SUPREME COURT OF YUKON

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

Date: 20171023
S.C. No. 05-A0043
Registry: Whitehorse

BETWEEN:

ROSS RIVER DENA COUNCIL

PLAINTIFF

AND

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh	Counsel for the Plaintiff
Suzanne M. Duncan and Geneviève Chabot	Counsel for the Defendant

REASONS FOR JUDGMENT

TABLE OF CONTENTS

1. INTRODUCTION

[1] On July 1, 1867, the provinces of Canada, Nova Scotia and New Brunswick united to form the Dominion of Canada. They did so with the blessing of the Imperial government in Great Britain, under the authority of the *British North America Act,* 1867 (the "*BNA Act*"), now known as the *Constitution Act, 1867.* At that time, the vast territories to the west and northwest of the new Dominion were known as Rupert's Land and the North-Western Territory. The Hudson's Bay Company ("HBC"), which operated a fur trade under a royal warrant, the 1670 Charter, controlled the territories and exercised various governmental functions in them.[1] Rupert's Land was roughly composed of the drainage basin for Hudson Bay. The North-Western Territory generally included all of the Canadian mainland territory northwest of Rupert's Land, west to the borders of British Columbia and Alaska, and north to the Arctic Ocean.

[2] Section 146 of the *BNA Act* anticipated that the new Dominion would apply to the British government to have the two territories transferred to its jurisdiction by submitting an Address from the Houses of the Parliament of Canada. In December 1867, the Parliament of Canada delivered such an Address to the Queen, asking the Imperial Parliament to "unite Rupert's Land and the North-Western Territory with this Dominion" and to grant Canada authority to legislate in respect of the territories (the "*1867 Address*").

[3] The purpose of the *1867 Address* was to extend the lands within Canada from the Atlantic to the Arctic Oceans, and to the border of the-then-colony of British Columbia. The two territories spanned over 7,500,000 square kilometres, composed largely of boreal forest, tundra and prairie, which now amounts to nearly 75% of

[1] *Caron v. Alberta*, 2015 SCC 56, at paras. 11 and 12.

Canada's land mass.[2] In exchange for acquiring the right to govern those lands, the Canadian Parliament made two undertakings. The first was to provide that the legal rights of any Corporation, company or individual within the enlarged Dominion would be respected and placed under the protection of courts of competent jurisdiction. The second undertaking is the one at issue in this litigation. It stated:

> … [U]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

I will refer to this as the "relevant provision". This case is about its modern-day interpretation.

[4] In response to the *1867 Address* (and a subsequent Address which I will discuss later), in 1870, the British Privy Council enacted the *Rupert's Land and North-Western Territory Order*[3] (the "*1870 Order*") as an Imperial Order-in-Council authorizing the transfer of the two territories to Canada. The relevant provision is specifically located in Schedule A of the *1870 Order*, which is now part of the Constitution of Canada because it is included in the schedule to the *Constitution Act, 1982*, referred to in s. 52(2)(b) of that *Act*.

[5] The plaintiff, Ross River Dena Council ("RRDC") commenced this action in 2005. As stated, the principal issue is what the relevant provision means today, especially given its constitutional status. RRDC commenced a second action in October 2006. In that matter, the principal issue is whether Canada has failed to negotiate RRDC's

[2] Frank J. Tough, "Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory" (1992) 17:2 *Prairie Forum* (Special Issue, Native Studies).
[3] Reprinted in R.S.C. 1985, App. II. No. 9.

comprehensive land claim in good faith. The two actions are closely related, in that the *1870 Order* figures prominently in the pleadings in both cases. These are referred to by the parties, respectively, as the "'05 Action" and the "'06 Action".

2. PROCEDURAL HISTORY

[6] The parties originally agreed in case management to an order that both actions would be tried together, and that the evidence and rulings in one action would be applicable to the other.

[7] These reasons follow a continuation of the trial, which originally commenced in November 2011. At that time, counsel for the parties asked me to answer two so-called "threshold" questions, which they drafted by way of a consent order. The first essentially asked whether the relevant provision was justiciable, in the sense of giving rise to obligations enforceable in this Court. The second question asked whether the provision gave rise to obligations of a fiduciary nature. I answered both questions in the negative.

[8] RRDC successfully appealed to the Court of Appeal of Yukon on the first question.[4] The Court of Appeal found that answering the first question, as it was drafted, did not advance the litigation, and that the question ought not to have been severed as an issue to be determined in advance of others. In particular, the Court held that my reasons focused inordinately on the original intention of the Canadian Parliament in drafting the *1867 Address*, as well as the intention of the British Privy Council in enacting the *1870 Order*, with the *1867 Address* contained within it (the written reasons of the Court of Appeal are cited as 2013 YKCA 6). The Court of Appeal quashed the order arising from my answer to the first question and remitted the litigation back to this

[4] There was no appeal from my determination that, if the relevant provision gives rise to legally enforceable obligations, then those obligations are not of a fiduciary nature.

Court, stating that neither my answer nor my analysis in reaching that answer should be considered binding in further proceedings.[5]

[9] While I will obviously comply with the Court of Appeal's direction in this regard, many passages about the historical context of the relevant provision from my original reasons (cited as 2012 YKSC 4) remain apposite to the current analysis and have found their way back into these reasons.

[10] When the trial recommenced in September 2014, there was some confusion between counsel as to whether the evidence introduced in the first phase of the trial was still part of the record (RRDC's position), or whether the parties were required to begin the trial afresh (Canada's position). I dealt with this confusion in a pre-trial ruling on the admissibility of certain evidence.[6] In short, I ruled that the continuation of this trial follows the evidence already on the record from the first phase of the trial. That includes all of the documentary evidence (eight volumes of documents), as well as a report authored by an expert called by Canada, Dr. Paul McHugh, dated September 21, 2011 ("Dr. McHugh's report"), and Dr. McHugh's testimony. The documentary evidence entered during the continuation of the trial includes two volumes of a common book of 201 documents, as well as two volumes of 110 documents which were footnoted by the Crown's other expert, Dr. Theodore Binnema. It is important to note as well that RRDC's counsel filed an academic article authored by Dr. Kent McNeil, entitled *"*Indigenous Rights Litigation, Legal History, and the Role of Experts*"* [7](the "McNeil Indigenous Rights article"), which I discuss immediately below.

[5] 2013 YKCA 6, at para. 47.
[6] 2014 YKSC 53, at paras. 5 - 9.
[7] (2014), 77 Sask L. Rev. 173 - 203.

[11] At the outset of the continuation of this trial, in September 2014, Canada sought to enter a second expert report from Dr. McHugh dated July 1, 2014, as well as an expert report from Dr. Binnema, dated July 2, 2014. In my ruling[8], I declined to admit Dr. McHugh's second report. However, a good deal of the McNeil Indigenous Rights article was a direct challenge to the reasoning and methodology employed by Dr. McHugh in his first report, dated September 21, 2011, as well as his testimony during the first phase of the trial. Accordingly, I allowed Dr. McHugh to testify a second time in order to respond to the criticisms of Dr. McNeil.

[12] As for Dr. Binnema, I admitted his report of July 2, 2014 ("Dr. Binnema's report"), subject to a few redactions where I felt he was purporting to opine on questions of domestic law. Dr. Binnema also testified about his report.

[13] RRDC called no witnesses in this trial.

[14] When the trial originally began in November 2011, RRDC's Statement of Claim only tangentially touched on the issue of the honour of the Crown, and RRDC's counsel did not argue it further.[9] 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[l] it.[10]

[8] 2014 YKSC 53.
[9] See also 2012 YKCA 10, at para. 5.
[10] Statement of Claim, at para. 20A.

In response to this change, Canada amended its Statement of Defence, pleading that, if the relevant provision does create a solemn obligation that engages the honour of the Crown:

> … then the Crown has acted honourably and met its obligation to 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.[11]

[15] 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.

[16] In its written argument for the trial, Canada asserted that the Crown had acted honourably in its dealings with RRDC by engaging in comprehensive land claims negotiations from 1973 to 2002. RRDC declined to respond specifically to Canada's arguments relating to the honour of the Crown in its written reply.

[17] When the trial resumed on March 13, 2015, RRDC's counsel began making oral submissions about his client's conduct during the negotiations, and particularly advanced the client's position that the Umbrella Final Agreement ("UFA") was never properly ratified. The UFA forms the basis of the final land claim agreements obtained between Canada, Yukon and 11 other Yukon First Nations between 1995 and 2006. The ratification question is a very important issue in the '06 Action.

[18] Canada's counsel objected to these submissions because the parties had agreed not to try the '06 Action at that stage. My concern, however, was that Canada put

[11] Statement of Defence, at para. 11B.

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.

[19] In the result, on July 14, 2015, I decided to suspend my decision on the interpretation of the *1870 Order* until the '06 Action was tried.[12] This was to allow both parties to have a full opportunity to address the issue of whether Canada had negotiated in good faith throughout the modern era negotiations. I refer to this as the 2015 procedural ruling. I summarized my conclusion for that ruling at para. 44, as follows:

> In conclusion, I agree with Canada that, in these particular circumstances, it is appropriate to suspend my decision on the modern-day interpretation of the *1870 Order* until the issues in the '06 Action are tried. RRDC's asserted right to obtain a treaty before their lands were opened up for settlement is not absolute. Rather, it is subject to infringement by Canada, providing the infringement can be justified. For the sake of this argument, I will assume that the *1870 Order* gives rise to a binding constitutional obligation on Canada to consider and settle RRDC's claims before opening up their lands for settlement. I will further assume that there was an historic breach of that obligation by Canada by opening up the lands before commencing negotiations in 1973. However, if Canada can establish that it conducted itself in accordance with the honour of the Crown throughout the modern era negotiations, and was unable to obtain a treaty with RRDC notwithstanding, then that finding may have an ameliorating effect on any historic breach. Thus, the issue of whether the honour of the Crown was upheld during the negotiations is inextricably intertwined with whether Canada can be held liable for any historic breach. Accordingly, Canada should be given a full opportunity to establish that it interpreted the relevant provision in a purposive manner and diligently pursued fulfillment of the purposes of the obligation arising from it, to

[12] Cited as 2015 YKSC 33.

> use the language from *Manitoba Metis*, cited above. (emphasis in original)

[20] The '06 Action was tried over six days in April 2017, and my reasons for judgment in that action, cited as 2017 YKSC 59, are being concurrently released with these reasons. In short, I found that RRDC had not proven that Canada failed to negotiate with due diligence and in good faith towards a settlement of RRDC's comprehensive land claim.

3. FACTUAL BACKGROUND

[21] It may be helpful to set out a number of undisputed facts, in order to establish some context, before turning to the issues:[13]

1. RRDC is a band within the meaning of the *Indian Act*, R.S.C. 1985, c.I-5.
2. RRDC and its members are a part of the Kaska tribe of Indians.
3. The Kaska tribe of Indians - now known as "the Kaska" or "the Kaska Nation" - is one of the Aboriginal peoples of Canada. More importantly, for the purposes of this trial, the Kaska tribe of Indians is one of the "Indian tribes" referred to in the *1867 Address*.
4. The Kaska claim as their traditional territory a tract of land that includes what is now the south-eastern part of the Yukon, as well as adjacent lands in the Northwest Territories and British Columbia. The issues in this trial concern only the portion of the Kaska's claimed traditional territory located in the Yukon.
5. In particular, this trial concerns the lands located within the boundaries of two trap lines: the larger one is known as the "Ross River group trap line"

[13] I have largely borrowed the wording of RRDC's counsel here.

(recorded by the Yukon government as Group Trapping Concession No. 405); and the smaller trapping concession located in and around the community of Ross River (recorded as Registered Trapping Concession No. 415). I understand that the smaller trapping concession is subsumed within the larger group trap line. These lands are referred to as the "Territory" in the pleadings, and comprise approximately 35,380 km², or slightly more than 7% of the area of the Yukon. In these reasons, I will refer to this area variously as the "lands", the "lands at issue" or the "Territory".

6. The portion of the Kaska's claimed traditional territory located in the Yukon was, prior to 1870, part of the North-Western Territory referred to in s. 146 of the *Constitution Act*, *1867*, formerly the *BNA Act*.

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

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

9. Shortly after the acquisition of Rupert's Land and the North-Western Territory in 1870, Canada began a process of negotiating treaties with certain of the Aboriginal peoples occupying those lands: Treaty No. 1 was concluded in 1871 and the last of the numbered treaties, Treaty No. 11,

was concluded in 1921. There was also an adhesion to Treaty No. 9 in 1930. Those treaties are today referred to as the post-Confederation treaties. Treaties 1 through 4 range from western Ontario, across southern Manitoba to southern Saskatchewan. Treaties 5 through 10 span from northern Ontario across the northern portions of the prairie provinces, and into northeast BC and southeast Yukon. Treaty No. 11 is north of the 60th parallel in the western Northwest Territories.

10. On or about August 8, 1973, Canada's Minister of Indian Affairs and Northern Development announced the federal government's new comprehensive land claims policy.

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

12. In 1981, Canada's Minister of Indian Affairs issued a land claims policy statement that confirmed that, since 1973, the federal government had operated under a policy that acknowledged Native interests in certain land areas claimed and allowed for the negotiation of settlements of claims where those interests could be shown not to have been previously resolved.

13. Canada's comprehensive land claims policy, published in 1986 under the authority of the Minister of Indian Affairs, confirms that the basis for the policy is the fulfillment of the treaty process through the conclusion of land claim agreements with those Aboriginal peoples of Canada that continue

to use and occupy traditional lands and whose Aboriginal title has not been dealt with by treaty or superseded by law.

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

4. ISSUES

[22] The global issue in this trial is to determine the current meaning of the relevant provision. However, in making that determination, the following sub-issues arise:

1) What are the principles applicable to the interpretation of the relevant provision?

2) What obligations, if any, does the relevant provision impose on Canada?

3) If the relevant provision creates a constitutional obligation upon Canada to consider and settle RRDC's land claim, does that give rise to a "land freeze" until that obligation is honoured?

4) Are the lands which comprise the Territory "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*?

5) Are ss. 19(1) and 45(1) of the *Yukon Act*, S.C. 2002, c. 7, inconsistent with the rights RRDC may have under the *1870 Order* and, are they therefore, by virtue of s. 52(1) of the *Constitution Act, 1982*, of no force and effect with respect to the lands?

5. ANALYSIS

5.1 What are the principles applicable to the interpretation of the relevant provision?

5.1.1 General principles

[23] In her text *Sullivan on the Construction of Statutes*,[14] Professor Ruth Sullivan, refers to the "modern principle" of statutory interpretation. This was first described by Elmer Driedger, more than 30 years ago, in the first edition of his text, *Construction of Statutes*, where he stated:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[15]

[24] The modern principle has been cited and relied upon in innumerable decisions of Canadian courts, and in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 ("***Rizzo")***, was declared to be the preferred approach of the Supreme Court of Canada.[16] See also: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 ("***Bell"***).[17] Professor Sullivan describes the three "dimensions" of the modern principle.[18] The first dimension is the textual meaning or ordinary meaning, which she notes that Driedger calls the "grammatical and ordinary sense of the words." She expands upon this as follows:

> As understood and applied by modern courts the ordinary meaning rule consists of the following propositions:
>
> 1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> 2. Even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation; they must consider the entire context.

[14] 5th ed. (Markham: Lexis Nexis Canada Inc., 2008)
[15] Sullivan, at p. 1.
[16] *Rizzo*, at para. 21.
[17] *Bell*, at paras. 26 and 27.
[18] Sullivan, at pp. 1 and 2.

> 3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.[19]

[25] The second dimension is legislative intent or purpose. This aspect of interpretation is captured in Driedger's reference to "the scheme and object of the Act and the intention of Parliament."[20] Consideration of legislative purpose underlies what is known as "purposive analysis", which is particularly relevant to the interpretation of constitutional documents.[21] Professor Sullivan observes that legislative purpose is often thought of in terms of the mischief or social ill it is designed to remedy or the problem it is meant to address:

> … This mischief or problem may be identified in an authoritative source such as the preamble to legislation, a Commission report or a scholarly text. It may also be inferred by matching provisions in the legislation to conditions which existed at the time of enactment and to which the provisions are a plausible response.[22]

She then continues:

> … The purpose of legislation is an historical fact - no less than the mischief or evil the legislation is designed to address. If the duty of courts is to give effect to the actual intent of the legislature, it must attempt to reconstruct the original purpose(s) of the legislation by relying on historically accurate information.[23]

[26] The third dimension of the modern principle is compliance with established legal norms.[24] Professor Sullivan notes that these norms are part of the "entire context" in which the words of an Act must be read, and that they are an integral part of legislative

[19] Sullivan, at p. 24.
[20] Sullivan, at p. 2.
[21] Sullivan, at p. 263.
[22] Sullivan, at p. 277.
[23] Sullivan, at p. 278.
[24] Sullivan, at p. 2.

intent.[25] She says that these legal norms include "rationality, coherence, [and] fairness" and that judges are concerned about violations of such norms.[26] The weight attaching to this factor depends on considerations which include:

- the cultural importance of the norm engaged;
- its degree of recognition and protection in law; and
- the seriousness of the violation.[27]

Lastly, on the point, Professor Sullivan states:

> If a possible outcome appears to violate a norm that is well-established and widely shared, if the violation is serious and there are no competing norms, this factor should receive significant weight.[28]

[27] Professor Sullivan summarizes as follows:

> The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases.[29] (italics in original, underlining added)

At the end of the day, says Professor Sullivan, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is "appropriate … reasonable and just".[30]

---

[25] Sullivan, at p. 2.
[26] Sullivan, at p. 8.
[27] Sullivan, at p. 8.
[28] Sullivan, at p. 9.
[29] Sullivan, at p. 3.
[30] Sullivan, at p. 3.

[28] In speaking of the intention of the legislature, Professor Sullivan explains that it is the corporate mind of the legislature that approves and enacts laws, as distinct from the minds of the individual participants in the legislative process. She elaborates on this as follows:

> … the mind that formulates legislative purposes must be distinguished from the minds of individual participants in the legislative process, whether drafters, members of Cabinet or voting members of the legislature. Although the desires and intentions of these individuals obviously determine the content and form of bills, the "mind" that approves the content and form of a bill and enacts it into law is the corporate mind of the legislature.
>
> Some commentators object to imputing intention to a corporate entity like a legislature on the grounds that any such "mind" is obviously a fiction; an institution is incapable of forming actual intentions. However, this objection misses an important point. People never have direct access to the content of other people's minds; we are always in the position of inferring what others must have intended based on what was said and the context in which it was said. This inference drawing process is the same regardless of whether the text to be interpreted issues from Shakespeare in the form of a play, from an acquaintance in the form of an email or from an entity such as a legislature in the form of official texts.[31]

[29] Professor Sullivan speaks further about the relative weight to be given to the dimension of parliamentary intention:

> … if the legislature's intention seems clear and relevant to the problem at hand, a pragmatic judge will assign it significant weight. How much weight depends on
>
> - Where the evidence of legislative intent comes from and how cogent and compelling it is
> - How directly the intention relates to the circumstances of the dispute to be resolved.

[31] Sullivan, at p. 265.

> If the evidence of intention comes from a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor appropriately receives considerable weight.[32]

5.1.2 Principles applicable to constitutional documents

[30] In *Edwards v. Attorney-General for Canada*, [1930] A.C.124 (P.C.) ("*Edwards")*, the Judicial Committee of the Privy Council, then Canada's highest court, was deciding whether women were considered "qualified persons" under s. 24 of the *BNA Act*, which authorized the Governor General to appoint members of the Senate. Lord Sankey L.C., speaking for the Court, noted that the common law of England generally deemed women incapable of exercising public functions,[33] but that the exclusion of women from all public offices was probably a relic from the days when the deliberative assemblies of earlier societies were comprised of armed men, at a time when women did not bear arms.[34] He further observed that such customs were apt to develop into traditions which remain unchallenged long after the reason for them has disappeared.[35] He did not think that it was right to apply "rigidly to Canada of today" precedents based on such traditions, arising in different centuries and in countries of different stages of development.[36] Then, he famously concluded:

> 44 The British North America Act planted in Canada **a living tree** capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention": Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

[32] Sullivan, at p. 8.
[33] *Edwards*, at para. 12.
[34] *Edwards*, at para. 9.
[35] *Edwards*, at para. 36.
[36] *Edwards*, at para. 39.

> 45 Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the Act by a narrow and technical construction but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. (my emphasis)

[31] In his text, *Constitutional Law of Canada*,[37] Professor Peter Hogg discusses the living tree principle within the "doctrine of progressive interpretation". He notes that this doctrine is one of the means by which the *BNA Act* has been able to adapt to the changes in Canadian society, in that the words of the *Act* are continuously adapted to new conditions and new ideas.[38] Professor Hogg refers to "the general language used to describe the classes of subjects (or heads of power)" in ss. 91 and 92 of the *BNA Act*, and states that such language is "not to be frozen in the sense in which it would have been understood in 1867."[39]

[32] Professor Hogg then continues more broadly:

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

[37] 5th ed. Supplemented, looseleaf, (Toronto: Carswell, 2007).
[38] Hogg, at p. 15-48.
[39] Hogg, at p. 15-48.

> The idea underlying the doctrine of progressive interpretation is that the Constitution Act, 1867, although undeniably a statute, is not a statute like any other: it is a "constituent" or "organic" statute, which has to provide the basis for the entire government of a nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures, and deny remedies to hitherto unrecognized victims of injustice. It must be remembered too that the Constitution Act, 1867, like other federal constitutions, differs from an ordinary statute in that it cannot easily be amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the courts.[40] (my emphasis)

[33] The idea that the "original understanding" of the Constitution is forever binding is called "originalism".[41] Professor Hogg is critical of this approach:

> In Canada it is well established that the language of the Constitution Act, 1867 is not to be frozen in the sense in which it would have been understood in 1867. Rather, the language is to be given a "progressive interpretation" so that it is continuously adapted to new conditions and ideas. The principle of progressive interpretation is flatly inconsistent with originalism, the whole point of which is to deny that the courts have the power to adapt the Constitution to new conditions and new ideas. It would be wrong to conclude that the principle of progressive interpretation is necessarily inconsistent with the intentions of the framers. What originalism ignores is the possibility that the framers were content to leave the detailed application of the Constitution to the courts of the future, and were content that the process of adjudication would apply the text in ways unanticipated at the time of drafting.[42] (my emphasis)

[34] The Supreme Court of Canada, in *Reference re Same-Sex Marriage*, 2004 SCC 79 ("*Same-Sex Marriage*"), squarely dealt with the question of originalism in deciding whether Parliament's power over "Marriage" in s. 91(26) of the *Constitution Act, 1867*, would extend to legalizing same-sex marriage. As Professor Hogg notes:

[40] Hogg, at pp. 15-50 and 15-51.
[41] Hogg, at p. 15-49.
[42] Hogg, at pp. 60-9 and 60-10.

> … No one doubted that the original understanding in 1867 would have been that marriage was by its nature the union of a man and woman with a view to the procreation of children. At that time, marriage and religion were inseparable and homosexual acts between consenting adults were criminal (as they remained until 1969).[43]

The Supreme Court addressed this as follows:

> … Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life ….
>
> …
>
> A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.[44] (my emphasis)

[35] The Court of Appeal of Yukon forcefully echoed these sentiments in its reasons on the appeal in this case, which I cited above.[45] There, the Court referred to certain findings I made about governmental intentions in 1867 and 1870, and continued:

> 41 Our legal system has consistently rejected "originalism" - the idea that the intentions of the drafters of constitutional documents forever govern their interpretation - as a constitutional precept (*Edwards v. Canada (Attorney General)*, [1930] A.C. 124).

5.1.3 Principles applicable to Aboriginal cases

[36] The Supreme Court of Canada earlier dealt with the theme of progressive interpretation, while not specifically using the term, in *R. v. Van der Peet*, [1996]

[43] Hogg, at pp. 15-49.
[44] *Same-Sex Marriage*, at paras. 22 and 23.
[45] At para. 8 of these reasons.

2 S.C.R. 507 ("*Van der Peet*"). There the Court addressed the interpretation of "aboriginal rights" whenever that term is used in relation to title or rights "recognized and affirmed" under s. 35(1) of the *Constitution Act, 1982*. Lamer C.J., speaking for the seven member majority, stated:

> 20 The task of this Court is to define Aboriginal rights in a manner which recognizes that Aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by Aboriginal people because they are Aboriginal …. (underlining already added)
>
> 21 The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of Aboriginal rights will be comprehended. In *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers" … (my emphasis)

[37] In *Van der Peet*, the Supreme Court also confirmed that constitutional provisions applicable to Aboriginal peoples must be given a "generous and liberal interpretation" and that where there is doubt or ambiguity in the interpretive exercise, such doubt or ambiguity must be resolved in their favour. Lamer C.J. expanded upon this issue as follows:

> 23 Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and Aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 [S.C.R.; p. 179 C.N.L.R.] that s. 35(1) should be given a generous and liberal interpretation in favour of Aboriginal peoples:

> When the purposes of the affirmation of Aboriginal rights are considered, it is clear that a generous and liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added]
>
> 24 This interpretive principle, articulated first in the context of treaty rights … arises from the nature of the relationship between the Crown and Aboriginal peoples. The Crown has a fiduciary obligation to Aboriginal peoples with the result that in dealings between the government and Aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of Aboriginal peoples, must be given a generous and liberal interpretation …
>
> 25 The fiduciary relationship of the Crown and Aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of Aboriginal peoples. (my emphasis)

[38] On the other hand, the Supreme Court had earlier clarified in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 ("*Mitchell*"), that while ambiguities in the interpretation of statutes relating to Indians are to be resolved in their favour, this does not imply automatic acceptance of the Indians' preferred interpretation. There, La Forest J. stated:

> … it is clear that in the interpretation of any statutory enactment with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533.
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also

> necessary to reconcile any given interpretation with the policies the Act seeks to promote.[46]

[39] It may also be important to remember the Supreme Court's caution in *R. v. Blais*, 2003 SCC 44 ("*Blais*"), about not overshooting the actual purpose of the right or freedom in question. In *Blais*, the Supreme Court was dealing with the question of whether Métis are "Indians" within the meaning of a constitutional document, the Manitoba *Natural Resources Transfer Agreement* (the "*NRTA*"). The Court referred to the "living tree" principle at para. 40:

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

[40] Interestingly, the Supreme Court subsequently distinguished and arguably narrowed the scope of application of *Blais* in *Same-Sex Marriage*. There, some of the interveners relied on *Blais* in submitting " … that the intention of the framers [of the *Constitution Act, 1867*] should be determinative in interpreting the scope of the heads of

[46] *Mitchell*, at paras. 119 and 120.

power enumerated in ss. 91 and 92 …". The Supreme Court responded curtly to that submission:

> That case [*Blais*] considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here.[47]

5.2 What obligations, if any, does the relevant provision impose on Canada?

5.2.1 What is the ordinary meaning of the provision?

[41] Once again, the relevant provision of the *1867* Address, as incorporated into the *1870 Order*, reads as follows:

> … 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. (my emphasis)

[42] I note, initially, that the words "will be" differ from the words "shall be" used in the first undertaking in the *1867 Address*, which I touched on above at para. 2 of these reasons:

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

[43] Later in these reasons, I deal with how Dr. McHugh addresses this distinction.

---

[47] *Same-Sex Marriage*, at para. 30.

[44] That said, I think that the plain and ordinary meaning of the words "will be" in the relevant provision is sufficiently mandatory to indicate an obligation upon Canada to consider and settle Indian claims for compensation for lands required for the purposes of settlement. However, as Professor Sullivan urges, even if the ordinary meaning of a legislative text seems plain, courts must go on to consider the scheme of the legislation as part of the entire context.

[45] The assessment of this legislative scheme begins with s. 146 of the *BNA Act*, which was enacted by the British Parliament to give the young Dominion of Canada an opportunity to initiate the process by which it could acquire Rupert's Land and the North-Western Territory. Section 146 provides:

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

[46] Next is the *1870 Order* itself.[48] The relevant portions for present purposes are as follows:

> Whereas by the "*Constitution Act*, 1867," it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such terms and conditions in each case as should be in the Addresses expressed, and as the Queen should think fit to approve,

[48] A complete copy of the *1870 Order*, including the *1867 Address*, can be found at www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t31.html .

> subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf **should have effect** as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland:
>
> And whereas by an Address from the Houses of the Parliament of Canada, of which Address a copy is contained in the Schedule to this Order annexed, marked A, …
>
> …
>
> It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory …[49] (my emphasis)

[47] Next one must consider the impact of s. 2 of the *Colonial Laws Validity Act*, *1865*[50] and s. 7(1) of the *Statute of Westminster*.[51] By virtue of these provisions, the Canadian government was not competent to enact laws inconsistent with legislation applicable to Canada that was enacted by the British government. These provisions respectively state:

> 2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but

[49] Rupert's Land was admitted by the *1870 Order* into the Dominion of Canada pursuant to a second, later, Address, which will be discussed in greater detail below at paras. 72 to 75.
[50] *Colonial Laws Validity Act*, 1865, (U.K.), 28 and 29 Vict., C. 63.
[51] *Statute of Westminister,* 1931, (U.K.), 22 Gov. V, c. 4.

> not otherwise, be and remain absolutely void and inoperative. (my emphasis)

and

> 7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts*, 1867 to 1930, or any order, rule or regulation made there-under.

[48] Finally, the *Constitution Act, 1982*, expressly incorporated the *1870 Order* into the Constitution, as it is identified in the Schedule to that *Act*.

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

> …[T]he supremacy of the Constitution was established well before 1982 and even before Confederation in 1867. Canada recognized the British Parliament as the proper authority for enactment of our Constitution down to and including 1982 when section 52 of the *Constitution Act*, *1982* was adopted. It was a legal doctrine of the British Empire that imperial laws (that is, enactments of Westminster) applying to a colony were supreme over colonial laws. This position was codified by statute, the *Colonial Laws Validity Act*, *1865* […], section 2 ...
>
> The *British North America Act*, *1867* [30 & 31 Vict., c. 3 (U.K.) [R.S.C. 1970, Appendix II, No. 5]], was an imperial law extending to the colony of Canada and its supremacy was thus assured as long as Westminster was the recognized legislative authority for Canada in constitutional matters. While ordinary Canadian laws were freed from the application of the *Colonial Laws Validity Act*, *1865*, and thus from the paramountcy of British laws, by the *Statute of Westminster*, *1931*, the latter statute preserved the supremacy in Canada of the *B.N.A. Acts* over local laws. It is no accident that a new supremacy clause was inserted in subsection 52(1) of the *Constitution Act*, *1982*. Subsection 52(2) of that *Act* partially defines the *Constitution of Canada* to include the legislation listed in the Schedule to the *Act*. The *Colonial Laws Validity Act*, *1865* is not so listed. To avoid any uncertainty as to the continuing supremacy of the Constitution it was therefore necessary to insert subsection 52(1) to provide that:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. (my emphasis)

[50] The Supreme Court of Canada also addressed these provisions in *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721, as follows:

> 50 Since April 17, 1982, the mandate of the judiciary to protect the Constitution has been embodied … in s. 52 of the *Constitution Act, 1982*. This section reads:
>
> > 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> Prior to enactment of the *Constitution Act, 1982*, the governing provision was, pursuant to the *Statute of Westminster, 1931*, s. 2 of the *Colonial Laws Validity Act*, 1865, …
>
> 51 The constitutional jurisprudence, developed under the *Colonial Laws Validity Act, 1865*, was based on the invalidity doctrine. If Parliament or a provincial legislature was ultra vires its constitutionally allocated powers in enacting a certain Act, then the repugnancy of that Act with the provisions of the *British North America Act, 1867* would mean that the Act was "absolutely void and inoperative".
>
> 52 Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid. (my emphasis)

[51] To summarize:

1) the relevant provision that the claims of the Indian tribes to compensation for lands required for purposes of settlement "will be considered and settled" was adopted by the Canadian Parliament as one of two

undertakings in the *1867 Address*, which in turn was submitted to the British government pursuant to the authority of s. 146 of the *BNA Act*;

2) the *1870 Order* then "ordered and declared" that the North-Western Territory "shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth" in the *1867 Address*, one of which was the relevant provision;

3) pursuant to s. 146 of the *BNA Act*, the provisions of the *1870 Order*, which of course included the relevant provision, "shall have effect" as if they had been enacted by the British Parliament; and

4) pursuant to s. 2 of the *Colonial Laws Validity Act*, *1865* and s. 7(1) of the *Statute of Westminster*, and subsequently pursuant to s. 52(1) of the *Constitution Act, 1982*, the relevant provision acquired constitutional force.

[52] Thus, the "ordinary meaning" of the relevant provision would seem to lead to the conclusion that it is mandatory and that it became a constitutional obligation through the interplay of these statutory instruments. In other words, the provision created a mandatory constitutional obligation that Canada consider and settle the claims of the Indian tribes for compensation for their lands required for purposes of settlement. I will deal with the interpretation of what the "equitable principles" means in more detail below at paras. 155 to 166.

[53] However, the textual or ordinary meaning is only one of the three dimensions of the modern principle of statutory interpretation. The second dimension is legislative intent or purpose; that is, what did the Canadian Parliament and the British Privy Council respectively intend in approving the words of the relevant provision and including them in the *1870 Order*?

5.2.2 What was the legislative intent behind the wording of the relevant provision?

[54] In this regard, Canada proffered the evidence of two historical experts, Drs. Paul McHugh and Theodore Binnema. I will deal with each in turn.

5.2.2.1 The evidence of Dr. Paul McHugh

[55] During the first phase of this trial, I admitted, over RRDC's objection, Dr. McHugh's expert report, dated September 21, 2011.[52] However, during the continuation of this trial in September 2014, I refused Canada's attempt to enter a supplementary report from Dr. McHugh.[53] Nevertheless, I allowed Dr. McHugh to testify on a limited basis in response to the McNeil Indigenous Rights article, which was critical of his testimony during the first phase of the trial. Therefore, the evidence of Dr. McHugh is comprised of his initial expert report, as well as his testimony in both the first and second phases of this trial.

[56] Dr. McHugh has been a teaching member of the Faculty of Law, University of Cambridge, England, since 1986, and is now a full professor. He obtained his LL.B. (Honours), First Class, from Victoria University, in Wellington, New Zealand, in 1980. He then obtained his LL.M. from the University of Saskatchewan in 1981. He subsequently obtained his Ph.D. from Cambridge in 1988, where he presently teaches constitutional law and property law. His *curriculum vitae* lists some 78 publications in the area of Aboriginal rights and title of Aboriginal people in Australia, Canada and New Zealand. In addition, as I understand it, Dr. McHugh has published four books on Aboriginal law. He has also been the recipient of some seven prizes and awards for publications and contributions to legal education.

[52] My reasons for that ruling are cited as 2011 YKSC 87.
[53] My ruling on the admissibility of the expert evidence is cited as 2014 YKSC 53.

[57] Dr. McHugh has been retained as an independent expert for the New Zealand Ministry of Justice, the Province of British Columbia and Justice Canada. He has presented papers at numerous conferences and colloquia as a legal historian. Dr. McHugh provided expert evidence for Canada in *Chippewas of Sarnia Band v. Canada (Attorney General*), (2000), 51 O.R. (3d) 641(CA) ("*Chippewas*"). In 2013, he also testified as an expert for the Crown in *Alderville First Nation v. Canada,* 2016 FC 733.

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

[59] In preparing to provide his expert opinion, Dr. McHugh reviewed 536 documents provided by Canada and 33 documents that he obtained independently. These documents consist of a mixture of articles, historical documents, legislation, and case law. All of the documents reviewed by Dr. McHugh are in evidence.

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

[61] Dr. McHugh's expert opinion is essentially that there is no evidence to show that the wording of the relevant provision was intended or even thought to affect the legal position of Aboriginal peoples involved in the transfer of Rupert's Land and the North-

Western Territory to the Dominion of Canada.[54] He explained that the legal basis of Crown relations with Aboriginal peoples was formed in the Imperial era and carried over to colonial and then to early national times when jurisdictional competence was transferred from the British Parliament to the new Parliament of the Dominion of Canada. In his report, Dr. McHugh states:

> … The Crown recognised the land rights of tribes and negotiated for their cession but these practices were undertaken as a matter of executive grace rather than from any legal imperative compelling this treaty-making. These relations engaged Crown beneficence and guardianship but they were never regarded as justiciable or enforceable by legal process - a possibility that the state of legal art could not admit (until the late-twentieth century). The reference to those 'equitable principles' in the Addresses and instrumentation for the transfer of Rupert's Land and the Northwestern Territories in the 1870 Order in Council was not intended or contemplated at that time to change the received position of non-justiciability.[55]

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

> … In the late-nineteenth century (and for most of the twentieth), the Crown's relations with tribes in respect of their land "rights" were conceived as a matter of non-justiciable executive grace in the sense that the "trust" and "guardianship" duties avowed by the Crown, including the practice of obtaining formal cessions of their land, were regarded as having a high moral character not enforceable directly through court process. It was not until the courts developed the common law doctrine of aboriginal title from the 1970s onwards that those collective land rights and associated Crown obligations became justiciable. There is no evidence that the 1870 transfer was designed to or seen at that time as changing that position.[56]

[54] McHugh, at para. 9.
[55] McHugh, at para. 10.
[56] McHugh, at para. 9.

[63] The path to Dr. McHugh's conclusions begins with the recognition that, from the earliest days of English settlement of the New World, British relations with Aboriginal tribes were managed under the authority of "royal warrant".[57] A Canadian example of a royal warrant is the 1670 Charter granted by the Crown to the HBC, which gave proprietary rights to HBC over the vast watershed lands of the Hudson Bay basin and entitled HBC the exclusive right to trade and govern within that territory. The territory became known as Rupert's Land. The territory to the west and north of Rupert's Land became known as the North-Western Territory, with the exception of the land that became the colony of British Columbia.[58]

[64] Dr. McHugh testified that a subsequent problem of competition in the fur trade between the HBC and the more latterly incorporated North-Western Company was resolved by the British Parliament amalgamating the two entities in 1821. Also in 1821, the reorganized HBC received a Crown grant, or "Licence", to trade and otherwise represent the Crown in dealings with the Aboriginal populations of Crown territories not included in the HBC's charter or in any other colonial jurisdiction. That meant that the North-Western Territory came under the protection of the HBC, including what came to be the Yukon Territory.[59]

[65] In 1838, the Licence was renewed for a period of 21 years.

[66] Dr. McHugh reported that in the late 1850s, the HBC was facing many pressures, such as the influx of settlers from the east and the south, mineral discovery and

[57] McHugh, at para. 27.
[58] McHugh, at paras. 12 and 13.
[59] McHugh, at para. 13.

exploitation, the rise of the Red River community in what would become the province of Manitoba, and technological advances, such as the telegraph.[60]

[67] According to Dr. McHugh, a debate arose over whether there should be a second renewal of HBC's licence, as the government of the Province of Canada took the position that the lands held by the HBC should be transferred to it, in whole or in part. Chief Justice (of Canada) Draper communicated this to the British Parliament in 1857, and that led to an inquiry by a Special Committee of the House of Commons, which recommended a negotiated settlement between the HBC and the Province of Canada in order to transfer the territories. Some attempts to negotiate followed, without result. The HBC Licence expired in 1859.[61]

[68] Dr. McHugh wrote that the issue of the transferring the HBC territories to the Province of Canada resurfaced in the mid-1860s with the prospect of Confederation. In 1865, the Province of Canada sent representatives to the British Parliament in London to urge for the transfer of the HBC territories. The British government was sympathetic and enacted s. 146 of the *BNA Act*.[62] It was pursuant to this that, in December 1867, during the first session of the new Canadian Parliament, the House of Commons and the Senate adopted an Address to request the transfer of Rupert's Land and the North-Western Territory to the Dominion.[63]

[69] According to Dr. McHugh, Prime Minister John A. Macdonald believed that the *1867 Address* would secure for the Canadian government the governance rights of the HBC, leaving HBC's proprietary rights to be determined by Canadian courts. However, the Governor of the HBC protested against the proposed unilateral annexation by

[60] McHugh, at para. 13.
[61] McHugh, at para. 13.
[62] McHugh, at para. 14.
[63] McHugh, at para. 14.

Canada and the prospect that the Company's rights would subsequently be adjudicated by courts appointed by the Canadian government. The Colonial Office of the British government sympathized with HBC, and took the position that HBC's agreement and British legislation were needed to authorize the transfer.[64] Accordingly, the British Parliament enacted The *Rupert's Land Act* in 1868.[65] This set the stage for the transfer of Rupert's Land from HBC to Britain, following which the territory could then be transferred to Canada, once an agreement was reached with HBC for its surrender. Negotiations between the HBC and Canada ensued until, eventually, with the assistance of Earl Granville,[66] a surrender agreement was reached on March 22, 1869.

[70] Dr. McHugh opined that the surrender agreement, which dealt with Rupert's Land, meant that a second Joint Address from the Parliament of Canada was required for the North-Western Territory, and this was issued on May 29 and 31, 1869. It repeated the request for the transfer of the North-Western Territory, on the terms and conditions of the *1867 Address*, and requested that the transfer of Rupert's Land be subject to the terms and memoranda attached to the second Address, including the agreement of March 22, 1869.[67] With respect to Rupert's Land, item 8 of this agreement provided:

> It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them.[68] (my emphasis)

[64] McHugh, at para. 16.
[65] McHugh, at para. 16.
[66] Granville George Leveson-Gower, 1815-91.
[67] The second Address is included in Schedule "B" to the *1870 Order.*
[68] McHugh, at para. 17.

[71] Clause 14 of the *1870 Order* was based upon para. 14 of HBC's deed of surrender of Rupert's Land.[69] Clause 14 states:

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

[72] The second 1869 Address also includes the following acknowledgment:

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

[73] Dr. McHugh testified that the HBC wanted a "clean exit" with respect to any responsibilities it exercised *vis-à-vis* the Indian tribes under the 1670 Charter. He explained this was the reason for the repeated references in the *1870 Order* to HBC being "relieved of all responsibilities in respect of" the claims of Indians. Further, to the extent that the situation of the Indian tribes featured explicitly in the negotiations, Dr. McHugh took the position that it was couched in terms of a duty of "protection" being transferred from the Imperial Crown to the Canadian government.[70]

[74] Dr. McHugh opined that it was understood in 1870 that there was a difference between the "reservation" of individual or corporate "rights", on the one hand, and the

[69] Attached as Schedule "C" to the *1870 Order.*

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

"protection" of a certain class of Her Majesty's subjects, on the other:

> *Reservation* of rights entailed a hard justiciable form of legal coverage whereas *protection* entailed a softer non-justiciable form reliant upon benign executive discretion. (emphasis already added)[71]

[75] This distinction is arguably exemplified in the first undertaking of the *1867 Address*, which provides:

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

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

[77] Earl Granville held various cabinet offices in the British government between 1851 and 1886.[72] As the Colonial Secretary in Prime Minister Gladstone's first cabinet in 1868, Granville held a post of considerable prestige. Dr. McHugh described him as a brilliant "velvet-glove strategist", and when the negotiations between the HBC and the

[71] McHugh, at para. 21.
[72] Ged Martin, Report for the Department of Justice, Government of Canada, Re: *Manitoba Métis Federation et al. v. A.G. Manitoba and A.G. of Canada.*

Canadian delegates on the transfer of the territories became deadlocked, Earl Granville intervened on behalf of the British government. He suggested terms to the parties in what is now seen to have been a 'take it or leave it' offer, in that he threatened to have the Judicial Committee of the Privy Council review the matter, if either party rejected the terms.[73] Indeed, that offer, set out in a March 1869 letter from Sir Frederick Rogers, of the British Colonial Office, found its way into Schedule B of the *1870 Order* and was the basis for the terms of HBC's deed of surrender as well as the 15 "terms and conditions" specified in the operative portion of the *1870 Order*.

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

> On one point, which has not been hitherto touched upon, I am anxious to express to you the expectations of Her Majesty's Government. They believe that whatever may have been the policy of the Company, and the effect of their chartered right upon the progress of settlement, the Indian tribes, who form the existing population of this part of America, have profited by the Company's rule. They have been protected from some of the vices of civilization: they have been taught, to some appreciable extent, to respect the laws and rely on the justice of the white man, and they do not appear to have suffered from any causes of extinction beyond those which are inseparable from their habits and their climate. I am sure that your Government will not forget the care which is due to those who must soon be exposed to new dangers, and, in the course of settlement, to be dispossessed of the lands which they are used to enjoy as their own, or be confined within unwantedly narrow limits.
>
> This question had not escaped my notice while framing the proposals which I laid before the Canadian Delegates and the Governor of the Hudson's Bay Company. I did not, however, then allude to it, because I felt the difficulty of

[73] Frank Tough, Jim Miller, and Arthur Ray, "Bounty and Benevolence": a History of Saskatchewan Treaties, March 15, 1998, Report for the Office of the Treaty Commissioner, Saskatoon, Saskatchewan.

> insisting upon any definite conditions without the possibility of foreseeing the circumstances under which these conditions would be applied, and because it appeared to me wiser and more expedient to rely on the sense of duty and responsibility belonging to the Government and people of such a country as Canada. That Government, I believe, has never sought to evade its obligations to those whose uncertain rights and rude means of living are contracted by the advance of civilized man. I am sure that they will not do so in the present case, but that the old inhabitants of the country will be treated with such forethought and consideration as may preserve them from the dangers of the approaching change, and satisfy them of the friendly interest which their new governors feel in their welfare." (my emphasis)

[79] Dr. McHugh interprets this dispatch as clearly indicative that the negotiations with HBC had not focused explicitly upon the position of the Indians. He further infers "strongly if not unmistakably" that Clause 14 in the operative portion of the *1870 Order* (quoted above at para. 71) was aimed at the post-transfer rights and liabilities of the HBC, and was not aimed at erecting legal obligations relative to Indian lands that would subsequently become binding upon the Dominion of Canada.[74]

[80] Dr. McHugh also opined that, in the second paragraph of the Granville dispatch, Granville was adverting to the continuance by the Canadian government of the long-standing Imperial policies over Aboriginal affairs, following the transfer of those responsibilities from the British Crown to the Canadian government. Dr. McHugh further stated that Granville was almost certainly referring to the Robinson Treaties and related transactions that Canada had formerly conducted for the Indian lands surrounding the Great Lakes. Thus, Granville expected that the equitable principles that had been applied in Canada, first by British governmental officials, and then by the Canadian

[74] McHugh, at para. 22.

government upon assumption of the responsibility for Indians, would be extended to the soon-to-be annexed territories.[75] In conclusion on this point, Dr. McHugh states:

> …This Granville put in terms of an expectation falling upon the honour of the Canadian government rather than it being a legal stipulation inserted into the transfer. This makes it plain that if the parties had viewed the reference to 'equitable principles' as entailing the creation or recognition of a justiciable obligation then it would have been acknowledged explicitly as such. Rather, the British authorities and HBC regarded the transfer as only creating legal rights for HBC. Whereas the outcome of the transfer for the HBC itself was a set of hard legal rights ('reservations'), for the Indian tribes their 'protection' was transferred from the aegis of the HBC as grantee of Rupert's Land and sometime administrator of the North West Territory [as written] to Canada.[76] (my emphasis)

[81] Dr. McHugh's report continues on to examine the broader historical context of relations between Aboriginal peoples and the British Crown, to demonstrate that what he said was happening in Canada around the time of the *1870 Order* was consistent with the driving themes of those relations elsewhere in the Victorian era. He also analyzed some of the early case law, such as *R. v. St. Catharine's Milling and Lumber Co.* (1887), 13 S.C.R. 577, aff'd (1888), 14 App. Cas. 46 (J.C.P.C.) ("*St. Catharine's Milling*"), and concluded:

> …The case-law shows that native peoples were regarded as holding all the legal capacities of the settlers so far as the protection of their individual person and personal property were concerned. Where, however, they claimed certain collective rights - to land most especially - the legal enforcement of those rights (against squatters or trespassing stock, to give the strongest examples) was a matter for the Crown. That is, the Crown acted as legal protector of native peoples collective or, to use the modern term, aboriginal rights.[77] (my emphasis)

[75] McHugh, at paras. 23 and 24.
[76] McHugh, at para. 24.
[77] McHugh, at para. 47.

[82] Dr. McHugh was careful throughout his evidence to clarify that he was opining on the probable intentions and perceptions of the relevant legal actors in the period leading up to Confederation and ultimately the *1870 Order*. As an expert legal historian, he repeatedly stressed that he was not expressing an opinion on how the relevant provision ought to be interpreted today. To this extent, I understand his evidence goes to the purpose of the relevant provision as "an historical fact", to use the language of Professor Sullivan,[78] or what is otherwise referred to as a "legislative fact". I also recognize that my ultimate determination on the sub-issue of legislative intent, as part of my overall assessment of the current interpretation of the relevant provision, is a question of law.

5.2.2.1.1 RRDC's challenges to the Dr. McHugh's evidence

[83] RRDC's counsel referred me to a number of academic articles in evidence in support of his argument that the relevant provision creates a constitutional obligation that is binding upon Canada today. First among these is a monograph by Dr. Kent McNeil entitled *Native Claims in Rupert's Land and the North-western Territory: Canada's Constitutional Obligations*[79] (the "McNeil Native Claims article"). The article begins with the premise that the *1870 Order* "recognized the existence of [A]boriginal land claims in Rupert's Land and the North-Western Territory, and placed a constitutional obligation on the Canadian government to settle those claims." (my emphasis). Dr. McNeil then continues on to examine the nature and extent of that obligation. At pp. 9 and 13, he referred to the relevant provision and stated at p. 19: "In addition to placing an obligation on the Canadian government to settle Indian claims,

[78] Sullivan, at p. 278.
[79] Saskatoon: University of Saskatchewan Native Law Centre, 1982.

the 1867 Address also lays down a standard which the government must adhere to" (my emphasis). Dr. McNeil suggests that this standard is the procedure outlined in the Royal Proclamation.[80] He then concludes:

> … Since the [*1870 Order*] imposed a constitutional obligation on Canada to settle Indian, and probably Inuit and Métis, claims, it follows that it would be beyond the competence of Parliament and the provincial legislatures to abrogate or derogate from the rights on which those claims were based without first reaching a settlement with the aboriginal peoples involved. On the basis of this approach, federal laws…would be inoperative to the extent that they are inconsistent with unsurrendered aboriginal rights in Rupert's Land and the North-Western Territory.[81]

[84] In a subsequent essay in his book *Emerging Justice*, *Essays on Indigenous Rights in Canada and Australia*[82] (the "McNeil Emerging Justice article"), Dr. McNeil continued to explore the fiduciary responsibilities of the federal government towards Aboriginal peoples.[83] He once again examined the relevant provision[84] and concluded that the inclusion of the provision in the *1870 Order* "imposed a constitutional obligation on the Canadian Government to resolve land claims in both territories before opening the lands up to settlement."[85] However, the focus of the article was the undertaking contained in the May 28, 1869 Resolutions and the *1869 Address*, that "it will be the duty of the Government [or, in the Address, "our duty"] to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer [of the two territories]".[86] Dr. McNeil referred to this as the "protection" undertaking and suggested that it was "a term or condition for the admission of *both*

[80] McNeil's Native Claims article, at pp. 20 - 21.
[81] McNeil, at p. 36.
[82] Saskatoon: University of Saskatchewan Native Law Centre, 2001.
[83] Essay entitled "Fiduciary Obligations and Federal Responsibility for Aboriginal Peoples".
[84] McNeil's Emerging Justice article, at p. 327.
[85] McNeil's Emerging Justice article, at p. 330.
[86] McNeil's Emerging Justice article, at p. 331.

territories" into the Dominion of Canada,[87] and that it created "a legally enforceable obligation".[88]

[85] RRDC's counsel cross-examined Dr. McHugh about this latter essay,[89] and asked him whether he agreed with Dr. McNeil's opinion that the *1870 Order* created a "constitutional obligation" on the Canadian government to resolve land claims in the territories before opening land up for settlement. Dr. McHugh replied that he is very familiar with the work of Dr. McNeil, and suggested that he was providing a contemporary legal conclusion, rather than an historical one. Further, under the contemporary legal approach, Dr. McNeil ignored the distinction between "duties" and "obligations" of government, and collapsed the two terms together. However, Dr. McHugh testified that if Dr. McNeil's opinion was offered as an historical conclusion, then he disagreed with it, stating that, in the late 19th century, the *1870 Order* would not have been viewed as a constitutional obligation in the manner suggested by Dr. McNeil.

[86] RRDC's counsel next cross-examined Dr. McHugh about an article by Professor Frank Tough, entitled *Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory,* from 1992 (the "Tough article").[90] In the article, Professor Tough examined the circumstances surrounding the acquisition of the two territories under the *1870 Order*, including the dispatch of Earl Granville, and particularly the passage I emphasized above at para. 78. At p. 240 of his article, Professor Tough stated:

> By reducing Indian title to a sense of duty, the negotiations did not have to reconcile the two differing claims to Rupert's Land. During the negotiations, the serious consideration of

[87] McNeil's Emerging Justice article, at p. 331.
[88] McNeil's Emerging Justice article, at p. 333.
[89] Transcript, November 22, 2011, pp. 65 - 68.
[90] See footnote 2.

> Indian title would have led to a comparison of the HBC claim to Rupert's Land and Indian entitlement. Clearly, the question of Indian title was not a mere oversight; there was a deliberate effort by the imperial government to confine Indian entitlement to a policy status.

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

> …There wasn't any active reduction going on, there wasn't any active confinement going on, beyond what was the established position already. Now, we might not like that, but that's -- that's how they saw it.[91]

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

> The Canadian delegates reiterated the terms of the Address of 1867 during the negotiations and added that three points "were <u>the only terms and conditions</u> which, in the opinion of the Canadian Parliament, it was expedient to insert in the Order in Council, authorized by the 146th section ..." [92] (my emphasis)

The letter from Cartier and McDougall characterized Canada's assumption of the jurisdiction to govern the new Territories as an undertaking to govern and legislate. This undertaking was in addition to what I described as the two undertakings in para. 3 of these reasons. In their letter, Cartier and McDougall paraphrased the 'three' undertakings in the *1867 Address* and then added their relevant remarks:

> 1st. That Canada should undertake the duties and obligations of Government and legislation in respect of those territories.

[91] Transcript, November 22, 2011, pp. 68 - 69.
[92] Tough article, p. 240.

> 2nd. That the legal rights of any Corporation, Company or individual within the territories should be respected, and that provision should be made for that purpose by placing those rights under the protection of courts of competent jurisdiction.
>
> 3rd. That the claims of the Indian tribes to compensation for lands required for purposes of settlement should be considered and settled, in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.
>
> The above were the only terms and considerations which, in the opinion of the Canadian Parliament, it was expedient to insert in the Order in Council authorized by the 146th section. [93] (my emphasis)

[88] Dr. McHugh made the following comments relating to the relevant provision and Professor Tough's remarks above:

> A … Now, the words used there for the lands required, the claims of Indian tribes compensation will be, "Will be," not "Shall be," shall be does appear elsewhere, will be considered and settled in conformity. Now, there are two verbs there, "Considered," and "Settled."
> Q Yes.
> A Now, for those words to have any meaning, "Consideration" means that there is the capacity to decide whether or not you're going to accept, modify, reject, spurn the claims. If they're going to be considered, yeah, so I'm saying that that verb will be considered and settled --
> Q Mm-hmm.
> A -- [imparts] that there is this discretion, as understood, at that time, right. So "Will be considered and settled." So if we look at this letter --
> Q Yes.
> A -- and we see that on -- Mr. Tough referred to the terms and conditions, yet, the delegates say, the above, "Those three," that appear on the first Address, were the only terms and considerations.
> Q Yes.
> A So adverts to the verb, "Considered."

[93] Exhibit 2F, Tab 327.

> Q Right.
> A He does not use the word, "Conditions," the -- the above were the only terms and considerations, which in the opinion of the Canadian Parliament, it was expedient to insert in the [Order-in-Council] authorized by the 146 section, that is to say, the first Address. So that conclusion of Professor Tough does not square with the words being used by the delegates. They used the word, "Considerations."
> Q Yes.
> A And the verbs "Considered" and "Settled" does appear in the Address itself. So it is open, at least, to argue that at that time, the position of tribes was a consideration.
> Q Yes.
> A Not an obligation, a duty, yeah, and that -- that's how I read it. To me, the evidence of how the thinking was occurred [as written] at that time is plain. But if he's trying to argue a legal, contemporary legal position, that of course is law office history and it's a different way of doing things. It's legal, contemporary legal interpretation, but it's not historical interpretation, yeah. And both equally viable and valid activity, just they're not the same …[94] (my emphasis)

[89] As I noted earlier, at the recommencement of this trial, RRDC's counsel also filed the McNeil Indigenous Rights article, presumably as a counterpoint to Dr. McHugh's evidence during the first phase of the trial. While I allowed Dr. McHugh to give direct testimony in response to this article, RRDC's counsel did not cross-examine him on it.

[90] In the article, Dr. McNeil was generally critical of Dr. McHugh's reasoning and methodology in his interpretation of the relevant provision. There were a number of points of disagreement between the two academics. However, in the interests of brevity and utility, I will only focus on one particular complaint made by Dr. McNeil. He asserted that Dr. McHugh was concluding that there was "no law" in relation to Aboriginal land rights in what is now Canada in the late 19th century. In his conclusion, Dr. McNeil

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

states:

> 27 This paper challenges Paul McHugh's position, expressed in his published work and on the witness stand, that there was no law in relation to Indigenous land rights in Canada prior to decisions of the Supreme Court in cases such as Calder, Guerin, and Delgamuukw. In my opinion, the Crown was bound by the common law and constitutional documents, in particular the Royal Proclamation of 1763 and the Rupert's Land Order of 1870, to acknowledge the land rights of the Indigenous peoples and to settle them through established practices in accordance with legal principles. In other words, the Crown's dealings with Indigenous peoples were not a matter of royal prerogative and executive grace, but rather were governed by law ….

[91] In response, Dr. McHugh testified that his position was not that there was no law, but that the law was derived from the Royal Prerogative, which evolved over time, but had not reached the stage where it was regarded as justiciable in the Crown's courts.[95] The key prerogative he said was the Crown Prerogative to dispose of land by obtaining the consent of Aboriginal peoples to settlement through treaties and other practices.[96] Dr. McHugh testified that the constraints upon the Prerogative were self-imposed by the Crown, principally through mechanisms of reporting, hierarchy, the possibility of officials being recalled, disallowance of legislation, and the continual petitioning of the Crown by settlers and Aboriginal peoples.[97] He summarized his response as follows:

> I'm talking about executive discretion derived from the common law's Prerogative channel disciplined through mechanisms that the Crown itself adopts, regularizes, proceduralizes through petitioning, prayer, petitioning through correspondence, reporting up and down, disallowance, and all of that.
>
> …

[95] Transcript, September 9, 2014, p. 5.
[96] Transcript, September 9, 2014, p. 9.
[97] Transcript, September 9, 2014, p. 7.

> Sovereign authority is continually monitored in Parliament through select committees; through the publication of dispatches, which becomes a regular feature during the 19th Century; through letters, correspondence to the Colonial Office when it has the jurisdiction; to governors; prayers; petitions. There is a continual, continual machinery of accountability -- of constitutional accountability that is occurring; it's just that the courts aren't intervening in a late 20th Century reviewing sense …[98]

[92] RRDC's counsel submitted (but not until his reply to Canada's closing submissions during the first phase of this trial) that Dr. McHugh's evidence should be given little weight because he has been shown to not be independent or impartial and because his evidence was influenced by the exigencies of the litigation: see *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, at paras. 100 and 101. RRDC's counsel cited three reasons in support of this submission:

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

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

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

[98] Transcript, September 9, 2014, p. 23.

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

(1) Justice Strong in St. Catharine's Milling

[94] RRDC's counsel cross-examined Dr. McHugh about certain passages from Justice Strong's judgment in *St. Catharine's Milling*, cited above, including this one:

> … Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an expressed positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th subsection of section 91, as well as the 109th section and the 5th subsection of section 92 of the *British North America Act*, must be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments."[99] (my emphasis)

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

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

[99] *St. Catharine's Milling*, (1887), 13 S.C.R. 577, aff'd (1888), 14 App. Cas. 46 (J.C.P.C.), at p. 613.

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

> Q Now, paragraph 46. Would you agree with me that Justice Strong's decision in dissent is contrary to your first two sentences here?
> A Well, I'll -- I will go here, there, counsel, if you could explain to me where this is leading, because we're remembering that Strong is in dissent, and there are issues about what he meant by enforceability, subject to all the caveats that I have expressed, if you could carry on.
> Q I'm not sure that I understand that answer. You're agreeing with me that Justice Strong's reasons in dissent are contrary to what you state in the first two sentences here?
> A I'm saying that Justice Strong is in dissent and that he -- he -- yeah, so he's -- yeah, he's -- he's -- yeah, okay, I'll go with that.[100]

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

> Q … [Strong J.] wrote, "These territorial rights of the Indians were strictly legal rights," and I'm asking you if his views in that regard are contrary -- his views in dissent in that regard are contrary to the position you express in your report about the enforceability of those territorial rights?
> A If by enforceable, you mean they could be enforceable by agency of the Crown, I [indiscernible] if he was technically vested, and it's perfect -- that's what I've been arguing throughout my report, that the title to Indian lands being vested in the Crown, the Crown taking the protective duties enforces it vicariously, as it were, under the [mantle] of its ownership. So -- so in that indirect sense, enforcement, but it is through agency, through the intermediary of the Crown that enforcement is occurring, and to the extent that enforcement is being conceptualized at that time, it is in that way, through the agency of the Crown, because it's had -- if you could explain to me how it might be enforced other

[100] Transcript, November 22, 2011, pp. 83 and 84.

than via the Crown, because --
Q We'll come to that.
A Thank you.[101]

[98] Ultimately, regardless of how contrary Justice Strong's views are to Dr. McHugh's, Dr. McHugh also stressed that Justice Strong's judgment was a dissent and that, in the course of the *St. Catharine's Milling* case from trial through to the Judicial Committee of the Privy Council in England, a total of sixteen judges were involved, with fourteen of those judges taking the view that "the tenure of the Indians was a personal and usufructory right, dependent upon the good will of the Sovereign", to use the words of Lord Watson in the judgment of the Judicial Committee of the Privy Council.[102]

[99] Thus, I accept Dr. McHugh's opinion that Justice Strong's dissent was "not representative of the prevailing view at that time".[103] I would also note that Dr. McHugh did not attempt to suggest that the prevalent view of the non-justiciability of Aboriginal rights in the nineteenth century was universal or monolithic.[104] On the contrary, he acknowledged that there were one or two cases in Canadian courts on Aboriginal "customary law" issues, but that these cases were not routine.[105] Further, he was careful to point out that there were occasions when arguments were made about the capacity of natives to enforce their rights, but that there was "no pattern of that happening."[106]

[100] For the foregoing reasons, I give little weight to RRDC's argument regarding Dr. McHugh's treatment of Justice Strong's reasons.

---

[101] Transcript, November 22, 2011, p. 83.
[102] Para. 6. Q.L.
[103] Transcript, November 22, 2011, p. 82.
[104] Transcript, November 22, 2011, pp. 94 - 95 and p. 148.
[105] Transcript, November 22, 2011, p. 76.
[106] Transcript, November 22, 2011, p. 94.

(2) Surrender Before Settlement

[101] The second reason RRDC urges me to find that Dr. McHugh was not independent or impartial is based on an assertion that Dr. McHugh resiled from a concession he made when being cross-examined about the *Chippewas* case in the Ontario Court of Appeal.[107] Dr. McHugh said that he had "no difficulty with" what the Court of Appeal said there, which was as follows:

> In the light of our findings on the evidence before us that whatever the formal legal status of the Royal Proclamation subsequent to the passage of the *Quebec Act*, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender (see paras. 57- 65 above), little turns in this case on whether the surrender provisions per se of the Royal Proclamation had the force of law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed.[108] (my emphasis)

[102] RRDC's counsel submitted that Dr. McHugh made concerted efforts to avoid admitting that, in principle, the surrender of Aboriginal lands is supposed to occur before settlement, because it was not helpful to Canada in the case at bar.

---

[107] [2000] O.R. (3d) 641.
[108] *Chippewas*, at para. 198.

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

> Q Okay, thank you. And do you agree that as the Court of Appeal found, the Royal Proclamation has been, I'm quoting here:
>
> … has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealing with the Aboriginal people of Canada [para. 201].
>
> A I think that's a very broad open-ended sentence that, in terms of legal history, needs considerable more detailing, which the Court is not doing there.
>
> Q So you don't agree that the proclamation has been cited as the defining source of the principles?
>
> A It's not a question of my disagreeing or agreeing so much as recognizing that that is a statement that needs considerable -- considerable texturing.
>
> Q Would you agree -- I don't -- we don't have time –
>
> A For example, "It has been consistently cited in the case law from the earliest times…." Well, if one looks at the pathways, okay, that suggests that there is a consistent body of jurisprudence, of case law. There isn't. There is only a sprinkling of cases which refer to the Royal Proclamation, and then in a variety of ways. So that is a court judgment; it's not an historical account of how the Royal Proclamation was viewed at any given time within Canada, because the Royal Proclamation is a legal instrument with a history of interpretation. One cannot say that the Royal Proclamation is -- the interpretation application of it is carved in stone any more than one can say that the interpretation of the Charter has an enduring and particular -- or the 5th Amendment in America, has an enduring interpretation. So for an historian, who is asked to answer the question of how people thought in a particular period, you are asking me to -- this is a court judgment from the 20th Century. It is not the words or the setting in Upper Canada of the 1830s of how the Royal Proclamation was viewed at that time. So -- so we need to distinguish an historical inquiry from -- what this court is doing is rendering a legal

> judgment about the status or otherwise of an argument about unextinguished Aboriginal title in Sarnia at the turn of the 20th Century. See --
>
> Q The Court clearly concluded that the principles and the proclamation should have been followed and weren't.
>
> A Well, the word is principles.
>
> Q Yes.
>
> A Principles are not rules. Principles -- you see, we're getting into an argument here about -- I'm resisting the suggestion that you're making it historically. There was a perception that they were externally enforceable standards that could be brought to bear against the Crown for the conduct of its relations with First Nations. That is a suggestion you are making, it seems to me, and that I'm resisting, in the period that we're looking at, because historically there was no perception that there were externally enforceable standards that could be brought to bear against the Crown. That is not occurring historically …[109] (my emphasis)

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

> Q But you just told me that you agreed with what the Court of Appeal set out in paragraph 198, and it said:
>
> We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement ….
>
> A Land available for settlement in the sense of before a Crown grant would issue.
>
> Q Yes.
>
> A And making lands available for settlement, making it before a Crown grant would issue. But frequently, there were settlers going in, encroachment, deals being made directly with the chiefs, all kinds of activity, because settlers are disputatious; they were an unruly mob.
>
> Q Yes.
>
> A And it was the Crown's job to try and clean things up and come between Crown and First Nations.

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

> Q Yes.
> A And treaties were part of their -- part of the process by which they tried to mop things up, and then also accommodate the demand for settlement. So we're not talking about a nice, neat, ordered frontier; we're talking about something that's human, that's very messy, and full of highly acquisitive activity, by white settlers in particular.[110]

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

(3) The "equitable principles"

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

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

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

> ceremonialism which was in their manifestation of sovereignty, not of justiciable requirements imposed against the Crown. That's not how they were conceived then.[111] (my emphasis)

[107] There is a good deal of overlap between this point and RRDC's previous point regarding surrender before settlement, both of which RRDC says go to Dr. McHugh's lack of independence and impartiality. However, I am simply unable to find as a fact that Dr. McHugh ultimately opined that the equitable principles in the relevant provision of the *1870 Order* were not those emanating from the Royal Proclamation. While I regret having to include lengthy quotations from evidence in a judgment, it seems necessary on this point to capture the full flavour of the cross-examination about the equitable principles. What follows should also be read together with the above quotes touching on the Royal Proclamation:

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

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

Q But I keep --
A -- and I'm suggesting that that is an unhistorical --
Q -- I keep saying to you I'm not asking you that.
A -- an unhistorical approach to how the Crown regarded its position.
Q I'm not asking you, Dr. McHugh, please take me at my word, I'm not asking you about your views on the enforceability of these provisions right now. I'm asking you for your views as to the meaning of the words used, and -- and I don't understand why you would disagree with me that the equitable principles which have uniformly governed the British Crown are the principles expressed in the proclamation, and the --
A Usually, yes --
Q Eh?
A -- but they -- I'm not -- I'm not disagreeing with that at all. They were most usually -- the procedures almost invariably -- the procedures set out in the Royal Proclamation.
Q You could agree with me, because what we're trying to interpret here is what the Canadian Houses of Parliament had in mind when they said that the settlement would be in conformity with the equitable principles which uniformly govern the British Crown, and I don't dispute your view. In fact, there is authority to support it, that the Proclamation doesn't provide a lot of detail, makes some large statements, but doesn't provide a whole lot in the way of detail as to how they're to be implemented.
A Well, counsel, you're jumping there from a legal conclusion and a historical one.
Q Okay, but would you agree with me that the commons, the house of -- the Canadian House of Commons and the Senate had in mind the principles, the core principles in the Royal Proclamation when they said that the settlement would be in conformity with the equitable principles which have uniformly governed the British Crown in its dealing with the --
A There was an expectation that the procedures in Upper Canada, which were generally in line with the Royal Proclamation, will be continued, of course, here, yeah.
Q Yeah, okay. So that this could be construed as a reference, the equitable principles are the principles in the Royal Proclamation.

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

…

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

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

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

A Okay.

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

A And it continued to be because there was a continuance of treaty-making. So it continued to that extent but the suggestion that I'm reading from your questions, counsel, is that the Crown's hands were tied to treaty-making, that it had to make treaties. And that's not how that particular clause would have been regarded or operational -- regarded as operationalizing at that time, though treaty-making was the invariable practice and it followed, there was a high executive discretion, you've got to remember that, self-monitoring …

…

Q But, again, my question is, is does their conduct -- the very people that drafted this undertaking said, "We will consider settling in conformity with the equitable

principles that uniformly govern the British Crown." When they got the lands on those terms and conditions, they immediately embarked upon the post-confederation treaty process, and does that -- can you agree with me that that supports the view that the equitable principles that they're talking about here are the principles expressed in the Royal Proclamation?

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

Q No, they said that they would --

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

Q Mm-hmm.

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

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

A Well, as I said, I agree with -- to the extent, with a caveat, which you said is not needed to be there, on enforceability. It was expected, and they did continue the treaty-making, so I would say yes."[112] (my emphasis)

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

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

[109] Therefore, I disagree with the suggestion by RRDC's counsel that Dr. McHugh avoided admitting that the equitable principles were those emanating from the Royal Proclamation.

5.2.2.2 The evidence of Dr. Theodore Binnema

[110] Dr. Binnema also testified for Canada on the issue of the legislative intent giving rise to the enactment of the relevant provision. He opined as well on other historical issues. Dr. Binnema was qualified as an expert historian able to research and interpret historical documents related to the history of Indigenous peoples in western North America, and the history of Indian policy in Canada, with a focus on the facts surrounding the negotiations leading to the *1870 Order* and its relationship to the development of treaties in Canada. RRDC took no issue with Dr. Binnema's qualifications to testify in this area.

[111] Dr. Binnema obtained his Ph.D. in history from the University of Alberta in 1998. In that same year he was awarded the Governor General's Gold Medal for being the most outstanding Ph.D. graduate at the convocation. He has been teaching in the History Department of the University of Northern British Columbia in Prince George since 2000, where he has been a full professor since 2008. Dr. Binnema's teaching has

included the comparative history of Indigenous people in Canada, the United States of America, Australia and New Zealand. He is the author of over 90 publications, including monographs, peer-reviewed articles and book reviews. He has also presented numerous papers at conferences as a speaker, commentator or moderator on various topics related to the Aboriginal history of North America.

[112] Dr. Binnema provided his evidence through testimony and through an expert report, dated July 2, 2014, entitled *The Rupert's Land and North-Western Territory Order of 1870 Understood in Context of the British Crown's Dealings with Aboriginal People in the British Empire*. The sub-title of the report is *The "Equitable Principles" Provisions in Historical Context* ("Dr. Binnema's report").

[113] Dr. Binnema's evidence centered mainly on an explanation of how the phrase in the *1867 Address*, "the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines", would have been understood in its historical context in Canada.

[114] As an expert historian, Dr. Binnema grounded his opinions and inferences on his review and interpretation of historical documents, case law and academic articles. These have been entered into evidence in two volumes of binders containing 110 documents comprising thousands of pages.

[115] Dr. Binnema focussed on three general areas. The first was the existence or non-existence of Crown-Aboriginal treaties throughout Canada and other British colonies both before and after 1870, and the reasons or factors that determined whether treaties would be entered into.

[116] The second area Dr. Binnema focussed on was the historical factual background leading up to the negotiation of the HBC surrender agreement that gave rise to the *1870*

Order. In this regard, he particularly stressed the contributions of Canada's negotiators, William McDougall and George-Étienne Cartier, both of whom were lawyers and ministers in the Canadian government at the time. McDougall was Minister of Public Works (he had previously been Commissioner of Crown Lands and thus *ex-officio* the Superintendent General of Indian Affairs) and Cartier was Minister of Militia and Defence, as well as the principal lieutenant of Prime Minister John A. Macdonald in Lower Canada. It was Dr. Binnema's expert opinion that McDougall and Cartier were the likely authors of the relevant provision.

[117] The third focus of Dr. Binnema's evidence was on Crown-Aboriginal relations post-Confederation, and in particular, the practice of concluding treaties, or not doing so, and the factors involved in those determinations. He also made specific reference to what was happening in the Yukon, post-Confederation, and compared that with Canada's general practice south of the 60th parallel, as well as with what was happening in British Columbia. This third area is less relevant to the question of legislative intent and more relevant to the entirety of the historical context of the relevant provision. However, for the sake of convenience I have included it here.

[118] Dr. Binnema opined that McDougall was probably the primary author of the relevant provision, and was probably fully aware that when he wrote the words of the provision in 1867 there were no equitable principles that had “uniformly” governed the British Crown in its dealings with aborigines up to that time. Rather, from the beginning of British colonization in the early 1600s until 1867, the British Crown decided whether or not to recognize the claims of Aboriginal peoples, and whether or not to compensate them for those claims, based on calculations of what was in the best interests of the Crown itself under the particular circumstances. Dr. Binnema’s evidence was that the

practice of purchasing Aboriginal title by entering into land-transfer treaties with aborigines was not uniformly applied in Great Britain's colonies around the world or even within North America.

[119] However, the British Crown's policy and practice in North America changed significantly after the Royal Proclamation. The Royal Proclamation of October 7, 1763, followed the Treaty of Paris on February 10th that same year. That treaty, which ended a war between England and France that had begun in 1754, transferred virtually all of France's North American possessions to Great Britain.[113] These lands included a large area, known as "Indian Territory", beyond the established 13 colonies along the eastern seaboard of what is now the United States of America. This "Indian Territory" ranged from the Gulf of Mexico in the south, to the Mississippi River in the west, to Rupert's Land in the north, and to the crest of the Appalachian Mountains in the east. The British were unable to take effective possession of this vast interior region because of resistance by the various Aboriginal groups who had military control of their respective regions. Rather than facing the prospect of a long and costly war against the Indians, the British chose the path of conciliation through the Royal Proclamation.[114] According to Dr. Binnema, the Royal Proclamation is "very significant", because it represents the first time that the British Crown stipulated that land could only be bought from Indians by the Crown with their consent. Private individuals could not make such purchases.[115] Further, these land purchases would only happen in carefully regulated circumstances in public meetings between the Indians and British officials, as set out in the Royal

[113] Binnema, at p. 10.
[114] Binnema, at p. 11.
[115] Binnema, at p. 12.

Proclamation. Dr. Binnema continued that these terms "set the standards under which land-transfer treaties … were conducted thereafter".[116]

[120] By 1867, says Dr. Binnema, it was "established policy and practice" that the Crown entered into such treaties with First Nations in that portion of "Indian Territory" defined by the Royal Proclamation in British possession.[117] Further, in the ten years immediately following Confederation, it continued to be the policy of the Canadian government to enter into treaties with First Nations in most newly acquired territories, with the exception of British Columbia and the Yukon Territory. In particular, Dr. Binnema stated in his report:

> The historical record suggests that in the first years after Confederation (1867-1877), the policy of the Canadian government was to enter into treaties with First Nations in most newly acquired territories [as written]. Its efforts to do so were frustrated in British Columbia by the British Columbia government's refusal to negotiate such treaties, and by British Columbia's control of Crown lands. Elsewhere, the evidence suggests that Canadian government policy was to negotiate treaties with First Nations when territory was required for settlement and/or resource exploitation. It did so in most of the territory acquired in 1870, but for various reasons, it did not do so in Yukon Territory. Between 1930 and 1973, the Canadian government did not enter into land-transfer treaties with any First Nations groups in Canada. (my emphasis)[118]

[121] In a more global context, Dr. Binnema reported that, in the period following the late 1700s, official documents from the Colonial Office in England began to increasingly refer to "aboriginal or Indian title", but in vague and imprecise ways.[119] The documents suggest that Aboriginal title was a usufructuary right and not absolute ownership. Further, such title conferred upon Aboriginal people moral (if not legal) rights to some

[116] Binnema, at p. 12.
[117] Binnema, at p. 1.
[118] Binnema, at p. 2.
[119] Binnema, at p. 18.

form of compensation for the loss of their lands, including the granting of certain benefits such as reserves, legal protection, education, health care, and other assistance in becoming "civilized".[120] However, stated Dr. Binnema, the documents do not support the conclusion that it was widely held in British official circles that there was a "legal obligation" to clear Aboriginal title through purchase.[121] In Australia, for example, settlement occurred in all of the colonies without the conclusion of any land-transfer treaties.[122]

[122] In Canada, Dr. Binnema wrote that, as of 1867, land-transfer treaties had been concluded for all of Upper Canada, and the Selkirk/Red River region of what would become Manitoba, and for very small but more densely settled portions of Vancouver Island.[123] However, no such treaties had been entered into in any part of:

- Lower Canada;
- New Brunswick;
- Nova Scotia;
- Prince Edward Island;
- Newfoundland or Labrador;
- mainland British Columbia;
- most of Vancouver Island; or
- Rupert's Land (except Selkirk/Red River) or the North-Western Territory.[124]

[120] Binnema, at p. 18.
[121] Binnema, at p. 18.
[122] Binnema, at p. 31.
[123] Binnema, at p. 29.
[124] Binnema, at p. 30.

[123] Returning to the wording of the relevant provision, Dr. Binnema opined that William McDougall was probably aware that no land-transfer treaties had been concluded with Aboriginal people in Australia, but that he and Cartier must have been aware of the non-uniform dealings between the British Crown and Aboriginal people in Canada. Dr. Binnema was also of the view that McDougall's use of the word "aborigines", without reference to location, and juxtaposed as it was with the term "Indian tribes", was intentional, so that the provision "could be as broadly interpreted as possible", i.e. with reference to the British Crown's dealings with Indigenous peoples throughout the British Empire.[125] Dr. Binnema stated that the relevant provision was:

> … composed [in] such a way as to promise virtually nothing, but in such a way that it implied that Canada's future treatment of aborigines would be superior to that of the [Hudson's Bay Company] …, and equal to that of the British government (whose dealings with aborigines the address described in elevated prose, but whose actual dealings… are difficult to characterize as uniform).[126]

In short, the provision was intended to offer as little as possible in order to acquire as much as possible.[127]

[124] Dr. Binnema also held that it is significant that the relevant provision does not refer to the Royal Proclamation or to treaties or agreements.[128]

[125] For all of the above reasons, Dr. Binnema concluded that the provision "defies any attempt at straightforward interpretation",[129] and that the evidence suggests that McDougall and Cartier's wording of the provision was not intended to commit Canada to

[125] Binnema, at pp. 32, 44 and 45.
[126] Binnema, at pp. 33 - 34.
[127] Binnema, at p. 33.
[128] Binnema, at p. 44.
[129] Binnema, at p. 44.

"any course of action" in regards to the claims of the Indians.[130] Further, there was nothing in the circumstances leading to the negotiation of the deed of surrender of Rupert's Land or in the British parliamentary debates preceding the enactment of the *1870 Order* to suggest otherwise.

[126] Nevertheless, Dr. Binnema reported that, after the *1870 Order*, the Canadian government began negotiating land-transfer agreements with Aboriginal communities that lived in regions which the government anticipated would soon come under settlement pressure. In particular, between 1871 in 1877, it concluded Treaties 1 through 7. These covered lands from what is now southwest Ontario, all of Manitoba, and southern Saskatchewan and Alberta. However, Dr. Binnema stated that the documents do not suggest that the Canadian government's decision to negotiate those treaties was influenced in any significant way by the terms of the *1870 Order*.[131] For example, he noted that in 1880, Alexander Morris, who negotiated several of what eventually became known as the "Numbered Treaties" (1 through 11), published a book entitled *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*,[132] but the book does not refer to the *1870 Order*;[133] nor does it imply that the *1870 Order* influenced the Canadian government's decision to make these treaties in the western interior. Rather, Dr. Binnema testified that the documents imply that the Canadian government was just continuing past policy and practice from what had been pursued in Upper Canada.[134]

[130] Binnema, at p. 48.
[131] Binnema, at p. 58.
[132] Toronto: Belford's, Clarke & Co., 1880.
[133] Transcript, September 12, 2014, p. 55.
[134] Transcript, September 12, 2014, p. 55.

[127] Dr. Binnema noted that Treaties 8 through 11 were concluded between 1899 and 1921 for a wide swath of subarctic territory from the Ontario-Québec border to the Mackenzie River region. In addition, adhesions (lands added to an existing treaty) were made to Treaty 9 as late as 1930. He explained that the long gap of 22 years between the conclusion of Treaty 7 and the making of Treaty 8 was connected with the fact that the Canadian government was reluctant to conclude treaties until land was required for settlement, railways or intensive resource exploitation.[135]

[128] Dr. Binnema reported that the Canadian government took a different approach to regions that did not seem likely to become agriculturally important or subject to the kinds of resource extraction that was likely to disrupt the lifestyles of Aboriginal people.[136] He argued that this was particularly the case with the Canadian North above the 60th parallel.

[129] Dr. Binnema agrees here with the historical research of Drs. Ken Coates and William Morrison that the Canadian government had no intention in the late 1890s, or later, of entering into a formal treaty with the Yukon Indians, because it seemed that agricultural development in the Yukon was impossible and that the gold boom of 1898-99 was likely to be transitory.[137] According to Dr. Coates, the policy of the Canadian government until the 1950s was that the Indians in the Yukon were "best left as Indians". Indeed, this phrase became the title of Coates' book, *Best Left as Indians: Native-White Relations in the Yukon Territory, 1840-1973.*[138] Under this policy, the Canadian government seemed convinced that Native people in the North were best left as subsistence hunters and trappers and saw no justification for any systematic attempt

[135] Binnema, at p. 60.
[136] Binnema, at p. 60.
[137] Binnema, at p. 62.
[138] Montréal and Kingston: McGill-Queen's University Press, 1991.

to restructure their lives.[139] Rather than entering into treaties, the Canadian government apparently felt that it was sufficient to provide the Indians with certain benefits such as education, medical aid and relief from destitution wherever possible, supervised by occasional visits from government inspectors.[140]

[130] Interestingly, with the exception of a relatively small portion of the present day Northwest Territories included within Treaty 8 in 1899, Dr. Binnema observed that Treaty 11 is the only treaty in Canada negotiated before 1975 that included any land north of the 60th parallel. He opined that the Canadian government sought this treaty when it became apparent that oil deposits existed in the Mackenzie Valley area, in particular around the Hamlet of Norman Wells.[141]

[131] Making extensive references to Coates' book, *Best Left as Indians*, Dr. Binnema recounted the experience in the Yukon from the 19th century and into the 20th. He observed that fur traders arrived in the Yukon region relatively late, i.e. during the 1840s. Further, between 1870 and 1896, the Canadian government showed little interest in the region, apparently remaining convinced that it held few prospects for significant settlement. Dr. Binnema further stated that as late as 1896, Aboriginal people may have outnumbered non-Aboriginal people in the Yukon by about 4-to-1. Following the peak of the gold rush in 1898-99, i.e. in 1901, the non-Aboriginal people suddenly outnumbered Aboriginal people by 8-to-1. However, the non-Aboriginal population declined quickly thereafter. In 1901, the population of Yukon was 27,219 (12.2%

[139] Binnema, at p. 63.
[140] Binnema, at p. 63.
[141] Binnema, at p. 63.

Aboriginal), but was only 8,512 ten years later (17.5% Aboriginal), and only 4,157 in 1921 (33.4% Aboriginal).[142]

[132] Between 1899 and 1910, missionaries (e.g. Bishop Bompas) and Aboriginal leaders (e.g. Chief Jim Boss of the Lac Laberge region) did advocate for a treaty, but the Canadian government apparently felt it was meeting its obligations to Aboriginal people by providing small residential reserves near non-Aboriginal settlements, emergency relief and health care.[143]

[133] Particularly relevant to the case at bar, Dr. Coates noted in his book that land appears to have been set aside by an Order-in-Council for the Ross River Dena First Nation in 1953 because of mining development in the region, and in 1965 it was formally reserved to them, although not as an official reserve under the *Indian Act*.[144]

[134] In summary, Dr. Binnema opined that the conduct of the Canadian government regarding land-transfer treaties in the Yukon Territory and the setting aside of small land reserves was "unusual" given its conduct elsewhere in western Canada.[145] This was because the government felt it was unnecessary or unwise to negotiate treaties in areas that were unlikely to become agriculturally important or subject to intense resource development. Dr. Binnema observed that the government might also have been influenced by the "unusual circumstances" that prevailed in the Yukon during the last years of the 19th century and the first half of the 20th.[146] Specifically, the non-Aboriginal population grew exceptionally quickly because of the Yukon gold rush - "too quickly for

[142] Binnema, at p. 64.
[143] Binnema, at p. 65.
[144] Binnema, at pp. 67 - 68.
[145] Binnema, at p. 68.
[146] Binnema, at p. 68.

the Canadian government to respond effectively."[147] Further, government officials regarded the gold rush as only a "transitory boom", as the non-Aboriginal population declined rapidly thereafter, "eliminating any sense of urgency".[148] Dr. Binnema reported that, after the gold rush, most Aboriginal communities in the Yukon continued to live by a combination of subsistence hunting and gathering, and commercial trapping, until after World War II.[149] Furthermore, after the war and during the civil rights era in North America, the Canadian government aimed to reduce and eliminate legal distinctions between Aboriginal people and others through a policy of social integration and assimilation.[150]

[135] Dr. Binnema observed that after the adhesions to Treaty 9 in 1930, the Canadian government did not engage in land-transfer negotiations with Aboriginal communities until after the Supreme Court of Canada's decision in 1973 in *R*. *v. Calder,* [1973] S.C.R. 313 ("*Calder*"). He opined that this was due to a combination of factors, such as the government's policy of attempting to assimilate Aboriginal peoples into non-Aboriginal society, the economic depression of the 1930s, the wartime distractions of the first half of the 1940s and the economic exploitation of the vast regions of western Canada.[151]

[136] In concluding that the historical treatment of Aboriginal people in the British Empire was not uniform, Dr. Binnema stated:

> I am not aware of evidence that representatives of the British Crown before 1867 believed that the Crown had legal obligations to purchase aboriginal title in territories in North America, Australia or New Zealand except where provided

[147] Binnema, at p. 68.
[148] Binnema, at p. 68.
[149] Binnema, at p. 68.
[150] Binnema, at p. 67.
[151] Binnema, at p. 68.

> for by the Royal Proclamation of 1763 … It was the policy of the Dominion of Canada, at least for most of the time between 1867 and 1923, to negotiate land-transfer treaties with First Nations communities when the territories of First Nations groups were subject to non-aboriginal settlement and/or intensive resource exploitation. However, that policy was not consistently applied in all areas of the country. [152]
> (my emphasis)

[137] On the other hand, Dr. Binnema testified in cross-examination as follows:

> Q So, there's -- there's no doubt that both before and after Confederation the policy that was followed was when lands were required for purpose of settlement the representatives of the Crown attempted to achieve a land [indiscernible] treaty?
> A In most of what was Canada, yes.[153]

5.2.2.3 Conclusion on legislative intent

[138] I have approached the question of legislative intention or purpose from the perspective of whether either the Canadian Parliament, which generated the wording of the relevant provision in the *1867 Address*, or the British Privy Council, on behalf of Her Majesty the Queen, which adopted that wording as part of the *1870 Order*, intended the provision to create a legally enforceable obligation. Based upon the historical evidence of Drs. McHugh and Binnema, I conclude that neither legislative body would have contemplated that to be the case at that time. Rather, in my view, the relevant provision was intended to be a general statement of assurance by Canada that it would continue to deal fairly and honourably with the Indian tribes in the soon to be acquired territories, whose lands had not yet been surrendered to the Crown. In other words, I find that the legislative bodies intended this to be a moral, but not a legal, obligation.

[152] Binnema, at p. 70.
[153] Transcript, September 15, 2014, p. 7, lines 25 - 29.

[139] I have cautioned myself here against placing too much weight on the probable intentions of McDougall and Cartier as the likely drafters of the wording. Nevertheless, it is significant to me that:

1) as the Court of Appeal of Yukon observed: (a) the role of the courts in constitutional adjudication was completely unascertained at that time; and (b) the Crown enjoyed near complete immunity from judicial oversight in its fulfillment of obligations;[154] and

2) both the Canadian Parliament and the British Privy Council approved of the distinction between the "legal rights" of individuals and corporations which would be placed under the protection of courts after the transfer (in what I have referred to as the first undertaking) and "the claims of the Indian tribes to compensation for lands required for purposes of settlement", which were simply to be "considered and settled", without any reference to the involvement of courts.

Thus, I also conclude that the obligation would not have been justiciable at that time, in the sense of being enforceable in the courts.

[140] Having said that, my interpretive task does not end with this conclusion on legislative intent. As Professor Hogg emphasizes, the language of the Constitution is not to be frozen in the sense in which it would have been understood in 1867 or 1870. Accordingly, I must now go on to consider the third dimension of the modern principle of statutory interpretation, which is compliance with established legal norms.

[154] 2013 YKCA 6, at para. 42.

5.2.3 Compliance with established legal norms

[141] Established legal norms are part of the entire context in which the words of a statute must be read. Professor Sullivan stressed that judges are concerned about violations of legal norms such as rationality, coherence and fairness, and that the weight to be attached to this factor depends on considerations which include:

- the cultural importance of the norm engaged;
- its degree of recognition and protection in law; and
- the seriousness of the violation.[155]

I repeat that Professor Sullivan says:

> If a possible outcome appears to violate a norm that is well-established and widely shared, if the violation is serious and there are no competing norms, this factor should receive significant weight ….[156]

[142] There are a number of established legal norms which, in my view, are potentially determinative in this exercise of statutory interpretation:

1) the honour of the Crown;
2) judicial preference for progressive interpretation over originalism;
3) generous and liberal interpretation of constitutional documents affecting Aboriginal peoples, with doubts and ambiguities to be resolved in their favour; and
4) respect for “minority rights”, including Aboriginal rights, as a foundational constitutional principle.

[143] First, I will address the honour of the Crown. The Court of Appeal of Yukon stated that the effect of the honour of the Crown on the interpretation of the *1870 Order*

[155] Sullivan, at p. 8.
[156] Sullivan, at p. 9.

is "critically important" to this litigation.[157] The status of the honour of the Crown has also been repeatedly confirmed by the Supreme Court of Canada as a constitutional principle that is always at stake in the Crown's dealings with Aboriginal peoples.

[144] In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 ("*Beckman*"), Binnie J., for the majority, stated:

> 42 The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 …, in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. The honour of the Crown has since become an important anchor in this area of the law…, previously referred to. The honour of the Crown has thus been confirmed in its status as a constitutional principle. (my emphasis, citations omitted)

[145] In *Haida Nation v. British Columbia*, 2004 SCC 73 ("*Haida Nation*"), McLachlin C.J., speaking for the Supreme Court, stated:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples…It is not a mere incantation, but rather a core precept that finds its application in concrete practices. (my emphasis, citations omitted)

[146] The Supreme Court further explained the principle of the honour of the Crown in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 ("*Manitoba Metis*"), where McLachlin C.J. and Karakatsanis J., speaking for the Court, said this:

> 66 The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the

[157] 2013 YKCA 6, at para. 37.

> several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection": …
>
> …
>
> The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24:
>
> > The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. (my emphasis)

[147] *Manitoba Metis* clarified that the honour of the Crown is not a cause of action in itself. Rather it speaks to how obligations that attract it must be fulfilled.[158] The duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will also vary with the circumstances.[159] One of the situations in which the honour of the Crown has been applied is in treaty-making, where it leads to requirements such as honourable negotiation and avoiding the appearance of sharp dealing.[160] The honour of the Crown is also engaged by constitutional obligations to Aboriginal groups.[161]

[158] *Manitoba Metis*, at para. 73.
[159] *Manitoba Metis*, at para. 74.
[160] *Manitoba Metis*, at para. 73.
[161] *Manitoba Metis*, at para. 91.

[148] The second established legal norm relevant to this interpretive exercise is judicial preference for progressive interpretation over originalism. The Court of Appeal of Yukon was quite blunt about this in its earlier consideration of this case:

> 41 Our legal system has consistently rejected "originalism" - the idea that the intentions of the drafters of constitutional documents forever govern their interpretation - as a constitutional precept (*Edwards v. Canada (Attorney General)*, [1930] A.C. 124).
>
> 42 It is particularly dangerous to assume that a matter that was not intended to be the subject of adjudication by the courts in 1870 remains outside the supervision of the courts today. The role of the courts in constitutional adjudication was completely unascertained at that time. Further, the Crown enjoyed near-complete immunity from judicial oversight in its fulfillment of obligations. Indeed, more than 100 years after the Order, the Supreme Court of Canada considered that it was precluded from ruling on an Aboriginal Land Claim without a fiat having been obtained from the Crown (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313). (my emphasis)

[149] This rejection of originalism is also supported by Professor Hogg:

> In Canada it is well-established that the language of the Constitution Act, 1867 is not to be frozen in the sense in which it would have been understood in 1867. Rather, the language is to be given a “progressive interpretation” so that it is continuously adapted to new conditions and ideas. The principle of progressive interpretation is flatly inconsistent with the originalism, the whole point of which is to deny that the courts have the power to adapt the Constitution to new conditions and new ideas.[162] (my emphasis)

[150] Further, as I noted earlier at para. 34 of these reasons, the Supreme Court in *Same-Sex Marriage*, cited above, stated that originalism runs contrary to the “living tree” approach to progressive interpretation.[163]

[151] It is also helpful to remember what Lamer C.J. said in *Van der Peet*, cited above:

---

[162] *Constitutional Law of Canada*, 5th ed., pp. 60-9 and 60-10.
[163] At para. 22 of *Same-Sex Marriage*, where originalism is described as “frozen concept” reasoning.

> … Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers"…[164]

[152] On this issue of originalism versus progressive interpretation, Canada submitted as follows:

> A generous and liberal interpretation does not entail the expansion of the original meaning of a provision to accommodate current circumstances. Rather, it is meant to accomplish the very purpose sought by the drafters in adopting the provision.[165]

However, no authority is cited specifically in support of this submission.

[153] The third established legal norm is that courts strive to interpret constitutional documents affecting Aboriginal peoples generously and liberally, with doubts and ambiguities generally being resolved in their favour: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 (at para 25, Westlaw); *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), at para. 56 (Q.L.); and *Van der Peet*, cited above, at paras. 24 - 25.

[154] The fourth established legal norm is that respect for minority rights, including the rights of Aboriginal people, is one of Canada's foundational constitutional principles. In *Reference re Succession of Québec*, [1998] 2 S.C.R. 217 ("*Reference re Succession of Québec*"), the Supreme Court of Canada considered, from a constitutional perspective, whether Québec had a right to unilateral succession. In considering the general constitutional principles that bore upon the reference, the Court said this:

> 49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of

[164] *Van der Peet*, at para. 21.
[165] Canada's Outline, filed September 16, 2014, at para. 155.

evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

…

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, supra, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The “promise” of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their

> own right or as part of the larger concern with minorities, reflects an important underlying constitutional value. (my emphasis)

Thus, respect for minority rights, including Aboriginal rights, is a fundamental constitutional principle.

5.2.4 What are the "equitable principles" in the relevant provision?

[155] In order to complete my task of determining what obligations, if any, the relevant provision imposes on Canada, it is necessary to ascertain the meaning of the words "equitable principles" in the provision.

[156] The historical evidence of Dr. McHugh is that the equitable principles governing the surrender of Indian lands to the Crown were rooted in the Royal Prerogative, and were conceived of as a matter of non-justiciable executive grace, guardianship, trust and protection, expected from the Crown towards Aboriginal peoples. Specifically, Dr. McHugh's evidence was that the procedures and protocols emanating from the Royal Proclamation of 1763 should not be viewed as "a uniform … externally enforceable standard" or a "code of procedure", but rather as reflecting a pattern of "fair dealing" in transactions to obtain the surrender of Indian lands.[166] Nevertheless, Dr. McHugh conceded, during extensive cross-examination, that there were "usual" practices and procedures originating from the Royal Proclamation leading to treaty making, and that these were "almost invariably" followed. Indeed, at one point he referred to treaty making as "the invariable practice", and agreed that it was followed during the post-Confederation treaty process. His only caveat, at the end of the day, was that it was not a legally enforceable obligation upon the Crown <u>at that time</u>.

[166] See paras. 106 and 107 of these reasons.

[157] Dr. Binnema's historical evidence was that the words "equitable principles" in the relevant provision defied any attempt at straightforward interpretation and were not intended to commit Canada to any specific course of action in regards to the claims of the Indians.[167] However, with respect to the surrender of Indian lands, Dr. Binnema also gave evidence that the Royal Proclamation was "very significant" because it represented the first time that the British Crown stipulated that land could only be bought from Indians by the Crown, with their consent, and that private individuals could not make such purchases.[168] Further, these land purchases would only happen in carefully regulated circumstances in public meetings between the Indians and British officials. Dr. Binnema concluded that the circumstances "set the standards under which land-transfer treaties … were conducted thereafter".[169] In addition, Dr. Binnema's evidence was that, by 1867, it was "established policy and practice" that the Crown entered into such treaties with First Nations in that portion of "Indian Territory" defined by the Royal Proclamation in British possession.[170] Finally, Dr. Binnema stated that, in the 10 years immediately following Confederation, it continued to be the policy of the Canadian government to enter into treaties with First Nations in most newly acquired territories, with the exception of British Columbia and the Yukon Territory.[171]

[158] The historical importance of the Royal Proclamation as a source of policy for Canada's land dealings with Aboriginal peoples is also highlighted in a report by the Minister of Justice for Canada to the Governor General, dated January 19, 1875, recommending an Order-in-Council to disallow legislation enacted by British Columbia

[167] Binnema, at p. 44.
[168] Binnema, at p. 12.
[169] Binnema, at p. 12.
[170] Binnema, at p. 1.
[171] Binnema, at p. 2.

on the grounds that it failed to respect the rights of the Indians in that province. In the report, the Minister of Justice stated as follows:

> The undersigned believes that he is correct in stating that with one slight exception as to land in Vancouver Island surrendered to the Hudson Bay Company, which makes the absence of others the more remarkable, no surrender of lands in that province have ever been obtained from the Indian tribes inhabiting it, and that any reservations which have been made, have been arbitrary on the part of the government, and without the assent of the Indians themselves, and though the policy of obtaining surrenders at this lapse of time and under the altered circumstances of the province, may be questionable, yet the undersigned feels it his duty to assert such a legal or equitable claim as may be found to exist on the part of the Indians.
>
> There is not a shadow of doubt that from the earliest times, England has always felt it imperative to meet the Indians in council and to obtain surrenders of tracts of Canada, as from time to time such were required for purposes of settlement. (my emphasis)[172]

[159] Then, after quoting the provisions of the Royal Proclamation at considerable length, the Minister of Justice went on to write that:

> It is not necessary now to inquire whether the lands west of the Rocky Mountains and bordering on the Pacific Ocean, form part of the lands claimed by France and which if such claim were correct, would have passed by cession to England under the treaty of 1763, or whether the title of England rests on any other ground, nor is it necessary to consider whether that proclamation covered the land now known as British Columbia.
>
> It is sufficient, for the present purposes, to ascertain the policy of England in respect to the acquisition of the Indian territorial rights, and how entirely that policy has been followed to the present time, except in the instance of British Columbia.
>
> …

[172] Plaintiff's Book of Authorities (Statutes and Publications), filed August 29, 2014, Tab 5, Order-in-Council, January 23, 1875.

> The determination of England as expressed in the proclamation of 1763, that the Indians should not be molested in the possession of such parts of the Dominion and Territories of England as, not having been ceded to the King, and reserved to them, and which extended also to the prohibition of purchase of lands from the Indians, except only to the Crown itself – at a public meeting or assembly of the said Indians to be held by the governor or commander-in-chief - has, with slight alterations, been continued down to the present time either by **the settled policy of Canada**, or by legislative provision of Canada to that effect, and it may be mentioned that in furtherance of that policy, so lately as in the year 1874, treaties were made with various tribes of Indians in the North-west Territories, and large tracts of land lying between the Province of Manitoba and the Rocky Mountains were ceded and surrendered to the Crown, upon conditions of which the reservation of large tracts for the Indians, and the granting of annuities and gifts annually, formed important consideration… (my emphasis)

[160] Whatever the differences in historical views about the extent to which the Royal Proclamation was uniformly followed, there is a significant amount of jurisprudential authority which suggests that it should be seen, today, as the source of the "equitable principles" in the relevant provision.

[161] This line of authority, in a modern-day sense, begins with *Calder*, cited above, in 1973, where Hall J. (in dissent) stated:

> Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763. **This Proclamation** was an Executive Order having the force and effect of an Act of Parliament and **was described by Gwynne J. in *St. Catharine's Milling* case at p. 652 as the "Indian Bill of Rights"**: see also *Campbell v. Hall*. **Its force as a statute is analogous to the status of Magna Carta** which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the *Colonial Laws Validity Act* applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was

> deemed advisable to amend it the amendment was effected by an Act of Parliament, namely, the *Quebec Act* of 1774.
>
> In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. **The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.** Its effect was discussed by Idington J. in this Court in *Province of Ontario v. Dominion of Canada* [(1909), 42 S.C.R. 1], at pp. 103-4 as follows:
>
> > A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.
> >
> > That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties. (my emphasis)[173]

[162] In *Guerin v. Canada*, [1984] 2 S.C.R. 335 ("*Guerin*"), Dickson J. (later Chief Justice) said this about the Royal Proclamation:

> 99 The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Cath*[*a*]*rine's Milling*, *supra*, at p. 54, **this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown**, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada.

[173] *Calder*,at paras. 137 - 138.

> Successive federal statutes, predecessors to the present Indian Act, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown … (my emphasis)

[163] In *Sparrow*, cited above, the Supreme Court stated in 1990 that the Royal Proclamation bore "witness" to the British policy of respecting the right of native populations to occupy their traditional lands, despite the Crown's ownership of the underlying title post-sovereignty.[174]

[164] In *Chippewas of Sarnia Band v. Canada (Attorney General)*, cited above, leave to appeal refused, [2001] 1 S.C.C.A. No. 63, a five-member panel of the Ontario Court of Appeal summarized the function of the Royal Proclamation and then commented on its relative importance in the history of Crown-Aboriginal relations in Canada:

> 53 The Royal Proclamation was an important, albeit not the first, manifestation of Crown imperial policy as it applied to Indian lands. The Royal Proclamation:
>
> > recognized that First Nations had rights in their lands;
> >
> > established imperial control over settlement on Indian lands whether those lands were within or beyond the boundaries of the established British colonies in North America;
> >
> > prohibited private purchase of Indian lands and required that alienation of Indian rights in their lands be by way of surrender to the Crown; and
> >
> > established a process by which surrenders of Indian land would be made to the Crown. The surrender process accepted that Indian rights in their lands were collective and not individual.
>
> …
>
> 201 … the evidence shows that while the Royal Proclamation was a unilateral declaration of the imperial

[174] *Sparrow*, at para. 49.

> Crown, historically, it had become a formal part of the treaty relationship with the Indian nations. In reviewing the evidence, we have already alluded to the fact that **the Crown took extraordinary steps to make the First Nations aware that the policy set out in the Royal Proclamation would govern Crown-First Nations relations and the importance attached to the Royal Proclamation by First Nations as their Charter.** There can be little doubt that from the Aboriginal perspective, the Royal Proclamation was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown. We also note in the record evidence that government officials considered that the Indian land provisions in the Royal Proclamation were still in effect even after the passage of the *Quebec Act*. Moreover, the Royal Proclamation is expressly referred to in the *Canadian Charter of Rights and Freedoms*, s. 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 and it has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the Aboriginal people of Canada. (my emphasis)

[165] In *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (Eng. C.A.), the Indian Association of Alberta, and others, brought an application before the English Court of Appeal in opposition to the proposed entrenchment of the Constitution in Canada by way of the *Constitution Act, 1982.* The applicants sought a declaration that Her Majesty in right of her government in the United Kingdom still owed treaty and other obligations to the Indian peoples of Canada by virtue of the Royal Proclamation. Lord Denning, M.R., made the following comments about the Proclamation:

> Over 200 years ago, in the year 1763, the King of England made a Royal Proclamation under the Great Seal. In it he gave solemn assurance to the Indian peoples of Canada. These assurances have been honoured for the most part ever since….
>
> …

> To my mind the Royal Proclamation of 1763 was equivalent to an entrenched provision in the Constitution of the colonies in North America. It was binding on the Crown "so long as the sun rises and the river flows". I find myself in agreement with what was said a few years ago in the Supreme Court of Canada in the case of *Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145, in a judgment in which Mr. Justice Laskin concurred with Mr. Justice Hall, and said at page 203:
>
> > This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne J. as the "Indian Bill of Rights". Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories....
> >
> > In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.
>
> **The 1763 Proclamation governed the position of the Indian peoples for the next 100 years at least.** It still governs their position throughout Canada, except in those cases when it has been supplemented or superseded by a Treaty with the Indians….(my emphasis)[175]

[166] Based upon the weight of these judicial authorities, and to a certain extent the evidence of Dr. McHugh and Dr. Binnema, I conclude that the "equitable principles" referred to in the relevant provision ought to be interpreted today as those principles emanating from the Royal Proclamation which specifically contemplated a duty to treat.

[175] Pp. 3 and 6, C.N.L.R.

5.2.5 Conclusion on the interpretation of the relevant provision

[167] In my view, the ordinary meaning of the relevant provision, particularly keeping in mind the purpose and scheme of the legislation in which it is found, is capable of creating a constitutional obligation that Canada enter into treaty negotiations with any Indian tribes in Rupert's Land and the North-Western Territory which had claims for compensation for lands required for the purposes of settlement. The ordinary meaning would also suggest that this constitutional obligation continues today.

[168] I recognize that the historical evidence is relatively clear and compelling that the intention of the Canadian Parliament in approving the wording of the relevant provision, and that of the British Privy Council in including it as part of the *1870 Order*, was that it would be a general statement of assurance that Canada would continue to deal fairly and honourably with the Indian tribes in the soon-to-be-acquired territories, whose lands had not yet been surrendered to the Crown. Accordingly, I conclude above that the legislative bodies intended this to be a moral, but not a legal, obligation.

[169] However, it is the principle of compliance with established legal norms which tips the balance in favour of my conclusion that the relevant provision ought to be interpreted <u>today</u> as one giving rise to a legally binding constitutional obligation. In my view, this outcome achieves the goals of rationality, coherence and fairness referred to by Professor Sullivan. To repeat, the four established legal norms which are relevant to this exercise of statutory interpretation are:

1) the honour of the Crown;

2) judicial preference for progressive interpretation over originalism;

3) generous and liberal interpretation of constitutional documents affecting Aboriginal peoples, with doubts and ambiguities to be resolved in their favour; and

4) respect for "minority rights", including Aboriginal rights, as a foundational constitutional principle.

These norms are all culturally important, recognized, protected in law, well-established and widely shared. Further, the violation of these norms asserted by RRDC could hardly be more serious - the dispossession and settlement of Kaska lands without compensation or surrender. As well, all four established legal norms, but particularly the honour of the Crown, support an interpretation that the relevant provision, today, constitutes a legally binding constitutional obligation.

[170] The historical fact that the relevant provision would likely not have been legally enforceable in the courts in or about 1870, or indeed at any subsequent time until the concept of Indian/Aboriginal title was recognized in *Calder* in 1973, and in Canada's comprehensive land claims policy which followed later that same year, is of limited significance. This was stressed by the Court of Appeal of Yukon in its decision in this case, as I noted earlier:

> 42 It is particularly dangerous to assume that a matter that was not intended to be the subject of adjudication by the courts in 1870 remains outside the supervision of the courts today. The role of the courts in constitutional adjudication was completely unascertained at that time. Further, the Crown enjoyed near-complete immunity from judicial oversight in its fulfillment of obligations. Indeed, more than 100 years after the Order, the Supreme Court of Canada considered that it was precluded from ruling on an Aboriginal Land Claim without a fiat having been obtained from the Crown (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313).

> 43 While I do not doubt that the intentions of the Canadian Parliament and the British government in 1867 and 1879 are of some moment in the interpretation of the 1870 Order, those intentions cannot be isolated from other considerations in assessing its modern effect.[176] (my emphasis)

[171] Further, it is an historical fact that Canada obtained land-surrender treaties with the Indian tribes across the country during the post-Confederation treaty process, from Ontario to the border of British Columbia (indeed, even including a sizable portion of the northeast part of that province),[177] as well as substantial areas in the Northwest Territories, and a portion of southeast Yukon,[178] wherever such lands were required for the purposes of settlement or the exploitation of natural resources.

[172] The situation with most of the province of British Columbia was exceptional, because there the Crown in right of the province owned the underlying title, post-sovereignty. Nevertheless, Canada took the position that the province ought to have negotiated land-surrender treaties before settling on Indian lands. I refer here to the Order-in-Council dated January 23, 1875, by which Canada disallowed legislation enacted by the British Columbia legislature on the grounds that it failed to respect the rights of the Indians in that province. I also refer to the comments of the federal Minister of Justice just prior to that Order-in-Council, which I quoted at length at paras. 158 and 159 of these reasons.

[173] Dr. Binnema gave evidence that Canada chose not to enter into a treaty with Yukon Indians because it seemed that the relative lack of agricultural development or resource extraction was not expected to significantly disrupt the lifestyles of Aboriginal people. He also suggested that the brief flurry of mining activity and settlement

[176] 2013 YKCA 6.
[177] Treaty 8.
[178] Treaty 11.

associated with the Yukon gold rush, in and shortly after 1898, probably passed too quickly for Canada to respond effectively with a treaty.

[174] However, it is very significant to me that Canada was able to obtain a treaty with the Aboriginal peoples of the present day Northwest Territories in relatively short order, when it became apparent that oil deposits existed in the Mackenzie River Valley area. Dr. Binnema's evidence was that the presence of oil was confirmed by a discovery well which blew in at Norman Wells on August 25, 1920, and by March 3, 1921, a Committee of the Privy Council authorized the signing of the treaty with the Aboriginal people having unsurrendered lands in the Mackenzie River Valley north of the 60th parallel.[179] Why there was insufficient time for Canada to obtain a treaty with the Yukon Indians between the peak of the gold rush in 1898-99 and 1901, when non-Aboriginal people in the Yukon still outnumbered Aboriginal people by 8-to-1, remains unexplained by Dr. Binnema.

[175] In my view, the relevant provision probably obliged Canada to enter into treaty negotiations with Yukon Indians at the time of the gold rush, or shortly thereafter. Whatever the reasons of the federal bureaucrats and politicians for not doing so, the result is that, until Canada implemented its comprehensive land claims policy in 1973, Yukon Aboriginal peoples were treated differently from all other Aboriginal peoples in the regions across the country from Ontario to Alberta and the Northwest Territories where treaties were obtained. Further, whatever the intentions of the Canadian Parliament and/or the British Privy Council regarding the wording of the relevant provision, it is appropriate to interpret it today as a promise in a constitutional context which engages the honour of the Crown and seeks to reconcile the land rights of pre-

[179] Treaty Research Report, Treaty No. 11, by Kenneth S. Coates and William R. Morrison, 1986.

existing Aboriginal societies with the assertion of Crown sovereignty. This theme of reconciliation was stressed by the Supreme Court in *Manitoba Metis*, cited above, as follows:

> 70 The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The [page661] Constitution is not a mere statute; it is the very document by which the "Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation": *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably": para. 17 (emphasis added).
>
> 71 An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both: *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1044; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24-25. Moreover, both types of promises are made for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty …
>
> It seems inconsistent with the honour of the Crown for Canada to have treated Yukon Aboriginal peoples in such a different fashion, especially when one contrasts Canada's ability to obtain Treaty 11 in March 1921, less than a year after oil was discovered at Norman Wells, Northwest Territories. This inconsistent treatment violates the legal norms of rationality, coherence and fairness and causes me to give this factor significant weight in this exercise of statutory interpretation.

[176] It also seems appropriate here to remember what the Supreme Court said in *Sparrow*, at para. 50, about the Crown virtually ignoring the rights of Aboriginal people for many years prior to *Calder*:

> 50 For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to [page1104] the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see The Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the Calder case in this Court (1973) to prompt a reassessment of the position being taken by government. (my emphasis)

[177] That said, the lands at issue in this case are limited to those within the Ross River group trap line, and the evidence is less clear about when those particular lands were first opened up for settlement. The community of Ross River is a significant distance from the centre of the gold rush activity in and around Dawson City (about 581 kilometres today by road). Further, there is no evidence in this trial that the gold rush had any impact upon non-Aboriginal settlement on the lands within the group trap line. There are, however, at least four points in time when development, and particularly resource development and exploitation, within the lands had become potential factors associated with the onset of settlement.

[178] The first is the construction of the Canol pipeline, which was built to carry crude oil from Norman Wells, Northwest Territories, to Alaska, USA, during World War II. As I understand it, the routing was from Norman Wells through the Ross River area, then down to Johnson's Crossing, Yukon, and then along the Alaska Highway to Whitehorse. Construction began in 1942 and was completed in April 1944. I have taken judicial notice of these facts, as neither party called any evidence on the point. In Dr. Coates' book, *Best Left as Indians*, cited above, there are passing references to the construction of this pipeline,[180] which may have occurred in part within the Ross River group trap line. However, there is no evidence this was associated with opening up the group trap line to any significant settlement.

[179] The second point in time is Dr. Binnema's evidence that, in 1953, land was set aside by an Order-in-Council for the Ross River Dena First Nation because of mining development in the region. Dr. Coates notes this in *Best Left as Indians*, which in turn was extensively referred to by Dr. Binnema. Dr. Coates writes:

> In 1953 the territorial Indian agent was asked to investigate the need for new reserves in areas facing development pressure. R. J. Meek requested a reserve for the Ross River because "recent mining discoveries in the area will probably create a change in the economic set-up of the Indians which up to this year has been based entirely on trapping and hunting".[181]

[180] The third development event was the construction of the Robert Campbell Highway, which serves the communities of Faro and Ross River, and intersects the Canol Road near Ross River. During the late 1960s and continuing to 1971, part of the Highway was built to connect Carmacks, Yukon, with Ross River. This construction

[180] At pp. 52,102,183, and 189.
[181] Coates, at p. 211.

brought year-round access to Ross River. Again, I have taken judicial notice of these facts, as no evidence was called on the point by either party. There is also no evidence that this event was associated with opening up the group trap line to any significant settlement.

[181] The fourth event was in 1969, when the Cyprus Anvil Mining Corporation opened a mine and built a new company town, named Faro. Dr. Coates writes about this as well:

> … The distinction between Native and white settlements was graphic in the Ross River area, where in 1969 the Cyprus Anvil Mining Corporation opened a mine and built a new company town. During the construction period, the workers stayed at Ross River, a largely Native community forty miles away, an arrangement which worked poorly and caused considerable racial strife. When the town site was ready, the whites moved to modern new homes, complete with the amenities common to company towns in that era. Ross River, impoverished in comparison, remained home to Natives unable to find work in the mines and those denied the right to live within the Faro town limits.[182]

[182] There is also evidence that on November 23, 1962, the federal Superintendent of Indian Affairs applied for a 66-acre parcel of land to be used for the Ross River Indian band village site.[183] However, there is no evidence that this was associated with any particular non-Aboriginal settlement or resource exploitation.

[183] In my view, the constitutional obligation arising under the relevant provision would only have been triggered historically when the lands within the Ross River group trap line were thought to be required for the purposes of settlement by the government actors and Aboriginal peoples of the day. The evidence here is less than clear. Nevertheless, it seems safe to say that this trigger point would have been no later than

[182] Coates, at p. 221.
[183] Appellant's factum, p. 5, Respondent's factum, p. 3, *Sterriah, et al v HMTQ* et al, CA 98-YU400.

1969, with the construction of the town site of Faro, and the development of the Cyprus Anvil mine, which ultimately became the largest open pit lead-zinc mine in the world.

5.3 If the relevant provision creates a constitutional obligation upon Canada to consider and settle RRDC's land claim, does that give rise to a "land freeze" until that obligation is honoured?

[184] As I stated in my 2015 procedural ruling, RRDC's rights under the *1870 Order* are not absolute.[184] Even Aboriginal rights that are recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*, are not absolute.[185] Rights do not exist in a vacuum. They must always be viewed in context, and particularly with respect to competing objectives. In this case, the competing objectives were those of Canada and Yukon in seeking to open up the Faro Mine in 1969. At that time, Aboriginal claims were not yet recognized by the federal government as having any legal status. Indeed, Canada's then-policy was that Aboriginal claims to land were so general and undefined that it was not realistic to think of them as specific claims capable of a remedy.[186]

[185] However, after the *Calder* decision, on January 31, 1973, Canada's position changed quickly and significantly.

[186] Approximately one week after the release of *Calder*, Canada's Prime Minister, Pierre Elliott Trudeau, and other members of his Privy Council, agreed that Minister of Indian Affairs and Northern Development, Jean Chrétien, would prepare a paper for Cabinet on the topic. The paper would set forth his proposed revisions to the existing policies of the Canadian government on the broad question of the claims of Aboriginal peoples. Minister Chrétien did so and submitted a memorandum to Cabinet on June 5, 1973, entitled "Indian and Inuit Claims Policy".

---

[184] 2015 YKSC 33, at para. 44.
[185] *R. v. Sparrow*, [1990] 3 C.N.L.R. 160, at para. 62.
[186] *Sparrow*, at para. 50.

[187] On June 14, 1973, the Cabinet met to discuss the new policy on Indian and Inuit claims and established a Special Committee of Ministers on Indian Claims.

[188] On June 28, 1973, the Special Committee recommended to Cabinet, amongst other things, that:

a) Canada should immediately and publicly declare a policy of recognizing Indian title in the Yukon Territory, amongst other places;

b) Canada should accept the principle of compensating Indians for lands in the Yukon Territory, amongst other places; and

c) Canada should express its willingness to negotiate land claims settlement with the Indians in the Yukon Territory, amongst others.

[189] On July 19, 1973, Cabinet accepted all of the recommendations of the Special Committee.

[190] On August 8, 1973, Minister Chrétien publicly released Canada's new policy on the claims of Indian and Inuit people in the form of a Communiqué. At that time he also confirmed that Canada had already agreed with representatives of native people in the Yukon to enter into negotiations concerning their claim. As a result, the comprehensive land claims of the Yukon Indian People, which included the land claim of RRDC, were the first claims accepted by Canada in 1973 under its new policy.

[191] In fact, the Yukon Indian People were then represented by a group called the Yukon Native Brotherhood ("YNB" and later, the "Council for Yukon Indians", and currently, the "Council for Yukon First Nations") which had prepared a land claim document entitled "Together Today for our Children Tomorrow", in January 1973. The YNB met with Prime Minister Trudeau, on February 14, 1973, to present their position

on land claims. By August 8, 1973, Canada had already agreed to enter into negotiations concerning YNB's claims.

[192] As I discuss in greater detail in my reasons for judgment in the '06 Action, Canada's negotiations with RRDC continued from 1973 through to June 2002, when Canada's mandate for continuing negotiations expired. RRDC had significant advance notice of the pending expiry of the mandate. I also explain in those reasons why the comprehensive land claims negotiations have not continued since then and what other steps Canada has taken to engage RRDC in local land governance discussions.

[193] In the '06 Action, RRDC's counsel made rather extensive submissions about the persuasive burden of proof having been shifted to Canada to prove that it negotiated in good faith during the modern era negotiations. This issue arose because of the references in my 2015 procedural ruling to giving Canada the opportunity to "establish" that it conducted itself in accordance with the honour of the Crown in the modern era negotiations (see para. 19 above). I dealt with this argument at paras. 315 through 327 of my reasons for judgment in the '06 Action. I conclude here that Canada only took on an evidential burden to establish that it negotiated in good faith and in accordance with the honour of the Crown, and not a persuasive burden. Further, because the evidence in the '06 Action can be considered as evidence in this trial as well, I am now satisfied that Canada did conduct itself in accordance with the honour of the Crown throughout the modern era negotiations, and was unable to obtain a treaty with RRDC notwithstanding.

[194] What has all this to do with the notion of a land freeze?

[195] RRDC has argued in this trial that Canada repeatedly breached its constitutionally imperative obligations under the *1870 Order* by enacting legislation

which opened the lands in question to settlement (e.g. mining legislation, Territorial Lands Acts, the *Yukon Act*, etc.). As I understand the argument, RRDC says all those enactments were unconstitutional and therefore of no force and effect, because they allowed the lands in question to be opened up for settlement before Canada had considered and settled RRDC's land claim. Prior to the enactment of the *Constitution Act, 1982*, the governing provision was, pursuant to the *Statute of Westminster, 1931,* s. 2 of the *Colonial Laws Validity Act, 1865,* cited above, which provided:

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Since April 17, 1982, s. 52(1) of the *Constitution Act, 1982*, governs. It provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[196] I reject this argument for two reasons.

[197] First, there is no temporal requirement in the relevant provision obliging Canada to compensate RRDC before opening up the lands at issue for settlement. It would be absurd to conclude that Canada was obliged to consider and settle RRDC's claim "upon the transference of the territories" on July 15, 1870, as there is no evidence that Canada was even aware of the Kaska tribe of Indians at that time. Rather, I agree with Canada's counsel that "upon the transference of the territories" means only that from that time onwards, Canada was assuming responsibility for any claims of the First

Nations, instead of the HBC or the British government. Beyond that, the relevant provision makes no prescription for considering or settling claims at a certain time. Similarly, article 14 of the *1870 Order*, which is the only other provision that addresses claims of First Nations, is also silent with respect to any temporal deadline for resolving claims:

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company [HBC] shall be relieved of all responsibility in respect of them.

[198] By contrast, elsewhere in the *1870 Order* there are clear timelines by which certain other acts must be completed. For example: Canada was to pay 300,000 British pounds to the HBC "when Rupert's land is transferred to the Dominion of Canada"; the HBC could select land adjoining each of its trading posts "within twelve months of surrender"; the HBC could claim grants of land in the Fertile Belt "for fifty years after the surrender" and could defer this exercise "for not more than ten years after it is set out".[187]

[199] Having said this, I do not want to be misunderstood as suggesting that there was no temporal association between opening the lands up for settlement and considering and settling the claims of the Indian tribes for compensation. Rather, I am simply concluding that there was no requirement upon Canada to obtain a treaty with a particular First Nation, before setting foot on their traditional lands or before enacting any legislation that may have facilitated the settlement of those lands. As far as I am aware, there is no evidence in this trial that this was the case for any of the post-Confederation treaties. Rather, I infer that the treaty-making process was one that

[187] *1870 Order*, paras. 1, 2 and 5; see also Binnema, at pp. 54 - 55.

unfolded as the Canadian government allowed for settlement westward, no doubt in conjunction with the building of the Canadian Pacific Railroad. Thus, there was a temporal association between Canada requiring Indian lands for settlement and the making of the post-Confederation treaties, but there was no bright line requirement that Canada obtain a treaty in each settlement area before conducting any activities in such area or enacting any legislation pertaining to it.

[200] The second reason I reject RRDC's "land freeze" argument, is that it does not apply in the modern day context of Aboriginal rights and title recognized and affirmed under s. 35(1) of the *Constitution Act, 1982.* Even after the entrenchment in Canadian law of the constitutional protection of Aboriginal rights since 1982, courts have not interpreted this enhanced legal protection to mean that a land freeze is required before land claims are settled. Instead, the Crown's ability to manage lands over which claims have been asserted has been confirmed by our highest court, subject to a duty to consult and, if required, accommodate the asserted Aboriginal right and interest.

[201] In *Haida Nation,* cited above, the Supreme Court of Canada wrote:

> 26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
>
> 27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of

> treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.
>
> …
>
> 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take. (my emphasis)

[202] Similarly, in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ("*Tsilhqot'in*"), the Supreme Court of Canada stated that the Crown can use land over which Aboriginal title is asserted up until the time that title vests in the Aboriginal group, as long as the duty to consult and accommodate, where appropriate is met:

> 113 ...Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.
>
> 114 It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until

> Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands [page306] of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words "vested in the Crown" to cover at least lands to which Aboriginal title had not yet been confirmed.
>
> 115 I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order.* To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands. (my underlining, italics in original)

Even after Aboriginal title is proven, it is not absolute, in the sense that certain rights and restrictions flow from its legal interest, as a burden on the underlying (radical) title asserted by the Crown at sovereignty. This was touched on in *Tsilhqot'in*, cited above, as follows:

> 75 The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group - most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.
>
> 76 The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the

> government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*. (my emphasis)

[203] I appreciate here that RRDC has not pleaded any reliance upon s. 35 of the *Constitution Act, 1982*, in either this action or the '06 Action. I also appreciate that RRDC is not asserting Aboriginal title in either action. As RRDC's counsel has repeatedly submitted, 'this is not a s. 35 case'. As well, I acknowledge, having had the benefit of further submissions from RRDC's counsel since the 2015 procedural ruling, that RRDC's rights under s. 35 and its rights under the *1870 Order* are analytically distinct. However, that does not mean that the s. 35 jurisprudence has no relevance in this action.

[204] As RRDC's counsel, Mr. Walsh, himself earlier submitted:

> The provisions of the **1870 Order** under consideration are part of a larger statutory scheme, namely the **Constitution of Canada**. The principle of interpretation that presumes a harmony, coherence and consistency between statutes dealing with the same subject matter provides compelling support for the view that, today, the relevant provisions of the **1870 Order** have the same legal force and effect and are subject to the same modern interpretive principles as the rest of the ***Constitution of Canada***, particularly **s. 35(1)** of the ***Constitution Act, 1982*** …
>
> The **1870 Order** and **s. 35(1)** are part of the same statutory scheme (the **Constitution of Canada**), both were enacted by the Imperial Parliament and both address the same subject matter: the constitutional rights of aboriginal people. Therefore, in accordance with the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter, the principles of interpretation applicable to **s. 35(1)** are also applicable to the **1870 Order** …[188] (emphasis already added)

[188] RRDC's Outline, filed August 26, 2014, at paras. 33 and 34.

[205] Aboriginal title, which is a type of Aboriginal right associated with land, is not an absolute right. Also, it is clear that the Crown can manage lands where such title is asserted, until such time the title is proven, providing the honour of the Crown is upheld in the meantime. If that is so, then similarly I cannot see how RRDC's rights under the *1870 Order* can be absolute. However, this would seem to be the effect of RRDC's 'land freeze' argument. That is, that RRDC has an absolute right to have its claims for compensation considered and settled before the opening of the lands at issue for settlement. And further, that any legislation purporting to facilitate the opening of those lands for settlement must be of no force or effect.

[206] I prefer an approach that recognizes that RRDC does have a right to have its claims for compensation considered and settled in conjunction with the opening of the lands at issue for settlement. However, Canada is not rendered impotent in managing the lands in the interim, before and during treaty negotiations, providing the honour of the Crown is upheld.

5.4 Are the lands which comprise the Territory "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*?

[207] RRDC's counsel argued that the lands at issue here within the boundaries of the Ross River group trap line are "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*. As a result, argued counsel, the lands are not available to Canada as a source of revenue until RRDC's claims to the lands have been considered and settled in conformity with the *1870 Order*. RRDC's counsel relies principally here on *St. Catharine's Milling*, cited above, which held that the words "lands

reserved for the Indians" in s. 91(24) are "sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation."[189]

[208] In *St. Catharine's Milling*, the lands in dispute were in south-western Ontario. They had been occupied by Indians from the date of the Royal Proclamation of 1763 and were within the geographical area governed by the Proclamation. After Confederation, the lands came into Canada through the *1870 Order*. In 1873, Indian title to the lands was surrendered to the federal government by Treaty 3. Canada assumed that it acquired ownership of the land following the completion of the treaty, as well as the right to benefit economically from the land, and purported to issue a timber permit to the St. Catharine's Milling company. The province of Ontario contested Canada's right to issue the permit on the basis that it was the beneficial owner of the land following the surrender of Indian title. The Judicial Committee of the Privy Council, then Canada's highest court, ultimately decided the case. Lord Watson delivered the judgment of the court. The paragraphs relied upon by RRDC's counsel are 13 and 14:

> 13 In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91(24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted

[189] *St. Catharine's Milling* (J.C.P.C.), at para. 13.

> by the British Parliament in 1867, but it does not occur in sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.
>
> 14 Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 92(24). There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title. (my emphasis)

[209] RRDC's counsel submits that the closing words of paragraph 14 support the proposition that the lands at issue are not available to Canada (or to the Yukon, post-devolution) as a source of revenue, since the estate of the Crown in the lands has never been disencumbered of the Indian title.

[210] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*"), also dealt with the meaning of the phrase "Lands reserved for the Indians" in s. 91(24). Lamer C.J., speaking for the majority at para. 174, specifically quoted with approval the words of Lord Watson which I highlighted above from para. 13 of *St. Catharine's Milling*. Lamer C.J. then went on to state that "all lands" includes not only reserved lands, "but lands held pursuant to [A]boriginal title as well."[190] He did not further elaborate on exactly what he meant by "lands held pursuant to [A]boriginal title". In any event, it must

[190] *Delgamuukw*, at para. 174.

be remembered that the issue between the parties in that case was whether the phrase "Lands reserved for the Indians" conferred jurisdiction on the federal government to legislate with respect to Aboriginal title. If so, then by implication it also conferred jurisdiction to extinguish that title:

> "Lands reserved for the Indians"
>
> 174 I consider the second part of this provision first, which confers jurisdiction to the federal government over "Lands reserved for the Indians". The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title. The province's principal submission is that "Lands reserved for the Indians" are lands which have been specifically set aside or designated for Indian occupation, such as reserves. However, I must reject that submission, because it flies in the face of the judgment of the Privy Council in *St. Catherine's Milling*. One of the issues in that appeal was the federal jurisdiction to accept the surrender of lands held pursuant to aboriginal title. It was argued that the federal government, at most, had jurisdiction over "Indian Reserves". Lord Watson, speaking for the Privy Council, rejected this argument, stating that had the intention been to restrict s. 91(24) in this way, specific language to this effect would have been used. He accordingly held that (at p. 59):
>
> > . . . the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.
>
> Lord Watson's reference to "all lands" encompasses not only reserve lands, but lands held pursuant to aboriginal title as well. Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title. (my emphasis)

[211] It is apparent from the above passage that the focus of the case was on a jurisdictional question and not on the ways and means by which lands may come to be "reserved for the Indians".

[212] In *Ross River Dena Council v. Canada*, 2009 FC 391, Hugessen J. more squarely dealt with this issue. In that case, certain lands within RRDC's claimed traditional territory had been "set aside" by notation in the land records of the Northern Affairs Program of the Department of Indian and Northern Affairs. RRDC sought a declaration that those "lands set aside" were "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. As in the case at bar, Hugessen J. acknowledged the agreement of the parties that there was a distinction between "reserves" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, and "Lands reserved for the Indians" in s. 91(24):

> … It is common ground that that head of federal power [s. 91(24)] also includes lands which, while not constituting reserves within the meaning of the *Indian Act*, have none the less been reserved for the Indians in such a way as to bring them within federal jurisdiction. It is that second category of federal Indian lands which underlies the plaintiff's present claim.[191]

[213] Hugessen J. referred extensively to the decision of the Supreme Court of Canada in *Ross River Dena Council Band v. Canada*, 2002 SCC 54, which dealt with the principles governing the creation of reserves under the *Indian Act*. He found the following passage from the Supreme Court decision particularly instructive:

> E. *Summary of Principles Governing the Creation of Reserves Applicable to this Case*
>
> 67 Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for

[191] *Ross River*, at para. 6.

> creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; *Woodward*, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.[192] (my emphasis)

[214] Finding against RRDC on the facts, Hugessen J. concluded:

> … While there is no definitive or authoritative list of the means where by land may be "reserved" within the meaning of subsection 91(24) of the *Constitution Act* but where no "reserve" within the meaning of the *Indian Act* is created, I know of no instance, and none has been suggested, where this has happened other than through a very formal expression of the will of the sovereign such as a Royal Proclamation (see e.g. the case of *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577) a formal treaty (see e.g. *Chingee v. Canada (Attorney General)* (2005), 261 D.L.R. (4th) 54 (B.C.C.A.) leave to appeal to S.C.C. refused, 31206 (March 30, 2006)) or an Order-in-Council. With respect, it seems to me that the foregoing analysis by the Supreme Court of the formal requirements for reserve creation, and the analogy with the treaty making power, are equally applicable to the requirements for reserving "land ... for the Indians" within the meaning of the second branch of subsection 91(24) of the *Constitution Act*. …[193] (my emphasis)

[192] *Ross River* at para. 7.
[193] *Ross River*, at para. 8.

He then went on to stress, as did the Supreme Court in the passage just quoted above, that the question was "particularly fact sensitive".

[215] In his oral submissions, RRDC's counsel acknowledged that the lands at issue in *St. Catharine's Milling,* cited above, were lands within the area reserved by the Royal Proclamation, which Hugessen J. described, in his *Ross River* decision above, as "a very formal expression of the will of the sovereign". Counsel then went on to submit that the "same principles apply to lands protected by the *1870 Order*". I do not accept this last submission.

[216] I understand Lord Watson's apparent conclusion that "all [the] lands reserved" and specifically identified in the Royal Proclamation were considered by him to be "Lands reserved for the Indians" under s. 91(24). Those were described in the Proclamation as:

> … all the lands and Territories not included within the Limits of Our Said New Governments [i.e. the colonies along the eastern seaboard, including Massachusetts, Connecticut, Virginia, North Carolina, South Carolina and Georgia], or within the Limits of the Territory granted to the Hudson's Bay Company [i.e. Rupert's Land], as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and the North West as aforesaid …[194]

A map depicting the geography of this area is shown on p. 11 of Dr. Binnema's report. In general terms, these lands ranged from the Gulf of Mexico, in the south, to the crest of the Appalachian Mountains, in the east, to the Mississippi River, in the west, and to the Hudson Bay drainage basin, in the north. The Royal Proclamation further made repeated reference to these lands being "reserved" for the Indians.[195] However,

[194] Binnema, at p. 12.
[195] Binnema, at pp. 10 - 11.

Dr. Binnema opined that none of the terms of the Royal Proclamation was intended in 1763 to apply to the area of present-day Yukon.[196] Indeed, none of the lands at issue in the case at bar fall within the geographic area contemplated by the Royal Proclamation. This is because North America to the west of Louisiana and the Great Lakes was not encompassed within the above map.

[217] The lands at issue were within the North-Western Territory identified in the *1870 Order*. That territory was vast.[197] It generally included all of the Canadian mainland territory northwest of Rupert's Land west to the borders of British Columbia and Alaska, and North to the Arctic Ocean.

[218] This is where my confusion arises from the oral submission of RRDC's counsel that the principles expressed in the Royal Proclamation apply to lands protected by the *1870 Order,* in the sense that until the lands are surrendered by the Aboriginal peoples concerned, they remain lands "reserved for Indians", and are not available as a source of revenue to government. I assume he does not mean to say that all of the lands referred to in the *1870 Order*, i.e. Rupert's Land and the North-Western Territory were intended to be "Lands reserved for the Indians" under s. 91(24). That seems over-reaching and a result for which there is no case authority and no historical evidence of that being the intention of the Crown or of Parliament, such as there is in the case of the Royal Proclamation. It would also mean that any lands remaining in either Rupert's Land or the North-Western Territory that have not been dealt with by treaty post-1870, would still be considered "Lands reserved for the Indians". Again, I know of no case authority or historical evidence to support such a proposition. Yet, the submission of

[196] Binnema, at pp. 12 - 13.
[197] As depicted in Exhibit 9, Tab 177, p. 226.

RRDC's counsel implies that all such lands would be considered reserved for the Indians' occupation and therefore unavailable as a source of revenue to the Crown.

[219] I prefer the approach of Hugessen J. in his 2009 *Ross River* decision.[198] He accepted that "a very formal expression of the will of the sovereign, such as a Royal Proclamation", as in the case of *St. Catharine's Milling*, cited above, could constitute a means by which lands could become "Lands reserved for the Indians" under s. 91(24). It is also essential to recognize that the Supreme Court of Canada stressed in its 2002 *Ross River* decision that the process of granting reserves under the *Indian Act* is extremely fact-sensitive and that evidence of the Crown's "intention" is a critical part of the analysis.[199] Hugessen J. felt that the formal requirements discussed by the Supreme Court in its 2002 *Ross River* decision were "equally applicable to the requirements for reserving "land … for Indians" within the meaning of the second branch of s. 91(24) of the *Constitution Act*."[200]

[220] There is simply no evidence from which one can infer that any of the lands being brought into the Dominion of Canada by the *1870 Order* were intended by either the Canadian Parliament (in the *1867 Address*) or the British Privy Council (in the *1870 Order*) to be lands reserved for Indians under s. 91(24). In my view, it would be absurd to conclude that all of the lands within Rupert's Land and the North-Western Territory were intended to be so reserved. Further, beyond the broad reference in the *1867 Address* to these two "territories", and "lands required for purposes of settlement" in the relevant provision, there is no further specific identification of a geographic area of land, such as there was in the Royal Proclamation. Not even the specific "lands set aside" in

[198] *Ross River*, at para. 8.
[199] *Ross River*, at paras. 50 and 67.
[200] *Ross River*, at para. 8.

Hugessen J.'s *Ross River* decision were considered to be "Lands reserved for the Indians" under s. 91(24). Thus, I fail to see how the general references to "territories" and "lands" in the *1870 Order* are capable of constituting a 'formal expression of the will of the Crown' to transform such lands into "Lands reserved for the Indians".

[221] I conclude that the lands at issue are not "Lands reserved for the Indians" within s. 91(24) of the *Constitution Act, 1867.*

5.5 Are ss. 19(1) and 45(1) of the *Yukon Act* inconsistent with RRDC's rights under the *1870 Order* and, therefore, by virtue of s. 52(1) of the *Constitution Act, 1982*, of no force and effect with respect to the Territory?

[222] Sections 19(1) and 45(1) of the *Yukon Act* provide as follows:

> 19. (1) The Legislature may make laws in relation to
>
> > (a) the exploration for non-renewable natural resources in Yukon and oil and gas in the adjoining area;
> >
> > (b) the development, conservation and management of non-renewable natural resources in Yukon, oil and gas in the adjoining area and forestry resources in Yukon, including laws in relation to the rate of primary production from those resources;
> >
> > (c) oil and gas pipelines located entirely within Yukon;
> >
> > (d) the development, conservation and management of sites and facilities in Yukon for the generation and production of electrical energy;
> >
> > (e) the export, from Yukon to another part of Canada, of the primary production from non-renewable natural resources and forestry resources in Yukon, and of electrical energy generated or produced from facilities in Yukon; and
> >
> > (f) the export, from the adjoining area to another part of Canada, of the primary production from oil and gas in that area.

…

> 45. (1) Subject to this Act and section 37 of the *Northern Pipeline Act*, the Commissioner has the administration and control of public real property and of oil and gas in the adjoining area and may, with the consent of the Executive Council, use, sell or otherwise dispose of that property, or any products of that property, that oil or gas, or any interest in that oil or gas, and retain the proceeds of the disposition.

[223] RRDC's counsel argues that the grant in s. 19(1) of the legislative power over lands and resources and the grant in s. 45(1) of the right to dispose of property and retain the proceeds of such disposition are inconsistent with RRDC's rights under the *1870 Order*, which he says remain unfulfilled. Accordingly, pursuant to s. 52(1) of the *Constitution Act*, he submits that ss. 19(1) and 45(1) should be found to be of no force or effect: see also *Reference re-Succession of Québec*, cited above, at para. 72. This is a similar argument to RRDC's "land freeze" argument, discussed above.

[224] In any event, Canada's counsel argues firstly that, if RRDC does have rights under the *1870 Order*, the *Yukon Act* provisions are nevertheless consistent with the authority granted to the Dominion Parliament "to legislate for the future welfare and good government" of the North-Western Territory in the *1870 Order*. Counsel submits that placing local land-related and natural resource matters under the control of the locally elected Legislative Assembly is consistent with this authority.

[225] Secondly, Canada submits that the purpose of the *Yukon Act* was not to extinguish RRDC's rights, but rather to transfer certain governance responsibilities to the local government in the Yukon. The preamble of the *Act* states that the legislation is required "to implement certain provisions of the Yukon Northern Affairs Program Devolution Transfer Agreement." Canada notes that Chapter 2 of that Agreement gives

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; education; public real property; and "generally, all matters of a merely local or private nature". Thus, the *Yukon Act* enhances the ability of the Yukon to govern itself. Most importantly in this regard, s. 3 of the *Act* provides:

> 3. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*. (the "non-abrogation provision")

[226] Thirdly, Canada relies upon *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 ("*Grassy Narrows*"), in support of its argument that the transfer of administration and control over lands from the federal to the Yukon government can be viewed as a transfer of a "beneficial interest" in the lands, but it does not absolve the federal Crown of its duties and responsibilities to Aboriginal peoples.[201] Further, as was recognized in 2010 by the Supreme Court of Canada in *Beckman*, cited above, the Yukon government, in exercising its governmental responsibilities and jurisdiction, must comply with the same duties owed by the federal government in its dealings with Aboriginal peoples, such as respecting the honour of the Crown and complying with the duty to consult and accommodate.[202] Thus, the *Yukon Act* does not absolve the Yukon government of the same obligations towards First Nations that the federal government previously owed. Indeed, Canada expressly acknowledges that it continues to be bound by such duties in its dealings with Aboriginal people, for example in any future negotiations with RRDC towards a treaty.

---

[201] *Grassy Narrows*, at para. 46.
[202] *Beckman,* at para. 62.

[227] RRDC's counsel failed to respond to this last argument.

[228] In response to Canada's argument about s. 3 of the *Yukon Act* (the non-abrogation provision), RRDC's counsel submitted orally that his client's rights under the *1870 Order* are not existing Aboriginal rights under s. 35 of the *Constitution Act, 1982*. In this regard, he relies exclusively on *Van der Peet*, cited above, which held that the time period that a court should consider in identifying whether the Aboriginal right claimed meets the standard of being integral to the Aboriginal community is the period prior to contact between Aboriginal and European societies ("pre-contact").[203] Further, counsel submitted that it is "obvious" that the *1870 Order* is speaking to "post-contact" practices of the Crown in relation to considering and settling Indian land claims.[204] Thus, the argument seems to be that although the *Yukon Act* cannot abrogate or derogate from existing Aboriginal rights under s. 35, the *Act* does not expressly protect his client's asserted constitutional right under the *1870 Order* to have its land claim considered and settled.

[229] As I indicated in my procedural ruling cited as 2015 YKSC 33, I find this argument rather simplistic and confusing.

[230] If Canada has a constitutional obligation to consider and settle RRDC's land claim, as RRDC asserts, then the *Yukon Act* is necessarily subject to that constitutional obligation. Thus, until the land claim is considered and settled, Canada has further obligations arising out of the honour of the Crown, such as the duty to consult and accommodate with respect to the lands, and any decisions to use or dispose of them. In

[203] *Van der Peet*, at para. 60 and elsewhere.
[204] Transcript, September 16, 2014, p. 116, line 42.

this sense, I agree with Canada that the provisions in the *Yukon Act* are not inconsistent with any rights RRDC has under the *1870 Order*.

[231] Once again, I appreciate that it may not be necessary for RRDC to prove an existing Aboriginal right under s. 35 in this action. In that sense, RRDC is correct to say that this is not a s. 35 case. However, RRDC's right to have its claims "to compensation for lands required for purposes of settlement" considered and settled effectively makes this a land claim case. Indeed, the Court of Appeal of Yukon expressly recognized this in its reasons, where it referred to this action as "in essence, a land claim".[205] I acknowledge that this does not mean that RRDC must prove that it has Indian or Aboriginal title to the lands at issue (the group and community trap lines), but that does not mean that the concept of Indian title is totally irrelevant to this case. On the contrary, there is evidence that suggests that the reason the Canadian Parliament and British Privy Council respectively included the relevant provision in the *1867 Address* and the *1870 Order* probably had to do with a concern about the unsurrendered Indian title in the lands required for the purposes of settlement within Rupert's Land and the North-Western Territory. The nascent concept of Indian title at that time was founded upon the prior occupation of the lands by the Indian tribes before contact with Europeans. Even if Indian title was not legally enforceable in the courts in or about 1867 to 1870, it would seem that the governing bodies of the day were nevertheless concerned about the morality of acquiring these lands without compensating the Indian tribes concerned.

[232] In addition, as the majority noted in *Van der Peet*, cited above, Aboriginal rights and Aboriginal title are related concepts; Aboriginal title is a subcategory of Aboriginal

[205] 2013 YKCA 6, at para. 4.

rights that deals solely with claims of rights to land.[206] I acknowledge that *Van der Peet* held that the time period that a court should consider, in identifying whether the Aboriginal right claimed meets the standard of being integral to the Aboriginal community claiming the right, is the period prior to contact between Aboriginal and European societies.[207] However, *Van der Peet* also held that the Aboriginal rights protected by s. 35(1) have the purpose of reconciling pre-existing Aboriginal societies with the assertion of Crown sovereignty over Canada.[208] Finally, *Van der Peet* clarified that the focus on the pre-contact period must be understood in the sense that the Aboriginal rights being claimed in the present (i.e. post-contact) must be shown to have "continuity" with the practices, customs and traditions that existed pre-contact.[209] At para. 43, Lamer C.J., speaking for the majority, stated:

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

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

---

[206] *Van der Peet*, at para. 74
[207] *Van der Peet*, at para. 60.
[208] *Van der Peet*, at para. 57 and elsewhere.
[209] *Van der Peet*, at paras. 59 - 64.

In other words, there is a linkage between what happened pre-contact and what is being asserted post-contact by virtue of the necessity of establishing "continuity" of the practices, customs and traditions.

[234] In the case of Aboriginal title, which is a subcategory of Aboriginal rights, one is dealing solely with claims of rights to land which arise from the First Nation's pre-contact use and occupation of the land.[210] With respect to the *1870 Order*, the reference to "claims of the Indian tribes to compensation for lands required for purposes of settlement" logically also arises from the pre-contact use and occupation of those lands by the Indian tribes.

[235] I agree with RRDC's counsel that the relevant provision is speaking to post-contact practices of the Crown in considering and settling such claims, particularly if that is done according to the equitable principles arising from the Royal Proclamation. However, it seems overly simplistic to ignore the fact that such claims were and are based on the pre-contact use and occupation of the lands by the Indian tribes, which in turn also gave rise, at least potentially, to the prospect that the Indian tribes had some form of Indian title to those lands. It is in this sense that I understand there to be an aspect of the relevant provision that relates to pre-contact Aboriginal rights, which are protected by s. 35(1) of the *Constitution Act, 1982*, whether RRDC chooses to rely on that provision or not. Therefore, the basis for RRDC's claim for compensation for the settlement of the group and community trap lines at issue must necessarily be based upon at least a notional claim of Indian/Aboriginal title to those lands, which in turn is an existing Aboriginal right protected by s. 3 of the *Yukon Act*.

---

[210] *Van der Peet*, at para. 74.

[236] It is for these reasons that I disagree with the suggestion of RRDC's counsel that the relevant provision deals exclusively with the post-contact obligations of the Crown and the post-contact rights of the First Nation. In my view, the underlying basis for the claim for compensation by RRDC for the settlement of its group and community trap lines is its pre-contact use and occupation of the lands. That, in turn, underlies a potential claim for Aboriginal title to such lands, which is protected by s. 3. Thus, there is no basis upon which to conclude that ss. 19(1) and 45(1) of the *Yukon Act* are inconsistent with RRDC's asserted constitutional rights under the *1870 Order*.

6. CONCLUSION

[237] It is appropriate to interpret the relevant provision today as a promise in a constitutional context which engages the honour of the Crown and seeks to reconcile the land rights of pre-existing Aboriginal societies, including the Kaska, with the assertion of Crown sovereignty over their lands. In particular, it was inconsistent with the honour of the Crown for Canada to have failed to attempt to obtain a treaty with the members of RRDC when their lands within their group trap line were required for purposes of settlement, which I have found would have been no later than 1969, with the construction of the town site of Faro, and the development of the Cyprus Anvil mine. Canada remained in breach of this constitutional obligation between that time and 1973, when RRDC's comprehensive land claim was accepted by Canada for negotiation.

[238] On the other hand, I am satisfied on the evidence both here and from the trial of the '06 Action that Canada has made a good faith effort to negotiate a treaty with RRDC in the modern era, in a manner that has upheld the honour of the Crown. Indeed, RRDC's counsel agreed during oral submissions that if a treaty/Final Agreement had been achieved, neither this action nor the '06 Action would have been necessary. It

does not matter whether Canada's intention in negotiating a land claim agreement with RRDC was motivated by RRDC's potential claim for Aboriginal title or a potential claim for compensation under the *1870 Order.* The ultimate purpose of the negotiations was to achieve reconciliation with the First Nation, given the Crown's assertion of sovereignty over the lands at issue. Simply put, had a deal been struck, the parties would not be here litigating these questions. Finally, the fact that there has not yet been a settlement agreement is not one that Canada can be held solely responsible for.

[239] In terms of the remedies, RRDC has confirmed that it is not seeking all of the relief set out in its statement of claim filed June 18, 2013. In particular, RRDC is not seeking the relief in paragraphs h, i or j. All of the remaining relief is declaratory. Tracking the paragraphs in RRDC's 'prayer for relief' in its statement of claim:

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

b. I declare that this commitment is a part of the Constitution of Canada and that it is binding on Canada:

    i. I declare that this commitment engages the honour of the Crown and that the honour of the Crown was not upheld by Canada in respect of this commitment over the period from at least 1969 to 1973 (the "breach"); and

ii. I further declare that Canada made a good faith attempt to consider and settle RRDC's land claim from 1973 to 2002, and that its efforts in that regard have upheld the honour of the Crown and have ameliorated its liability for the breach.

c. I decline to make a declaration that the claims of RRDC and other Kaska for compensation for lands comprising the Territory that have been alienated by Canada by way of grants, leases, licences or permits must be settled before any further such dispositions may be made by Canada to third parties;

d. I decline to make a declaration that any further dispositions, by way of grants, leases, licences, or permits, made by Canada in respect of land within the Territory, are invalid unless preceded by a settlement of RRDC's and other Kaska's claim for compensation in respect of such further dispositions;

e. I decline to make a declaration that, until such time as RRDC's and other Kaska's claims to the Territory have been considered and settled in conformity with the terms of the *1870 Order*, the lands which comprise the Territory are "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*;

f. I decline to make a declaration that, until such time as RRDC's and other Kaska's claims to the Territory have been considered and settled in conformity with the terms of the *1870 Order*, the lands which comprise the Territory are not available to Canada as a source of revenue:

i. I decline to make a declaration that s. 45 of the *Yukon Act*, S.C. 2002, c. 7, is inconsistent with the rights of RRDC and other Kaska under the *1870 Order* and is, therefore, of no force and effect in respect of the Territory;

ii. I decline to make a declaration that s. 19(1) of the *Yukon Act* is inconsistent with the rights of RRDC and other Kaska under the *1870 Order* and is, therefore, of no force and effect in respect of the Territory;

g. I decline to make a declaration that Canada is in breach of its constitutional duty to RRDC and other Kaska in respect of the Territory.[211]

[240] Costs for this trial have not yet been spoken to. As success was mixed, I would ordinarily expect each party to bear their own costs. However, if counsel are unable to agree on the issue, they may submit further written submissions on the point. RRDC is to submit its written submissions, if any, within 90 days of the date of this judgment. Canada 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.

GOWER J.

[211] I previously ruled in 2012 YKSC 4 that the relevant provision, even if justiciable, did not give rise to fiduciary obligations. That finding has not been appealed by RRDC and it remains unchallenged.

APPENDIX “A”

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

Bedford v. Canada (Attorney General), 2010 ONSC 4264;

Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42;

Chippewas of Sarnia Band v. Canada (Attorney General), (2000), 51 O.R. (3d) 641(CA);

Chippewas of Sarnia Band v. Canada (Attorney General), [2001] 1 S.C.C.A. No. 63;

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010;

Edwards v. Attorney-General for Canada, [1930] A.C.124 (P.C.);

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

Guerin v. Canada, [1984] 2 S.C.R. 335;

Haida Nation v. British Columbia, 2004 SCC 73;

Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14;

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85;

Nowegijick v. The Queen, [1983] 1 S.C.R. 29;

R. v. Blais, 2003 SCC 44;

R. v. Calder, [1973] S.C.R. 313;

R. v. Sparrow, [1990] 1 S.C.R. 1075;

R. v. St. Catharine’s Milling and Lumber Co. (1887), 13 S.C.R. 577, aff’d (1888), 14 App. Cas. 46 (J.C.P.C.);

R. v. Van der Peet, [1996] 2 S.C.R. 507;

Reference re Same-Sex Marriage, 2004 SCC 79;

Reference re Succession of Québec, [1998] 2 S.C.R. 217;

Reference re: Manitoba Language Rights, [1985] 1 S.C.R. 721;

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27;

Ross River Dena Council Band v. Canada, 2002 SCC 54;

Ross River Dena Council v. Canada, 2009 FC 391;

Singh v. Canada (A.G.), [2000] 3 F.C. 185;

The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, [1981] 4 C.N.L.R. 86; and

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.