MANDELL PINDER

422 - 1080 MAINLAND STREET | VANCOUVER, BC | V6B 2T4
RECEPTION SUITE 300 | T 604.681.4146 | F 604.681.0959

***Ross River Dena Council v. Canada (Attorney General)*, 2012 YKSC 4**

Case Comment

Introduction

This is a case about the interpretation of historical constitutional documents. The question here was whether it was intended at the time of the 1870 Order admitting Rupert's Land and the North-western Territory into Canada that the Crown would have an obligation to negotiate compensation for lands required for settlement. The interpretation of the 1870 Order depends largely measure on legislative intent and historical context *circa* 1870. The Crown called an expert legal historian to give evidence on the historical context of the 1870 Order and to provide an account of how the Order would have been understood as a legal instrument by the representatives of the Imperial Crown who were involved at that time. The Court accepted the expert's opinion evidence to conclude that in 1870, this provision was not intended to have legal force and effect or to be enforceable in the courts. The Court emphasized that we cannot look back based on the current law of Aboriginal title to give meaning to these historical documents.

Background

On July 15, 1870, over 7.5 million square kilometres of British North America – Rupert's Land and the North-western Territory – were incorporated into the Dominion of Canada pursuant to the *Rupert's Land and North-western Territory Order* of June 23, 1870 (the "1870 Order"). 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 section 146 of the *BNA Act, 1867*.

Shortly after the acquisition of Rupert's Land and the North-Western Territory in 1870, Canada began a process of negotiating treaties with certain Aboriginal peoples: Treaty No. 1 was concluded in 1871 and the last of the numbered treaties, Treaty No. 11, was concluded in 1921.

However, to date, the claims of the Kaska, including the Ross River Dena Council ("RRDC"), to compensation for lands required for purposes of settlement have not been resolved.

At issue in this case was the interpretation of the following provision found in Schedule A to the 1870 Order:

> ...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. (emphasis added)

The Supreme Court of Yukon considered two questions:

> (1) whether the terms and conditions referred to in the 1870 Order concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement" were intended to have legal force and effect and give rise to obligations capable of being enforced by the Court [referred to by the Court as being "justiciable" obligations]; and
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> (2) if the answer is yes, are those enforceable obligations of a fiduciary nature?

The Court first held that the relevant terms and conditions in the 1870 Order were not intended to have legal force "at that time" and have not since acquired legal force. Instead, the Court held that by way of the 1870 Order, Canada assumed jurisdiction over Aboriginal affairs in the North-western Territory, including executive discretion to enter into treaties but not a legal obligation to do so. Secondly, although not necessary to decide the case, the Court held that even if the relevant terms and conditions in the 1870 Order had legal force, they would not be fiduciary obligations.

1. Did the 1870 Order Create Enforceable Legal Obligations?

Expert Evidence

The Court relied heavily upon the expert evidence of Dr. Paul McHugh ("McHugh"),[1] a legal historian called by Canada. McHugh provided an expert opinion on the historical context of the

[1] Dr. McHugh also testified as an expert for the Crown in *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.N.L.R. 56 (OCA).

1870 Order, the legal understanding of the Crown's role at the time of the 1870 Order, and how the 1870 Order would have been understood as a legal instrument at that time.

Essentially, McHugh's opinion that the Crown's relations with Indian tribes in respect of their land rights were not regarded as justiciable or enforceable by legal process until the late 20th century. In 1870, the Crown's relations with Aboriginal people could be characterized as "Crown beneficence and guardianship".

McHugh testified that the Hudson Bay Company ("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, 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.

RRDC did not call its own expert witness, and instead relied upon books and academic articles to demonstrate the intent and context of the 1870 Order. The Court gave little weight to RRDC's evidence on the basis that the authors reached their conclusions through the lens of contemporary legal analysis as lawyers rather than through an historical lens to understand Crown-Aborigianl relations in the second half of the 19th century.

Statutory Interpretation

The Court began its reasons with a review of the modern principle of statutory interpretation. The Court then reviewed the principles of statutory interpretation applicable to constitutional documents relating to Aboriginal people. The Court noted it must take both a purposive approach to the interpretation of a constitutional document and one that allows the document to be "capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers." However, the Court relied on *R. v. Blais*, 2003 SCC 44, and noted that it:

- was "not free to invent new obligations foreign to the original purpose" of the relevant provision;

- must not "overshoot" that original purpose; and
- must place the relevant provision in its "proper linguistic, philosophic and historical context" and not confuse generous rules of interpretation with "a vague sense of after-the-fact largess."

The Court reasoned that the provision did not impose a legally enforceable duty upon Canada at the time, and noted that RRDC did not make any arguments about how or why the provision could have subsequently acquired legal force and effect.

Honour of the Crown

While the Court agreed that the honour of the Crown should be considered in every dispute between the Crown and Aboriginal peoples, and enforced where appropriate, it stated it was not clear "[p]recisely how the honour of the Crown impacts upon the analysis of whether the relevant provision was intended to be and is currently justiciable." The Court held that the honour of the Crown would not have been considered a legally enforceable principle at the time and in the specific context of the 1870 Order.

The Requirement to Negotiate Treaties

Canada argued that the 1870 Order did not create a positive obligation on the Crown to settle claims for compensation of Aboriginal peoples. The Court agreed and held that while a "just resolution" of claims is required, Canada is not required to negotiate *per se* and that Canada retains the discretion to decide if, when, and how to negotiate, as a matter of Crown prerogative.

2. Did the 1870 Order Result in Canada Owing Fiduciary Obligations to RRDC?

The Court held that even assuming the relevant provision in the 1870 Order created enforceable obligations, in order to find that those obligations were of a fiduciary nature, RRDC had to demonstrate both a specific Indian interest in the claimed territory and that Canada assumed discretionary control in relation to that specific Indian interest.

The Court held that a fiduciary obligation cannot attach to lands where the claim to Aboriginal title remains unproven. As a result, the Court held that RRDC failed to meet this onus to show a specific interest.

The Court also went on to find that it was clear from the context that Canada did not intend to undertake to act on behalf of, and in the best interests of, any particular group. Rather, in undertaking discretionary control of the territory, Canada was acting in the best interest of the public at large, not in the interest of RRDC.

Some Lessons Learned

(a) The significant role of experts

This case emphasizes the important role of expert evidence in the statutory interpretation of historical and constitutional statutes. In this case, there was no battle of the experts as is often seen in aboriginal rights and title cases. RRDC did not call expert evidence. The Court relied heavily on Canada's witness, McHugh, who was qualified as an expert legal historian with experience in research, and interpreting historical documents from a historical perspective and in Crown-Aboriginal relations *circa* 1870. The Court declined to give significant weight to the contrary academic authorities (including the writings of Dr. Kent McNeil and Professor Frank Tough), relied upon by RRDC. The Court held that these authors "reached their conclusions through the lens of a contemporary legal analysis as lawyers."

(b) It's a matter of evidence, not logic

The Court held that analysis of legislative intent of Parliament (federal or Imperial), and of historical context requires some evidence. To support its interpretation of the 1870 Order, RRDC had pointed to other statutes dealing with the same subject matter to show that they must all be interpreted with consistency. Instead of concluding that the 1870 Order was enforceable, the Court cast doubt on whether the other statutes referred to included enforceable obligations. For example, relying again on McHugh's evidence, the Court expressed doubt that the *Royal Proclamation, 1763* gave rise to enforceable obligations. RRDC also relied on the 1875 federal disallowance of the provincial *Land Act* (B.C.), but again, the Court was concerned about the lack of evidence regarding the historical context of the disallowance, and again, there was the opinion of McHugh as to the general understanding of matters of Aboriginal title in B.C. at that time.

In addition to other statutes in and around the time of the 1870 Order, RRDC pointed to the post-confederation treaty process (from 1871 to 1921) as an aid to understanding the intent of the 1870 Order. Again, the Court accepted McHugh's opinion that the treaties were not negotiated out of any sense of legal obligation, but rather reflected at that time the Crown's conception of a high political trust and sense of honour to treat.

While the Court said the logic of RRDC's arguments was "appealing", there was no evidence to support the conclusions RRDC was urging as to the legal nature of the obligation to compensate the Indian tribes.

(c) The Return of the "Political Trust"

The Crown has resurrected its arguments about Crown prerogative, executive grace and discretion. The argument goes like this. It is up to the Crown to decide whether it will enter treaty: while it may be politically prudent for the Crown to do so, there is no legal obligation on the Crown. This kind of argument was unequivocally and unanimously rejected nearly 30 years ago in the *Guerin* case. In this case, focussing on what the Imperial Crown thought in 1870, as explained by McHugh, Crown discretion prevailed over legal obligations.

Next Steps

It is expected that RRDC will appeal this decision, and it will be an important case to watch as it proceeds up the court ladder. Also of note is that currently, the Supreme Court of Canada has reserved its decision the *Manitoba Métis Federation* case. That case also involves the interpretation of constitutional documents, and in that case, Canada relied on three expert witnesses (two historians and one political scientist). We will also be watching and reporting on the *Manitoba Metis Federation* case.