

[2] The plaintiff, Ross River Dena Council ("RRDC") is a member and representative of the Kaska Nation. It asserts that the relevant provision constitutionally obliges Canada to consider and settle its land claim before opening up Kaska lands for purposes of settlement. The lands at issue are within a group trap line and a community trap line registered to RRDC. The community trap line is in and around the community of Ross River, Yukon, and is subsumed within the larger group trap line, which comprises slightly more than 7% of the Yukon.

[3] The defendant, the Attorney General of Canada ("Canada"), asks me to suspend my decision on the interpretation of the relevant provision in the *1870 Order* until the companion action to the '05 Action is tried, i.e. Action 06-A0092 ("the '06 Action"). The '06 Action seeks declarations and damages arising out of the alleged failure of Canada to negotiate with due diligence and in good faith to settle RRDC's claims over lands comprising approximately 23% of the Yukon (of which the lands claimed in the '05 Action form a part).

[4] The parties originally agreed in case management to an order that both actions would be tried together and that any evidence and rulings in one action would be applicable to the other.[1] They also agreed to sever the issue of liability from that of damages and to try liability first.[2]

---

[1] Order dated February 20, 2008.
[2] Order dated October 24, 2008.

[5] When this trial originally began in November 2011, both actions were being tried together. At that time, I was asked by counsel for the parties to answer two "threshold" questions, which they drafted, relating to the justiciability of the relevant provision and whether it gave rise to fiduciary obligations. I answered both questions in the negative. RRDC successfully appealed my answer to the justiciability question, and the Court of Appeal returned the litigation to this Court with a direction that the question posed was not appropriately severed from other issues in the litigation.

[6] RRDC's statement of claim at that time only tangentially touched on the issue of the honour of the Crown and it was not argued further by RRDC's counsel. However, following the appeal, RRDC amended its statement of claim seeking a declaration that the relevant provision engages the honour of the Crown and that the honour of the Crown has not been upheld by Canada. In particular, RRDC now pleads that the relevant provision:

> … is a solemn commitment that engaged to the honour of the Crown and, as such, it requires that the Crown: (i) takes a broad, purposive approach to the interpretation of the commitment; and (ii) acts diligently to fulfil[l] it.[3]

[7] In response to this change, Canada also amended its statement of defence, pleading that if the relevant provision does create a solemn obligation that engages the honour of the Crown:

> … then the Crown has acted honourably and met its obligation to fulfill it through its actions over the years and including but not limited to its actions in attempting to negotiate a comprehensive land claim and self-government agreement with the plaintiff and/or its representatives.

[3] This language reflects the conclusion on the honour of the Crown in *Manitoba Metis Federation Inc v. Canada (Attorney General)*, 2013 SCC 14, at para. 128.

[8] When the trial recommenced in September 2014, the parties agreed that only the ‘05 Action would be tried. I am informed that RRDC’s counsel indicated in writing to Canada’s counsel that he would not be pursuing the bad faith claim in the ‘06 Action “except to the extent that it is necessary to respond to the Crown”. The parties each closed their respective cases with respect to the evidence, however the trial had to be adjourned to allow counsel to finish their oral submissions. The adjournment was ultimately extended from September 2014 to March 2015, due to the intervening illness of RRDC’s counsel.

POSITIONS OF THE PARTIES

[9] In its written argument for the trial, Canada asserts that the Crown has acted honourably in its dealings with RRDC. In particular, Canada focuses on the fact that it engaged in comprehensive land claims negotiations from 1973 to 2002, firstly with the Council of Yukon Indians (“CYI”), then representing RRDC, and later directly with RRDC itself. Canada’s arguments on the negotiations process from 1973 to the present day are set out in 53 paragraphs of its written outline. In addition, numerous documents in evidence were footnoted in support of the arguments. Canada also argues that its involvement in the Federal/Territorial Lands Advisory Committee (“FTLAC”), the lands set aside (“LSA”) for the benefit of RRDC by federal cabinet directive, and land withdrawal orders are further examples of how it has attempted to uphold the honour of the Crown.

[10] RRDC declined to specifically respond to Canada’s arguments relating to the honour of the Crown in its written reply.

[11] The trial resumed on March 13, 2015, at which time RRDC’s counsel began making oral submissions about his client’s conduct during the negotiations, and

particularly the importance of their position that the Umbrella Final Agreement ("UFA") was never properly ratified. It is the UFA which formed the basis of the final land claim agreements between Canada, Yukon and 11 other Yukon First Nations between 1995 and 2006. RRDC's counsel concedes that the ratification question is a very important issue in the '06 Action.

[12] Canada's counsel objected to these submissions because the parties had agreed not to try the '06 Action at this stage. My concern, however, was that Canada had put forward a significant amount of argument and evidence to say that, from 1973 on, it had made a good faith effort to come to a settlement with RRDC, but was unable to do so through no fault of its own and therefore had complied with the honour of the Crown. I wanted to hear the counterpoint from RRDC. That led to some rather lengthy submissions about the various details surrounding the issue of the UFA ratification and other related matters. We then adjourned to allow Canada's counsel to make a sur-reply on another day.

[13] On May 8, 2015, RRDC's counsel filed a Notice of Application to reopen its case in order to introduce new evidence relating to whether the post-1973 negotiations were conducted in good faith.

[14] On May 15, 2015, Canada requested a case management conference to discuss the application to reopen. At that time, RRDC's counsel conceded that the issues he had raised during the continuation of the trial on March 13, 2015 "go to the heart" of the '06 Action, regarding the alleged bad faith negotiations by Canada. I expressed my concern about having to address the reasonableness of approximately 30 years of negotiations in the '05 Action in order to address whether the honour of the Crown has been upheld,

especially given that it is the ‘06 Action which more fully raises that question. Accordingly, at the close of that conference I asked counsel whether they would consider severing (in the sense of deciding later) the issue of whether the honour of the Crown has been upheld from the other issues raised in the ’05 Action. This case management conference was off the record, and I rely upon my notes of what was discussed.

[15] On May 22, 2015, I convened a further case management conference, this time on the record, so that the submissions could be applied to the trial. I indicated that I did not yet feel I had sufficient evidence to decide whether Canada is in breach of the honour of the Crown today, because the parties originally anticipated that much of that evidence would be raised when the ‘06 Action is tried. I therefore walked the parties through RRDC’s prayer for relief in its statement of claim and indicated the declarations which I felt I would be able to decide without having to determine whether Canada is currently in violation of the honour of the Crown. RRDC’s counsel generally agreed with my approach. He also formally indicated that he was abandoning the application to reopen RRDC’s case. Canada’s counsel said she would take my proposal under advisement and seek instructions.

[16] On May 26, 2015, I convened a further case management conference on the record, again so that the submissions could be applied to the trial. Canada’s counsel argued that I should heed the caution of the Court of Appeal in this case and that severing issues should be the exception rather than the rule. She further submitted that severing the issue of current compliance with the honour of the Crown would be unfair to Canada at this stage, because, although RRDC has had an opportunity to tender its evidence (in response to Canada’s evidence) on whether Canada has acted diligently in

seeking to fulfill any commitment that may arise from the relevant provision, RRDC by and large has chosen not to present such evidence. Canada's counsel also noted that RRDC abandoned its application to reopen its case in this regard.

[17] Canada's counsel further argued that it would be inappropriate for me to decide on the modern-day interpretation of the relevant provision separately from a consideration of whether there may be limitations to any obligation arising from it. Putting it another way, if RRDC has a right arising from the relevant provision and Canada has infringed that right, is that infringement justified? In order to answer this question, the evidence related to the '06 Action is engaged.

[18] On May 27, 2015, Canada's counsel wrote to the Court further to her submissions on May 26th. She submitted that if I decide either:

> (a) that there is insufficient evidence on the modern-day negotiations history to determine whether Canada met its duty of the honour of the Crown; or
>
> (b) that the allegations of bad faith negotiations to be tried in the '06 Action are inextricably linked with the evidence in the '05 Action;

then I should suspend my ruling on the interpretation of the *1870 Order* until the '06 Action is tried.

CASE LAW

[19] The case law relied upon by Canada starts with *Nguyen v. Bains*, 2001 BCSC 1130, where Martinson J. summarized the considerations when a court is deciding whether to try some issues before others:

> 11 Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:

> a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
>
> b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
>
> c. Severance is most appropriate when the trial is by judge alone.
>
> d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
>
> e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
>
> f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

[20] The Court of Appeal in its earlier decision in the present case quoted *Nguyen* with approval, and went on to say:

> 21 In general, the jurisprudence suggests a cautious approach to the severance of issues. Issues should only be severed where it appears that efficiencies will result from having one issue determined in advance of others. Cases in which severance of an issue is appropriate are the exception rather than the rule.
>
> 22 In order for an issue to be suitable for severance, it must be capable of being decided independently of other issues. An issue that is inextricably intertwined with others will not be suitable for separate determination (*Prevost v. Vetter*, 2002 BCCA 202). (my emphasis)[4]

[4] 2013 YKCA 6.

[21] In *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, Newbury J.A. noted the direction from the Supreme Court of Canada that Aboriginal rights are not absolute and cannot be defined separately from a consideration of whether any limitation of those rights can be justified:

> 18**.** …It is only in the last 20 years or so that a framework for the analysis of aboriginal claims has been established, case by case, by the Supreme Court of Canada. As Mr. Wruck argued, that analysis is a purposive one and is directed towards the "reconciliation" of aboriginal rights with Crown sovereignty over Canadian territory. In my view, **such rights cannot be properly defined separately from the limitation of those rights**. The latter are needed to refine and ultimately define the former: *R. v. Van der Peet* [1996] 2 S.C.R. 507, at paras. 30-1. As Cory J. stated in *R. v. Nikal,* [1996] 1 S.C.R. 1013 in connection with treaty rights:
>
> > It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. **Absolute freedom in the exercise of even a Charter or constitutionally guaranteed aboriginal right has never been accepted,** nor was it intended. Section 1 of the Canadian Charter of Rights and Freedoms is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:
> >
> > > ...Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is

> recognized in s. 1 of the Canadian Charter of Rights and Freedoms which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.
>
> [at 1057-8; emphasis added.]
>
> 19 Applying these comments to the case at bar, it is clear that any aboriginal "right to fish" that might be the subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. **The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.** (underlining in original, bolding added)

[22] Satanove J., in *Kwakiutl Nation v. Canada (Attorney General)*, 2006 BCSC 1368, was addressing an asserted treaty right to fish. She applied *Cheslatta* and continued:

> 16 *Cheslatta* concerned aboriginal, not treaty rights, but the Supreme Court of Canada in *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324, held that the principles dealing with infringement of aboriginal rights enunciated in *R. v. Sparrow,* [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, applied equally to any infringement of rights under a treaty. Aboriginal and treaty rights are both of a unique, *sui generis* nature. Even though treaty rights are the result of mutual agreement, they may be unilaterally abridged, if justified.
>
> 17 Most significantly, the Supreme Court of Canada in *R. v. Badger, supra,* stated clearly at para. 76 that:
>
> > It follows that the scope of treaty rights will be determined by their wording, **which must be interpreted in accordance with the principles enunciated by this Court.** [emphasis added]
>
> 18 I understand the phrase which I have emphasized above to mean that the scope of interpretation of words in a treaty must encompass a consideration of government infringement and whether it is justified or not. Once again, I view this as an integral, not sequential, part of the interpretation process. (bolding in original; underlining added)

[23] In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, McLachlin C.J. confirmed that the Aboriginal rights recognized and affirmed in s. 35(1) of the *Constitution Act, 1982* are not absolute:

> 119 Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. "[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights" (*Sparrow*, at p. 1109)….(my emphasis)

[24] In *Tzeachten First Nation v. Canada Lands Company*, 2014 BCSC 1704, Pearlman J. applied *Cheslatta* and *Kwakiutl*, and added:

> 54 The Aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, including Aboriginal title, are not absolute: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 160. Aboriginal rights, including Aboriginal title, may be infringed where the Crown meets the burden of justifying the infringement: *Delgamuukw* at paras. 161-168; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 77-88.

[25] Pearlman J. also noted, at para. 19, the direction of the Court of Appeal in the case at bar that actions in which severance of an issue is appropriate are "the exception rather than the rule". As well, at para. 20, he quoted from Mr. Justice Harris (now Harris J.A.), in *Brennand v. Sun Life Assurance Co. of Canada*, 2011 BCSC 759, on the issue of severance:

> 22 The court has the jurisdiction to sever or bifurcate proceedings. There is no doubt that compelling reasons justify the reluctance of the court to do so. The policy of the law is that all claims should be brought and adjudicated at one time. Severing issues rarely saves time or expense, can

> produce unexpected procedural complications, cause delay and, where issues severed are inextricably interwoven, risk inconsistent findings of fact or verdicts.
>
> 23 Nevertheless, there are situations in which severance is ordered. Typically, those are cases where there exist extraordinary, exceptional or compelling reasons for severance and not merely where doing so would be just and convenient. (my emphasis)

ANALYSIS

[26] RRDC firstly argues that the concept of justifiable infringement of rights is a construct relating to s. 35(1) of the *Constitution Act, 1982*, and that because this case is not about any s. 35 rights, the principles relating to that provision are inapplicable. Rather, counsel submits that this case is about constitutional rights arising under the *1870 Order.*

[27] RRDC's counsel further submits that s. 35 rights are distinct from rights under the *1870 Order*, because the former are pre-contact rights, whereas the latter arose post-contact. In this regard, he relies exclusively on *R. v. Van der Peet*, [1996] 2 S.C.R. 507, which held that the time period that a court should consider in identifying whether an Aboriginal right claimed meets the standard of being integral to the Aboriginal community is the period prior to contact between Aboriginal and European societies ("pre-contact").[5] Further, counsel submits that it is "obvious" that the *1870 Order* is speaking to "post-contact" practices of the Crown in relation to considering and settling Indian land claims.[6]

[28] The suggestion that RRDC's rights under the *1870 Order* are somehow significantly different from the First Nation's existing Aboriginal rights under s. 35(1) of the *Constitution Act*, *1982* seems to be an attempt to create a distinction without a real

[5] para. 60 and elsewhere.
[6] Transcript, September 16, 2014, p. 116, line 42.

difference. I appreciate that it may not be necessary for RRDC to prove an existing Aboriginal right under s. 35 in order to obtain a remedy in this action. In that sense, RRDC is correct to say that this is not a s. 35 case. However, RRDC's asserted right to have its claims "to compensation for lands required for purposes of settlement" considered and settled effectively makes this a land claim case. Indeed, the Yukon Court of Appeal expressly recognized this in its reasons, where it referred to this action as "in essence, a land claim".[7] I acknowledge that this does not mean that RRDC must prove that it has Indian or Aboriginal title to the lands at issue (the group and community trap lines), but that does not mean that the concept of Indian title is totally irrelevant to this case. On the contrary, there is a good deal of evidence that suggests that the reason the Canadian Parliament and British government respectively included the relevant provision in the *1867 Address* and the *1870 Order* probably had to do with a concern about the unsurrendered Indian title in the lands required for the purposes of settlement within Rupert's Land and the North-Western Territory. The nascent concept of Indian title at that time was founded upon the prior occupation of the lands by the Indian tribes before contact with Europeans. Even if the Indian title was not legally enforceable in the courts in 1867-70, it would seem that the governing bodies of the day were nevertheless concerned about the morality of acquiring these lands without compensating the Indian tribes concerned.

[29] In addition, as the majority noted in *Van der Peet*, Aboriginal rights and Aboriginal title are related concepts; Aboriginal title is a subcategory of Aboriginal rights that deals solely with claims of rights to land.[8] I acknowledge that *Van der Peet* held that the time

[7] 2013 YKCA 6, at para. 4.
[8] para. 74.

period that a court should consider, in identifying whether the Aboriginal right claimed meets the standard of being integral to the Aboriginal community claiming the right, is the period prior to contact between Aboriginal and European societies.[9] However, *Van der Peet* also held that the Aboriginal rights protected by s. 35(1) have the purpose of reconciling pre-existing Aboriginal societies with the assertion of Crown sovereignty over Canada.[10] Further, *Van der Peet* clarified that the focus on the pre-contact period must be understood in the sense that the Aboriginal rights being claimed in the present (i.e. post-contact) must be shown to have "continuity" with the practices, customs and traditions that existed pre-contact.[11] At para. 43, Lamer C.J., speaking for the majority, stated:

> 43 The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the Aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfilling both of these purposes…

[30] Thus, as I interpret *Van der Peet*, when a First Nation asserts Aboriginal rights in the present day, they must establish that the rights originated from pre-contact traditions, customs and practices. Further, the recognition and affirmation of those rights by modern-day courts is one of the means by which the prior occupation of the lands by the First Nation is reconciled with the assertion of Crown sovereignty over those lands. In other words, there is a linkage between what happened pre-contact and what is being

---

[9] para. 60.
[10] para. 57, for example.
[11] paras. 59-64.

asserted post-contact by virtue of the necessity of establishing “continuity” of the practices, customs and traditions.

[31] In the case of Aboriginal title, which is a subcategory of Aboriginal rights, one is dealing solely with claims of rights to land which arise from the First Nation’s pre-contact use and occupation of the land.[12] In *Tsilhqot’in* , the Supreme Court described the legal characterization of Aboriginal title as follows:

> 69 ... At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* (*1763*), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest…(my emphasis)

[32] If the relevant provision, interpreted today, gives rise to a constitutional obligation upon Canada to consider and settle RRDC’s land claim before opening up those lands for settlement, then the underlying basis for the claim would logically be the Kaska’s use and occupation of the lands prior to the assertion of European sovereignty. In this sense, it is RRDC’s “independent legal interest” in the lands which underlies its claim for compensation. Whether that *sui generis* interest is referred to as Aboriginal title or not, the nature of the interest would seem to have the same origin and the same character as Aboriginal title. The only remaining difference is that it is not necessary for RRDC to prove that it has Aboriginal title over the lands at issue in order to obtain a remedy. If Canada has a constitutional obligation to consider and settle RRDC’s land claim pursuant to the *1870 Order,* it remains an open question what RRDC needs to establish in relation

[12] *Van der Peet*, para. 74.

to its prior use and occupation of the lands that have been opened up for settlement. This is an issue which I expect will be more fully developed if the trial of the ’06 Action proceeds before my final decision on the modern-day interpretation of the *1870 Order*.

[33] In any event, it is in this sense that I say RRDC’s independent legal interest in the lands at issue, assuming the relevant provision creates a constitutional obligation, is similar to the concept of Aboriginal title - both arise from the pre-contact use and occupation of those lands by the First Nation.

[34] I agree with RRDC’s counsel that the relevant provision is speaking to post-contact practices of the Crown in considering and settling the claims for compensation for lands required for the purposes of settlement, particularly if that is done according to the equitable principles arising from the Royal Proclamation. However, it seems overly simplistic to ignore the fact that such claims were and are based on the pre-contact use and occupation of the lands by the Indian tribes. It is for these reasons that I understand there to be an aspect of the relevant provision that relates to pre-contact Aboriginal rights, which are in turn protected by s. 35(1) of the *Constitution Act, 1982*, regardless of whether RRDC relies upon s. 35(1) in this lawsuit or not. Putting it another way, there seems to be an unavoidable overlap between the nature of RRDC’s asserted rights under the *1870 Order* and its existing Aboriginal rights under s. 35(1). Thus, it would seem to be taking an unnecessarily narrow view to disregard entirely the significant body of case law referred to above because of the simple assertion that this is not a s. 35 case.

[35] RRDC’s second argument, as I understand it, is that the issue of whether the post-1973 land claim negotiations between it and Canada were conducted in good faith or bad faith has absolutely no relevance to whether the breaches alleged by it occurred. Here,

RRDC refers to paras. 43 and 43A of its most recent statement of claim. In particular, the relevant pleadings are as follows:

> 43. The defendant, through its servants and agents, has breached and is continuing to breach the defendant's constitutional and fiduciary duties to the plaintiff, its members and other Kaska in respect of the Territory. Those breaches include the following:
>
> …
>
> b. enacting legislation to open the Territory for purposes of settlement by others without first considering and settling the claims of the plaintiff and its members (and other Kaska) in accordance with the requirements of the 1870 Order;
>
> c. making grants of land and issuing leases, licenses and permits for the development of lands within the Territory without first considering and settling the claims of the plaintiff Kaska in conformity with the requirements of the 1870 Order;
>
> d. enjoying the benefits of the lands comprising the Territory by exploiting those lands as a source of revenue, prior to considering and settling the plaintiff's and other Kaska's claim to those lands in conformity with the requirements of the 1870 Order;
>
> …
>
> f. refusing or otherwise failing to compensate the plaintiff and its members (and other Kaska) in respect of the disposition of lands and resources within the Territory to third parties.
>
> …
>
> h. purporting to devolve administration and control of, and the right to beneficially exploit, the

> Territory to the Government of Yukon over objections of the Kaska, including the plaintiff, and without first considering and settling the claims of the plaintiff and other Kaska to the Territory.
>
> 43A. The conduct of the defendant described in subparagraphs 43(b), (c), (d), (f) and (h) above is inconsistent with the honour of the Crown in that the defendant has failed to take a broad, purposive approach to the interpretation of the commitment made by Canada in 1867 and accepted by Her Majesty in the 1870 Order to settle the claims to compensation of the Indian tribes of the North-Western Territory, including the claims of the plaintiff, "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines"; and (ii) has not acted diligently to fulfil[l] that commitment. (underlining in original)

[36] During submissions, RRDC's counsel referred to these as "the historic breaches", and repeatedly stated that Canada has not denied that the breaches occurred. I disagree. Canada's latest statement of defence pleads as follows:

> 32. He specifically denies the allegations of fact contained in paragraph 43 of the Amended Fresh Amended Statement of Claim.
>
> 32A. He denies that the allegations set out in subparagraphs 43(b), (c), (d), (f), and (h), **which are not admitted, but expressly denied**, are inconsistent with the honour of the Crown. He denies that the reference to the 'commitment made by the Crown in 1867 and accepted by Her Majesty in the 1870 Order' is a solemn commitment, obligation or promise explicity owed to a specific Aboriginal group that engages the honour of the Crown, requires a broad, purposive approach and that the Crown act diligently [as written] to fulfill it. (underlining in original; bolding added)

[37] I also disagree with RRDC's assertion that whether the post-1973 negotiations were conducted in good faith or bad faith is totally irrelevant to whether Canada is liable

for the historic breaches. Rather, I agree with Canada's position that negotiations for the settlement of land claims must necessarily deal with any historic breaches, and that that is one of the reasons why millions of dollars are often paid in compensation for such breaches. Canada further submits that it can establish that it made its best efforts, in good faith, to obtain a settlement with RRDC, over the course of approximately 30 years of negotiations, but was unable to obtain a settlement through no fault of its own. In other words, Canada says that it has met the honour of the Crown in the modern claims negotiation process, which in effect has ameliorated any historic breaches. In my view, this makes the evidence of whether the post-1973 negotiations were conducted in good faith or not clearly relevant to whether, and the extent to which, Canada can be held liable for the historic breaches.

[38] RRDC's third argument is that Canada has not properly pleaded the defence of good faith negotiations in this action. More particularly, RRDC's counsel submits that Canada has not expressly pled that, if there is a constitutional obligation arising from the *1870 Order*, that it has acted diligently in attempting to fulfill the obligation. Again, I disagree. Although Canada's latest statement of defence may not have expressly pleaded that it acted diligently, I am satisfied that it is done so implicitly and that the plaintiff should not be prejudiced by Canada taking the position it is on this point.

[39] Although I touched on this point earlier, it may be helpful to restate the relevant amendments to RRDC's latest statement of claim which deal with the honour of the Crown. These are found in paras. 20A and 43A:

> 20A. The commitment made by Canada in 1867 and accepted by Her Majesty in the 1870 Order to settle the claims to compensation of the Indian tribes of the North-Western Territory, including the claims of the

> plaintiff, “in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines” is a solemn commitment that engaged the honour of the Crown and, as such, requires the Crown: (i) takes a broad, purposive approach to the interpretation of the commitment; and (ii) acts diligently to fulful[l] it.
>
> …
>
> 43A. The conduct of the defendant described in subparagraphs 43(b), (c), (d), (f) and (h) above is inconsistent with the honour of the Crown in that the defendant has failed to take a broad, purposive approach to the interpretation of the commitment made by Canada in 1867 and accepted by Her Majesty in the 1870 Order to settle the claims to compensation of the Indian tribes of the North-Western Territory, including the claims of the plaintiff, “in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines”; and (ii) has not acted diligently to fulfil[l] that commitment. (underlining in original)

[40] In response, Canada has pled as follows:

> 11A. He [the Attorney General of Canada] denies that the term and condition referred to in paragraph 20A is a solemn commitment, obligation or promise explicity owed to a specific Aboriginal group that engages the honour of the Crown and requires a broad, purposive approach and that the Crown act diligently to fulfill it.
>
> 11B. In the alternative, if the term and condition does create a solemn obligation that engages the honour of the Crown, which is not admitted, but expressly denied, then the Crown has acted honourably and met its obligation to fulfill it through its actions over the years and including but not limited to its actions in attempting to negotiate a comprehensive land claim and self-government agreement with the plaintiff and/or its representatives.
>
> …

> 32. He specifically denies the allegations of fact contained in paragraph 43 of the Amended Fresh Amended Statement of Claim.
>
> 32A. He denies that the allegations set out in subparagraphs 43(b), (c), (d), (f), and (h), which are not admitted, but expressly denied, are inconsistent with the honour of the Crown. He denies that the reference to 'the commitment made by Canada in 1867 and accepted by Her Majesty in the 1870 Order' is a solemn commitment, obligation or promise explicity owed to a specific Aboriginal group that engages the honour of the Crown, requires a broad, purposive approach and that the Crown act diligently to fulfill it. (underlining in original)

[41] In my view, Canada's pleadings speak for themselves and, when read together, clearly raise the defence that it has acted diligently to pursue fulfillment of the purposes of any constitutional obligation arising out of the *1870 Order*.

[42] It is perhaps also worth remembering, as I noted above at para. 6, that RRDC's pleadings here reflect the language used by the Supreme Court in *Manitoba Metis*, particularly at para. 128:

> 128 The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation….(my emphasis)

It seems obvious to me that Canada's pleadings in this regard effectively deny that the relevant provision creates a constitutional obligation, but if it does, then the Crown has acted honourably by interpreting it broadly and purposively and by acting diligently. In any event, the Supreme Court has recently suggested in *Tsilhqot'in* that courts in Aboriginal cases should take a functional approach to pleadings and overlook minor defects:

> 20 I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases.

> The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice….

[43] In its submissions on May 26, 2015, Canada's counsel urged me to proceed to decide the honour of the Crown issue based upon the evidence presented thus far. Counsel suggested that if the evidence is incomplete, then that is RRDC's problem, since it has had every opportunity to present evidence in response to that which Canada has presented. While I am somewhat sympathetic with that argument, if I were to decide whether Canada has met the honour of the Crown in the present day, I would be doing so with the knowledge that the evidence of whether the post-1973 negotiations were conducted in bad faith is not complete. This could lead to a decision in Canada's favour, which might well be inconsistent with a later decision in the '06 Action, if I am then persuaded that Canada indeed negotiated in bad faith.

CONCLUSION

[44] In conclusion, I agree with Canada that, in these particular circumstances, it is appropriate to suspend my decision on the modern-day interpretation of the *1870 Order* until the issues in the '06 Action are tried. RRDC's asserted right to obtain a treaty before their lands were opened up for settlement is not absolute. Rather, it is subject to infringement by Canada, providing the infringement can be justified. For the sake of this argument, I will assume that the *1870 Order* gives rise to a binding constitutional obligation on Canada to consider and settle RRDC's claims before opening up their lands for settlement. I will further assume that there was an historic breach of that obligation by Canada by opening up the lands before commencing negotiations in 1973. However, if Canada can establish that it conducted itself in accordance with the honour of the Crown

throughout the modern era negotiations, and was unable to obtain a treaty with RRDC notwithstanding, then that finding may have an ameliorating effect on any historic breach. Thus, the issue of whether the honour of the Crown was upheld during the negotiations is inextricably intertwined with whether Canada can be held liable for any historic breach. Accordingly, Canada should be given a full opportunity to establish that it interpreted the relevant provision in a purposive manner and diligently pursued fulfillment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis*, cited above.

[45] Subject to an appeal of this ruling, I will leave it to the parties to arrange case management to set the ‘06 Action down for trial, and to deal with any pre-trial issues that need to be addressed.

_____

GOWER J.