SUPREME COURT OF YUKON

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

Date: 20171023
S.C. No. 06-A0092
Registry: Whitehorse

BETWEEN:

ROSS RIVER DENA COUNCIL

PLAINTIFF

AND

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Before Mr. Justice L.F. Gower

Appearances:

Stephen Walsh and Claire Anderson — Counsel for the Plaintiff

Suzanne M. Duncan and Geneviève Chabot — Counsel for the Defendant

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1. INTRODUCTION

[1] The plaintiff, Ross River Dena Council ("RRDC"), is a "band" within the meaning of the *Indian Act* [1] and its headquarters are located in the community of Ross River, Yukon. RRDC and its members are part of the Kaska tribe of Indians, also known as the Kaska Nation. There are five discrete First Nations within the broader Kaska Nation, including three in British Columbia and two in the Yukon. RRDC has been acknowledged by the defendant, Attorney General of Canada ("Canada"), as the authorized representative of its members in respect of their comprehensive land claims in and to the Kaska traditional territory in the Yukon. This traditional territory is also claimed by Liard First Nation, the other Kaska First Nation in the Yukon, which has similarly been involved in the comprehensive land claims process with Canada and Yukon. The whole of the traditional territory claimed by the Kaska includes what is now the south-eastern part of the Yukon, as well as adjacent lands in the Northwest Territories and north-eastern British Columbia. The Kaska traditional territory in the Yukon comprises about 110,000 square kilometres and constitutes approximately 23% of the Yukon. The claims referred to in this action by RRDC are only in respect of the Kaska's claimed traditional territory in the Yukon ("the Kaska traditional territory").

[2] In 2005, RRDC commenced an action against Canada to decide the modern-day interpretation of a provision in the *Rupert's Land and North-Western Territory Order* [2] (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:

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[1] R.S.C. 1985, c. I-5.
[2] Reprinted in R.S.C. 1985, App. II No.9.

> … 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 as the "'05 Action" and there RRDC sues as a representative of the Kaska Nation. It asserts that the relevant provision constitutionally obliged Canada to consider and settle its land claim before opening up the Kaska lands at issue 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 and is subsumed within the larger group trap line, which comprises slightly more than 7% of the Yukon.

[3] Between 1973 and 2002, RRDC was, in some capacity, engaged in land claims negotiations with Canada. In this action, commenced action in 2006, RRDC sues on its own behalf and not on behalf of the Kaska Nation, essentially alleging that Canada has breached its duty to negotiate RRDC's comprehensive land claim in good faith since the negotiations began in 1973. It seeks declarations in that regard as well as declarations relieving it from debts it owes to Canada for funds borrowed during the negotiations. I refer to the present action being tried as the "'06 Action".

2. PROCEDURAL BACKGROUND

[4] The parties originally agreed in case management to an order that this action and the '05 Action would be tried together and that any evidence and rulings in one action

would be applicable to the other.[3] They also agreed to sever the issue of liability from that of damages, and to try liability first.[4] Both of these consent orders continue to apply.

[5] In November 2011, the trial of both actions began. 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 of Yukon returned the litigation to this Court, with a direction that the question posed was not appropriately severed from the other issues in the litigation.

[6] RRDC’s statement of claim at that time in the ‘05 Action only tangentially touched on the issue of the honour of the Crown, and it was not argued further by RRDC’s counsel.[5] 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 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 it. [6]

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

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[3] Order dated February 20, 2008.
[4] Order dated October 24, 2008.
[5] See also 2012 YKCA 10, at para. 5.
[6] 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.

> … then the Crown has acted honourably and met its obligation to fulfil 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.

[8] When the trial recommenced in September 2014, the parties agreed that only the '05 Action would be tried. 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.

[9] In its written argument for the trial, Canada asserted that the Crown had acted honourably in its dealings with RRDC. In particular, Canada focused on the fact that it engaged in comprehensive land claim 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 were set out in 53 paragraphs of its written outline. In addition, numerous documents in evidence were referenced in support of Canada's arguments. Canada also argued that its involvement in the Federal/Territorial Lands Advisory Committee ("FTLAC"), the lands set aside for the benefit of RRDC by federal cabinet directive ("Lands Set Aside" or "LSA"), and land withdrawal orders were further examples of how it had 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, Stephen Walsh, began making oral submissions about his client's conduct during the

negotiations, and particularly the importance of their position that the Umbrella Final Agreement (the "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.

[12] Canada's counsel objected to these submissions, because they raised issues arising in the '06 Action and the parties had agreed not to try the '06 Action at that stage. My concern, however, was that Canada had put forward a significant amount of evidence and argument 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 oral 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] Following a series of case management conferences, and further submissions from both counsel, on July 14, 2015, I decided that I should suspend my ruling on the modern-day interpretation of the *1870 Order* until the '06 Action was tried, since the principal issue in that action is whether Canada upheld the honour of the Crown in attempting to negotiate RRDC's comprehensive land claim. I refer to this as the 2015 procedural ruling, and it is cited as 2015 YKSC 33. I summarized my reasons for that decision as follows:

> 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 <u>and</u> diligently pursued fulfillment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis*, cited above. (emphasis already added)

[14] RRDC appealed my 2015 procedural ruling. It sought not only to set aside the procedural ruling, but also a number of declarations roughly similar to those included in RRDC's 'prayer for relief' in the '05 Action. Canada successfully brought an application

to quash the appeal with respect to all the relief, except that seeking to set aside the procedural ruling.[7] RRDC subsequently abandoned the balance of the appeal without explanation.

[15] Counsel and I held a number of case management conferences in preparing for the commencement of the trial of the '06 Action. At one such conference, on April 6, 2016, RRDC's counsel argued that Canada should deliver its argument first on the grounds that:

1) it was Canada that raised the issue of whether it acted honourably throughout the modern-era negotiations;

2) the nature of the issue is such that Canada carries the persuasive burden; and

3) common sense dictates that the party that carries the persuasive burden should be the first to deliver its argument.

Canada opposed this submission, stating that RRDC, as the plaintiff, has the burden of proof. By the end of the case management conference, RRDC's counsel, Mr. Walsh,[8] had changed his mind and agreed to file his written argument/outline first.

[16] Before starting my analysis, I feel compelled to state that I am left troubled by the exchange of written arguments between the parties in anticipation of this trial. The sheer volume of the arguments and their lack of clarity, primarily on RRDC's part, have left me somewhat confused as to what the genuine issues are and how they should be disposed of. New issues were raised as the arguments evolved and existing issues became something of a moving target as time went on. Although I held several case management conferences with counsel along the way, I accept some of the responsibility for not maintaining a firmer grip on the deadlines for filing materials.

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[7] The Court of Appeal decision is cited as 2015 YKCA 16.
[8] During the trial of the '06 Action, RRDC was also represented by co-counsel, Claire Anderson.

[17] On August 19, 2016, RRDC's counsel filed his initial outline of argument. However, the document was very short, only five pages and as many paragraphs, and most of the argument (the first 2½ pages) was a critique of my 2015 procedural ruling in the '05 Action. Counsel also attempted to preserve the opportunity to provide further submissions by way of reply, quoting from the ruling as follows:

> … [I]t is trite to say that, until such time as Canada discloses to the plaintiff the grounds upon which it proposes to establish to the trial judge's satisfaction 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"
> > [and that]
> >
> > "... it interpreted the relevant provision in a purposive manner <u>and</u> diligently pursued fulfilment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis"*,
>
> the plaintiff is obviously in no position to set out its response to those grounds. Accordingly, the plaintiff will provide its response in its written submissions in reply.

RRDC's counsel then listed 15 grounds upon which he purported to rely on to demonstrate that Canada's post-1973 conduct "has been and continues to be flagrantly inconsistent with the honour of the Crown". However, no arguments were developed on any of the points, nor were there any references to the evidence in support.

[18] Thus, it would appear as though RRDC's counsel effectively reverted to his position asserted at the case management conference on April 6, 2016, i.e. that Canada should make its arguments first, and then RRDC would reply. It seemed as if counsel was keeping his cards close to his vest until Canada revealed theirs. That put Canada in the position of potentially having to apply to file a sur-reply.

[19] Another problem with RRDC's approach overall is that new issues, which should have been raised in the first instance, were sometimes raised in reply, as I have noted earlier in the trial of the '05 Action. I have cautioned RRDC's counsel about this practice orally in court.

[20] This very problem was raised by Canada's counsel at a case management conference held on August 24, 2016. However, I declined to grant Canada a remedy at that time. Rather, I encouraged Canada's counsel to do the best she could to put her written argument forward, and if RRDC filed a reply that raised substantial new points which should have been raised initially, then Canada could apply to make a sur-reply.

[21] Canada filed its initial outline of argument on September 20, 2016. In comparison to the argument of RRDC, Canada's argument was much lengthier and more detailed (252 paragraphs, over 69 pages). Further, as might be expected, in its introduction, Canada's counsel took issue with RRDC's scanty initial argument, and purported to reserve its right to provide a sur-reply:

> The defendant does not have a substantive outline from the plaintiff to which it can respond, despite the fact that the plaintiff bears the burden of proof to make out its case on the balance of probabilities. The outline below is largely anticipatory … The defendant also reserves its right to request and provide a sur-reply, after the plaintiff has filed and served its reply …

[22] RRDC filed a six-page reply outline on September 23, 2016.

[23] Then, on January 31, 2017, RRDC filed a further outline of argument which largely repeated, with only minor amendments, the critique of my 2015 procedural ruling in the '05 Action, set out in its initial outline filed August 19, 2016, as well as the 15 grounds upon which RRDC asserts that Canada's post-1973 conduct has been

inconsistent with the honour of the Crown. However, yet again, the arguments were not developed, nor were there any references to the evidence in support. Counsel also added 15 paragraphs about the *Royal Proclamation of 1763* and the *1870 Order*, concluding his argument with the assertion that the equitable principles contemplated in these documents had been breached (at issue in the '05 Action).

[24] On February 28, 2017, Canada filed an addendum outline, again complaining in its introductory paragraph about the lack of substance being provided by RRDC's counsel in his outline of January 31, 2017:

> This addendum to the defendant's Outline is provided after receiving the 13 page amended Outline dated January 31, 2017, provided by plaintiff's counsel, as ordered by the Court at the last Case Management Conference on September 30, 2016. The plaintiff did not show in its Outline which parts were amended, as is usually required by the Rules. The defendant notes that most of paragraphs 1 - 4 in the plaintiff's January Outline are substantially the same as the Outline filed by the plaintiff on August 19, 2016. Paragraphs 8-20 are very similar or identical to various paragraphs of the plaintiff's Outline (47-55; 79-81) filed in [the '05 Action] on July 22, 2014.

[25] On March 20, 2017, RRDC's counsel filed a further reply outline, in response to Canada's addendum outline.

[26] On March 28, 2017, I held a case management conference with counsel, at which time I allowed the application by Canada to file a sur-reply, which was done that same day.

[27] On April 3, 2017, RRDC filed another copy of its outline of January 31, 2017, but this time with some references to the evidence in support of his 15 grounds of argument.

[28] Finally, on the second day of the trial, April 6, 2017, RRDC's counsel, now appearing with co-counsel, began making extensive references to notes prepared in response to Canada's sur-reply. These notes, which were compiled into a document, were the lengthiest submissions from RRDC to date, comprising 34 paragraphs over 21 pages. Although counsel did not seek to file these submissions, presumably because they were being presented so late, I felt that it would be better to err on the side of caution and accept them for filing in order to have the most complete record of argument possible, given the complexity of the issues.

[29] The upshot of these numerous written submissions, combined with the oral submissions made at trial, is that there are now multiple issues to be disposed of, well beyond those originally raised by RRDC in its pleadings or even in its initial written argument. I will do my best to try to set them all out below.

3.0 ISSUES

[30] In its initial outline filed August 19, 2016, RRDC raised the following issues in this trial (I have taken the liberty of changing the wording somewhat, as I felt was appropriate):

1) Has Canada, since 1973, failed to take reasonable, or any, steps to protect the claimed Aboriginal title of RRDC? If so, is such conduct inconsistent with the honour of the Crown?

2) Has Canada, since 1973, ignored the fact that until the relevant provision in the *1870 Order* is complied with, the lands in question are "lands reserved for the Indians" within the meaning of s. 91(24) of the

Constitution Act, *1867*? If so, is such conduct inconsistent with the honour of the Crown?

3) Has Canada, since 1973, failed to take reasonable steps to prevent the disposition of interests in land and resources within RRDC's traditional territory to third parties? If so, is such conduct inconsistent with the honour of the Crown?

4) Has Canada generally failed to honour the Kaska Framework Agreement, dated September 21, 1989 ("KFA"), in particular paras. 4 and 12 of that Agreement? If so, is such conduct inconsistent with the honour of the Crown?

5) Has Canada insisted on the Umbrella Final Agreement dated May 29, 1993 as the only basis for negotiation of RRDC's (and other Kaska's) claims to its traditional territory and refused to negotiate on any other basis? If so, is such conduct inconsistent with the honour of the Crown?

6) Has Canada negotiated in bad faith by insisting that the UFA be the basis for any negotiations with RRDC, despite the fact that it has not shown that the UFA has ever been validly ratified in accordance with s. 3.5 and other relevant terms of the 1989 Agreement in Principle between the Government of Canada, the Council for Yukon Indians and the Government of Yukon (the "1989 AIP"), and s. 2.2.8 of the UFA?

7) Have Canada's representatives knowingly (or with reckless indifference) procured and relied upon a series of conflicting and false affidavits with

respect to the alleged ratification of the UFA? If so, is such conduct inconsistent with the honour of the Crown?

8) Has Canada failed or refused to agree, after June 2002, to resume negotiations with RRDC, despite requests from RRDC that Canada do so and despite proposals from RRDC for the resumption of negotiations? If so, is such conduct inconsistent with the honour of the Crown?[9]

9) Was Canada's conduct inconsistent with the honour of the Crown when it devolved administration and control over the lands in question to the Yukon Territorial Government, over the objections of the Kaska and without first considering and settling the plaintiff's claims to compensation for lands required for purposes of settlement?

10) Has Canada allowed the moratorium on the collection of income taxes that had applied to RRDC members in respect of income earned on Land Set Aside to expire? If so, is such conduct inconsistent with the honour of the Crown?

11) Has Canada refused, and does it continue to refuse, to take the steps necessary to convert RRDC's Land Set Aside to reserve lands within the meaning of the *Indian Act*? If so, is such conduct inconsistent with the honour of the Crown?

12) Has Canada refused requests to implement the published policy on the implementation of the inherent right of self-government in respect of RRDC? If so, is such conduct inconsistent with the honour of the Crown?

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[9] In its outline filed August 19, 2016, RRDC's counsel originally submitted as a separate issue that "Canada has rejected or refused to agree with the proposals advanced by the plaintiff for the resumption of negotiations". I have taken the liberty of combining this issue with issue #8.

13) Has Canada refused or failed to take the necessary steps to honour and/or implement the *United Nations Declaration on the Rights of Indigenous Peoples* (*"UNDRIP"*) (and in particular Article 26 thereof) in respect of RRDC's Aboriginal title and rights in and to the lands in question? If so, is such conduct inconsistent with the honour of the Crown?

14) Has Canada failed to take any steps to implement the terms of ss. 49 and 50 of the *Yukon Act*[10] in respect of RRDC's unsettled claims in and to the Kaska traditional territory in the Yukon? If so, is such conduct inconsistent with the honour of the Crown?

[31] The other issues raised after the RRDC outline was filed in August 2016 are as follows. I will continue the sequential numbering to avoid unnecessary confusion:

15) Which party bears the onus of proof in this action to establish that the Crown did not negotiate in good faith?

16) What, if anything, does RRDC have to establish with respect to its prior use and occupation of the lands that have been opened up for settlement in the Kaska traditional territory?

17) Is there any basis in this case for the application of the principles relating to s. 35(1) of the *Constitution Act, 1982*?

18) Was the legislation passed after the *1870 Order* purporting to open the Kaska traditional territory up for settlement null and void?

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[10] S.C. 2002, c.7.

4.0 ANALYSIS

[32] In my review of the evidence on the issues, I note that virtually none of it is particularly controversial. Accordingly, my review can also be taken as my findings of fact in these reasons. In the areas where controversy exists, I will indicate what is in dispute.

4.1 Issue #1: Has Canada, since 1973, failed to take reasonable, or any, steps to protect the claimed Aboriginal title of RRDC? If so, is such conduct inconsistent with the honour of the Crown?

[33] RRDC has not pleaded this issue in this action, except in its June 16, 2009 response to demand for particulars. Other than raising the bald issue in its initial outline filed August 19, 2016, RRDC's counsel has not, as far as I can recall, made any further written or oral submissions on the point. Further, I have not been directed to any evidence relating to the issue. However, evidence was presented in the '05 Action, where Canada responded in greater detail than here. Accordingly, much of the following findings are drawn from submissions made in that context, but not fully addressed in my decision in the '05 Action.

[34] The Federal/Territorial Lands Advisory Committee ("FTLAC") was formed in July 1974 to provide a forum for coordination, at the regional level, of the interests and concerns of the Aboriginal peoples in the Yukon with respect to the administration, control and disposition of federal Crown lands, among other things. FTLAC membership included federal and territorial representatives, as well as the Regional Director of what was then the federal "Indian and Eskimo Affairs Program". The terms of reference for FTLAC were reformulated slightly in a document dated June 7, 1988, which then also confirmed that the membership of FTLAC included representatives from each First

Nation for land applications falling within their respective traditional territories. Meetings of FTLAC were to be held at the call of the Chairperson, but were generally held once per month. In the trial record of the '05 Action, there are copies of correspondence and minutes of the FTLAC meetings as examples of interactions between the then-Chairperson of the Ross River Resource Committee ("RRRC"), Hammond Dick (later an RRDC Chief), and FTLAC. In particular, it is stated that notice of any land use/management application concerning RRDC would be sent to the RRDC for its input into the development of natural resources in the RRDC traditional territory.[11]

[35] Prior to FTLAC and the consultation process formalized through that body, in 1955, Canada established a policy and procedure for reserving land in the Yukon for the use of other federal government departments, for specific purposes such as First Nation housing, for example.[12] These parcels became known as "Land Set Aside". The administration, control and disposition of such lands remained with the federal Department of Aboriginal Affairs and Northern Development, even after devolution in 2003. In a document dated April 20, 1979, Canada's Director of Economic Development & Lands stated:

> It is the policy of Indian Affairs to consult with the Chief and Council before any alienations are made on Land Set Aside. As such, there is no legal (although we perceive a moral) obligation to consult. We in the Department made the assumption that all "Land Set Aside" will eventually form part of a comprehensive land claim settlement and therefore, we treat Land Set Aside as if it were an Indian Reserve.[13]

[36] "Land Set Aside" is defined in the UFA, which I will discuss in further detail under Issue #5, as meaning:

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[11] '05 Common Book of Documents, tabs 64, 66 and 69.
[12] '05 Common Book of Documents, tab 2.
[13] '05 Common Book of Documents, tab 29.

> … land in the Yukon reserved or set aside by notation in the property records of the Northern Affairs Program, Department of Indian Affairs and Northern Development, for the use of the Indian and Inuit Program for Yukon Indian People.

Section 4.2.2 of the UFA provides that Land Set Aside may be selected by a Yukon First Nation as settlement land under a Final Agreement, unless otherwise agreed.

[37] RRDC has 82.17 hectares of Land Set Aside within its traditional territory. Such land is generally being used for housing individual RRDC members within the Ross River community, or for community purposes such as a band office or community centre.[14]

[38] In addition, beginning in 1988, a number of parcels of land within RRDC's claimed traditional territory were withdrawn from potential alienation pursuant to "Withdrawal Orders" made by Canada and, post-devolution, by Yukon. These Withdrawal Orders protect the land parcels pending resolution of RRDC's land claim. In a document dated June 7, 1988, it is noted that a total of 2,137.91 square kilometres are interim protected.[15] These interim protection orders were extended by Yukon in April 2008, in April 2013,[16] and again in March 2017.[17]

[39] RRDC's counsel argued in his reply outline filed September 23, 2016 that Canada has failed to take steps to protect RRDC's interests under the terms of ss. 49 and 50 of the *Yukon Act*. However, as I indicate later in disposing of Issue #14, RRDC has not pleaded this issue in the '06 Action. Accordingly, I am not going to address it.

[40] There is also an overlap between this issue and Issue #3 below.

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[14] '05 Common Book of Documents, tabs 1, 3, 29, 31, 34, 127, 140 and 180.
[15] '05 Common Book of Documents, tab 78.
[16] O.I.C. 2013/57, dated March 27, 2013.
[17] O.I.C. 2017/50.

[41] I conclude that the FTLAC process and the interim protection measures were reasonable steps taken by Canada to protect the claimed Aboriginal title of RRDC. In any event, RRDC has failed to meet its onus on this issue.[18]

4.2 Issue #2: Has Canada, since 1973, ignored the fact that until the relevant provision in the *1870 Order* is complied with, the lands in question are "lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*? If so, is such conduct inconsistent with the honour of the Crown?

[42] RRDC did not plead this issue in the '06 Action. Accordingly, I am not going to address it here. I note however, that it was pled and argued in the '05 Action and addressed in my reasons at 2017 YKSC 58.

4.3 Issue #3: Has Canada, since 1973, failed to take reasonable steps to prevent the disposition of interests in land and resources within RRDC's traditional territory to third parties? If so, is such conduct inconsistent with the honour of the Crown?

[43] This is essentially the same issue as Issue #1 and my answer to that question should also dispose of this question, i.e. RRDC has failed to meet its onus here.

4.4 Issue #4: Has Canada generally failed to honour the Kaska Framework Agreement, dated September 21, 1989 ("KFA"), in particular paras. 4 and 12 of that Agreement? If so, is such conduct inconsistent with the honour of the Crown?

[44] Once again, this issue is not pleaded in the statement of claim in the '06 Action. It was only referred to incidentally in two paragraphs of the response to demand for particulars from RRDC, dated May 14, 2009. Furthermore, RRDC's counsel did not develop this argument in either their written materials or their oral submissions at the trial. Nor have counsel pointed to any particular evidence on the record to support the argument, other than referencing the KFA itself. Accordingly, I am left to speculate (as was Canada) as to what exactly RRDC's point is here.

[18] As I said earlier, which party bears the onus in this action is itself an issue. I will deal with it below.

[45] Paragraph 4 of the KFA, dated September 21, 1989, provides:

> Except where the Parties otherwise agree, the [1989] agreement-in-principle concluded by the Council for Yukon Indians shall be the basis for the negotiation of Kaska Agreements.

[46] "Kaska Agreement" is defined in para. 1 of the KFA as meaning:

> … a Yukon First Nation Final Agreement entered into by the Government of Canada and the Government of Yukon with the Ross River Dena Council or the Liard River Indian Band, or a Kaska Transboundary Agreement entered into by the Government of Canada and the Government of Yukon with the Kaska Dena Council;

[47] I believe the relevant portion of the 1989 Agreement in Principle ("1989 AIP") is s. 3.5, which states:

> Approvals of Settlement Agreements by Government and Yukon First Nations, in accordance with the process for ratification set out in each agreement, shall be conditions precedent to the validity of that agreement, and in the absence of approval by either, the agreement shall be null and void and of no effect.

"Settlement Agreements" are defined in s. 1.9 of the 1989 AIP as including the UFA.

[48] Section 2.3 of the 1989 AIP states:

> Based upon this Agreement-in-Principle, the parties hereto shall begin as soon as possible to negotiate Settlement Agreements.

[49] Thus, the 1989 AIP formed the basis for the negotiation of the UFA. Further, RRDC was represented by the Council for Yukon Indians as its bargaining agent during the negotiations and conclusion of the UFA. Once the UFA was concluded, it effectively superseded the 1989 AIP, as contemplated by s. 2.3 above. The UFA included a provision that the Yukon First Nation Final Agreements were subject to the terms of the

UFA (s. 2.1.3). Therefore, any argument by RRDC that it was not a party to the UFA or was not bound by the UFA in negotiating its Final Agreement is untenable.

[50] Alternatively, RRDC's argument may be that: (1) because the UFA was never validly ratified, which is another of RRDC's arguments below (Issue #6), then the effect of s. 3.5 of the 1989 AIP is that the UFA is null and void and of no effect; and (2) further, para. 4 of the KFA has not been complied with.

[51] I disagree with RRDC's premise that the UFA has never been validly ratified. My reasons for this conclusion are set out more fully in addressing Issue #6 below. Accordingly, I also disagree that Canada has failed to honour para. 4 of the KFA.

[52] Paragraph 12 of the KFA states:

> The Parties shall continue to negotiate Kaska Agreements with due diligence and good faith according to the schedule and agenda jointly established.

[53] Once again, RRDC's counsel has failed to develop this argument in any significant way. Canada's response to this argument was to point out that there are numerous examples in the record of documents constituting negotiation schedules and agendas, many of which were jointly agreed upon between the governments of Canada and Yukon and RRDC.[19] RRDC's reply to this response was conclusory and difficult to understand:

> Canada's argument that s. 12 of the 1989 Framework Agreement was honoured is plainly wrong. For example, it is clear that none of the documents that Canada refers to in its Outline constitute the schedule and agenda referred to in s. 12 of the 1989 Framework Agreement bear no resemblance to the changes made in the UFA to the provisions dealing with transboundary claims which changes are clearly

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[19] '06 Common Book of Documents, tabs 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 104, 105, 122, 123, 127, 140, 143, 146, 148, 257, 260, 272, 279, 280, 281, 288, 308 and 312; '05 Common Book of Documents, tab 113.

> adverse to the interests of the Kaska and inconsistent with the honour of the Crown. [as written][20]

[54] To the extent that RRDC seems to argue that s. 12 of the KFA required a single "schedule and agenda" to be jointly agreed upon, I disagree. First of all, s. 12 anticipated the parties negotiating "Kaska Agreements", in plural. Therefore, the section must be interpreted as anticipating that there would be more than a single schedule and agenda. Second, the evidence on record in this trial clearly indicates that these land claim negotiations were an ongoing process over several years, involving numerous meetings and a proportionate number of schedules and agendas that had to be negotiated for each meeting. Finally, the last part of the paragraph above beginning with "bear no resemblance" appears to be a *non sequitur* resulting from a typographical error.

[55] Accordingly, I find against RRDC on this issue.

4.5 Issue #5: Has Canada insisted on the Umbrella Final Agreement dated May 29, 1993 ("UFA") as the only basis for negotiation of RRDC's (and other Kaska's) claims to its traditional territory and refused to negotiate on any other basis? If so, is such conduct inconsistent with the honour of the Crown?

[56] Canada has admitted that prior to the end of its negotiations mandate in the Yukon, in or around June 2002, it had insisted upon the UFA as the mandatory basis for negotiations towards the settlement of RRDC's land claims in the Yukon, and that it was not prepared to negotiate with RRDC on a basis other than the UFA.[21]

[57] Therefore, the real question here is whether Canada's position in this regard was inconsistent with the honour of the Crown. For the following reasons, I conclude that

[20] RRDC's Reply Outline filed September 23, 2016, para. 5.
[21] '06 Common Book of Documents, tab 431, p. 1.

Canada acted reasonably in taking this position and in a manner consistent with the honour of the Crown.

[58] As stated above, RRDC was a member of CYI, and its predecessor, the Yukon Native Brotherhood, from that organization's inception in the late 1960s. RRDC agreed to be represented by CYI as its central bargaining agent in the negotiations towards the 1989 AIP as well as the UFA. Indeed, this was specifically confirmed by RRDC's Chief, Hammond Dick, in a letter to the Director General of Indian and Northern Affairs Canada, Ian Potter, dated September 11, 1989:

> The Council for Yukon Indians was the central bargaining agent for Ross River in the AIP negotiations and continues in that role in the present Umbrella negotiations. Our regional negotiator is actively involved in those discussions. I, too, have joined in the Umbrella talks, in addition to my involvement as a member of the CYI Board. I am pleased with the progress made being made and I fully intend to continue my participation to the extent my other obligations permit. (my emphasis)[22]

[59] RRDC continued to be represented by CYI as its central bargaining agent throughout the negotiations for the UFA, up until and including its signing on May 29, 1993. Therefore, RRDC cannot take the position that it was not a party to the UFA negotiations.

[60] I recognize that RRDC opposed the ratification of the UFA at the CYI "Special Leadership Meeting" on March 31, 1993. Indeed, Chairperson Judy Gingell acknowledged this in her letter to the Minister of Indian Affairs and Northern Development, dated the same day, in which she stated:

> The Kaska representative asked me to relay that they opposed the attached resolution [approving the UFA], primarily due to Section 25.5.5 of the UFA. This section

[22] '06 Common Book of Documents, tab 84.

> provides the Government of Yukon with a veto power over future transboundary settlements in the Yukon, in constitutional matters that are within the jurisdiction of the Yukon. The Kaska maintain that this veto power constitutes a major breach of Canada's fiduciary obligation
>
> Their position was formally conveyed to you on March 26, 1993, in a letter signed by their leaders.[23]

Nevertheless, as I explain more fully in discussing the next issue on ratification, RRDC also participated in the discussions and decision-making within CYI on the processes it would adopt to ratify the UFA. Those processes evolved over time, but the one agreed-upon immediately prior to the vote taken at the CYI Special Leadership Meeting on March 31, 1993 was that the approval of the UFA would require affirmative votes by a majority of two-thirds of the 14 First Nations. This majority was achieved at that meeting and accordingly I conclude that the UFA was properly ratified. The fact that RRDC did not agree with the outcome does not mean that they were not a party to the process; nor does it mean that the ratification was invalid.

[61] It is also important to remember that the UFA was the product of approximately 20 years of negotiations, commencing in 1973 when the comprehensive land claim of the Yukon Native Brotherhood was accepted for negotiation by the Liberal Government of Prime Minister Pierre Elliott Trudeau. From relatively early on in the negotiations, Canada had indicated a relatively flexible position in allowing the negotiation process to unfold through discussion, as opposed to imposing templates and restrictions on the parties. This is evident in a letter from the Minister of Indian and Northern Affairs, John Munro, to the CYI, dated April 22, 1980, in which he wrote:

> I … appreciate your concern that it is not conducive to negotiations for a federal negotiating posture to be either too

[23] '06 Common Book of Documents, tab 169.

> restrictive or definitive. I agree that in any negotiations it is not advisable to impose preconceived models or conditions on the negotiations as these preclude the "give and take" necessary to reach agreements.[24]

[62] This attitude was also reflected in a later letter from a subsequent Minister of Indian Affairs and Northern Development, David Crombie, to CYI, dated December 20, 1984, in which he stated:

> … My position has been that I would not threaten or seek to impose, and that there should be a clear, voluntary expression of choice by the Yukon Indian people as to whether the agreement-in-principle was acceptable to them [as written].[25]

[63] There is no evidence on the record before me that Canada attempted to impose a model agreement-in-principle upon CYI prior to the UFA signing on May 29, 1993.

[64] I also acknowledge that there was a breakdown in negotiations between Canada, Yukon and RRDC for a period of time after the signing of the UFA, because of RRDC's dissatisfaction with its content and the process by which it came about.

[65] In 1994, there were several letters exchanged between RRDC's counsel and Canadian officials in which RRDC questioned whether the provision in the UFA dealing with ratification of the document, s. 2.2.8, had been complied with and, if so, how.

[66] However, in March 1996, the RRDC leadership obtained a mandate from RRDC members, on the recommendation of the Chief and Council of RRDC "to go to the bargaining table, on a "without prejudice basis", under the UFA."[26] Indeed, RRDC's Chief and Council passed a band Council resolution on April 25, 1996 approving the return to negotiations on this basis. This decision was communicated by RRDC's Chief

[24] '06 Common Book of Documents, tab 37.
[25] '06 Common Book of Documents, tab 54.
[26] '06 Common Book of Documents, tab 219, p. 4.

in a letter to Minister of Indian and Northern Affairs, Ron Irwin, dated May 10, 1996, despite RRDC's concerns with the UFA.

[67] In 1999, RRDC sent more letters to Canadian officials again requesting particulars on how the UFA had been ratified in accordance with s. 2.2.8. However, there is no evidence that RRDC stated that it would cease negotiating on the basis of the UFA until 2000.

[68] On February 24, 2000, the Kaska Nation (which includes RRDC) Tribal Chief, Hammond Dick, wrote to Minister of Indian Affairs, Robert Nault, stating a number of concerns regarding the status of the Kaska land claim negotiations. In the letter, the Chief made the following statement, presumably with reference to the CYI ratification vote on March 31, 1993:

> … As you know, we rejected the UFA, and it continues to be our firm position that it was never validly ratified and is not binding on us.[27]

Of course, simply saying this does not make it so.

[69] In any event, on August 25, 2000, Canada responded with a letter from the Regional Director General of Indian and Northern Affairs Canada, Yukon Region, Terry Sewell, in which he stated:

> While I respect that we have different views on the binding nature of the Umbrella Final Agreement (UFA), Canada has been clear that the mandate for negotiations is based on the provisions of the UFA. We understand the Ross River and Liard First Nations have entered these negotiations to reach an agreement based on the UFA. If we are mistaken in that understanding please clarify with the Chief Federal Negotiator in the Yukon, Mr. Jim Bishop.[28]

There is no evidence that RRDC followed up with Mr. Bishop on this point.

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[27] '06 Common Book of Documents, tab 259, p. 3.
[28] '06 Common Book of Documents, tab 264.

[70] Notwithstanding RRDC's position on the UFA, it continued negotiating with Canada and Yukon. As of January 30, 2001, RRDC had signed off on the land quantum part of its claim, with land choices comprising approximately 4,662 square kilometres (about 1,800 square miles) in numerous parcels near the community of Ross River.[29] The negotiations continued throughout 2001 and 2002, until there was a failure to obtain a Final Agreement in late June 2002 and Canada took the position that its mandate to negotiate had expired (I will deal with this in greater detail below under Issue #8). Throughout this time, the parties were negotiating on the basis of the UFA.

[71] It is reasonable to infer that the purpose behind the UFA was to ensure, to the maximum extent possible, that the Final Agreements reached with each of the Yukon First Nations would be as similar as possible, if not exactly alike. This is because the UFA itself requires that its provisions be included in each Yukon First Nation Final Agreement, along with the specific provisions applicable to each Yukon First Nation on a regional and community basis. Thus, the UFA serves as a template to ensure that each Yukon First Nation has rights and obligations that are roughly equal.

[72] Accordingly, in my view, it was reasonable for Canada to take the position that it would only negotiate with RRDC on the basis of the UFA. To do otherwise may well have resulted in a Final Agreement which varied significantly from those of the other 11 Yukon First Nations who have obtained Final Agreements on the basis of the UFA. While it may be somewhat speculative, it is probably not unreasonable to expect that this could cause a considerable political upheaval between Yukon First Nations, and between those with Final Agreements and Canada. As Canada submitted, the content of the UFA emerged through negotiations over several years and resulted from a

[29] '06 Common Book of Documents, tab 275.

Yukon-made, unique process that was ultimately agreed to by all three parties, including RRDC's bargaining agent, CYI. Therefore, it was reasonable for Canada to take the position that it would remain the template for negotiations with RRDC.

[73] In the result, I find that Canada's conduct in this regard was consistent with the honour of the Crown.

4.6 Issue #6: Has Canada negotiated in bad faith by insisting that the UFA be the basis for any negotiations with RRDC, despite the fact that it has not shown that the UFA has ever been validly ratified in accordance with s. 3.5 and other relevant terms of the 1989 Agreement in Principle between the Government of Canada, the Council for Yukon Indians and the Government of Yukon (the "1989 AIP"), and s. 2.2.8 of the UFA?

[74] As noted earlier, s. 3.5 of the 1989 AIP provides:

> Approvals of Settlement Agreements by Government and Yukon First Nations, in accordance with the process for ratification set out in each agreement, shall be conditions precedent to the validity of that agreement, and in the absence of approval by either, the agreement shall be null and void and of no effect.

"Settlement Agreements" are defined in s. 1.9 of the 1989 AIP as including the UFA.

[75] Section 2.2.8 of the UFA provides:

> The parties to the Umbrella Final Agreement shall negotiate the processes for ratification of the Umbrella Final Agreement and the ratification of those processes shall be sought at the same time as the ratification of the Umbrella Final Agreement.

[76] RRDC argues that s. 2.2.8 creates two requirements:

1) that the parties shall negotiate the processes for ratification and conclude an agreement on those processes; and subsequently

2) that the ratification of those processes be obtained at the same time as the ratification of the UFA.

[77] I would clarify two points at this stage. As I understand the argument: (1) RRDC is principally submitting that it is the first requirement above which has not been satisfied, in that no formal agreement about processes was ever concluded; and (2) despite this, RRDC takes no issue with the processes adopted by Canada and Yukon, respectively, for ratification of the UFA.

[78] "Ratify" is defined in *The New Shorter Oxford English Dictionary*, 1993 as:

> Confirm or validate (an act, agreement, etc …) by signing or giving formal consent or sanction …

[79] The definition of "ratification" in *Black's Law Dictionary*, 9th edition, includes the following:

> 1. Adoption of an enactment, esp. where the act is the last in a series of necessary steps or consents;
>
> 2. Confirmation and acceptance of the previous act, thereby making the act valid from the moment it was done

[80] The premise of RRDC's argument here is that the parties did not conclude an agreement on the processes for ratification of the UFA at a particular point in time prior to the time when the ratification of the UFA was sought. In other words, the first requirement of s. 2.2.8 was never met, and, as a result of that failure, neither was ratification in the second requirement. Accordingly, the UFA was not properly ratified and, pursuant to s. 3.5 of the 1989 AIP, the UFA is "null and void and of no effect".

[81] I disagree that s. 2.2.8 required the parties to reach an agreement on the processes for ratification <u>before</u> seeking the ratification of those processes at the same time as the ratification of the UFA. Rather, I interpret s. 2.2.8 as requiring, firstly, that the parties negotiate the processes, which they did, and, secondly, that the parties conclude

their agreement on those processes at the same time as they respectively sought to ratify the UFA, which they also did by their conduct. I will turn to the evidence which supports these conclusions shortly.

[82] I acknowledge that the wording of s. 2.2.8 is less than crystal clear. The word “ratification” is used three times in the same sentence. Interestingly, the same criticism can be made of s. 2.2.9, which provides:

> Each Yukon First Nation and Government shall negotiate the processes for ratification of that Yukon First Nation’s Final Agreement and the ratification of those processes shall be sought prior to or at the same time as ratification of the Yukon First Nation Final Agreement.

[83] If RRDC’s interpretation of s. 2.2.8 is correct, then there would also be a requirement for each Yukon First Nation and government to negotiate and conclude an agreement on the processes for ratification of that Yukon First Nation’s Final Agreement, which would then need to be ratified or approved at or before the time for the ratification of the Final Agreement. However, the evidence shows that this did not happen in the context of any of the 11 settled land claims. Rather, as I understand the evidence, each First Nation was expected to determine its own ratification process internally. To my knowledge there is no evidence on the record in this trial of any agreements between a First Nation and the governments of Canada and Yukon on what the ratification processes would be before the First Nations sought ratification from their respective citizens. Nevertheless, as far as I am aware, no one has ever argued that a First Nation’s Final Agreement (which also falls within the definition of “Settlement Agreements” in the 1989 AIP) is “null and void” because s. 2.2.9 was not formally complied with.

[84] What the evidence shows is that the negotiation of the processes for ratification of both the UFA and the Final Agreements was an iterative, back and forth process, involving proposals and counter-proposals. However, in the result, the ratification processes proposed by CYI were ultimately accepted by Canada and Yukon.

[85] It must also be remembered that there was not a single point in time when the ratification processes employed by each of the three parties, CYI, Canada and Yukon, were ratified, prior to the ultimate ratification when the UFA was signed on May 29, 1993. This is because each party was required to individually ratify the UFA according to the processes each respectively proposed, which were implicitly if not expressly agreed to by the other two parties. In other words, the ratification processes proposed by each of the three parties had to be individually authorized by their respective principals, and then subsequently collectively authorized when the parties ratified (i.e. signed) the UFA.

[86] I will now turn to a review of the evidence on this issue. Virtually none of it is particularly controversial, and accordingly, my review will also be my findings of fact in this area. In general, the areas where controversy exists are where the parties have used "ratification" language in their respective documents. I do not find against RRDC on this issue for that reason alone, but rather because I disagree with RRDC's interpretation of s. 2.2.8, as I have already indicated.

[87] A Memorandum dated May 19, 1989 from a legal working group to the Chief Negotiators for each of the three parties specified that "Ratification Processes" were included on an agenda for an upcoming meeting. At that time, it was anticipated that a separate sub-agreement on the ratification processes would be completed. The

agreement would deal with issues such as eligibility of voters, percentage of votes required for approval and methods of execution of the UFA by each First Nation. There is no evidence that such a sub-agreement was ever concluded.

[88] On June 7 and 8, 1989, a UFA negotiating meeting was held between the Chief Negotiators for each of the three parties. Ratification of the UFA was one of the several items discussed at the meeting. The minutes of the meeting indicate that Canada would ratify by way of the Cabinet and then an Order-in-Council and that Yukon would "mimic" that process to the extent possible.[30] CYI indicated that they would "ratify through a Special General Assembly". In addition, "each First Nation would specify how it will ratify its Final Agreement".

[89] I pause with my findings of fact to briefly discuss the change in Canada's position about this meeting. Initially, two of Canada's representatives in this action and another Federal Court action (T-108-07) understood that this meeting was a UFA negotiation session. However, after Canada's counsel consulted further with another two of its representatives (now retired) who actually attended the meeting, Canada subsequently clarified that the meeting was only an exploratory session where the parties exchanged their preliminary positions on various issues, including ratification. Accordingly, Canada subsequently clarified that there was no agreement at that meeting on the ratification processes to be employed by each of the respective parties. I deal with this further below under Issue #7.

[90] On December 8, 1989, at a press conference, Victor Mitander, CYI's Chief Negotiator at the time, stated:

[30] '06 Common Book of Documents, tab 80.

> … The ratification process will indicate whether the Yukon Indian people will accept a package or not … [U]ltimately the principals, our leadership, will have an opportunity to talk about what is required to conclude the balance of the package at that time. So, I think the ratification package, the ratification process has to be still laid out. The General Assembly has provided specific instructions to C.Y.I. that once we have the package in place, there will be a special General Assembly called, and at that time special General Assembly will decide the ratification process on the U.F.A. as well as that first [Yukon First Nation Final Agreement] …[31]

[91] On February 15, 1990, Senior Assistant Deputy Minister of Northern Affairs, Richard Van Loon ("ADM Van Loon"), wrote a briefing note to his Minister regarding ratification of the UFA. In the note, he observed that CYI may ratify the UFA by their General Assembly, which would be equivalent to a vote by the 14 First Nation chiefs. However, ADM Van Loon's advice to his Minister was that there should be a vote by every eligible Yukon First Nation person:

> The federal view is that UFA ratification will require a vote by every adult eligible to become a beneficiary. The vote could be on a community basis or overall Yukon. The federal government may consider a 51percent vote in favour as sufficient to ratify the UFA …[32]

It should be noted that there is no evidence of any response from the Minister to this briefing note. Therefore, this cannot be taken to be a reflection of Canada's actual position on ratification at that time.

[92] On February 16, 1990, a representative of Canada wrote an internal memorandum indicating that he or she had an expectation that CYI would ratify the UFA by "a territorial-wide referendum":

> … Negotiations fell somewhat behind schedule in 1989-90 as the Umbrella Final Agreement is now anticipated by April

[31] '06 Common Book of Documents, tab 97, p. 13.
[32] '06 Common Book of Documents, tab 106.

> 7, 1990. The CYI will then hold a territorial-wide referendum to ratify the UFA. Shortly thereafter, one or more First Nation Final Agreements will be negotiated and ratified by the individual community concerned. The First Nation Agreements and the UFA will then be submitted to Cabinet for ratification before additional [Final Agreements] are negotiated.[33]

[93] Sometime after March 31, 1990, CYI published an "Information Package" entitled "Understanding the Yukon Umbrella Final Agreement". The document summarized the various components of the UFA in plain language, and under the heading "The Process", the document stated:

> When the Negotiators are satisfied that they have come to an agreement on the meaning of all the provisions of the Umbrella Final Agreement, this agreement will be presented to a Special General Assembly of the Council for Yukon Indians. Delegates will vote on it at this time to accept, amend or reject it …[34]

[94] On July 6, 1990, one of Canada's negotiators wrote a note to the Government Caucus members stating:

> At long last the editing of the Umbrella Final Agreement has been completed …
>
> …
>
> The Yukon Indians are holding their annual general meeting this week. Subsequent to the meeting, negotiation of the UFA ratification process will get underway …[35]

[95] On July 17, 1990, the Minister of Indian and Northern Affairs, Tom Siddon, wrote to CYI Chairperson Gingell, referring to the fact that the UFA had been initialled by the parties on April 1, 1990. He then went on to propose that CYI ratify the UFA by a

[33] '06 Common Book of Documents, tab 107.
[34] '06 Common Book of Documents, tab 164, p. 5.
[35] '06 Common Book of Documents, tab 113.

Yukon-wide referendum and suggested that at least 50% of Yukon First Nation members and 50% of Yukon First Nations themselves support the UFA:

> … [I]n addition to whatever traditional means you employ to ratify the Umbrella Final Agreement, I would ask that you also ensure that there is a Yukon-wide referendum.
>
> How and when you wish to conduct this referendum is a matter for negotiation, but I consider it is essential that when I proceed to Cabinet I must be able to demonstrate that the Umbrella Final Agreement is supported by at least 50 percent of the Yukon Indian People and 50 percent of the Yukon First Nations. With this level of support, I would seek ratification by Cabinet of the Umbrella Final Agreement, after it has also been ratified by the Government of the Yukon Territory. This ratification would take place along with at least one and preferably three or four ratified Yukon First Nation Final Agreements. If a Yukon-wide referendum is not acceptable to your people, I could only proceed to Cabinet if at least seven or eight of the Yukon First Nations have negotiated and ratified their First Nation Final Agreements …[36]

[96] On July 31, 1990, Chairperson Gingell wrote to Minister Siddon acknowledging his suggested methods for ratification of the UFA and indicating that she had passed them on to CYI's negotiators to consider when dealing with this issue over that summer.

[97] On August 1, 1990, Chairperson Gingell wrote to Minister Siddon and Yukon Premier, Tony Penikett, indicating that CYI held its General Assembly on July 5 - 10, 1990, and that the initialled UFA had been put to the Assembly "for their consideration and eventual ratification". She did not elaborate on the ratification process that would be employed, but did say that CYI intended to put an information program into place on the UFA to assist First Nation communities in coming to an informed decision.[37]

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[36] '06 Common Book of Documents, tab 114.
[37] '05 Common Book of Documents, tab 191.

[98] On October 1, 1990, ADM Van Loon wrote to Chairperson Gingell about the funding for the Yukon Enrolment Commission (established to create a list of land claims beneficiaries) and the ratification process:

> I now await an indication from the CYI regarding the process that will be used to ratify the Umbrella Final Agreement. This information is required to support any decision to supply the Commission with additional funding.
>
> Once there are firm plans for the ratification of the UFA, additional support may be provided to enable the Commission to update the beneficiaries list as required.[38]

[99] On October 20, 1990, Minister Siddon held a press conference indicating that he had met that afternoon with CYI. His comments indicated that he was still pressing for a Yukon-wide ratification of the UFA at that time:

> … The [April 1, 1990 UFA] calls for a Yukon-wide ratification before the end of 1991 …
>
> …
>
> … [W]e can see the process continuing to unfold… The Council for Yukon Indians have undertaken to submit to a General Assembly of the C.Y.I. Yukon First Nations [as written]. They are prepared to submit recommendations as to the means of giving final ratification to the Umbrella Final Agreement …
>
> …
>
> … [G]iven that we have important work to do in the Band final negotiations, leading in particular to a Yukon-wide ratification, then we've gotta [as written] get down to business …[39]

[100] On November 7, 1990, Chairperson Gingell wrote to Minister Siddon acknowledging his desire for a Yukon-wide vote, but countering with CYI's position that

[38] '06 Common Book of Documents, tab 118.
[39] '06 Common Book of Documents, tab 119.

ratification would be considered at an upcoming Special General Assembly on January 16 to 18, 1991:

> … I wish to confirm the following …
>
> The Government of Canada sought an undertaking from the Council for Yukon Indians to propose the ratification of the Umbrella Final Agreement prior to March 31, 1991, through a territorial wide vote …
>
> …
>
> In response to the foregoing, the Council for Yukon Indians adopted the following corresponding positions …
>
> …
>
> The CYI advised that a Special General Assembly will be held on January 16, 17 and 18, 1991, to consider a process for Umbrella Final Agreement ratification …[40]

[101] An agenda for a Federal Government Caucus meeting on the UFA, dated November 28, 1990, included an item entitled "Negotiations of ratification process of the UFA (2.2.8)".

[102] An undated, but presumably originating around the same time, "CYI Claim Workplan" for remaining UFA negotiations included as one of the issues "Negotiation of process for ratification of UFA (2.2.8)". The Workplan further indicated that CYI was to hold a Special General Assembly to decide on the process in mid-January 1991, and that the process proposed by CYI was to be discussed at a UFA negotiating session to be scheduled in February 1991.

[103] An agenda for a UFA negotiation meeting held in Ottawa on December 4 to 7, 1990 similarly included an item entitled "Negotiations of ratification process of UFA (2.2.8)".

[40] '06 Common Book of Documents, tab 121.

[104] A memorandum dated December 17, 1990, and directed by Chairperson Gingell to all Yukon First Nations indicated that a Special General Assembly would be held January 17 to 19, 1991, and that the discussion would focus on the process for ratification of the UFA. She also indicated that a ratification working group had been established in November 1990 to assist in this process. She hoped that the upcoming Assembly would be able to decide on "how to ratify" the UFA. In a separate memorandum, also dated December 17, 1990, and directed to all Yukon Chiefs and Band Councillors, the first item on the draft agenda for the upcoming Special General Assembly scheduled for January 1991 stated: "Review Agreement On Ratification To Discuss And Decide On Process" [as written].

[105] On December 21, 1990, Minister Siddon wrote to Chairperson Gingell indicating that he was "pleased to hear" that progress was being made with respect to ratification of the UFA and that he looked forward to hearing of continued progress in that regard.

[106] On January 19, 1991, the General Assembly of CYI passed a Resolution by consensus which stated that ratification of the UFA would require a two-thirds majority of the Yukon First Nations and that the final date for ratification would be within three months of the first four Yukon First Nations reaching their Final Agreements:

> THEREFORE BE IT RESOLVED THAT:
>
> 1. The Council for Yukon Indians and all Yukon First Nations shall jointly provide an information program to all Yukon First Nations citizens prior to undertaking Yukon First Nation by Yukon First Nation ratification; and
>
> 2. The Council for Yukon Indians and Yukon First Nations shall convene and utilize the Yukon First Nation Caucus in the ratification process.

3. Upon the completion of the following:
   a) At least four First Nation Final Negotiations;
   b) Umbrella Final Agreement Implementation Plans;
   c) Enrollment Lists;
   d) Detailed Workplans and Resourcing Agreements;

   each Yukon First Nation shall recognize the right of each Yukon Indian Person to have a say in the ratification of the Umbrella Final Agreement, and that the approval of the Umbrella Final Agreement shall be determined by each Yukon First Nation according to its traditions; and

4. The ratification of the Umbrella Final Agreement will require a two-thirds majority of the Yukon First Nations; and

5. Final date for ratification of the Umbrella Final Agreement will be within three months of the first four Yukon First Nations who have reached their First Nation Final Agreements.

AGREED TO BY CONSENSUS.[41]

[107] On January 22, 1991, Chairperson Gingell wrote to Minister Siddon and Premier Penikett reporting on the Resolution passed by the Special General Assembly on January 19th, and including the particular five clauses of the Resolution set out above. In the opening paragraph of her letter she also reminded the recipients that:

> The Council for Yukon Indians during our General Assembly of July 1988 passed a resolution which required that a process for ratification be confirmed in a future Special General Assembly.[42]

Finally, Chairperson Gingell indicated that she would be happy to meet with the Minister and the Premier later that week in the event that either had any questions on the resolution.

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[41] ’06 Common Book of Documents, tab 130. Canada's counsel indicated in her written submissions that a two-thirds majority of the 14 Yukon First Nations would require nine First Nations to vote in favour. However, I believe the correct number is that 10 of 14 would be required.

[42] ’06 Common Book of Documents, tab 131.

[108] On January 25, 1991, ADM Van Loon prepared a memorandum on how to respond to the Resolution, presumably for discussion with the Minister. After assessing various options, he recommended delaying making any decision on the ratification process at that time:

> … [I]t is recommended that we delay making any decision on the ratification process at this time. We should agree to proceed to negotiate four [Yukon First Nation Final Agreements] as soon as possible and advise CYI that we expect that these [Agreements] will be concluded by early summer. At that time, we can assess progress in negotiations and the general support of [Yukon First Nations] before making a decision as to whether, and by what process, the UFA should be ratified …[43]

[109] On February 27, 1991, Minister Siddon wrote to Chairperson Gingell indicating his disappointment that the parties would be unable to meet the mutually agreed upon deadline of March 31, 1991 for the ratification of the UFA. Nevertheless, he further indicated that he was "prepared to proceed with the negotiation of Final Agreements with those First Nations which are prepared to accept the UFA and government's allocation of land and financial compensation as the basis for negotiation". Finally, he indicated that he was "heartened by the continuing commitment of the Yukon Indians to move to conclude" their comprehensive claim.

[110] An undated "Workplan" for remaining UFA negotiations included as one of the issues "Negotiation of process for ratification of UFA (2.2.8)", with the note opposite stating "On hold until Minister re-assesses CYI's proposed ratification process in August, 1991".

[43] '06 Common Book of Documents, tab 132.

[111] A "Workplan" dated May 1, 1991, similarly included among the issues the negotiation of process for ratification of the UFA, with the notation opposite "Feds to consider CYI General Assembly decision".[44]

[112] The CYI "Workplan" for land claims and central self-government for the fiscal year 1991-92 indicated that: (1) the ratification process would be addressed by CYI over the period from April to October 1991; (2) that the information campaign would continue over that period; and (3) that the vote by the 14 First Nations on ratification would occur in December 1991.[45]

[113] On October 25, 1991, Minister Siddon wrote to Chairperson Gingell indicating that he was pleased with the progress of the negotiations of the first four Yukon First Nations Final Agreements and, in view of that progress, he proposed the following steps for ratification of the UFA and the first four Final Agreements:

> 1. Ratification of the UFA by the Council for Yukon Indians (CYI) through its Board or a General Assembly …
>
> 2. Yukon First Nations would then proceed to ratification of their respective [Final Agreements] and approval of the implementation plans by the [Yukon First Nations]. A similar process could be followed to ratify the self-government agreements.
>
> 3. With ratification of these agreements, I would proceed to seek approval by the federal Cabinet of the UFA and four [Yukon First Nation Final Agreements], together with authority to sign the agreements and to draft territory-wide settlement legislation.
>
> 4. Official signing by the parties of the UFA and four [Final Agreements] could follow after Cabinet approval.[46]

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[44] '06 Common Book of Documents, tab 140.
[45] '06 Common Book of Documents, tab 143.
[46] '06 Common Book of Documents, tab 145.

[114] I pause in my findings of fact here to simply observe that this is apparently the first indication that the Minister was prepared to back off from his earlier position that there be a territory-wide vote by First Nation members on ratification.

[115] On December 16, 1991, Chairperson Gingell wrote to Minister Siddon and Premier Penikett to report that the UFA (now referred to as dated November 23, 1991) had been ratified by the Yukon First Nations at a General Assembly where ratification was discussed over a four-day period and "approved unanimously".[47] She enclosed a copy of Resolution # 12, which accomplished this ratification. Resolution # 12 was moved by George Smith (now known as Testloa Smith), who was then the Chief of RRDC. The particular wording of that portion of the Resolution approving the UFA is as follows:

> The Umbrella Final Agreement dated November 23, 1991, is hereby approved as the basis for completing the negotiation of Final Agreements which reflect the particular circumstances of the First Nations.[48]

[116] The passage of Resolution # 12 was also referred to in a community information circular about the UFA published by CYI, which stated:

> Following completion of negotiations of the remaining issues in the Umbrella Final Agreement, the Council for Yukon Indians held a special General Assembly on ratification of the Umbrella Final Agreement during the week of December 2, 1991. Five members from each of the fourteen Yukon First Nations attended to hear the report of our negotiators. After six days [as written] of discussions on the land claims agreement and self-government agreement, the Assembly voted by consensus to adopt the Umbrella Final Agreement.[49]

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[47] '05 Common Book of Documents, tab 194.
[48] '06 Common Book of Documents, tab 128.
[49] '06 Common Book of Documents, tab 155.

[117] On January 6, 1992, Minister Siddon wrote to Chairperson Gingell extending his congratulations to CYI on the ratification of the UFA on December 7, 1991.

[118] On January 13, 1992, Chairperson Gingell wrote to Minister Siddon about an upcoming meeting on January 20th, where ratification of the UFA was on the agenda because CYI was requesting retroactive funding for the ratification meeting and vote the previous December.

[119] On February 4, 1992, CYI and Canada agreed in writing that Canada would contribute $114,655 for CYI's expenses in holding the ratification vote for the UFA, retroactive to December 1, 1991.

[120] On February 6, 1992, Premier Penikett, and Chairperson Gingell jointly wrote to Minister Siddon confirming the ratification of the UFA by the General Assembly of CYI in December 1991.

[121] On February 13, 1992, Canada's then Associate Chief Federal Negotiator, Tim Koepke, wrote to CYI confirming the ratification of the UFA in December 1991. He also set out the conditions which Canada required before seeking Cabinet ratification of the UFA and the Yukon First Nation Final Agreements, and introducing federal settlement legislation:

> These are as follows:
> - The UFA initialled by all parties.
> - The UFA implementation plan, approved by the Council for Yukon Indians.
> - Four [Yukon First Nation Final Agreements], ratified by the respective Yukon First Nations.
> - Implementation plans for each of the [Yukon First Nations Final Agreements] and self-government agreements, approved by the respective Yukon First Nations.
> - Land selections and legal descriptions finalized following the public review. [50]

[50] '06 Book of Documents, tab 152.

[122] On March 17, 1992, Minister Siddon wrote to Chairperson Gingell acknowledging that the UFA had been unanimously ratified by Resolution # 12, and confirming that he would seek additional funding, if required, to allow for the conclusion of all the remaining Final Agreements during 1993-94.

[123] The UFA dated November 23, 1991 was subjected to a legal and technical review by all the parties. This resulted in a number of amendments and the amended UFA was dated May 30, 1992.

[124] On July 20 to 24, 1992, CYI held a General Assembly at Lake Laberge, during which they introduced Resolution # 6 to address the process for approval of the amended UFA of May 30, 1992. The pertinent portions of the draft resolution stated:

> WHEREAS the General Assembly of the Council for Yukon Indians approved by consensus the Umbrella Final Agreement dated November 23, 1991 (UFA November 23, 1991) on December 7, 1991; and
>
> WHEREAS as a result of editing and technical review certain editorial changes were made to the Umbrella Final Agreement of November 23, 1991; and
>
> …
>
> WHEREAS these changes have been incorporated into a revised Umbrella Final Agreement dated May 30, 1992;
>
> THEREFORE BE IT RESOLVED that the Umbrella Final Agreement dated May 30, 1992 ... is hereby approved to continue as the basis for completing the negotiation of Final Agreements which reflect the unique circumstances of each Yukon First Nation …[51]

The memorandum recording the Resolution began with the following statement:

> Albert James [one of the CYI chiefs] suggested that in terms of the following Resolution, the Leadership could deal with it

[51] '06 Common Book of Documents, tab 158.

> in consideration of the outstanding issues that would need to be resolved before this Resolution could be agreed to.
>
> The suggestion was agreed to by the Delegates.

[125] On September 10, 1992, CYI Negotiator, Victor Mitander, wrote to Canada's Negotiators, Tim Koepke and Shakir Alwarid, informing them of the General Assembly of July 20 to 24, 1992, the introduction of Resolution # 6, and the fact that CYI had instructed the Leadership to deal with it prior to the end of October 1992. Specifically, Mr. Mitander stated:

> In terms of process, the General Assembly has instructed the Leadership of CYI to deal with Resolution # 6. … The CYI Leadership is scheduled to meet prior to the end of October, 1992, and I expect approval of these changes as the Leadership has the ultimate authority in this regard.[52]

[126] In January 1993, the Yukon government prepared an "Information Package" regarding the UFA and summarizing the land claims process to that point. Under a sub-heading entitled "Ratification", the document stated:

> The Council for Yukon Indians ratified the Umbrella Final Agreement and the model Self-Government Agreement in December 1991. Subsequently, the amendments were made to the Umbrella Final Agreement that require ratification by CYI. They have proposed additional amendments for governments' consideration and are expected to ratify after resolution of those issues.
>
> The Yukon Government has ratified the UFA by way of introducing settlement legislation in December 1992.[53]

[127] Also in 1993, the Yukon government prepared another public document for information purposes about the UFA. Under a sub-heading entitled "Ratification", the document stated:

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[52] '06 Common Book of Documents, tab 160.
[53] '06 Common Book of Documents, tab 163, p. 1.

> The parties have to ratify the UFA. This means both the governments and the Yukon First Nations have to accept the terms of the agreement. Governments will do it by a cabinet process and the Yukon First Nations Indian people will decide soon how they will ratify.[54]

[128] On March 26, 1993, the President of the Kaska Dena Council ("KDC") and the Chiefs of the Liard Indian Band[55] and RRDC wrote to Minister Siddon objecting to the inclusion of amendments to Chapter 25 of the UFA, which they said gave the Yukon government a veto over future transboundary claims in the Yukon. They urged the Minister to remove the sections under heading 25.5.0 "Transboundary Agreements" from the UFA.

[129] The KDC is a society incorporated in British Columbia for the purpose of representing the Kaska in that province in the negotiation of their land claims there and their trans-boundary claims in the Yukon.

[130] On March 27, 1993, the UFA was initialled by the Negotiators for CYI, Canada and Yukon.

[131] On March 29 to 31, 1993, CYI held a Special Leadership Meeting with representatives of each of the 14 Yukon First Nations, as well as a number of other chiefs, elders and negotiators. Page three of the minutes of that meeting notes:

> The General Assembly has asked that the Leadership approve the changes made to the Umbrella Final Agreement as well as the Umbrella Final Agreement Implementation Plan.
>
> There were three areas of concern for the General Assembly:
>
> 1) Section 25.5 – Transboundary provisions

[54] '06 Common Book of Documents, tab 218.
[55] Now the Liard First Nation, being the Kaska principally resident in and around Upper Liard, Yukon.

2) Section 29.2 – Recognition of White River's Traditional Territory

3) Loan repayment[56]

On March 31, 1993, the CYI Leadership Board passed a Resolution (dated March 30, 1993) approving and accepting the UFA initialled March 27, 1993. The pertinent provisions of the resolution stated:

> WHEREAS the General Assembly of the Council for Yukon Indians approved by consensus the Umbrella Final Agreement dated November 23, 1991 (UFA November 23, 1991) on December 7, 1991;
>
> WHEREAS as a result of editing and technical review certain editorial changes were made to the Umbrella Final Agreement of November 23, 1991, and certain other changes were made to reflect Agreements between Council for Yukon Indians and Government Negotiators;
>
> WHEREAS these … changes have been incorporated into a revised Umbrella Final Agreement dated May 30, 1992;
>
> WHEREAS the General Assembly at Lake [Laberge], in July 1992, mandated the Leadership to approve the amended version of the UFA dated May 30, 1992;
>
> …
>
> THEREFORE BE IT RESOLVED that:
>
> 1. The Umbrella Final Agreement Implementation Plan dated March 27, 1993, it is hereby approved and accepted.
> 2. That the amendments, editorial changes and errata to the Umbrella Final Agreement are hereby approved and accepted as the basis for completing the negotiation of First Nation Final Agreements which reflect the unique circumstances of each Yukon First Nation ... [57]

[56] '06 Common Book of Documents, tab 170.
[57] '06 Common Book of Documents, tab 168.

The vote was recorded as “11 for”, “3 against” and “1 abstention”.[58] The three against were the Liard First Nation, RRDC and what is now Little Salmon/Carmacks First Nation. The abstention was the White River First Nation. Parenthetically, I note that Little Salmon/Carmacks First Nation concluded a Final Agreement and a Self-government Agreement in 1997, based on the UFA.

[132] On March 31, 1993, Chairperson Gingell wrote to Minister Siddon informing him of the result of the ratification vote. The pertinent parts of her letter are as follows:

> As Chairperson of the Council for Yukon Indians, it is with a great deal of pride and honour that I have the privilege to advise you that our Leadership Board ratified the UFA and UFA Implementation Plan on March 31, 1993, in Whitehorse, Yukon.
>
> …
>
> In essence, Mr. Minister, the Council for Yukon Indians has completed all pertinent matters respecting the Umbrella Final Agreement.
>
> I am attaching, for your information, a copy of the resolution which was passed by the Yukon Chiefs and the Executive of the Council for Yukon Indians. The vote was eleven in favour, three opposed, and one abstention.
>
> The Kaska representative asked me to relay that they opposed the attached resolution primarily due to Section 25.5.5 of the UFA …
>
> Their position was formally conveyed to you on March 26, 1993, in a letter signed by their leaders. [59]

[133] On May 13, 1993, Minister Siddon wrote to Chairperson Gingell congratulating CYI on the ratification of the UFA and the Implementation Plan. He also informed her that the federal ratification of the UFA was proceeding smoothly. In particular he stated:

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[58] Canada’s counsel informed me that CYI also had a vote at this meeting.
[59] ’06 Common Book of Documents, tab 169.

> It was with the greatest of pleasure that I received your announcement that the UFA and the UFA Implementation Plan have been ratified by the leadership of the Council for Yukon Indians (CYI) and that the First Nations which have initialled Final and Self-government agreements scheduled ratification proceedings for April 1993. May I convey to you my most sincere congratulations on this achievement. [60]

[134] On May 26, 1993, Minister Siddon wrote to Chairperson Gingell congratulating CYI and the first four First Nations for having ratified their respective Final Agreements and Self-Government Agreements. He also suggested a signing ceremony in Whitehorse on May 29, 1993.

[135] On May 29, 1993, the UFA was signed by all three parties, together with the first four Yukon First Nation Final Agreements and Self-government Agreements. A federal government news release was issued the same day about the signing. Judy Gingell signed as Chairperson of CYI, Tom Siddon, as Minister of Indian and Northern Affairs, and John Ostashek, as the Yukon government Leader.

[136] On February 17, 1994, one of RRDC's counsel in the case at bar, Stephen Walsh, wrote to Canada's senior counsel, William Elliott, inquiring whether s. 2.2.8 of the UFA had been complied with and asking: "what specifically was the ratification process that was ratified by the parties and when did this ratification occur?"

[137] On February 22, 1994, Mr. Elliott responded to Mr. Walsh by attaching Chairperson Gingell's letter of March 31, 1993, detailing the ratification process followed at the Special Leadership Meeting ending that same day.

[138] This answer has not satisfied the Kaska and they have subsequently asked a number of times through correspondence in the intervening years for the same information.

[60] '06 Common Book of Documents, tab 174.

[139] This concludes my findings of fact on this issue.

[140] In my view, the evidence establishes that the parties did negotiate the processes for ratification of the UFA, as required by the first branch of s. 2.2.8 of the UFA. Further, ultimately, the ratification of those processes was obtained at the same time as ratification of the UFA on May 29, 1993, by the signing of the document by Chairperson Gingell, Minister Siddon, and Yukon government, Leader Ostashek.

[141] There was never any issue that CYI disputed the processes for ratification proposed by each of Canada and Yukon. Canada had indicated from the outset, at the exploratory meeting held in Whitehorse June 7 and 8, 1989, that it would ratify by way of Cabinet and then by way of an Order-in-Council. Yukon indicated at that time that it would mimic, to whatever extent possible, Canada's process. The evidence indicates that CYI was always in general agreement with these proposals. Indeed, in the result, the ratification by the two governments occurred in virtually the exact manner originally proposed. Canada ratified by Minister Siddon taking the UFA to Cabinet and subsequently enacting territory-wide settlement legislation (*Yukon First Nations Land Claims Settlement Act* [61] and *Yukon First Nations Self-Government Act* [62]). The Yukon government, presumably on the instructions of Cabinet, ratified by enacting its own settlement legislation (*First Nations (Yukon) Self-Government* Act [63], and *An Act Approving Yukon Land Claim Final Agreements*[64]).

[142] The only real issue raised by RRDC is whether Canada and Yukon agreed with the ratification processes proposed by CYI, prior to the signing of the UFA on May 29,

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[61] S.C. 1994, c. 34.
[62] S.C. 1994, c. 35.
[63] R.S.Y. 2002, c. 90.
[64] R.S.Y. 2002, c. 240.

1993. While there may not have been a single point in time when the parties conclusively agreed on how CYI would ratify, the tenor of the negotiations and, in particular, the change of Canada's position over time indicate that there was general agreement on how CYI proposed to ratify.

[143] Again, CYI's original proposal at the Whitehorse meeting on June 7 and 8, 1989 was that it would ratify through a Special General Assembly. Although Minister Siddon initially took issue with this proposal, preferring instead a Yukon-wide referendum, with at least 50% of Yukon First Nation members and 50% of the Yukon First Nations themselves supporting the UFA, this position eventually softened. For its part, CYI continued to inform both governments that it intended to ratify the UFA by way of a Special General Assembly.

[144] Indeed, at the Special General Assembly held in Whitehorse on January 17 to 19, 1991, CYI passed the Resolution specifying that the ratification of the UFA would require a two-thirds majority of the 14 Yukon First Nations, and that the vote would have to occur within three months following the conclusion of the first-four Yukon First Nation Final Agreements. When CYI Chairperson Gingell reported to Minister Siddon and Premier Penikett on this outcome, neither of the recipients took any particular issue with it, until Minister Siddon wrote to Chairperson Gingell on October 25, 1991 proposing ratification of UFA "through its Board or a General Assembly". However, when Chairperson Gingell reported to Minister Siddon on December 16, 1991 that CYI had ratified the UFA (dated November 23, 1991) by way of a unanimous vote approving Resolution # 12 at its General Assembly on December 7, 1991, the Minister's response was to congratulate CYI on the ratification. Here, I agree with Canada's counsel that the

conduct of the parties was such that Minister Siddon's positive response and the absence of any evidence of disagreement with the process from the Yukon government indicates that the two governments generally accepted CYI's ratification process as appropriate.

[145] When the UFA dated November 23, 1991 was amended, a second ratification process became necessary. Canada's Chief Negotiator, Mr. Koepke, in his letter to CYI dated February 13, 1992, set out what Canada required in order to ratify the UFA through Cabinet and the introduction of settlement legislation:

- initialing of the UFA by all parties;
- CYI approval of the UFA Implementation Plan;
- ratification of the first four Yukon First Nation Final Agreements by the respective Yukon First Nations;
- approval by the respective Yukon First Nations of their respective Implementation Plans and Self-government agreements; and
- finalization of land selections and legal descriptions.

By the time the UFA was finally signed by all the parties on May 29, 1993, all of these conditions had been met.

[146] For its part, CYI decided at its General Assembly at Lake Laberge on July 20 to 24, 1992 that ratification of the amended UFA dated May 30, 1992 would take place by way of a subsequent vote by CYI's "Leadership" on draft Resolution # 6.

[147] In fact, what occurred was a Special Leadership meeting on March 29 to 31, 1993, where the CYI Board of Directors, comprised of a representative of each of the 14 Yukon First Nations, voted in favour of a new Resolution, dated March 30, 1993, which

approved the amended UFA dated May 30, 1992. With 10 of 14 First Nations (as well as CYI itself in favour), CYI had complied with its earlier Resolution passed January 19, 1991, requiring a two-thirds majority. Finally, when Chairperson Gingell reported this outcome to Minister Siddon, his response of May 13, 1993 was to again congratulate CYI on the ratification of the UFA by its “leadership”. This conduct demonstrates an implicit acceptance of CYI’s ratification process for the amended UFA, and there is no evidence that the Yukon government took any different position.

[148] Accordingly, it is my conclusion that when the three parties signed the UFA on May 29, 1993, they implicitly ratified the processes for ratification that had previously been negotiated between the parties, thus satisfying the requirements of s. 2.2.8 of the UFA.

4.7 Issue #7: Have Canada’s representatives knowingly (or with reckless indifference) procured and relied upon a series of conflicting and false affidavits with respect to the alleged ratification of the UFA? If so, is such conduct inconsistent with the honour of the Crown?

[149] There are essentially two sub-issues here. The first is that Canada’s representatives initially provided sworn evidence that the processes for ratification of the UFA were agreed to by CYI, Canada and Yukon at a meeting in Whitehorse on June 7, 1989. Canada later interviewed two of its negotiators who attended that meeting and discovered that it was only an exploratory session, where preliminary ideas about ratification were discussed, but that there was no clear agreement on the processes which would be followed. The second sub-issue is that the Acting Regional Director General of Indian and Northern Affairs Canada, Shari Borgford, swore an affidavit dated February 28, 2011, in which she stated that the UFA parties first discussed the ratification processes at an all-party meeting on June 7, 1989, and then agreed to those

processes at a meeting on October 25, 1991. Ms. Borgford subsequently discovered that her reference to a meeting on October 25, 1991 was in error, in that there was no meeting on that date. She corrected her evidence in an affidavit sworn September 27, 2013.

[150] RRDC's counsel, Mr. Walsh, has submitted that Canada's counsel has "procured and relied upon" a number of "false affidavits",[65] which refer both to the ratification agreement being obtained on June 7, 1989 and a subsequent meeting on October 25, 1991. Canada's counsel has submitted that it was simply complying with its continuing obligation to accurately and correctly answer interrogatories (in the case of the '05 and '06 Actions) and written examinations (in the case of the Federal Court actions), by the respective *Rules of Court* applicable to those actions, when they have discovered that an answer provided was inaccurate, incorrect or incomplete.

[151] I conclude that RRDC's counsel's allegations here are inflammatory and even reckless. The definition of "procure" in *The New Shorter Oxford English Dictionary* includes:

> … try to bring about (esp. something bad). Bring about, esp. by care or with effort; cause to be done; … Obtain, esp. by care or with effort …

Thus, the word suggests that Canada's counsel deliberately intended to mislead this Court and the Federal Court by introducing the information. I do not accept that this was the case.

[152] The source of one of Canada's representations in the Federal Court actions is Joe Leask. It is clear from the affidavits of Mr. Leask that his information about the meeting on June 7, 1989 was not based on a personal source, but rather that his

[65] RRDC's Outline, filed September 23, 2016.

information was based upon the documentation provided to him and reviewed by him. The same can be said about Ms. Borgford's original evidence regarding the meeting on June 7, 1989. RRDC's counsel accepts that Canada's deponents did not have personal knowledge of the information in their affidavits. However, he submits that the point is that Canada's representatives who were preparing and obtaining those sworn affidavits did in fact have personal knowledge and were aware that the sworn information contained in those affidavits was, on its face, conflicting.[66] There is no evidence that this was the case.

[153] Before going further, and for the sake of completeness, given the seriousness of the allegations by RRDC's counsel, I will set out the relevant portions of the documents pertaining to this issue.

[154] As noted earlier, a briefing note was prepared by ADM Van Loon, for an upcoming meeting between Minister Cadieux, Minister of Indian and Northern Affairs Canada, and CYI Chairperson Gingell on February 15, 1990. The briefing note was from ADM Van Loon to Minister Cadieux. There is no evidence of Minister Cadieux's response to the note. The briefing note contains ADM Van Loon's comments on the issue of how the UFA should be ratified. Among the discussion is the following statement: "CYI's position has not been discussed yet at the table", presumably with reference to the main table negotiations on the UFA.

[155] In five affidavits sworn by Joe Leask on behalf of Canada in Federal Court actions No. T-1749-99, between the Liard First Nation and Her Majesty the Queen, and No. T-108-07, between RRDC and Her Majesty the Queen (at one time, the two actions were being tried together) Mr. Leask provided answers to written examinations from the

[66] RRDC's Outline, filed February 23, 2016, para. 7.

plaintiffs.[67] The first of these affidavits was sworn on November 12, 2008, and the last on December 14, 2012. As I understand it, this is the first time that representatives of Canada deposed that the UFA ratification processes had been agreed to at the Whitehorse meeting between CYI, Canada and Yukon on June 7, 1989. I mentioned this meeting above in discussing Issue #6. Because there were numerous questions asked of Mr. Leask, I will only refer here to a representative number of questions and answers, as RRDC's counsel did not specifically take me to the various questions and answers he intends to rely upon.

[156] In his affidavit sworn November 12, 2008, Mr. Leask was asked the following questions and provided the following answers:

> *With respect to the Defendant's allegation in paragraph 9 of its Second Further Amended Statement of Defence that the UFA, and amendments thereto, were ratified by all Yukon First Nations, including the Plaintiff, please provide all particulars (in addition to those provided in response to the above questions) of:*
>
> *(a) the processes for ratification of the UFA alleged by the Defendant to have been negotiated by the parties thereto, in accordance with section 2.2.8 of the UFA; and*
>
> *(b) how and when the processes for ratification of the UFA referred to [above] were ratified, in accordance with section 2.2.8 of the UFA.*
>
> UFA Parties negotiated UFA ratification processes and achieved an agreement at the Umbrella Final Agreement Meeting at the Yukon Indian Centre in Whitehorse on June 7, 1989. UFA parties agreed that: (i) Canada would ratify by Cabinet approval and Order in Council; (ii) the Yukon Territorial Government would ratify by a process comparable to Canada, mirroring Canada's process to the extent possible; and (iii) the CYI would ratify by Special General Assembly …

[67] '06 Common Book of Documents, tabs 410 - 415.

> …
>
> The UFA Parties negotiated ratification processes for the UFA, and first achieved agreement on those processes at the UFA Meeting in Whitehorse on June 7, 1989. Each of the UFA parties thereafter undertook steps agreed upon to ratify the UFA. Evidence of the ratification of the UFA and the ratification processes is provided in the execution of the UFA including section 2.2.8 thereof, by the UFA parties …

[157] In his affidavit sworn October 18, 2012, Mr. Leask provided a response and a supplementary response to the following question:

> *Did the Defendant's servants or agents at any time prior to the delivery of the Affidavit of Joe Leask sworn November 12, 2008 inform the Plaintiffs that it is the Defendant's position that the parties to the UFA achieved an agreement on a process to ratify the UFA at a meeting on June 7, 1989? If so: [a] When, how and by whom were each of [Liard First Nation] and RRDC informed of this?*
>
> Response: Representatives of the Plaintiffs were present at a meeting on June 7- 8, 1989 where an agreement on the ratification process was reached.
>
> Supplementary Response: Nothing to add except to say that this was when agreement was first achieved. After this time there were further discussions and meetings about the process the Yukon First Nations would undergo for ratification. Final ratification occurred in 1992 (YTG) and 1993 (CYI and First Nations and Canada).
>
> …
>
> *Did the Defendant's affiant, Joe Leask, attend or participate in the meeting on June 7, 1989 at which the parties to the UFA are alleged by the defendant to have achieved an agreement on a process to ratify the UFA? If not, then: [a] Who specifically was the source of Mr. Leask's information that the parties to the UFA achieved an agreement on a process to ratify the UFA at a meeting on June 7, 1989?*
>
> Response: No personal source …

> Supplementary Response: As noted the source of Mr. Leask's information was the documentation provided to him and reviewed by him.[68]

[158] In a document in Federal Court action No. T-108-07 between RRDC and Her Majesty the Queen, dated January 9, 2009, and entitled Response to Request to Admit, Canada provided answers to questions in a request to admit from RRDC dated November 28, 2008. A number of these answers deal with the June 1989 meeting between CYI, Canada and Yukon during which ratification of the UFA was discussed. For the sake of convenience, I will set out the relevant questions and the answers:

> …
>
> 9) *As of February 15, 1990, the parties to the UFA had not reached an agreement on the process for ratification of the UFA.*
>
> He [the Attorney General of Canada] denies this fact. The general process was agreed to among the parties in June 1989. The details of each process were worked out over time.
>
> …
>
> (15) *In the letter dated July 17, 1990, referred to in paragraphs 13 and 14 above, Tom Siddon, the defendant Crown's Minister of Indian Affairs and Northern Development, addresses, among other things, his understanding of the timing for the negotiation of processes for the ratification of the Umbrella Final Agreement and, in that regard, states: "My negotiators inform me that negotiation of ratification processes will be dealt with this summer."*
>
> He admits that the sentence in quotes is what is stated in the letter. He does not admit that the negotiations referred to in the letter encompass all of the negotiations among the parties on ratification. The general process of ratification was agreed to in June 1989. The details were worked out over time.

[68] '06 Common Book of Documents, tab 413.

> …
>
> (25) *As of January 22, 1991, the parties to the UFA had not reached an agreement on the process for ratification of the UFA.*
>
> He denies the truth of this fact. A general agreement on the process of ratification was reached in June 1989.
>
> …
>
> (30) *As of October 25, 1991, the parties to the UFA had not reached an agreement on the process for ratification of the UFA.*
>
> He denies the truth of this fact. In general agreement on the process of ratification was reached in June 1989. [69]

[159] RRDC's counsel suggested to Ms. Borgford, in his examination of her in this trial, that there is an inconsistency between Canada's answer to question # 9 above and the statement in the ADM Van Loon briefing note for the upcoming meeting on February 15, 1990 that "CYI's position has not been discussed yet at the table". I disagree. The answer to question #9 suggests that there was a "general" agreement on ratification processes prior to the meeting between Minister Cadieux and Chairperson Gingell on February 15, 1990, but that the details had not yet been worked out. That is not necessarily inconsistent with ADM Van Loon stating in the note that "CYI's position has not been discussed yet at the table". There is no further information about what he meant by "CYI's position", but this statement does not exclude the possibility that he could have been talking about a position other than CYI's initial position at the Whitehorse meeting on June 7 and 8, 1989.

[69] '06 Common Book of Documents, tab 416.

[160] In her affidavit in this action, sworn February 28, 2011, Ms. Borgford provided answers to questions in RRDC's interrogatories dated November 17, 2010. Several of her answers in response to interrogatory number 39 are relevant here:

> …
>
> *(i) If the parties to the UFA did comply with the terms of s. 2.2.8 of the UFA, please answer the following questions:*
>
> > *(i) What were the specific processes for ratification of the UFA that were negotiated and agreed to by the parties?*
> >
> > The UFA parties agreed that the Council for Yukon Indians would ratify by Special General Assembly, the Yukon Government would ratify by a process comparable to Canada, mirroring Canada's process to the extent possible and Canada would ratify the UFA by Cabinet approval and OIC.
> >
> > ii. *What are the names of the representatives of the defendant that participated in the negotiations when the specific processes for ratification of the UFA were negotiated and agreed to by the parties?*
> >
> > The UFA parties first discussed the ratification issue in June 7, 1989 at an all party meeting. Representing Canada at the meeting were Mike Whittington, Wayne Crutchlow, Gerry Hitchins, and Gilberte Lavoie. The processes were agreed to at the meeting of October 25, 1991.
> >
> > iii. *On what date where the specific processes for ratification of the UFA and [as written] agreed to by the parties?*
> >
> > The UFA parties first discussed this matter in June 7, 1989 at an all party meeting and agreed to it at a meeting on October 25, 1991. [70]

[70] '05 Common Book of Documents, tab 199.

[161] In her affidavit in the '05 action, sworn September 27, 2013, Ms. Borgford provided a revised response to RRDC's interrogatories dated November 17, 2010, in particular to question number 39:

> 1. The following is a revision to various parts of question 39, answered by way of an exhibit to an affidavit dated 28 February 2011, on the basis of additional information of which I have become aware.
>
> 2. In the answer to question 39 (i) (i) (ii) and (iii) [as written] in the defendant's response of 28 February 2011 it is stated that the UFA parties first discussed the ratification issue in June 7, 1989 and the processes were agreed to at a meeting of October 25, 1991.
>
> 3. It is now my information, knowledge and belief that the meeting of June 1989 was an exploratory meeting at which there was a sharing of information and a statement of preliminary positions by the representatives of each of the UFA negotiating parties. The meeting was to determine how the parties would organize themselves for the next steps in the negotiations process and to exchange information about preliminary positions on various issues, including the ratification of the UFA. At that meeting, the minutes reflect that the information provided by the parties about UFA ratification was: 1) federal government ratifies by Cabinet and then Order-in-Council; 2) Yukon Government likely to do the same as the federal government; 3) CYI ratifies through a Special General Assembly. This is ultimately what occurred. However, there was no agreement at the June 1989 meeting that this is how ratification would occur, as discussion on that topic continued for several years after the meeting.
>
> 4. There was no meeting on October 25, 1991 at which the ratification processes were discussed and agreed to. We do not at this time know the specific date by which all of the ratification processes were agreed to.[71]

[71] '05 Common Book of Documents, tab 201.

[162] Rule 29(11) of the Yukon *Rules of Court* provides:

> Where a person who has given an answer to an interrogatory later learns that the answer is inaccurate or incomplete, the person is under a continuing obligation to deliver to the party who served the interrogatory an affidavit deposing to an accurate or complete answer.

[163] Rule 245 (1) of the Federal *Court Rules* similarly provides:

> A person who was examined for discovery and who discovers that the answer to a question in the examination is no longer correct or complete shall, without delay, provide the examining party with the corrected or completed information in writing.

Examination for discovery in the Federal *Court Rules* includes written discovery, which is equivalent to interrogatories in this Court.

[164] Thus, both *Rules of Court* contemplate that, from time to time, a deponent, an affiant or a witness may provide inaccurate, incorrect or incomplete information. This can easily be the case where the witness has deposed to a certain fact on the basis of information and belief, such as was the case here. Where a witness subsequently realizes that there has been an error, then they have a continuing obligation to provide the examining party opposite an accurate, correct and complete answer. That is precisely what happened in the case of Ms. Borgford. I do not know if Mr. Leask did the same in the Federal Court actions, as those are not before me.

[165] Nor can it be said that Canada's counsel has "relied" upon the inaccurate evidence. Rather, since the corrections have been made, Canada must now accept that there has been a change in the evidence regarding the issue of ratification. Further, as

Canada's counsel correctly pointed out in their written outline, both new answers are more favourable to RRDC's position than the original answers.[72]

[166] It must also be remembered that Canada has responded to hundreds of questions and reviewed tens of thousands of documents in both the Federal Court actions and the '05 and '06 Actions. It is undisputed that in Federal Court actions T-108-07 and T-1749-99, Canada responded to 1001 questions from the plaintiffs, was required to review over 46,000 documents, and produced over 16,000 documents. In the '05 and '06 Actions, Canada received 113 questions from RRDC, was required to review over 45,000 documents, and produced almost 14,000 documents.

[167] Another argument raised by RRDC's counsel is that the retired federal government employees, who subsequently clarified that the June 1989 meeting was exploratory only, have not been identified.[73] This is simply incorrect. Canada's answers to undertaking requests from the examination of Ms. Borgford on April 27, 2016, in a document dated June 30, 2016, at Request # 22, identified Wayne Crutchlow and Gilberte Lavoie as the sources of her information and belief that the June 1989 meeting was exploratory only. This was also confirmed by Ms. Borgford in her testimony at this trial.

[168] Nevertheless, RRDC's counsel argued further that there is no sworn affidavit in this Court that states there is new information from one of the retired federal government participants. In my view, there was no obligation upon Canada to provide such an affidavit beyond what was deposed to by Ms. Borgford in hers of September 27, 2013. It is trite to say that there is no property in a witness, and if RRDC thought

[72] Filed September 20, 2016, para. 136.
[73] RRDC's Outline, filed September 23, 2016, paras. 8 and 9.

they would benefit from subpoenaing either Mr. Crutchlow or Mr. Lavoie, then they could have done so.

[169] Canada has submitted that the incorrect information was not tendered intentionally, dishonestly or in bad faith, but rather was based upon the best information available to it at the time. RRDC's counsel, Mr. Walsh, has submitted that there is "abundant evidence" to show that this is not correct. In this regard he points to a document entitled "Response to Request to Admit", dated January 9, 2009. He says that a careful review of this document:

> … clearly demonstrates that there was abundant evidence before the Court several years ago showing that no agreement was arrived at in June, 1989 as to how the provisions of s. 2.2.8 of the UFA would be met. (my emphasis)[74]

Having said that, counsel pointed to no particular examples in the Response showing that "no agreement was arrived at in June, 1989". Rather, as I set out above, Canada repeatedly stated throughout the document that the "general process" of ratification was agreed to at the meeting in June 1989.

[170] Lastly in this area, RRDC's counsel says the issue is not whether Ms. Borgford knowingly swore a false affidavit - no such suggestion has been made or implied - but rather that Canada's representatives who prepared and obtained these sworn affidavits must have known that the sworn information contained therein was, on its face, conflicting. In particular, counsel complained that the source of the information has never been produced.[75] In response, in the document dated June 30, 2016, providing answers to undertaking requests from the examination of Ms. Borgford on April 27,

[74] RRDC's Outline, filed September 23, 2016, para. 10.
[75] RRDC's Outline, filed September 23, 2016, para. 12.

2016, Canada has indicated, at question # 9, that the basis for her original answer that there was a meeting on October 25, 1991 is as follows:

> The information was provided to us by researchers. Any further response is subject to litigation privilege. The referenced answer was inaccurate and has been corrected as required by Rule 29(11).

There is no suggestion on the record that RRDC sought to pursue the matter of the identity of the researchers any further. If they were unsatisfied with the answer, it seems to me they had an obligation to do so.

[171] Canada's counsel, at the trial, further indicated that the mistake by the researcher was likely due to a misunderstanding of the import of the letter dated October 25, 1991, from Minister Siddon to Chairperson Gingell on the topic of ratification.[76]

[172] In the result, I conclude that Canada has not knowingly (or with reckless indifference) procured and relied upon false affidavits about the UFA ratification.

4.8 Issue #8: Has Canada failed or refused to agree, after June 2002, to resume negotiations with RRDC, despite requests from RRDC that Canada do so and proposals from RRDC for the resumption of negotiations? If so, is such conduct inconsistent with the honour of the Crown?

[173] In its statement of claim, RRDC pleaded that one of the ways in which Canada has breached its constitutional duties towards RRDC is by the "unilateral and arbitrary abandonment of negotiations with [RRDC] in June 2002, and the subsequent refusal or failure to resume negotiations".[77] However, in its written outline filed August 19, 2016, RRDC refers only to the failure to resume negotiations despite requests and proposals from RRDC to do so, and that reference is only in the form of a stated issue, without any

[76] '06 Common Book of Documents, tab 145.
[77] Filed September 30, 2011, para. 50(d).

developed argument on the point. RRDC did not refer to the “abandonment” of negotiations by Canada in any of the written or oral arguments from their counsel.

[174] Nevertheless, in its outline filed September 20, 2016, Canada devoted a substantial amount of argument in response to the alleged abandonment. For this reason and because of the fact that the allegations of abandonment and failure to resume negotiations were linked in RRDC’s statement of claim, I propose to deal with both issues here. It is also important to determine whether there was a genuine abandonment of negotiations by Canada after June 2002 because, shortly after that, RRDC repeatedly raised this as an objection in its attempts to have Canada return to the negotiating table.

[175] I conclude that Canada did not abandon the negotiations. This conclusion is based on the history of those negotiations and, more particularly, on what happened immediately around the end of Canada’s negotiating mandate in June 2002.

[176] However, because RRDC’s counsel did not address the abandonment issue in either their written or oral argument, I do not propose to deal with that history in as much detail as Canada did in its written outline. That said, I will attempt to discuss what happened immediately leading up to and shortly after June 2002.

[177] As with the other earlier issues, the vast majority of the evidence on the allegations of abandonment and failure or refusal to resume negotiations is uncontested. Therefore, my references to this evidence can be taken as my findings of fact in this area, unless indicated otherwise, where the parties do not agree.

4.8.1 Abandonment of Negotiations

[178] The comprehensive land claims of the Yukon Indian People (as they were then known) were the first comprehensive claims accepted by Canada in 1973 under its comprehensive land claims policy, which was announced that same year. RRDC's (then known as the Ross River Band) claims to Aboriginal title, rights and interests in and to the Kaska traditional territory were part of these comprehensive land claims. The original group representing RRDC and the other Yukon First Nations at that time was known as the Yukon Native Brotherhood. This group later became known as the Council of Yukon Indians, and since August 1995 (I believe), as the Council of Yukon First Nations ("CYFN").

[179] From time to time since 1973, representatives of RRDC have been involved in negotiations with Canada towards a settlement of its comprehensive land claims in and to the Kaska traditional territory.

[180] An Agreement in Principle ("AIP") was successfully negotiated in 1984, however it was never ratified by the CYI, because RRDC and three other First Nations did not support it.

[181] In 1989, a new AIP was negotiated by CYI. However, RRDC and the Liard First Nation ("LFN") insisted on entering into a separate "Framework Agreement" with Canada to govern the negotiation of the Kaska land claims.

[182] The negotiations which ultimately led to the UFA were conducted on behalf of all Yukon First Nations by CYI, including representation from RRDC. However, both RRDC and LFN refused to support the UFA on the basis that it was not consistent with the

Kaska Framework Agreement. When the UFA was ratified by CYI in 1993, as I have found above, RRDC and LFN opposed the ratification.

[183] In 1995, RRDC and LFN withdrew from CYI and have never become members of CYFN.

[184] From 1995 until 2002, there were fits and starts in the negotiations between RRDC and Canada, however RRDC ultimately agreed to return to the negotiating main table on the basis of the UFA.

[185] A federal government document indicates that as of December 12, 1997, RRDC's final agreement and self-government negotiations were well underway.[78] Sixty percent of land selections had been agreed to and 45% of the lands were protected on an interim basis. Completion of the agreements was expected in September 1998.

[186] While this milestone was not achieved, the negotiations continued. A subsequent federal government document indicated that ratification of the Final Agreement and Self-Government Agreement were expected in October 1999.[79] Once again, however, that milestone was not achieved.

[187] On February 24, 2000, Kaska Nation Tribal Chief, Hammond Dick, wrote to Minister Robert Nault, raising several issues arising from the negotiations.[80] One of those was an allegation that the UFA was never validly ratified. Chief Dick indicated that the Kaska had commenced legal proceedings to vindicate their view in that regard.

[188] In March 2000, the Minister of Indian and Northern Affairs Canada obtained a mandate from the federal Cabinet to continue negotiations with the Yukon First Nations

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[78] '06 Common Book of Documents, tab 237.
[79] '06 Common Book of Documents, tab 243.
[80] '06 Common Book of Documents, tab 259.

who had not yet settled their Final Agreements or Self-Government Agreements. This new mandate was set to expire on March 31, 2002.

[189] Minister Nault met with representatives of all Yukon First Nations in May 2000, at which time the First Nations raised the issue of the ratio of the repayment of negotiation loans versus compensation dollars, as well as the issue of the end of the tax moratorium for each First Nation.

[190] The negotiations between RRDC and Canada continued and, as of June 22, 2000, the Chief Negotiators for Canada and Yukon provided a draft Final Agreement and a draft Self-Government Agreement to the Chief Negotiator for RRDC.[81]

[191] On August 25, 2000, Minister Nault replied to Chief Dick's February letter. In addition to discussing the renewed negotiations mandate, the Minister said this about the UFA:

> While I respect that we have different views on the binding nature of the Umbrella Final Agreement (UFA), Canada has been clear that the mandate for negotiations is based on the provisions of the UFA. We understand the Ross River and Liard First Nations have entered these negotiations to reach an agreement based on the UFA. If we are mistaken in that understanding please clarify with the Chief Federal Negotiator in the Yukon, Mr. Jim Bishop.[82]

[192] On January 25, 2001, Minister Nault again met with representatives of Yukon First Nations. On March 15, 2001, he wrote to the CYFN Grand Chief and the Chiefs of seven other First Nations, including LFN, to announce that he was addressing the problem of compensation dollars versus loan repayment in two ways: (1) by re-indexing the compensation funding set out in Schedule A of the UFA, and paying interest on the compensation dollars from 1997 (when interest was supposed to end) until March 31,

[81] '06 Common Book of Documents, tab 263.
[82] '06 Common Book of Documents, tab 264.

2002; and (2) by consolidating the negotiations loans to obtain a more favourable interest rate. He stated that the additional value of these measures amounted to $31 million. Minister Nault also announced the establishment of an Economic Development Strategic Investment Fund for each Yukon First Nation which completes their agreements before the mandate expiry. The combined value of the re-indexation, refinancing and Economic Development Strategy, he said, would exceed $60 million, if all Yukon First Nations complete their agreements within the mandate.

[193] On January 30, 2001, CHON-FM Radio in Whitehorse reported that RRDC had signed off on the land quantum part of its land claim, bringing them a step closer to a final deal. The report indicated that the previous evening, RRDC had made its land selections, comprising about 1,800 square miles (approximately 4,662 square kilometres), in numerous parcels near the community of Ross River. The report also referenced the expiry of the negotiations mandate on March 31, 2002.

[194] On April 11, 2001, Canada obtained litigation abeyance agreements from the KDC, RRDC and LFN regarding their respective actions (four in total) in the Federal Court.

[195] On November 8, 2001, Minister Nault wrote to RRDC Chief Caesar and his Council to announce that he would be in Ross River for a meeting on November 13th. In the letter, he again made reference to the expiry of the negotiations mandate on March 31, 2002, and the measures that he was proposing to deal with the problem of compensation dollars versus loan repayments. Minister Nault stated that the re-indexing and loan consolidation would amount to an additional $4.28 million for RRDC and the

Strategic Economic Development Investment Fund would amount to an additional $5.22 million, for a total increase in the compensation package of $9.5 million.

[196] On November 13, 2001, Minister Nault met with RRDC members in Ross River to discuss what had been agreed to with Canada to date. The meeting took almost three hours and was transcribed. Minister Nault heard from the Chief, community leaders and Elders. Among the many things that Minister Nault said were the following:

> My point to you as I leave is this: If it's the choice of your community not to sign an agreement, that is a choice I respect; but it's not one that I can continue to be at the table if there is no political will to finally change what we're doing [as written]. That's the message I came to send today. It's not intended to make you hurry up and do something you don't want to do, but I think the agreement is already there. Now it's difficult to make the final decision …
>
> …
>
> So, we have to either agree, or we have to disagree with respect. I think that's equally all right in building a relationship …[83]

[197] In media reports on November 15 and 19, 2001, Minister Nault stated that he would not be granting extensions to the mandate expiry just to keep talks going.[84] He was said to have made it very clear that the six First Nations that have yet to sign agreements must meet the March 31st deadline.

[198] On December 12, 2001, Minister Nault forwarded a brochure to RRDC Chief Caesar setting out the highlights of the meeting on November 13th. The brochure indicated, among other things:

- RRDC would obtain ownership of approximately 4,721 square kilometres (1,827 square miles) of settlement land;

[83] '06 Common Book of Documents, tab 305, p. 35.
[84] '06 Common Book of Documents, tabs 299, 300 and 301.

- RRDC would receive approximately $19.26 million in financial compensation over the following 15 years, less the loan repayment amounts;
- RRDC would receive an additional one-time payment of $4.28 million, resulting from Canada's decision to effectively re-index the compensation money;
- RRDC would receive an additional $5.22 million by way of the establishment of an economic development fund; and
- the offers of the re-indexation and economic development fund were contingent on Final and Self-Government Agreements being reached by March 31, 2002. [85]

[199] On February 15, 2002, Canada's Chief Negotiator, Tim Koepke, wrote to RRDC's Chief Negotiator, Dave Porter, reminding him that they had discussed the importance of the March 31, 2002 deadline over the past several months. He also reminded Mr. Porter that Minister Nault had held meetings with the CYFN Grand Chief, as well as Chiefs and Councils in Yukon communities in May 2000, April 2001, November 2001 and January 2002, and that on all such occasions he reiterated Canada's March 31, 2002 deadline. Mr. Koepke stated in the letter:

> It is also important to clarify my understanding of what will occur should the MOU not be completed, I anticipate that Minister Nault will be writing to the Chief of RRDC to indicate that if the MOU is not achieved negotiations would be discontinued with the expiry of the mandate on March 31, 2002. [86]

[85] '06 Common Book of Documents, tab 303.
[86] '06 Common Book of Documents, tab 307.

[200] The MOU referred to by Mr. Koepke is the Memorandum of Understanding upon which the RRDC Final and Self-Government agreements would be based. On March 12, 2002, Minister Nault wrote to Chief Caesar thanking him for the opportunity to meet with him on January 12, 2002. Minister Nault stated in the letter that if the MOU was not achieved on or before March 31, 2002, then he was giving notice that Canada would discontinue negotiations with RRDC as of April 1, 2002.

[201] On April 1, 2002, Canada issued a news release that the Yukon First Nations of Carcross/Tagish, Kluane, Kwanlin Dun and White River had signed individual MOUs with Canada and Yukon, officially concluding their negotiations.

[202] Canada, Yukon, RRDC and LFN had planned six days of negotiations between March 27 and 31, 2002. However, due to the death of Mr. Porter's mother on March 26, 2002, the Chiefs of RRDC and LFN requested an extension of the deadline beyond March 31, 2002, in order to allow the family an appropriate period of grieving.

[203] This request was supported by Yukon Premier Pat Duncan.

[204] On April 23, 2002, Minister Nault wrote to the RRDC and LFN Chiefs, agreeing to the extension, such that the final six days of negotiations would take place May 27 to June 1, 2002. However, this agreement was subject to four conditions:

1) no new negotiation funding would be provided;
2) the abeyance of the KDC litigation would have to continue;
3) the tax collection exemption would not include a three-year exemption beyond the effective date of the Final Agreements; and

4) ratification would still have to be obtained before March 31, 2003, resulting in a compressed time period for that purpose (originally it was to be one year after the signing of the MOU).[87]

[205] On May 21, 2002, the RRDC and LFN Chiefs wrote to Minister Nault agreeing to three of his four conditions, but not to the abeyance of the KDC litigation.

[206] The six days of negotiations scheduled to begin on May 27th were cancelled due to a suicide in the family of the LFN Chief. On June 5, 2002, the RRDC and LFN Chiefs, as well as the KDC Chair, wrote to Minister Nault requesting that the six days of negotiations be rescheduled to commence on June 16th, in Watson Lake. Minister Nault agreed to this.

[207] According to a letter from Canada's Chief Negotiator, Tim Koepke, to Minister Nault dated July 2, 2002, the six days of negotiations commenced on June 16, 2002, as agreed to.

[208] On June 20th, the Supreme Court of Canada's decision in RRDC's appeal in *Sterriah v. Her Majesty the Queen*, 2002 SCC 54, was released. RRDC's appeal was unanimously dismissed. In Mr. Koepke's opinion, this decision was not well received by the Kaska. He stated in his July 2nd letter:

> … It appears that expectations for success in the appeal had been raised by Kaska legal counsel and the disappointment on the loss was accompanied by significant taxpayer liability for income tax remittances previously withheld.[88]

[209] On the evening of June 20th, RRDC's Chief Negotiator, Dave Porter, asked Canada and Yukon to present a comprehensive final offer for the Kaska's consideration. Canada and Yukon did so by jointly presenting, on the afternoon of June 21st, a

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[87] '06 Common Book of Documents, tab 319.
[88] '06 Common Book of Documents, tab 328.

comprehensive settlement proposal for all remaining elements of the Final and Self-government Agreements for RRDC and LFN. According to Mr. Koepke's July 2nd letter, Mr. Porter phoned him late that evening to advise:

> … that while the offer was fair and acceptable to him and many of the Kaska caucus members, the Ross River and Liard chiefs would not authorize him as Kaska National Negotiator to sign the MOU … (my emphasis)

[210] On June 25, 2002, Mr. Porter wrote to Mr. Koepke, stating in the first paragraph of his letter:

> … While I was unable to obtain the necessary instructions to initial the negotiators' MOU on behalf of Ross River Dena Council and Liard First Nation, it is my position as National Negotiator for the Kaska that the comprehensive offer made by Canada and the Yukon (with the exception of concluding our lands discussions) is a reasonable basis for agreement which I am prepared to recommend to my principals.[89] (my emphasis)

It was Mr. Porter's view that the major reason that the MOU was not agreed to was because the Kaska were not able to adequately consult with the membership in the communities of Ross River and Watson Lake. He stated that he had been instructed by Kaska Tribal Chief, Hammond Dick, to make a written "proposal to ensure that community consultations on this urgent question are held in Ross River and Watson Lake". Mr. Porter also asked for additional funding to cover the costs of those community consultations.

[211] According to Mr. Koepke's letter to Minister Nault of July 2, 2002, Canada, Yukon, RRDC and LFN agreed to convene one-day sessions in each of Ross River and Watson Lake on Friday and Saturday, June 28th and 29th. However, despite final arrangements being made for those two meetings, Mr. Koepke was advised by

[89] '05 Common Book of Documents, tab 157.

Mr. Porter late in the afternoon of June 27th that RRDC and LFN had decided not to proceed with the meetings as planned. According to Mr. Koepke, no clear reason was given, other than the Kaska did not appear to be ready to deal with the matters at issue at that time. According to Mr. Koepke, Mr. Porter speculated that they might be ready to deal with the offer and final decision "in a couple of weeks", but no appeal was made for a further extension of the long passed deadline. According to Mr. Koepke, Premier Pat Duncan apparently visited Ross River after the decision had been made to cancel the meetings and sensed that there was a mood in the community to accept the offer and move forward to the next steps. However, Mr. Koepke received no communication from the RRDC Chief, the LFN Chief or Mr. Porter in that regard.

[212] In the penultimate paragraph of his letter to Minister Nault, Mr. Koepke stated as follows:

> I have concluded that there is a crisis of leadership in the Ross River and Liard communities and in spite of every possible opportunity having been afforded for success to break out, we have not been able to conclude the required Negotiators' MOUs, nor am I able to detect that [there] is any sense of urgency to do so. Accordingly, I am left with no choice but to recommend to you that all negotiations be discontinued with the Ross River Dena Council and Liard First Nation and that Canada and Yukon take appropriate actions to interim protect the completed Settlement Land selection packages. [90]

[213] A briefing note to Minister Nault, dated July 3, 2002, includes the following statement:

> … On June 27, 2002, the Kaska Nation Negotiator informed the [Chief Federal Negotiator] that the Chiefs have indicated a lack of political will to conclude MOUs in the near future. [91]

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[90] '06 Common Book of Documents, tab 328, p.3.
[91] '05 Common Book of Documents, tab 158.

[214] On July 10, 2002, Minister Nault wrote to the RRDC and LFN Chiefs, stating:

> As you have been advised for some time, in the absence of a signed MOU I have no authority from Cabinet to continue negotiations.
>
> …
>
> … It remains my hope that we will be able to re-engage in negotiations based on the Umbrella Final Agreement and existing Self-Government Agreements…
>
> In closing, as we have discussed over the course of the past two years, the Government of Canada sees no benefit for either party in staying at negotiations tables and using the time and resources of the leadership and staff where there is no prospect for settlement. Therefore, while I am disappointed, I will respect your respective decisions to direct the Kaska Nation Negotiator to not sign a Memorandum of Understanding for Ross River Dena Council and Liard First Nation. [92]

[215] On July 31, 2002, the RRDC and LFN Chiefs wrote to Minister Nault, stating: "[W]e share your disappointment concerning the unsuccessful results of the negotiating session which concluded on June 21st." [93] They then went on to cite three reasons why they were unable to sign the MOU: (1) Yukon was allowed to play too large a role at the bargaining table; (2) there were a few critically important topics which the Kaska could not support, e.g. transboundary transportation of wildlife products and a tax exemption issue; and (3) the need for review and support by the community members in each First Nation. As for the next steps, the Chiefs stated:

> Turning to the question of where we go from here, we feel that the Kaska will need some time to meet internally, both at the local and national level, to take stock of our situation and discuss our next steps… [W]e share your view that there is no benefit in staying at the negotiating table and using the

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[92] '05 Common Book of Documents, tab 159.
[93] '05 Common Book of Documents, tab 160.

> time and resources of our people where there is no prospect for settlement…[94]

[216] On September 3, 2002, Minister Nault wrote to the RRDC and LFN Chiefs:

> While I remain disappointed that you have chosen not to accept what I feel was a fair and balanced settlement offer, I respect your decision not to sign a Memorandum of Understanding (MOU), which, thereby, discontinued negotiations. As you are aware, in the absence of a signed MOU, I have no authority from Cabinet to continue negotiations.
>
> I look forward to hearing from you further following the internal deliberations your letter references.[95]

[217] To summarize on the question of the alleged abandonment, in my view the history set out above makes it quite clear that Canada and RRDC made significant and substantial efforts to conclude a settlement. Indeed, RRDC's Chief Negotiator, a former two-time Member of the Yukon Legislative Assembly, as well as Cabinet Minister and Deputy Premier, and someone described as "a seasoned negotiator",[96] felt that the comprehensive offer by Canada and Yukon was "a reasonable basis for agreement". Furthermore, other members of the Kaska caucus also apparently felt this way.

[218] Nevertheless, the Chiefs decided not to sign the MOU, but provided no counter-offer. Also, notwithstanding that RRDC and LFN asserted a need for community consultation before proceeding further, the arranged community meetings were cancelled by the First Nations, without explanation.

[219] Both sides agreed that further negotiations would not be a good use of the parties' resources, and I conclude that the decision to stop negotiating was mutual.

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[94] '05 Common Book of Documents, tab 160.
[95] '06 Common Book of Documents, tab 330.
[96] By Gavin Fitch, a special representative appointed by Canada to conduct exploratory discussions on the failure the three Yukon First Nations to obtain settlement agreements, '06 Common Book of Documents, tab 388; also referred to below at paras. 233 - 235 and 239 - 241.

4.8.2 Failure or Refusal to Resume Negotiations

[220] I agree with Canada's counsel that there were three main obstacles for the parties to overcome before they could return to the negotiating table: (1) the ongoing litigation, not only with RRDC but also with the KDC and the LFN; (2) the inability of the parties to come up with a satisfactory abeyance agreement regarding the litigation; and (3) RRDC's refusal to negotiate a Final Agreement under the framework of the UFA (or, conversely, Canada's insistence that further negotiations must be pursuant to the UFA).

[221] By 2006, there were eight active lawsuits by the three Kaska plaintiffs, RRDC, KDC and LFN, in three different courts. Five actions were in the Federal Court, the '05 and '06 Actions were in this Court, and one was in the Supreme Court of British Columbia. The following list shows the courts, the years in which the actions were commenced and the subject matters of the various actions:

- Federal Court:
  - 1986, KDC, re. land in Yukon
  - 1999, KDC, re. land in Yukon
  - 1999, RRDC, re. tax moratorium
  - 1999, LFN, re. tax moratorium (severed in 2007 from what was originally a joint lawsuit with RRDC)
  - 2001, KDC, re. land in British Columbia
- Supreme Court of Yukon:
  - 2005, RRDC, re. *1870 Order*
  - 2006, RRDC, re. failure to negotiate in good faith and loan funding

- Supreme Court of British Columbia:
  - 2006, KDC, re. addition to a reserve in British Columbia

[222] On April 11, 2001, the three KDC actions (1986, 1999 and 2001) were put into abeyance at Canada's insistence because the subject matter of the litigation was about what had gone on at the negotiating table in the past and what might go on in the future. Accordingly, the negotiators did not want to be caught in the trap of having their words and conduct at the negotiating table later being used as evidence in the litigation.

[223] In November 2001, KDC gave notice of its intention to reactivate its litigation in the Yukon in the event that they were unable to conclude a transboundary agreement by the end of Canada's negotiations mandate on March 31, 2002. Minister Nault wrote to KDC Chairperson Gleason, on April 23, 2002, requesting that the abeyance be continued because of recent tragic events (which I referred to above at paras. 201 to 205) resulting in an extension to the end of the negotiations mandate beyond March 31, 2002. Chairperson Gleason responded on April 25, 2002 by stating that KDC would neither rescind the notice of termination of abeyance nor revise it, but rather that KDC intended to proceed with case management in its Federal Court actions involving lands in the Yukon. In a letter dated May 21, 2002, both RRDC and LFN indicated to Minister Nault that they supported Chairperson Gleason's approach. Minister Nault wrote to Chairperson Gleason on May 24, 2002 noting that the negotiations mandate had been extended to allow for further negotiations to take place on May 27 to June 1, 2002, because of the unfortunate recent death of the Kaska Chief Negotiator's mother:

> It troubles me that despite reasonable, if not extraordinary gestures offered to address a unique cultural situation raised by the Yukon Kaska Chiefs and the Kaska Elders, Kaska Dena Council is not prepared to keep the Kaska Dena

> Council court actions in Yukon in abeyance to cover the period requested by the Kaska for rescheduled negotiations.[97]

Later in the letter, he referred to Chairperson Gleason's position as "intransigent", and stated that he had no intention of continuing negotiations with KDC, unless there was an abeyance agreement in place.

[224] As noted above, Canada's negotiations mandate expired on or about June 22, 2002.

[225] In December 2002, Yukon Premier Dennis Fentie, and Kaska Tribal Chief, Hammond Dick, wrote a joint letter to Minister Nault stating that the Yukon government and the Kaska Nation were very close to achieving an economic development agreement regarding the Kaska's traditional territory in southeast Yukon. With this in mind, they invited Canada to return to the negotiating table for the purpose of attempting to conclude an agreement on the Kaska's outstanding land claims and self-government issues. Minister Nault responded by letter dated January 30, 2003, stating that Canada would not engage in the negotiations process in the absence of signed abeyance agreements for <u>all</u> Kaska litigation, including those actions commenced by the KDC.

[226] Chief Dick wrote to Minister Nault on May 15, 2003 informing him that the Kaska leadership was prepared to consider an abeyance agreement subject to two conditions: first, that Canada provided funding to negotiate; and second, that Canada not pursue collection of alleged tax arrears while Kaska litigation is an abeyance. On June 13, 2003, Chief Dick again wrote to Minister Nault proposing a 90-day abeyance period, to allow for discussions to determine whether there was a basis for returning to tripartite

[97] '06 Common Book of Documents, tab 323.

negotiations in the Yukon. Chief Dick followed this with another letter on June 24, 2003, specifically requesting $15,000 in funding to negotiate a 90-day abeyance agreement.

[227] Minister Nault responded by letter to Chief Dick on September 2, 2003, stating that Canada was only prepared to take steps towards revitalizing negotiations with the Kaska Nation once all four Kaska Court actions were placed in abeyance (the three KDC actions and the RRDC/LFN tax action). Further, Canada did not agree to delay the collection of taxes during the 90-day abeyance period. Minister Nault said that once the necessary abeyance agreement was in place, Canada would provide $15,000 in funding.

[228] Further correspondence was exchanged between the parties.

[229] On December 3, 2003, Minister Nault proposed a 60-day abeyance period. Minister Nault was then replaced by Andy Mitchell as the Minister of Indian Affairs and Northern Development. The Kaska Nation wrote to Minister Mitchell on January 14, 2004, indicating that they were prepared to accept the 60-day abeyance period and the $15,000 in funding to prepare for and participate in one or two meetings.

[230] Shortly after that, Minister Mitchell was replaced by Andy Scott as the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians. Minister Scott wrote to the Kaska leadership on September 27, 2004, confirming that the $15,000 in funding would be provided once the 60-day abeyance agreement was in place.

[231] From then until approximately 2007, the negotiators for the parties got bogged down in an unsuccessful attempt to agree on the specific terms of the abeyance. In particular, they were unable to agree about how the basic principles should be

interpreted or applied: for example, the meaning of "without prejudice", "confidentiality", the notice period to terminate, which actions would be put into abeyance, and funding.[98]

[232] Throughout this period, active steps were being taken in the litigation between RRDC, LFN and Canada in Federal Court.

[233] On February 14, 2006, Kaska Tribal Chief, Hammond Dick, wrote to the Minister of Indian Affairs and Northern Development, Jim Prentice, to congratulate him on his recent appointment to Cabinet. In the letter, Chief Dick made the following statements:

> It is very important for you to appreciate, Mr. Prentice, that the Kaska have been forced to turn to the courts because Canada has abandoned negotiations with the Kaska in both the Yukon and British Columbia. [emphasis already added]
>
> At the Yukon land claims table in June 2002, Canada's representatives presented the Kaska with a profoundly unacceptable Final Agreement. The Kaska rejected that proposal. Canada then formally abandoned the negotiating process on the incredible grounds that its mandate to negotiate had expired…. [S]ince the expiry of the mandate in June 2002, Canada has refused to resume negotiations with the Kaska in the Yukon … [my emphasis]
>
> …
>
> For the past three years the Kaska have made repeated ongoing efforts to persuade Canada to end its boycott of the Kaska treaty table. However, federal officials, in typical bad faith fashion have rebuffed each and every one of those efforts …[my emphasis]
>
> …
>
> As you will have surmised, Mr. Minister, relations between the Kaska and the Government of Canada have deteriorated badly and are currently in an unacceptable state. It is for that reason that we are truly hopeful that the election of a new government in Ottawa and your appointment as Minister of Indian Affairs signals the end of the bad faith that has come

[98] '06 Common Book of Documents, tab 359.

> to represent the hallmark of Canada's dealings with the Kaska …[99] [my emphasis]

[234] On September 27, 2006, Minister Prentice appointed Gavin Fitch as a special federal representative with an initial mandate to conduct exploratory discussions with RRDC, LFN and the White River First Nation about why they had been unable to achieve land claim or self-government agreements. This mandate was later expanded to allow Mr. Fitch to conduct abeyance agreement negotiations with KDC, RRDC and LFN.

[235] The impasse over the abeyance agreement was broken when Mr. Fitch provided an initial report, dated September 19, 2007,[100] in which he determined that the inability to negotiate such an agreement had "taken on a life of its own, independent of any substantive issues related to the land claim". In the case of the 1986, 1999 and 2001 KDC actions, Mr. Fitch recommended that such an abeyance agreement was not necessary, providing that both Canada and KDC agreed to return to the British Columbia Treaty Commission negotiating table upon the following conditions:

1. The KDC will take no further steps in their BC litigation;
2. No new action related to their BC land claim will be commenced; and
3. The resumed treaty negotiations will be conducted on a without prejudice basis, meaning that the Kaska may not divulge information received from Canada in the negotiations, or raise it in the existing litigation.

If any one of these events occurred, Canada would immediately cease negotiating.

[236] These conditions were accepted by Canada and KDC and the negotiations between them and British Columbia have continued since then.

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[99] '06 Common Book of Documents, tab 356.
[100] '06 Common Book of Documents, tab 388.

[237] The three KDC cases (1986, 1999 and 2001) were brought out of abeyance by RRDC's counsel in 2016. Canada successfully applied in the Federal Court for a stay of the 1986 and 1999 actions because of the significant overlap that they have with the issues in the '05 and '06 Actions in this Court. It was unsuccessful in seeking a stay of the 2001 action, so that action is active.

[238] The 1999 RRDC tax moratorium case has been ongoing, despite a lull in activity during a period of negotiations to settle it from about 2009 to 2013. However, Canada was successful in applying for a stay of that action on June 2, 2014, again because of the overlap between that case and the case at bar.

[239] The 1999 LFN tax moratorium case is still technically active, but LFN is not pursuing the litigation at this time.

[240] On March 26, 2008, Gavin Fitch provided his final report to the Minister of Indian and Northern Affairs, Chuck Strahl, regarding the status of the Kaska land claims in the Yukon. Mr. Fitch provided some background information for each of RRDC and LFN and then went on to summarize the history of the unsuccessful land claim negotiations. At the risk of including a rather lengthy quote from the report, I feel it may be helpful to reproduce it here, as it is a brief, objective summary of the negotiations. I do not understand RRDC's counsel to take any significant issue with it:

> …
>
> The Liard River Band and the Ross River Band (as they were then known) were signatories to the original Council [of] Yukon Indians ("CYI") Land Claim in 1973. However, it was not long before <u>the Kaska proved to be the "black sheep" of the Yukon First Nations</u>.
>
> The negotiations which ultimately led to the Umbrella Framework Agreement were conducted on behalf of all

Yukon First Nations by the CYI, later known as the Council of Yukon First Nations ("CYFN"). As indicated above, these negotiations commenced in 1973 after the claim was submitted to Canada, and culminated with the successful negotiation of the UFA in 1993. Prior to the UFA being negotiated, an agreement in principle had been successfully negotiated in 1984. However, it was never ratified by the CYI because the RRDC and three other First Nations did not support it. In 1989, a new AIP was negotiated by the CYI. However, the RRDC and LFN insisted on entering into a separate "Framework Agreement" with Canada to govern the negotiation of the Kaska land claim. Ultimately, both RRDC and LFN refused to support the UFA on the basis that it was not consistent with the Kaska Framework Agreement. When the UFA was ratified by the CYI in 1993, RRDC and LFN opposed ratification. Not long after, in 1995, RRDC and LFN withdrew from the CYI. To this day they are not members of the CYFN.

Notwithstanding their opposition to the UFA (and their position that the UFA was never properly ratified), both LFN and RRDC continued to participate in UFA-based negotiations throughout the 1990's. In 1999, Canada agreed to a request that the claims of the LFN, RRDC and the Kaska Dena Council (representing the three B.C. Kaska First Nations) would be negotiated at a single table. These negotiations culminated, in June 2002, with the negotiators for Canada, YTG and the Kaska agreeing to draft Final Agreement/Self-Government Agreements under the UFA for both RRDC and LFN. However, notwithstanding that the agreements were recommended for acceptance by the chief negotiator for the Kaska, the Chiefs and Councils for RRDC and LFN rejected the agreements.

Since the UFA-based negotiations with the Kaska ended in 2002, LFN and RRDC have taken the position that it was Canada that terminated the negotiations and that they, the Kaska, are prepared to return to the negotiating table. To date, this has been frustrated by the existence of unresolved litigation previously commenced by the Kaska Dena Council ("KDC"), LFN and RRDC.

In 1986, the KDC filed a lawsuit against Canada alleging breach of fiduciary duty by virtue of Canada's failure to settle the Kaska's land claim in the Yukon. Since then, additional lawsuits have been filed by each of the KDC, RRDC and

> LFN. In some of these lawsuits, the Kaska allege that Canada has failed to negotiate their land claims in good faith. The existence of these lawsuits, and in particular the allegations of bad faith negotiating by Canada, have been a major impediment to the resumption of negotiations in the Yukon.
>
> The result is that there has been no resumption of negotiations between Canada and the Kaska since 2002, notwithstanding expressions of willingness to negotiate by both parties at different times during this period. [101] (my emphasis)

[241] Mr. Fitch's final report made 10 recommendations to the Minister. The first recommendation was as follows:

> The fact that each of … LFN and RRDC want the interim protection of their UFA land selections extended suggests that, at some point in the future, each will want to re-visit settlement of their land claims. However, the time is not right for trying to re-start negotiations under the UFA and there is no point in trying. [102](my emphasis)

[242] In recommendation number four, Mr. Fitch notes the problem that each of RRDC and LFN have by virtue of the lack of local governance power over the Land Set Aside upon which their communities are located. The *status quo*, he said, "is not acceptable". While being clear that he was not recommending negotiations for full self-government power, he did recommend "that Canada negotiate the provision of local, municipal-type governance powers to these First Nations in respect of their communities (i.e. on the Land Set Aside)". Mr. Fitch said this would be a first step in an incremental process to address an immediate need.

[243] There is no evidence of what Canada's response was to this report, other than what I refer to next.

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[101] '05 Common Book of Documents, tab 162, starting at p. 4.
[102] '05 Common Book of Documents, tab 162, at p. 9.

[244] With respect to recommendation number four regarding local governance, the process initiated by Canada began with an email, dated August 27, 2009, from Canada's Manager of Intergovernmental Affairs, Dionne Savill, to RRDC Chief Gordon Peter, confirming that she and another federal official had met with him in June 2009 to discuss Mr. Fitch's final report. The email confirms that Indian and Northern Affairs Canada ("INAC") agreed with the recommendation in the report to develop a land management and governance regime on Land Set Aside. Ms. Savill said that INAC was considering RRDC's request for funding to make a written submission, but that further detail was required from RRDC as to how the money would be spent. She said she was awaiting RRDC's more detailed proposal.[103]

[245] On October 30, 2009, Chief Peter wrote to INAC Regional Director General for the Yukon, Joanne Wilkinson, including a proposal to negotiate not only a land management regime but also a modern self-government agreement. Chief Peter also confirmed that he had an earlier meeting with federal officials on May 1, 2009 to discuss Mr. Fitch's report. His letter included a reference to RRDC's position on the UFA:

> The suggestion that negotiations with the Ross River Dena Council towards an agreement on governance and land management would be laying the groundwork for a settlement of land claims is completely at odds with our discussions of May 1, 2009 and is otherwise unacceptable. The Ross River Dena Council has rejected the UFA as a basis for negotiations. We will not enter into any negotiations based upon the UFA and will not participate in any process intended to lay the groundwork for a resumption of UFA-based negotiations. [104](my emphasis)

[246] On January 26, 2010, the new RRDC Chief, Jack Caesar, followed up with Ms. Wilkinson, stating that RRDC was still awaiting a response to their proposal.

[103] '06 Common Book of Documents, tab 387.
[104] '06 Common Book of Documents, tab 369.

[247] On February 2, 2010, Ms. Wilkinson wrote to Chief Caesar stating that her department did not have a mandate to pursue self-government negotiations, but rather was interested in working with RRDC to establish a land management regime to provide greater control for Land Set Aside.

[248] On June 11, 2010, Ms. Wilkinson wrote again to Chief Caesar confirming that they had met on May 6, 2010, to discuss the potential new land and governance regime. Once again, she confirmed that their preliminary discussions would only apply to those parcels of federal Crown land known as Land Set Aside. She stated that the new regime would not be as broad in scope as the Self-Government Agreements that had been negotiated under the UFA.

[249] On July 8, 2010, Chief Caesar wrote to Ms. Wilkinson stating that RRDC was prepared to consider negotiations relating to a land and governance regime for their Land Set Aside. He stated that he expected the negotiations would follow a “two-track process”, one being at the table with Canada and the other being an internal process to inform RRDC membership and to seek direction from them. However, he also stated:

> … We also continue to be very much of the view that any negotiations should be based on Canada’s published policy on the inherent right of self-government.[105]

[250] On August 9, 2010, Ms. Wilkinson wrote to Chief Caesar inviting him to contact a named federal official to arrange for the commencement of exploratory discussions.

[251] On August 19, 2010, Chief Caesar wrote to Ms. Wilkinson again suggesting that the parties “negotiate arrangements to implement our inherent right of self-government”.

[252] On March 11, 2011, Ms. Savill wrote to Chief Caesar informing him that the authority to negotiate Land Set Aside issues and self-government issues had been

[105] ’06 Common Book of Documents, tab 372.

transferred to a new INAC group entitled “Treaties and Aboriginal Government (“TAG”), Negotiations West”. Ms. Savill said that INAC was proposing a “scoping session” with officials from TAG, to take place in Whitehorse or Ross River on April 12, 2011. I am informed by Canada’s counsel, Suzanne Duncan, that that meeting did take place.

[253] On May 12, 2011, Canada’s acting Manager of Inter-Governmental Affairs, Elsie Wain, met with Chief Caesar, Dorothy Smith and RRDC’s counsel, Stephen Walsh. At that time, Ms. Wain made a presentation regarding the development of a land management and governance regime for Land Set Aside. The parties agreed that it would be helpful to have a future community meeting to hear from the RRDC members about the kind of management powers on Land Set Aside that they would like the Chief and Council to have. This was confirmed by Ms. Wain in an email to Chief Caesar dated June 29, 2011, in which she asked him to provide her with dates on which the community meeting could be held.

[254] On July 19, 2011, and again on August 22, 2011, Ms. Wain sent follow-up emails to Chief Caesar reminding him that INAC was still waiting to hear from him about a date for the community meeting.

[255] Having received no response to these emails, Ms. Wain wrote a letter to Chief Caesar on October 17, 2011, about the proposed community meeting and informing him that an additional $5,000 in funding could be provided to cover the costs for it.

[256] On December 1, 2011, Chief Caesar wrote to Ms. Wain confirming that RRDC was still interested in conducting “an initial meeting in Ross River regarding the proposed land management and governance regime”. He further confirmed that RRDC would require the additional $5,000 in funding. However, he also asked Ms. Wain to

confirm whether the initial discussions would include “matters in dispute in our First Nations Federal Court Action (T-108-07)”, which is RRDC’s tax moratorium case.

[257] On January 6, 2012, Ms. Wain wrote to Chief Caesar confirming that the Aboriginal Affairs and Northern Development Canada, the successor to Indian and Northern Affairs Canada, was still willing to support the community meeting in Ross River and to provide funding of up to $5,000. In specific response to the request about discussing the tax moratorium issues, Ms. Wain stated:

> As we proposed at our May 12th meeting, our initial discussions will focus on governance and land management issues on Land Set Aside. If these discussions progress, there is every possibility that any future discussions, particularly with respect to governance issues for your First Nation, could include part of the subject matter included in the Federal Court litigation …[106]

I am informed by Canada’s counsel, Ms. Duncan, that there was no reply to this letter from RRDC.

[258] On February 7, 2013, Ms. Savill wrote to RRDC Chief, Brian Ladue, reminding him of the offer from Aboriginal Affairs and Northern Development Canada to initiate exploratory discussions with RRDC to discuss a new land and governance regime. She further offered to meet with him and his new Council to explain her department’s interest in this proposal.[107] I am informed by Canada’s counsel, Ms. Duncan, that there was no reply to this letter from RRDC.

[259] This completes my finding of facts on this issue.

[260] From this history, it is firstly immediately apparent that the initial obstacle to the resumption of any negotiations between Canada and RRDC after June 2002 was the

[106] ’06 Common Book of Documents, tab 381.
[107] ’06 Common Book of Documents, tab 382.

ongoing Kaska litigation. This is evident from Minister Nault's response, of January 30, 2003, to the joint request from Premier Fentie and Chief Dick, in December 2002, that Canada return to the negotiating table. This was not an unreasonable position for Canada to take.

[261] Secondly, over the period from mid-2003 to early 2007, the parties then got bogged down in their unsuccessful attempts to come to a short-term abeyance agreement, after which they hoped to engage in exploratory discussions to see whether a return to the main table land claims negotiations would be viable. In my view, the responsibility for these unsuccessful abeyance negotiations must be shared between the parties responsible and cannot be laid solely at Canada's feet.

[262] Thirdly, after the initial report from Gavin Fitch in September 2007, Minister Strahl accepted Mr. Fitch's recommendation regarding the abeyance issue with KDC, which allowed those negotiations in British Columbia to recommence.

[263] Fourthly, Canada also attempted to pursue the fourth recommendation in Mr. Fitch's final report, which was that Canada should attempt to negotiate the provision of local governance powers with RRDC on its Land Set Aside. In my view, the record indicates that Canada made a good faith effort to do so over the period from June 2009 until its final letters to RRDC in January 2012 and again in February 2013, neither of which were responded to. As a result, the community meeting which had been discussed on May 12, 2011, to pursue the land management and governance regime discussion, never materialized. Again, Canada cannot be faulted for this outcome.

[264] It is also important to bear in mind that throughout the discussions from June 2009 until February 2013, both the '05 and the '06 Actions were being actively pursued

in this Court and RRDC's tax moratorium action in the Federal Court was also ongoing. However, that was not used as an excuse by Canada for not pursuing the land governance discussions.

[265] As for Canada's insistence that any further negotiations be based upon the UFA, I have already concluded above that this was a reasonable position for it to take.

[266] In the result on this issue, I conclude firstly that Canada did not abandon the negotiations. Secondly, although Canada ultimately failed to return to the main land claim negotiating table, the history makes it plain that Canada cannot simply be said to have "refused" to do so. Rather, Canada's concerns about the need for an abeyance of all actions relating to the land claims negotiations and the need to pursue further negotiations according to the UFA were not unreasonable. Accordingly, Canada's conduct in this regard was not inconsistent with the honour of the Crown.

4.9 Issue #9: Was Canada's conduct inconsistent with the honour of the Crown when it devolved administration and control over the lands in question to the Yukon Territorial Government, over the objections of the Kaska and without first considering and settling the plaintiff's claims to compensation for lands required for purposes of settlement?

[267] This argument was not developed at all by RRDC's counsel in either their written or oral submissions. Only the bald issue was raised. Accordingly, once again, Canada's counsel and this Court were left to speculate as to what the arguments might be.

[268] On October 29, 2001, the Government of Canada, as represented by the Minister of Indian Affairs and Northern Development, and the Government of Yukon entered into an agreement entitled *Yukon Northern Affairs Program Devolution Transfer Agreement,* which is commonly referred to as the "DTA".

[269] On April 1, 2003, most of the *Yukon Act,* cited above, which essentially gave legislative force to the DTA, came into force. Chapter 2 of the DTA gives Yukoners, through the Yukon Legislative Assembly, more direct control over a variety of local matters, such as: taxation, property and civil rights, administration of justice, wildlife conservation, waters, education, immigration, public real property, and generally all matters of a merely local or private nature. This transfer of legislative powers is found in s. 18 of the *Yukon Act.*

[270] If RRDC's argument here is that devolution occurred over the Kaska's objections, then I agree. However, neither RRDC in particular, nor the Kaska in general, had a veto over the ability of the two governments to negotiate the transfer of the province-like powers from Canada to the Yukon. On the other hand, if RRDC's argument is that the Kaska were not consulted about the transfer, then I disagree. The record is relatively clear that the Kaska and RRDC in particular were consulted early and often in the process, as was the Council for Yukon Indians, which was representing them for a time during that process. Further, the interests of Yukon First Nations generally were taken into account by the two governments and protective clauses recognizing those interests were included in both the DTA and the *Yukon Act*.

[271] I will refer to a few representative examples of the consultation and negotiation process. Again, none of this evidence is controversial, so my references here can be taken as my findings of fact.

[272] On November 4, 1994, Minister of Indian Affairs, Ronald Irwin wrote to Tribal Chief Hammond Dick, of the Kaska Tribal Council,[108] responding to his letter of September 27, 1994, and generally discussing the status of land claims negotiations in the Yukon and British Columbia. Minister Irwin also raised the issue of the Kaska Tribal Council's concerns on devolution, stating:

> Respecting your concerns on devolution, I would like to re-emphasize what my staff and officials have already expressed to you. The process of devolution of programs and services to the Government of Yukon is proceeding and Yukon First Nations (YFNs) will be consulted through a process with the Council for Yukon Indians (CYI), of which the Ross River Dena Council and Liard First Nation are a part. Although the KDC is not represented by the CYI, I understand that you have already met with Mr. John Rayner, Assistant Deputy Minister, Northern Program, to discuss your concerns with devolution and that Mr. Mike Ivanski, Director General, Yukon Region, has offered to provide the opportunity to meet with representatives of the Kaska Nation, including the KDC, to hear your concerns.
>
> You are aware that the rights of Aboriginal people are already protected under Section 35 of the *Constitution Act* and that this protection is not affected by the devolution process…[109]

[273] On May 21, 1996, R.J. Wright, a federal negotiator for the devolution process, wrote to RRDC's Chief Norman Sterriah stating:

> As you will recall, I had anticipated making one more trip to Whitehorse before publication of DIAND's proposal for devolution. I am very conscious that all of the Yukon First Nations are concerned that, in the process, their rights be taken into account and protected. I have advised the Minister that the proposal should outline in detail the Department's view of how this will be accomplished and I will do my best to see that the proposal does this. There will then be a period

[108] The Kaska Tribal Council was initially formed in response to a federal policy to promote more efficient delivery of services to related First Nations. It has since become a forum for the Kaska leadership in the Yukon and British Columbia to meet on pertinent issues.
[109] '06 Common Book of Documents, tab 204.

> of several weeks for comment and, as well, [a] public consultation process in which any concerns that you have will be considered.
>
> … [Assistant Deputy Minister] John Rayner will be coming to Whitehorse to outline a proposal to the various interested parties.[110]

[274] On September 12, 1997, Canada published a draft document, for discussion purposes only, entitled *Devolution of the Northern Affairs Program in Yukon: Transition Arrangements*. The opening paragraph set out some of the background circumstances, as follows:

> …
>
> On June 26, 1997, the Yukon Territorial Government (YTG) and the Council of Yukon First Nations (CYFN) wrote to Minister Stewart, indicating their *qualified* willingness to proceed with the devolution of DIAND's Northern Affairs Program (NAP), as articulated in the federal government's February, 1997 proposal, subject to the successful resolution of a number of issues …[111] (emphasis in original)

What followed were seven bullet points of issues, the first being "[t]he federal government's honouring of land claim and self-government obligations". Under the title "Principles", the last was subtitled "Protection of Aboriginal Interests", where the document stated:

> The federal government will ensure that the devolution agreement respects First Nation land claim and self government agreements, and does not inhibit the resolution of claims that are [not yet settled].

[275] On September 23, 1998, the governments of Canada and Yukon entered into an agreement entitled *Yukon Devolution Protocol Accord, 1998,* with all of the Yukon First Nations. Tribal Chief Hammond Dick, signed the document on behalf of the Kaska

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[110] '06 Common Book of Documents, tab 225.
[111] '06 Common Book of Documents, tab 236.

Tribal Council, representing RRDC and the Kaska Dena Council. The *Protocol* included the following statements:

> …
>
> Whereas Canada and the YTG desire that Canada transfer to YTG the provincial-type legislative powers, programs responsibilities associated with the Department of Indian Affairs and Northern Development ("DIAND") in the Yukon, such programs being commonly referred to as the Northern Affairs Program ("NAP");
>
> …
>
> 1. The Parties agree to negotiate an agreement (the "Transfer Agreement") providing for the transfer to YTG of the provincial-type legislative powers, programs and responsibilities associated with NAP in the Yukon and the Transfer Agreement, unless the Parties otherwise agree, shall outline:
>
> …
>
> b) the intent of the Parties to conclude, as matters being of the highest priority, the negotiation of any outstanding Yukon First Nation Final Agreement or self-government agreement and any Transboundary Agreement into the Yukon.
>
> …
>
> 12. In order to assist First Nation participation in the negotiation of the Transfer Agreement in the 1998-1999 fiscal year, Canada and the YTG shall provide in the aggregate up to $400,000 for this purpose.[112]

[276] On June 16, 1999, Minister of Indian Affairs and Northern Development, Robert Nault, wrote to Hammond Dick, Chief of the Kaska Nation, in response to Chief Dick's earlier letter to Minister Nault's predecessor, Jane Stewart, in which Chief Dick raised a number of matters concerning Yukon devolution. Minister Nault stated:

[112] '06 Common Book of Documents, tab 242, pp. 1, 2, 3 and 5.

> As a signatory to the Devolution Protocol Accord of September 1998, you are aware that it took into consideration that all final and trans-boundary agreements might not be concluded at the time of the transfer of administration and control of land and natural resources to the Yukon government. To that end, all parties agreed that the Devolution Transfer Agreement would outline the intent of all parties to conclude the negotiation of any outstanding trans-boundary agreements into Yukon.[113] (my emphasis)

[277] As an example of the involvement of CYFN in this process, on April 20, 2000, three of CYFN's negotiators, Stephen Mills, Allen Edzerza, and Mike Smith, wrote to both John Ellis, Federal Director of Yukon Devolution, and Angus Robertson, Yukon Assistant Deputy Minister, Executive Council Office, to raise a number of concerns regarding the Devolution Transfer Agreement. The letter began by referring to an earlier meeting of the legal working group held in Vancouver on April 10 - 11, 2000. In the letter, the negotiators proposed specific inclusions in the DTA of matters related to ss. 91(24), 92 and 95 of the *Constitution Act, 1867,* as well as the *1870 Order*. They also proposed a specific clause regarding the protection of existing Aboriginal or treaty rights:

> 1.5 Nothing in the Devolution Transfer Agreement shall be construed as abrogating or derogating from the protection provided for existing aboriginal or treaty rights of aboriginal people by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.[114](emphasis in original)

This letter was copied to Kaska Dena Council Tribal Chief, Hammond Dick, as well as all the other Yukon First Nations Chiefs.

[278] On December 5, 2000, Daryn Leas, on behalf of CYFN, Allen Edzerza, on behalf of the Kaska Tribal Council, and Mike Smith, on behalf of the Kwanlin Dun First Nation,

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[113] '06 Common Book of Documents, tab 251.
[114] '06 Common Book of Documents, tab 262.

wrote to Federal Director, John Ellis, and Yukon Assistant Deputy Minister, Angus Robertson, confirming that the Yukon First Nations supported the amendment of the *Yukon Act* necessary to implement the terms of the DTA signed by the parties. However, the letter also indicated that the First Nations would not support any arrangement which proposed that the *Yukon Act* would prevail to the extent of any conflict or inconsistency with the DTA, unless it incorporates those provisions of the DTA which protect First Nations Rights and interests.

[279] On January 5, 2001, Federal Director, John Ellis, responded directly to the above letter stating that he appreciated the written support of the First Nations for amendments to the *Yukon Act* to give effect to the terms of the DTA. He also stated:

> …
>
> … It is my understanding that the Yukon Government has also held meetings with First Nations organizations on its proposed changes to attempt to address the very concerns you have raised. I would encourage you to continue with this process with them [as written].
>
> With respect to the relationship of the *Yukon Act* and the DTA in the event of conflicts or inconsistencies, primacy rests with the *Yukon Act,* which is federal legislation, while the DTA is a contractual understanding.
>
> That said, each of your organizations is represented and participates in both the negotiation of the DTA and in reviewing and discussing proposed amendments to the *Yukon Act* through the Legislative Working Group…[115]

[280] On April 3, 2001, Allen Edzerza, on behalf of the Kaska Nation, wrote to the federal and Yukon negotiators to express for concerns regarding the draft DTA:

1) no safeguarding of transboundary interests;

[115] ’06 Common Book of Documents, tab 273.

2) non-derogation and First Nations protection measures must go in the *Yukon Act*;

3) environmental clean-up provisions are inadequate; and

4) that he needed more time to review with legal counsel.[116]

[281] On April 25, 2001, Yukon's negotiators responded to Mr. Edzerza, stating that:

1) they were interested in meeting to finalize the transboundary issues;

2) the *Yukon Act* is subject to the *Constitution*, so there is no need to repeat the non-derogation clauses in the former;

3) Kaska interests regarding mine cleanups are best dealt with through means other than the DTA; and

4) Kaska's legal counsel had attended most of the DTA negotiating sessions, and therefore should be up to speed.[117]

The letter also stated in the last paragraph:

> … [W]e can and have ensured that devolution will not derogate or abrogate from First Nations constitutionally protected rights and interests. The DTA will also provide enhanced land protection measures, a significant role for First Nations and the development of new resource legislation, and enhanced consultation on environmental matters and commitments to clean up contaminated sites on Settlement Land.

[282] On May 9, 2001, Indian and Northern Affairs Canada Director, Yukon Devolution, John Ellis, responded separately to Allen Edzerza's letter of April 3, 2001, also addressing each of Mr. Edzerza's four concerns in a manner similar to the letter from the Yukon negotiators, which I just referred to above. Mr. Ellis further stated:

[116] '06 Common Book of Documents, tab 283.
[117] '06 Common Book of Documents, tab 287.

> As a general statement, I believe that your letter does not recognize the significant efforts made to accommodate the Kaska interests at the Devolution multi-party table since the negotiations began in 1997. I would point out that even though, as was stated on several occasions, the negotiation of the Devolution Transfer Agreement was not a forum where all interests of First Nations could be addressed, measures protecting a significant number of those interests were negotiated and included in the agreement.
>
> Such measures to protect First Nations interests include enhanced land protection measures, a significant role for First Nations in the development of Yukon Government's successor resource legislation, enhanced consultation on environmental remediation matters and a range of commitments to remediate known and newly-discovered contaminated sites on Settlement Land.[118]

The letter concluded with reference to the "financial resources" provided to the Kaska by Canada to fund their legal counsel in these negotiations "… in each of the past 3 fiscal years …".

[283] On May 22, 2001, Allen Edzerza, again on behalf of the Kaska Nation, wrote separately once more to Director John Ellis, and copied to the Yukon negotiator Rob McWilliam and Kaska Leadership, reiterating the concerns set out in his earlier letter of April 3, 2001, this time including a threat to go to court to protect the Kaska's rights, if Canada was to conclude the DTA without their support.[119]

[284] On June 1, 2001, Director Ellis responded to Mr. Edzerza's letter of May 22, 2001, stating:

> …
>
> … <u>[T]here is no Kaska veto on the conclusion of the DTA</u> nor is there any intent to not respond to the First Nations' identified Devolution-related matters prior to the conclusion of the DTA.

[118] '06 Common Book of Documents, tab 289.
[119] '06 Common Book of Documents, tab 290.

> Given the nature of the expressed 'interests' you are pursuing however, it might not be possible for the Parties, particularly the two public governments, to deal with them before the conclusion of the DTA.
>
> In that regard, we might want to include in the final draft of the DTA an authorization for a Party such as the Kaska to later sign-on to the DTA when its non-Devolution related issues have been more fully addressed …[120] (my emphasis)

[285] On July 30, 2001, Kaska Tribal Council Chief, Hammond Dick, wrote to Minister Nault referring to an earlier meeting which the Minister had with Kaska leaders in Whitehorse on April 11, 2001, but indicating that the Kaska Nation would not be signing the proposed DTA because it did not adequately safeguard the rights and interests of the Kaska. Chief Dick did not elaborate on how the proposed DTA failed to do so.

[286] Despite the positions of the federal and Yukon negotiators in 2001 to the contrary, a non-abrogation/derogation clause protecting First Nations interests <u>was</u> added to the *Yukon Act* prior to its enactment. Section 3 now provides:

> For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing [A]boriginal or treaty rights of the [A]boriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

I find this language to be remarkably similar to the clause originally proposed by the First Nations' negotiators in their letter to the federal and Yukon negotiators dated April 20, 2000, which I just referred to above at para. 277.

[287] The DTA came into effect on April 1, 2003. It includes a number of provisions protecting Aboriginal interests. Section 1.1 provides:

> The objective of the Parties in entering into this Agreement is to provide for the transfer from Canada to the YTG of the resources and responsibilities associated with NAP and <u>to</u>

[120] '06 Common Book of Documents, tab 292.

> do so in a manner that respects the protection provided by the Constitution of Canada for any existing [A]boriginal, treaty and other rights of the [A]boriginal peoples of Canada that is consistent with Self-Government Agreements and any existing fiduciary duties or obligations of the Crown to [A]boriginal peoples of Canada. (my emphasis)

Section 1.3 provides that the conclusion of any outstanding Settlement Agreements or Self-Government Agreements will be "… a matter of the highest priority in the Yukon …". Sections 1.4 to 1.5 provide that nothing in the DTA shall be construed to affect in any manner the application of the Constitution of Canada, and particularly with respect to Indians or lands reserved for Indians, except as provided for in a Settlement Agreement or Self-Government Agreement. Sections 1.6 through 1.11 speak to the non-derogation of First Nations' rights and interests. Finally, sections 1.12 through 1.24 deal with land protection matters relating to land claims negotiations in the Yukon.

[288] Further, the transfer of the province-like powers from the federal government to the Yukon government through the DTA and the *Yukon Act* has not absolved the Yukon government of its constitutional responsibilities to protect First Nations Rights. As was stated by the Supreme Court in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, at para. 50:

> … When a *government* - be it the federal or a provincial government - exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question. (emphasis already added)

The same applies to a territorial government exercising Crown power: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para. 62.

[289] Thus, RRDC's interests were taken into account throughout the devolution process. Further, RRDC has not been prejudiced by devolution because the Yukon

government is bound by the same legal obligations as Canada towards Aboriginal peoples. Finally, Canada continues to share responsibility for land claims negotiations with the Yukon government.

[290] Accordingly, RRDC has not met its onus in alleging that Canada's conduct in proceeding with devolution was inconsistent with the honour of the Crown.

4.10 Issue #10: Has Canada allowed the moratorium on the collection of income taxes that had applied to RRDC members in respect of income earned on Land Set Aside to expire? If so, is such conduct inconsistent with the honour of the Crown?

[291] This issue has not been pleaded in either the '06 Action or the '05 Action. Nor was the issue argued in either the written or oral submissions of RRDC's counsel. There was only a singular passing reference to it during oral submissions, and counsel conceded that there is no evidence on the point either. I am informed by Canada's counsel that this is the main issue in one of the Federal Court actions which I cited above, and that the matter is lengthy and complicated. For these reasons, Canada did not respond to the allegation in any of its written submissions in this action. Accordingly, I am not going to deal with it either.

4.11 Issue #11: Has Canada refused, and does it continue to refuse, to take the steps necessary to convert RRDC's Land Set Aside to reserve lands within the meaning of the *Indian Act*? If so, is such conduct inconsistent with the honour of the Crown?

[292] As with the last question, this issue has also not been pleaded in either the '06 Action or the '05 Action. Nor was the issue argued in either the written or oral submissions of RRDC's counsel. To my knowledge, there is also no evidence on the point. Once again, I am informed by Canada's counsel that the issue has arisen in one of the Federal Court actions, but only in the context of a proposed settlement offer by

RRDC. For those reasons, Canada did not respond to the allegation in any of its written submissions. Accordingly, I am not going to deal with it either.

4.12 Issue #12: Has Canada refused requests to implement the published policy on the implementation of the inherent right of self-government in respect of RRDC? If so, is such conduct inconsistent with the honour of the Crown?

[293] As with the previous two issues, this question was also not pleaded in either the ‘06 Action or the ‘05 Action. I also do not recall RRDC’s counsel making any written or oral submissions on the point. However, Canada did respond to the issue briefly in its written argument, and there is some evidence on the matter. Accordingly, I will attempt to address it briefly as well.

[294] In my view, it cannot fairly be said that Canada “refused” RRDC’s attempts to negotiate self-government.

[295] Firstly, as I have already indicated above, Canada did make efforts to negotiate both a Self-Government Agreement and a Settlement Agreement with RRDC over the period from 1973 to 2002. However, Canada’s comprehensive offer was rejected by RRDC and Canada determined that its mandate to continue to negotiate had expired.

[296] Secondly, Canada responded affirmatively to the Gavin Fitch report of March 26, 2008, in which he raised, among other things, the problem of RRDC’s lack of local governance power over the Land Set Aside on which the community of Ross River is located. I addressed Canada’s response in this regard in more detail in paras. 243 through 257 of these reasons.

[297] Although Mr. Fitch did not recommend negotiations for full self-government power, he did recommend “that Canada negotiate the provision of local, municipal-type

governance powers" to RRDC in respect of its community. He said this would be a first step in an incremental process to address an urgent and immediate need.

[298] Canada responded by meeting with RRDC Chief Peter in June 2009, and following up with an email on August 27, 2009 inviting RRDC to make a written submission for funding to begin these discussions. There is no evidence on the record before me that RRDC responded to this invitation regarding funding.

[299] In 2009 and 2010, RRDC pushed to have these local land governance discussions include a modern self-government agreement. Canada's response was not to refuse to discuss self-government, but to point out that its mandate was limited to discussing the creation of a land management regime to provide greater control for Land Set Aside. Meetings were held in 2011 to pursue these issues. The parties agreed that it would be helpful to have a future community meeting in Ross River to hear from the RRDC members about the kind of management powers on Land Set Aside that they would like the Chief and Council to have. Canada offered $5,000 in funding to RRDC to facilitate this proposed community meeting. The meeting did not occur in 2011.

[300] In 2012 and in 2013, Canada again offered to provide funding and was still supportive of the proposed community meeting to discuss local governance. In a letter from Canada to RRDC Chief Jack Caesar dated January 6, 2012, Canada indicated that if the initial discussions on local governance and land management progressed, there was every possibility that future discussions might include other governance issues. However, there were no replies from RRDC to these overtures from Canada to meet.

4.13 Issue #13: Has Canada refused or failed to take the necessary steps to honour and/or implement the United Nations Declaration on the Rights of Indigenous Peoples ("*UNDRIP*") (and in particular Article 26 thereof) in respect of RRDC's Aboriginal title and rights in and to the lands in question? If so, is such conduct inconsistent with the honour of the Crown?

[301] Yet again, this issue was not pleaded in either the '06 Action or the '05 Action. Nevertheless, the parties did address the point in their written and oral arguments, and there is some evidence relating to the issue. Accordingly, I will attempt to deal with it briefly.

[302] *UNDRIP* was adopted by the General Assembly of the United Nations on September 13, 2007. It is undisputed that, as a declaration, it is a nonbinding international instrument. Unlike treaties, declarations are not signed or ratified.[121] Canada has endorsed *UNDRIP,* meaning that it has expressed its political support for the Declaration. Article 26 of *UNDRIP* recognizes that Indigenous peoples have the right to own, use, develop and control the lands which they have traditionally occupied. Further, states are required to give legal recognition and protection to those lands.

[303] Canada and RRDC agree that *UNDRIP* can be used as an aid to the interpretation of domestic law, however, there may be an issue about whether *UNDRIP* can be used to interpret the Constitution. In *Taku River Tlingit First Nation v. Canada (Attorney General)*, 2016 YKSC 7, Veale J. of this Court suggested that the Supreme Court of Canada has confirmed that the latter can be done, just before he quoted with approval from Strickland J. in *Nunatukavut Community Counsel Inc. v. Canada*

[121] J. Brunnée and S. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) XL Can. Y.B. of Int'l L. 3 at 18-19 (citations omitted); *Hupacasath First Nation v Canada (Minister of Foreign Affairs),* 2013 FCC 900, aff'd at 2015 FCA 4; *Snuneymuxw First Nation v Board of Education – School No. 68*, 2014 BCSC 1173.

(Attorney General), 2015 FC 981. The following quote is first from Veale J. In *Taku* and then from Strickland J. in *Nunatukavut*:

> 100 Although not enforceable against Canada, **the Supreme Court has confirmed UNDRIP's usefulness in interpreting Canada's Constitution** in *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981,
>
> > 103 I agree with the NCC's general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in *Baker*, [[1999] 2 S.C.R. 817] values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, [[2013] F.C.J. No. 1203] Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.(underlining in original, my bolding)

[304] RRDC's counsel urges me, on the basis of judicial comity[122], to accept Veale J.'s view that the Supreme Court of Canada has confirmed *UNDRIP's* usefulness in interpreting the Constitution. With respect, I do not feel I am able to do so. Although Veale J. makes reference to the Supreme Court in the above passage, it is not clear to me what case in particular he is referring to. The *Nunatukavut* case he went on to quote was decided by the Federal Court, and not the Supreme Court. Furthermore, in the paragraphs immediately following the one quoted by Veale J. above, Strickland J. was

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[122] *Re Hansard Spruce Mills,* [1954] 4 D.L.R. 590.

more cautious about using *UNDRIP* to interpret Canada's Constitutional obligations to Aboriginal peoples, stating:

> 104 That said, … UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty.
>
> ...
>
> 106 Most significantly, in this matter the NCC does not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions. In my view, in these circumstances, the NCC has not established that UNDRIP has application to the issues before me, or, even if it has, how it applies and how it impacts the duty to consult in this case. (my emphasis)

[305] The importance of the issue to RRDC seems to have been summarized by counsel's outline, filed March 20, 2017, in which the following submission is made:

> Accordingly, the plaintiff contends that, for the purposes of the case at hand, Article 26 of UNDRIP can and should be relied upon to inform the court's interpretation of the relevant provisions of the *1870 Order* as well as Canada's historic and ongoing breaches thereof.[123]

The problem with this submission is that the '06 Action is not about the interpretation of the *1870 Order*, nor is it about Canada's "historic and ongoing breaches thereof". Thus, I am left rather confused as to what RRDC's point is here.

[306] In any event, Canada and RRDC also agree that this question is not about whether *UNDRIP* is enforceable against Canada. They agree it is not.

[123] Para. 58.

[307] Therefore, the remaining issue here seems to be whether Canada has failed to 'implement' *UNDRIP*. It has not implemented the Declaration, at least not yet, but not in a manner inconsistent with the honour of the Crown, as the following facts establish.

[308] On May 10, 2016, the Minister of Indigenous and Northern Affairs, Carolyn Bennett endorsed *UNDRIP* at a meeting of the United Nations Permanent Forum on Indigenous Issues in New York City. In doing so, she stated:

> …
>
> … I'm here to announce, on behalf of Canada, that we are now a full supporter of the Declaration without qualification.
>
> We intend nothing less than to adopt and implement the [D]eclaration in accordance with the Canadian Constitution …
>
> …
>
> By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada …[124]

[309] On September 7, 2016, Minister of Justice, Jody Wilson-Raybould, gave a speech in Vancouver, British Columbia, where she acknowledged that Canada had "endorsed … without qualification" *UNDRIP* in New York City the previous May. She then went on to discuss the challenges around implementing *UNDRIP*:

> …
>
> Our collective challenge now is to implement the declaration and make those words our words, and to turn words into action, to translate them into practical and meaningful benefits on the ground in our communities. Yes, it will require changes in legislation, new forums of agreements, new structures and processes, and new approaches to decision making; new mechanisms …

[124] '06 Common Book of Documents, tab 389.

> …
>
> … It is critical…that we all…appreciate that [*UNDRIP*] requires a thoughtful and sound commitment for implementation.
>
> …
>
> … [I]t is important to appreciate how come it cannot simply be incorporated word for word into Canadian law.
> First, the declaration itself contemplates that it is to be implemented in many ways through various instruments.
> Second, the federal government simply does not have the jurisdiction to unilaterally address all the minimum standards and principles set out in the declaration …
>
> Third and in truth, every party involved in implementation needs to the time [as written] to develop practical and effective approaches to issues…[T]hese approaches could mean amending legislation, or developing new policies, depending on which element of the declaration we are concerned with …
>
> Fourth and finally, and I think most importantly, the implementation of the declaration has to take into account specific constitutional and legal context here in Canada. That includes our federal system, our [C]onstitution, particularly Section 35 of the Constitution Act and the Charter of Rights & Freedoms. Accordingly we will want to identify which laws, policies and practices need to be changed to give full effect to both Section 35 and [*UNDRIP*] …[125]

[310] On February 22, 2017, Canada issued a press release[126] announcing the creation of a working group of Ministers on the review of laws and policies related to Indigenous peoples. Supported by the Privy Council Office, the working group will include:

- the Minister of Indigenous and Northern Affairs;
- the Minister of Justice;

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[125] ’06 Common Book of Documents, tab 390.
[126] ’06 Common Book of Documents, tab 436.

- the Minister of Fisheries, Oceans and the Canadian Coast Guard;
- the Minister of Health;
- the Minister of Families, Children and Social Development; and
- the Minister of Natural Resources.

The press release describes the responsibility of the working group as follows:

> The Working Group of Ministers responsible for the review will examine relevant federal laws, policies, and operational practices to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission's Calls to Action. (my emphasis)

[311] On this evidence, it cannot fairly be said that Canada is refusing to implement *UNDRIP*.

4.14 Issue #14: Has Canada failed to take any steps to implement the terms of ss. 49 and 50 of the *Yukon Act* in respect of RRDC's unsettled claims in and to the Kaska traditional territory in the Yukon? If so, is such conduct inconsistent with the honour of the Crown?

[312] This issue has not been pleaded in either the '06 Action or the '05 Action. However, it was litigated as part of another action, with a different plaintiff, represented by one of RRDC's counsel in the present action, Mr. Walsh: *Taku River Tlingit First Nation v. Canada (Attorney General)*, cited above. Accordingly, Canada has not responded to the allegation.

[313] Further, other than raising the bald issue in their initial outline filed August 19, 2016, RRDC's counsel have not developed this argument, beyond making passing reference to it in two paragraphs in its reply outline filed September 23, 2016. Finally,

according to my notes, RRDC's counsel made no reference whatsoever to the issue in their oral submissions. Nor has any evidence been called on the point.

[314] For these reasons, I am not going to deal with the issue.

4.15 Issue #15: Which party bears the onus of proof in this action to establish that the Crown did not negotiate in good faith?

[315] RRDC's counsel briefly raised this issue in the case management conference on April 6, 2016, by submitting that Canada carries the "persuasive burden" in establishing that it interpreted the relevant provision in a purposive manner and diligently pursued fulfillment of the purposes of the obligation arising from it. This was in the context of trying to persuade me that Canada should be required to make its opening arguments first. However, as I indicated above, after some discussion, RRDC's counsel, Mr. Walsh, changed his mind at that conference and agreed to make his opening arguments first.

[316] After that, the issue was not raised again by RRDC's counsel until his outline filed January 31, 2017, and even then, somewhat cryptically, at para. 4:

> … [The 2015 procedural ruling] (at para. 44) gives rise to the following novel issue: 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 could that finding "have an ameliorating effect" on Canada's historic breaches of its constitutional obligations to the plaintiff?

[317] According to my notes, RRDC's counsel made no oral submissions on the point at all.

[318] This argument obviously arises from two things I said in the penultimate paragraph of the 2015 procedural ruling, which I quoted fully at para. 13 above:

> … 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 fulfilment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis*, cited above. (bolding added, underlining in original)

[319] Canada's position is simply that it is the plaintiff, RRDC, which alleges in this action that Canada did not negotiate in good faith during the modern day negotiations. Accordingly, the onus is on RRDC to prove this allegation, as is required in the normal course by a plaintiff who makes allegations in a statement of claim. Canada submits that it does not need to prove that it has acted in good faith.

[320] Part of the problem, in my view, is that RRDC's counsel has misunderstood the nature of his client's legal and persuasive burden in this action. I say this because, in the case management conference on August 24, 2016, RRDC's counsel made the following submission:

> … [T]here's a difference between the legal burden in civil proceedings and the persuasive burden. Persuasive burden goes back and forth, depending on what the point is and who raised it. I -- my client carries the legal burden to make out the case that it brought to the court, the ultimate burden. No question about that, and I don't--I'm not going to try and suggest otherwise. But it's Canada that has emphatically asserted that it satisfied the honour of the Crown post-73.[127] (my emphasis)

[127] Transcript, August 24, 2016, p. 6.

[321] In fact, according to S.N. Lederman, A.W. Bryant, and M.K. Fuerst, in their text *The Law of Evidence in Canada*,[128] the legal burden and the persuasive burden are effectively one and the same thing. As they explained, there are essentially two distinct concepts relating to the notion of 'burden'. The first has to do with the burden of proving a fact or issue to a certain standard, such as the balance of probabilities (the "persuasive" or "legal" burden). The second has to do with a party's obligation to adduce evidence, or point to evidence on the record, to raise an issue to the satisfaction of the trier of fact (the "evidential" burden):

> The term "burden of proof" is occasionally used to describe two distinct concepts relating to the obligation of a party in a proceeding in connection with proof. In its first sense, the term refers to the obligation imposed on a party to prove or disprove a fact or issue to either a balance of probabilities or beyond a reasonable doubt. In the second sense, it refers to a party's obligation to adduce or point to evidence on the record to raise an issue to the satisfaction of the trial judge. For example, the evidence may be found in the plaintiff's or the prosecution's case.
>
> Various labels have been used to describe the burden of proof in its first sense, including the legal burden, ultimate or fixed burden, the persuasive burden…and the burden on the pleadings… In previous editions of this text we selected the term legal burden on the basis it was the term most frequently used. Recent Supreme Court of Canada decisions show a preference for the term persuasive burden. We will use the term "persuasive (legal) burden" or simply "persuasive burden" to describe the onus of proof in relation to the balance of probabilities or beyond a reasonable doubt.
>
> To differentiate between the two senses in which the term "burden of proof" is used, the other burden may be called the "evidential burden"…

[322] These authors also make the point that in cases where multiple facts or issues are disputed, the evidential burden in relation to different facts or issues may be

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[128] (4th Ed.), LEXIS-NEXIS Canada Inc. 2014.

distributed between the parties[129], and that in civil proceedings, the evidential burden normally coincides with the legal burden for a particular fact or issue.[130] For example, in a standard negligence action the plaintiff bears both the evidential and legal burden of proving the defendant's negligence on a balance of probabilities. However, if the defendant alleges contributory negligence on the part of the plaintiff, then the defendant also bears an evidential and legal burden to prove the plaintiff's contributory negligence.

[323] The authors of *The Law of Evidence in Canada* further make the point that it is often misleading to talk about the 'shifting' of the evidential or persuasive burden, and that except for the operation of presumptions of law or rebuttable statutory provisions, these burdens do not shift.

[324] The other part of the problem on this issue is that RRDC's counsel has misunderstood what I said in my 2015 procedural ruling. First, it is essential to remember that this was a ruling within the '05 Action. Second, it was based in part upon Canada's amended statement of defence in response to RRDC's amended pleading that the *1870 Order* gives rise to "a solemn commitment that engaged the honour of the Crown" and that Canada's conduct is "inconsistent with the honour of the Crown".[131] Canada responded by pleading, in the alternative, that if the relevant provision:

> …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 fulfil 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…[132] (my emphasis)

[129] *Evidence*, at 3.16.
[130] *Evidence*, at 3.24.
[131] 2015 YKSC 33, at para. 39.
[132] *Ibid*, at para. 40.

[325] Fundamentally, I agree with RRDC’s proposition that the party who asserts must bear the burden of proof. As Scott C.J.M. said for the Manitoba Court of Appeal, in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2010 MBCA 71, at para. 218:

> … the *dictum* "he/she who asserts bears the burden of proof" is alive and well (see *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321 at para. 137, hereinafter "*Authorson,*" leave to appeal refused, [2007] S.C.C.A. No. 472 (QL)). (my emphasis)

[326] Thus, my comments at para. 44 of the 2015 procedural ruling must be understood in the context of what Canada has asserted in its amended pleadings, which I just quoted above. I am cognizant here of not falling into the trap of defending my own reasons or otherwise explaining what I meant to say. However, my comments about what Canada can “establish” must be read in the context of its assertion that it has acted honourably and met any obligation that arises from the *1870 Order.* But, all that is in the context of the ‘05 Action and not this action. As well, Canada’s response and my procedural ruling, both cited above, are consistent with the recognition of an evidential burden on Canada. While not at issue in this action, I see no reason to depart from the dictum in *Manitoba Metis*, cited above, which would leave the persuasive burden with the plaintiff, RRDC.

[327] Whatever the case in the ‘05 Action, it is RRDC that continues to bear the persuasive burden of proving, in this action, that Canada failed to negotiate in good faith post-1973.

4.16 Issue #16: What, if anything, does RRDC have to establish with respect to its prior use and occupation of the lands that have been opened up for settlement in the Kaska traditional territory?

[328] This is one of those issues which I referred to in my introduction as being a 'moving target' throughout the exchanges of written and oral submissions. It is also one which seems to have taken on a life of its own, notwithstanding that it is largely irrelevant to the pleadings in this action. On that basis alone, and for the sake of judicial economy, I am inclined not to deal with it. However, because both parties spilled a significant amount of ink in developing arguments on the point, I intend to discuss it briefly.

[329] The issue seems to have arisen from my discussion, in the 2015 procedural ruling, again within the context of the '05 Action, about the possible relationship between Aboriginal rights and title under s. 35(1) of the *Constitution Act, 1982*, and any potential constitutional rights arising under the *1870 Order.*[133] At para. 32, I stated:

> 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 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

[133] 2015 YKSC 33, at paras. 26 to 34.

> trial of the '06 Action proceeds before my final decision on the modern-day interpretation of the *1870 Order*. (my emphasis)

[330] RRDC's counsel have taken significant umbrage, in this action, with the emphasized passage above, even though it is squarely in the context of the '05 Action. In response, they argue, presumably with respect to establishing historic use and occupation of the lands, that:

1) all of the necessary facts have been established through admissions made by Canada;
2) there is nothing whatsoever remaining which RRDC needs to establish; and
3) Canada is, in any event, barred by the doctrine of estoppel from denying that RRDC, its members and other Kaska have a valid claim to Aboriginal title and rights in and to their claimed traditional territory in the Yukon.[134]

[331] Under the first argument, RRDC says that Canada has formally admitted: (1) that the Kaska are one of the "Indian tribes" that are referred to in the *1867 Address*; (2) that their traditional territory forms part of the North-Western Territory that was transferred to the Dominion of Canada under the *1870 Order*, and (3) that their claims for compensation have not been settled. I confess that I do not understand this argument. If what RRDC is trying to say here is that the admissions are tantamount to proof that it has established Aboriginal title to its claimed traditional territory, then I disagree.

[134] RRDC's Reply Outline filed March 20, 2017, at para. 33.

[332] That said, in the context of this action, it is not necessary for the plaintiff to prove that it has Aboriginal title in order to establish that Canada failed to negotiate in good faith in the post-1973 era.

[333] RRDC's second argument here turns on Canada's acceptance of RRDC's land claim under its comprehensive land claim policy which was announced in 1973, and was reaffirmed subsequently in 1981 and 1986. In the Communiqué issued August 8, 1973, the then Minister of Indian Affairs and Northern Development, Jean Chretien, stated:

> …
>
> The Government is now ready to negotiate with authorized representatives of these native peoples <u>on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided</u> to native peoples in return for their interest.[135] (my emphasis)

The argument, as I understand it, is that Canada would not have accepted RRDC's claim for negotiation unless RRDC had already "established" that its Aboriginal title to the claimed territory was intact. Consequently, there is no need for RRDC to subsequently prove its Aboriginal title in order to obtain compensation. I agree with the latter statement, but disagree with the former, as I will discuss in more detail below.

[334] The second piece of evidence that RRDC relies upon here is a document entitled "Resolving Aboriginal Claims", 2003, which includes a summary entitled "Federal Policy for the Settlement of Aboriginal Land Claims", stating as follows:

> In order for its comprehensive land claims submission to be accepted an Aboriginal group must demonstrate all of the following:

[135] '05 Common Book of Documents, tab 15.

> - the Aboriginal group is and was an organized society
> - the organized group has occupied a specific territory over which it asserts Aboriginal title from time immemorial, and the traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations
> - the occupancy of the territory by the Aboriginal party was largely to the exclusion of other organized societies
> - the Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes
> - the group's Aboriginal title and rights to resource use have not been dealt with by treaty
> - Aboriginal title has not been eliminated by other lawful means
>
> ... [136]

As I understand it, the argument here is similar to the one above - since Canada "accepted" RRDC's claim for negotiation on the basis of this policy or its predecessor, then, this is the equivalent of Canada having also accepted and recognized that RRDC has Aboriginal title to its claimed territory.

[335] RRDC's third argument here is that, having "accepted" and "recognized" RRDC's claimed Aboriginal title for the purposes of negotiation, Canada is now estopped, under the doctrine of estoppel by representation of fact, from denying that RRDC, its members and other Kaska have a valid claim to Aboriginal title in and to the lands comprising their traditional territory.

[336] Canada's position is that the acceptance of RRDC's claim for negotiation does not constitute recognition of or an admission of Aboriginal title to their claimed territory, because, if it were, there would be little or no purpose in negotiating land selections. I

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[136] Exhibit 11, tab 1.

agree. Indeed, the maps delineating the extent of the Kaska's claimed traditional territory in the Yukon were not even submitted to Canada until approximately 1988, as part of the negotiation process.

[337] RRDC made a similar argument in *Ross River Dena Council v. Government of Yukon*, 2011 YKSC 84. There, RRDC successfully applied for a declaration that the Yukon government had a duty to consult prior to recording a grant of quartz mineral claims in the Ross River area. There were three agreements in place between the parties concerning the land area in question. The first two agreements were both entered into in January 1997. The first agreement stated:

> 15. …
>
> Whereas the member governments of the KTC [Kaska Tribal Council] have continuing [A]boriginal rights, title and interests within the Yukon, …

The second stated:

> 16. …
>
> Yukon Indian People, subject to Settlement Agreements, have [A]boriginal rights, titles and interests in and to the Yukon which are recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> …

The third agreement, dated March 8, 2003, stated:

> 18. …
>
> Whereas Yukon acknowledges, in agreements entered into with the Kaska in January, 1997, that the Kaska have [A]boriginal rights, titles and interest in and to the Kaska Traditional Territory in the Yukon;
>
> …

[338] RRDC argued that the three agreements represent an acknowledgement that it had Aboriginal rights, title and interests in and to the Ross River area. Justice Veale, of this Court, disagreed:

> 46 In my view, the agreements do not amount to an acknowledgement that Ross River Dena Council has established aboriginal title to the full Ross River Area in the sense of exclusive use and occupation, although clearly the Government of Yukon has recognized that claims to aboriginal rights and title are extant and not yet defined. The fact that negotiations have been taking place for many years supports the view that the claims to aboriginal rights and title are credibly asserted but not established. It does not make sense to conflate the words in the agreements so that an acknowledgement of rights and title within the Ross River Area is an acknowledgement of aboriginal title to the whole area. I have no doubt that Ross River Dena Council asserts such a claim and as counsel indicates, the Kaska Tribal Council (representing Ross River Dena Council among others) has an outstanding court action in the Federal Court of Canada in this regard. But the nature, extent and scope of the asserted aboriginal rights have not been established. I conclude that the acknowledgements by the Government of Yukon in the three agreements are in the context of an assertion rather than an acceptance of an established aboriginal title to the Ross River Area. However, the Ross River Dena Council claim is not tenuous but in the category of a strong case sufficiently credible to meet the threshold required by the first element of the test for the duty to consult. (my emphasis)

[339] This case was appealed to the Court of Appeal of Yukon, however the Court did not find it necessary to resolve this particular issue in order to dispose of the appeal.[137]

[340] RRDC's counsel also relies upon a finding of fact made by Justice Veale in *Taku River Tlingit First Nation v. Canada (Attorney General)*, cited above. In that case, the First Nation successfully applied for declarations that Canada participate in the negotiation of the First Nation's transboundary claim in the Yukon, and also to protect

[137] 2012 YKCA 14, at paras. 29 to 31; leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 106.

and preserve the First Nation's rights and interests to its claimed territory in the Yukon, pending settlement. At para. 92, Veale J. made a number of findings of fact, the first of which was as follows:

> Canada declared publicly in August 1973 its **recognition** of Indian title and its willingness to negotiate with First Nations across the country to settle land claims. In the 1973 Claims Policy, Canada assumed responsibility for negotiating land claims in the territories, including Yukon, and indicated that it would push the process forward in British Columbia. (my emphasis)

[341] There is no dispute that the land claims of the Yukon Indians were the first accepted by Canada under this policy. However, they were accepted for negotiation, not simply for the purpose of writing the First Nations a cheque in compensation for their surrendered Aboriginal title. In my view, this is what Minister Chretien, as he then was, meant when he said in his August 8, 1973 Communiqué "that where their traditional interest in the lands concerned can be established [i.e. through negotiation], an agreed form of compensation or benefit will be provided" in return for that interest. Otherwise, what would be the point of the negotiations? In summary, I agree with Veale J. in *Ross River Dena Council v. Yukon*, just cited and quoted above, that references by Canada in its comprehensive land claims policy that it "recognizes" or "accepts" claims of First Nations regarding Aboriginal rights and title does not constitute an acknowledgement that such First Nations have "established" those rights and title. Rather, it constitutes an acknowledgement that the First Nations have credibly asserted an arguable claim to such rights and title, but not that those rights and title have already been established.

[342] I further conclude that this is what Justice Veale must have had in mind when he made his finding of fact in *Taku River Tlingit First Nation v. Canada (Attorney General)*,

also just cited and quoted above, that "Canada declared publicly in August 1973 its recognition of Indian title …". That is, that Canada publicly declared a policy of *recognizing* that certain First Nations have a credible and arguable claim to Indian/Aboriginal title.

[343] In other words, contrary to RRDC's estoppel argument, it is not the case that Canada made a representation of fact to RRDC that it had already established and proven that it has Aboriginal title to its traditional territory when it accepted RRDC's land claim for negotiation, and that it is now resiling from that representation.

[344] Accordingly, to answer the question initially posed in the discussion of this issue, because RRDC's claim has already been accepted under Canada's comprehensive land claims policy and negotiated under that policy for several years, I agree that RRDC does not have to establish anything with respect to its prior use and occupation of its claimed lands in order to continue negotiations. However, it remains an open question, not in this action, but in the '05 Action, what it needs to establish in relation to its prior use and occupation of the lands that have been opened up for settlement in order to trigger any imperative constitutional obligation that may arise under the *1870 Order* to consider and settle its claim for compensation. In any event, it is not the case that RRDC has already established that it has Aboriginal title to its claimed territory.

4.17 Issue #17: Is there any basis in this case for the application of the principles relating to s. 35(1) of the *Constitution Act, 1982?*

[345] This issue arises because of certain comments I made in the 2015 procedural ruling at paras. 26 through 34. However, those comments were all made in the context of the '05 Action and are not relevant here. Despite the fact that counsel for both parties devoted a considerable amount of their written and oral arguments to this issue, I

conclude that it is not necessary for me to resolve the question in order to decide this action.

4.18 Issue #18: Was the legislation passed after the *1870 Order* purporting to open the Kaska traditional territory up for settlement null and void?

[346] This is also an issue which falls squarely within the ‘05 Action, but it is not necessary for me to deal with it in order to decide this action.

5. CONCLUSION

[347] In its most recent statement of claim in this action, filed September 30, 2011, RRDC has pled that Canada’s conduct during the comprehensive land claims negotiations has been “exceptionally high-handed, oppressive and otherwise unconscionable”. I conclude that RRDC has not met its onus in this regard.

[348] Determining what ‘good faith’ is has not been elaborated upon in many cases. A. Swan and J. Adamski, in their text *Canadian Contract Law* [138], discuss the term in a contractual and negotiation context:

> … The role of good faith in contracts and contractual relations of all kinds is both hard to overemphasize and hard to define… The only workable definition of good faith is that it denotes the absence of bad faith …[139]
>
> …
>
> … [I]n the contractual situation, good faith may mean no more than dealing honestly and exercising a discretion or power fairly and on proper grounds without in any way subordinating one’s interest to that of the other …[140]
>
> …

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[138] (3rd Ed) LEXIS NEXIS Canada Inc., 2012.
[139] At 4.186.
[140] At 4.188.

> … [G]ood faith incorporates honesty and fair dealing …[141]

[349] It seems to me that in order to establish that Canada failed to negotiate with due diligence and in good faith, RRDC would have to establish on a balance of probabilities that Canada negotiated in a manner inconsistent with the honour of the Crown, perhaps by exhibiting some of the aspects of bad faith referred to in the jurisprudence. It has not done so. For example, there is no evidence that Canada:

- Failed to act with honour and integrity in attempting to make a treaty with RRDC: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 19;
- Gave the appearance of sharp dealing: *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Haida Nation*, cited above, at para. 19; and *Manitoba Metis*, cited above, at para. 73;
- Negotiated with an oblique motive: *Chemainus First Nation v. British Columbia (Assets and Land Corp.)*, [1999] 3 C.N.L.R. 8, at para. 26; and *Gitanyow First Nation v. Canada,* [1999] 3 C.N.L.R. 89, at para. 74;
- Failed to make disclosure of relevant factors: *Gitanyow,* at para. 74; or
- Demonstrated an unwillingness to accommodate Aboriginal interests: *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, at para. 50.

[350] It is also accepted that the concept of negotiating in good faith does <u>not</u> create a duty to reach an agreement: *Gitxsan*, at para. 50; *Chemainus First Nation*, at para. 26; <u>nor</u> does it require a party to negotiate endlessly: *Chemainus First Nation*, at para. 26.

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[141] At 9.181.

In general, the parties must make reasonable efforts to negotiate and reach an agreement. Tysoe J., as he then was, put it this way in *Gitxsan*:

> 50 The honour of the Crown requires it to conduct such negotiations in good faith and with a willingness to accommodate Aboriginal interests where necessary. The standard by which the court will assess the efforts of the Crown must, of necessity, depend on the reasonableness of the Crown's position. While the Crown may bargain hard and has no duty to reach an agreement, it must be willing to make reasonable concessions based on the strength of the Aboriginal claim and the potentially adverse effect of the infringement in question. If the Crown does not make reasonable concessions, it is open to the court to conclude that the Crown is not negotiating in good faith with a willingness to accommodate Aboriginal interests.

[351] I repeat, RRDC bears the burden of proof here. Despite the numerous allegations which might have, if proven, established bad faith dealing, it has failed to persuade me that any of the allegations have been made out.

[352] This case is not about RRDC getting the best possible deal on its comprehensive land claim. Rather, it is about whether Canada acted reasonably and fairly in the context of the negotiations. In my view, the record reflects that it did so over a period of approximately 30 years. In the interval prior to the expiry of its negotiating mandate, Canada's Minister of Indian and Northern Affairs travelled to the Yukon and met on several occasions with First Nations' leaders, including those of RRDC, in order to address concerns and facilitate an agreement. Indeed, the parties came very close to achieving an agreement in June 2002. In response to a short notice request by RRDC, Canada (and Yukon) provided a comprehensive offer on a memorandum of understanding, upon which a Final Agreement and Self-Government Agreement would be based. RRDC's own experienced negotiator was of the opinion that the offer was

reasonable. Nevertheless, the offer was rejected by RRDC's leadership. As a result, and pursuant to repeated warnings and notice given months earlier, Canada then eventually informed RRDC that it had no continuing mandate to negotiate.

[353] Further, despite the end of that mandate, Canada has not refused to continue to negotiate. Rather, it has insisted that it will only do so on the basis of the UFA, which I have found to be a reasonable position. In addition, the ability to continue to negotiate has been complicated by the ongoing Kaska litigation. Notwithstanding those difficulties, Canada has also reached out to negotiate local land and governance powers. The record suggests that those overtures have ultimately fallen on deaf ears.

[354] The specific declaration sought by RRDC in paragraph (a) of its prayer for relief in the statement of claim, is as follows:

> a. a declaration that the defendant has a fiduciary and constitutional duty to negotiate with due diligence and in good faith towards a settlement of the plaintiff's claims to compensation for lands within the Kaska traditional territory which have been or may be required for purposes of settlement and a settlement of the plaintiff's claims to Aboriginal title, rights and interests in and to the Kaska traditional territory;

[355] RRDC's counsel made no argument at all about whether this relief should be granted. However, Canada has effectively admitted, based upon *Manitoba Metis*, that it has a constitutional duty to negotiate RRDC's land claim in good faith.[142] Further, I concluded in the '05 Action that the relevant provision in the *1870 Order* creates a binding constitutional obligation upon Canada to consider and settle RRDC's claims for compensation for lands required for purposes of settlement within the boundaries of the Ross River group trap line. Only that portion of the Kaska traditional territory was at

[142] Canada's Outline, filed September 20, 2016, at para.244.

issue in that action. Nevertheless, that conclusion is applicable to this trial.[143] Therefore, I further conclude here that it is appropriate to grant 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. However, I decline to grant a declaration that Canada has a constitutional duty to negotiate "a settlement of [RRDC's] claims to aboriginal title, rights and interests in and to the Kaska traditional territory" (my emphasis), because that would be tantamount to declaring a duty to reach an agreement, when the concept of good faith negotiation does not go that far.

[356] Paragraph (b) of RRDC's prayer for relief seeks:

> b. a declaration that the defendant has breached and continues to breach its duty to negotiate with due diligence and in good faith towards a settlement of the plaintiff's claims;

For the reasons given above, I decline to grant this declaration.

[357] RRDC's prayer for relief also seeks declarations, at paragraphs (c) and (d), that its debts due to Canada for land claim negotiation funding are void and unenforceable. Once again, RRDC's counsel made absolutely no reference to this relief in any of their written or oral argument. Presumably, the submission would have been that, had Canada been proven to have breached its duty to negotiate in good faith, then this would justify nullifying the loans. Since RRDC has not proven the former, then there is no basis upon which to grant the declarations sought.

[143] Order dated February 20, 2008.

[358] As an aside, Canada's counsel have informed this Court that, so long as the negotiations are in limbo, the loans have been written off and Canada is not seeking to enforce their repayment.

[359] Paragraph (e) in the prayer for relief deals with damages, but the parties have previously agreed in case management to sever the issues of liability and damages, so there is no need to address that here.[144]

[360] Costs have not yet been spoken to. As the predominantly successful party, Canada would ordinarily be entitled to its costs for this trial. However, if counsel are unable to agree on the issue, they may submit further written submissions on the point. Canada is to submit its written submissions, if any, within 90 days of the date of this judgment. RRDC is to submit its written submissions, if any, within 120 days of the date of this judgment. If either party seeks case management on the issue, they are required to seek special leave of the court.

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GOWER J.

[144] Order dated October 24, 2008.

APPENDIX “A”

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53

Chemainus First Nation v. British Columbia (Assets and Land Corp.), [1999] 3 C.N.L.R. 8;

Gitanyow First Nation v. Canada, [1999] 3 C.N.L.R. 89;

Gitxsan First Nation v. British Columbia (Minister of Forests), 2004 BCSC 1734;

Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48;

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73;

Manitoba Métis Federation Inc. v. Canada (Attorney General), 2010 MBCA 71;

Nunatukavut Community Counsel Inc. v. Canada (Attorney General), 2015 FC 981;

R. v. Badger, [1996] 1 S.C.R. 771;

Sterriah v. Her Majesty the Queen, 2002 SCC 54; and

Taku River Tlingit First Nation v. Canada (Attorney General), 2016 YKSC 7;