COURT OF APPEAL OF YUKON

Citation: *Ross River Dena Council v. Canada (Attorney General)*, 2019 YKCA 3

Date: 20190219
Docket: 17-YU819

Between:

Ross River Dena Council

Appellant
(Plaintiff)

And

Attorney General of Canada

Respondent
(Defendant)

Before: The Honourable Mr. Justice Savage
The Honourable Madam Justice Fisher
The Honourable Madam Justice Smallwood

On appeal from: An order of the Supreme Court of Yukon, dated October 23, 2017 (*Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 58, Whitehorse Registry 05-A0043).

Counsel for the Appellant:	Stephen Walsh Claire Anderson
Counsel for the Respondent:	Andrew Fox Eden Alexander
Place and Date of Hearing:	Whitehorse, Yukon November 19 and 20, 2018
Place and Date of Judgment:	Vancouver, British Columbia February 19, 2019

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Madam Justice Smallwood

Concurring Reasons by:
The Honourable Madam Justice Fisher (**page 46, para. 139**)

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Summary:

The appellant commenced an action seeking declarations concerning the proper interpretation and the legal effect of an undertaking made by Canada in 1867 to consider and settle, in conformity with certain equitable principles, the claims of Indigenous peoples to compensation for lands in Yukon required for the purposes of settlement. This undertaking became a provision in a statute included in the Constitution of Canada. The trial judge held that the provision imposed a mandatory constitutional obligation on Canada to consider and settle the appellant's claims to compensation for its land required for purposes of settlement, notwithstanding the original legislative intent not to create a legal obligation. He further held that the provision did not require Canada to settle claims before opening lands to settlement and that two sections of the Yukon Act concerning the Yukon government's powers respecting natural resources were consistent with the appellant's constitutional rights under the provision. The judge found that Canada breached its constitutional obligation to the appellant from 1969 to 1973 by opening lands for settlement without engaging in negotiations, but that its good faith attempts to settle the appellant's claim from 1973 to 2002 ameliorated its liability for the earlier breach.

The appellant argues the judge made various interpretive errors that led to three erroneous conclusions: (1) that the provision was originally intended not to create a legal obligation; (2) that the provision did not create a condition precedent to opening lands for settlement; and (3) that the impugned sections of the Yukon Act were consistent with the appellant's constitutional rights under the provision. The appellant also challenges the judge's procedural decision to suspend the within action until a related action was tried and his conclusion that good faith negotiations could ameliorate liability for a prior breach of a constitutional right.

Held: appeal dismissed. The judge did not err in his interpretation of the relevant provision. He did not give unwarranted weight to expert opinion evidence, he did not fail to consider or give weight to relevant legislative provisions, and he did not err by considering s. 35 jurisprudence as an interpretive aid. Thus, there was no error in the judge's conclusions that the provision was originally intended not to have legal effect, that the provision did not create a condition precedent to opening lands for settlement, and that the impugned sections of the Yukon Act were consistent with the appellant's constitutional rights. The judge's decision to suspend the within action until the related action was tried cannot be challenged in this appeal as it is not included in the order under appeal. In any event, it was not an improper exercise of discretion. The judge's holding concerning amelioration must be confined to mean that Canada's good faith negotiations with the appellant from 1973 to 2002 effectively remedied its failure to engage in good faith negotiations from 1969 to 1973. Negotiations that are conducted in good faith but are ultimately unsuccessful cannot ameliorate a prior breach of a substantive constitutional right, other than a right to good faith negotiations.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. INTRODUCTION

[1] This appeal concerns the proper interpretation, and the legal effect, of a provision of the *Rupert's Land and North-Western Territory Order* (U.K.), reprinted in R.S.C. 1985, App. II, No. 9 (the "1870 Order"). The relevant provision (the "Transfer Provision") of the 1870 Order reads:

> [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.

[2] The trial judge, Mr. Justice Gower, found that the Transfer Provision constituted an assurance that the Dominion of Canada would treat the Indigenous peoples of Canada according to the same "equitable principles" that the British Crown did, but that it was intended as a moral, and not a legal, obligation.

[3] The judge found that the Transfer Provision did not give rise to an obligation of the Crown that could be enforced by the courts in 1870, but that a court today has the jurisdiction to review the constitutionality of past Crown actions and issue declaratory relief when appropriate. The judge therefore concluded that it was appropriate to issue declaratory relief at the time of trial.

[4] The judge held that the "equitable principles which have uniformly governed the British Crown in its dealings with the aborigines" emanate from the *Royal Proclamation of 1763*, reprinted in R.S.C. 1985, App. II, No. 1, and those principles contemplate a duty to treat—i.e., a duty to consider and settle claims for compensation for lands—that arises where the Crown requires lands for settlement. The duty to treat includes a duty to negotiate in good faith toward the settlement of land claims.

[5] The judge found that the duty to treat arose no later than 1969 when certain lands within the Ross River Dena Council ("RRDC") claim area were required for settlement at Faro, Yukon. Canada was in breach of these obligations from 1969

until 1973. Canada engaged in good faith negotiations during the period from 1973 to 2002 (following Canada's adoption of a new comprehensive land claims policy), which ameliorated the breach.

[6] Thus, the judge made the following conclusions regarding the declaratory relief sought by RRDC (in reasons for judgment indexed as 2017 YKSC 58):

> [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. [Footnote omitted.]

Declarations a and b are included in the order pronounced by the judge, which is attached to these reasons as Schedule A.

[7] RRDC argues that the judge made two principal errors: (1) he erred in determining the Transfer Provision was intended to be a moral but not a legal obligation; and (2) he erred in finding that the Crown's breach of a constitutional undertaking was ameliorated by good faith, but ultimately unsuccessful, modern-day land claims negotiations from 1973 to 2002. RRDC says that any laws that are inconsistent with the constitution are of no force and effect, and that Canada's breach of its constitutional undertaking is ongoing. Thus, RRDC says it is entitled to declarations it sought which the judge refused.

[8] The Crown supports the declarations made (a and b above), and the judge's refusal to make the other declarations sought, as appropriate.

[9] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

A. Background Facts

[10] RRDC is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. RRDC and its members are part of the Kaska tribe of Indians, known today as the Kaska Nation, one of the Aboriginal peoples of Canada. The Kaska Nation is one of the Indian tribes referred to in the Transfer Provision.

[11] The Kaska claim, as their traditional territory, a tract of land that includes what is now the south-eastern part of Yukon, as well as adjacent lands in the Northwest Territories and British Columbia. This proceeding concerns only a portion of the Kaska's claimed traditional territory, located within two trap lines in Yukon: Trapping Concessions Nos. 405 and 415.

[12] The underlying historical facts are not in dispute. Many of the salient facts were concisely summarized by Mr. Justice Groberman in reasons indexed as *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6, which the parties have incorporated into agreed facts and which I paraphrase.

[13] Upon confederation in 1867, Canada included only a small portion of the land mass that currently makes up the country. At the time of confederation, the vast territories to the west and northwest of what was then Canada were known as Rupert's Land and the North-western Territory.

[14] Section 146 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, provided for the expansion of Canada in two ways: (1) through the entry into confederation of the colonies of Newfoundland, Prince Edward Island and British Columbia; and (2) through the incorporation of Rupert's Land and the North-western Territory into the Dominion of Canada. Section 146 contemplated incorporation of the North-western Territory into Canada by imperial Order-in-Council following a request by the Canadian Parliament:

> 146. It shall 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 … the North-western Territory … 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 … 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.

[15] The land that now constitutes Yukon was formerly part of the North-western Territory. Thus, the portion of RRDC's claimed land at issue in this appeal was, prior to 1870, part of the North-western Territory referred to in s. 146 of the *Constitution Act, 1867*.

[16] In December 1867, during the first session of the Canadian Parliament, the Senate and House of Commons agreed to send a joint address to the Queen-in-Council seeking to have Rupert's Land and the North-western Territory made a part of Canada (the "1867 Joint Address"). Among the terms and conditions included in the address were the following:

> 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.
>
> And furthermore, that, 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.

The latter undertaking subsequently became the Transfer Provision that is at issue in this appeal.

[17] The existing rights of the Hudson's Bay Company, particularly in Rupert's Land, complicated the matter. Tri-partite negotiations among the United Kingdom, Canada and the Hudson's Bay Company occurred, and an agreement was achieved in March 1869 for the surrender, on terms, of the rights of the Hudson's Bay Company.

[18] However, as per the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), reprinted in R.S.C. 1985, App. II, No. 6, a statute enacted by the Imperial Parliament on July 31, 1868, a surrender by the Hudson's Bay Company of its rights or territories could not be accepted without a joint address from the Senate and House of Commons. Section 3 of the *Rupert's Land Act, 1868* provided:

> It shall be competent for the said Governor and Company to surrender to Her Majesty, and for Her Majesty ... to accept a Surrender of all or any of the Lands, Territories, Rights,... whatsoever granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land, upon such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company; provided, however, that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and

> embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada in pursuance of the One hundred and forty-sixth Section of the *British North America Act, 1867*...
>
> [Emphasis added.]

[19] The Senate and House of Commons subsequently adopted a second joint address in May 1869 (the "1869 Joint Address"), as required by s. 3 of the *Rupert's Land Act, 1868.* The 1869 Joint Address is attached as Schedule B to the 1870 Order.

[20] What transpired following transmission of the 1867 Joint Address to the Queen-in-Council is described in the following resolutions dated May 28, 1869, which are set out in Schedule B to the 1870 Order:

> ***Resolved***,—That the Joint Address of the Senate and Commons of Canada was duly laid at the foot of the throne, and that Her Majesty, by despatch from the Right Honourable the Secretary of State for the Colonies, to the Governor-General of Canada, under date of the 23rd of April, 1868, signified her willingness to comply with the prayer of the said Address; but She was advised that the requisite powers of government and legislation could not, consistently with the existing charter of the Hudson's Bay Company, be transferred to Canada without an Act of Parliament, which Act was subsequently passed by the Imperial Parliament, and received Her Majesty's Assent on the 31st July, 1868.
>
> ***Resolved***,—That by despatch dated 8th August, 1868, from Honourable Secretary of State for the Colonies, the Governor-General was informed, that in pursuance of the powers conferred by the Act for the surrender of the Hudson Bay territories to Her Majesty, he proposed to enter into negotiations with the Company as to the terms of such surrender, whereupon, under authority of an order of the Governor-General in Council of the 1st October, 1868, the Honourable Sir George Et. Cartier, Baronet, and the Honourable William McDougall, C.B., were appointed a Delegation to England, to arrange the terms for the acquisition by Canada of Rupert's Land, and by another Order in Council of the same date, were authorized to arrange for the admission of the North-West Territory into union with Canada, either with or without Rupert's Land, as it might be found practicable and expedient.
>
> [Emphasis added.]

The "Act" referred to in the first resolution above, is the *Rupert's Land Act, 1868*.

[21] In mid-1869, when it appeared probable to the Canadian government that the Queen-in-Council would approve the transfer of Rupert's Land and the North-western Territory in the near future, the Canadian government enacted legislation to

provide for temporary government measures pending that transfer. Accordingly, *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada* (1869), 32-33 Vict., c. 3 (Canada), reprinted in R.S.C. 1985, App. II, No. 7 [*Temporary Government of Rupert's Land Act, 1869*], was assented to on June 22, 1869.

[22] Eventually, the government of the United Kingdom approved the required Order-in-Council in 1870. The 1870 Order expressly incorporated the terms of the 1867 Joint Address, including the Transfer Provision. The 1867 Joint Address is included in Schedule A to the 1870 Order.

[23] The 1870 Order is, pursuant to s. 52(2)(b) and the Schedule to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, part of the Constitution of Canada. With respect to the terms and conditions applicable to the admission into Canada of the North-western Territory, the 1870 Order states:

> It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, ... that from and after [July 15, 1870] ... 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 [1867 Joint Address] …
>
> [Emphasis added.]

[24] As for the terms and conditions applicable to Rupert's Land admission into Canada, the 1870 Order states that:

> ... Rupert's Land shall from and after [July 15, 1870] be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the [1869 Joint Address] …
>
> [Emphasis added.]

[25] After Rupert's Land and the North-western Territory was admitted into Canada on July 15, 1870, Canada began negotiating treaties with certain of the Aboriginal peoples occupying these lands. The first of these numbered treaties, Treaty No. 1, was concluded in 1871, and the last, Treaty No. 11, was concluded in 1921. None of these numbered treaties deal with the lands at issue. As found by the

trial judge, Canadian settlement of the lands at issue in this proceeding began at least as early as 1969, with the opening of a mine and building of the townsite of Faro.

[26] 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, which acknowledged Indigenous interests in certain land areas, and allowed for the negotiation and settlement of claims where those interests could be shown not to have been previously resolved.

[27] RRDC's claims to Aboriginal rights and title in the Kaska traditional territory formed part of the claims of the Indigenous peoples of Yukon, which were the first comprehensive claims accepted for negotiation by Canada in 1973. Negotiations occurred from 1973 until 2002, when they concluded without a settlement.

[28] The basis for Canada's comprehensive land claims policy, published in 1986, is to fulfill the treaty process through the conclusion of land claim agreements with those Aboriginal peoples of Canada who continue to use and occupy traditional lands and whose Aboriginal title has not been dealt with by treaty or superseded by law.

[29] To date, the Kaska's claims for compensation for lands required for the purpose of settlement have not been resolved. In the actions brought by RRDC, it asserts that the 1867 Joint Address of the Canadian Parliament to the Queen-in-Council, as incorporated in the 1870 Order, placed affirmative duties on the Crown in right of Canada to negotiate with the Kaska Nation and to provide appropriate compensation before embarking on settlement of lands in its traditional territory. The effect of this is to impose a "land freeze" on use and development of the lands pending settlement of those claims.

B. Procedural History

[30] In June 2005, RRDC commenced the original proceeding as the representative plaintiff of the Kaska Nation to determine the meaning of the Transfer

Provision. The parties refer to this proceeding as the "2005 Action". As I have described, the lands at issue in the 2005 Action are located within a group trap line and a community trap line registered to RRDC. The community trap line is in and around the community of Ross River, and is subsumed within the larger group trap line, which constitutes slightly more than 7% of the area of Yukon. In the 2005 Action, RRDC asserts that the Transfer Provision constitutionally obliges Canada to consider and settle its claim to this Kaska traditional land before opening it up for settlement.

[31] RRDC also commenced a second action in October 2006, in its own right, to determine whether Canada failed to negotiate RRDC's comprehensive land claims in good faith from 1973 to 2002. The parties refer to this proceeding as the "2006 Action". The whole of the asserted Kaska traditional territory in Yukon is approximately 110,000 square kilometres and constitutes approximately 23% of Yukon's landmass. This area is also claimed by Liard First Nation, the other Kaska First Nation in Yukon, which has similarly been involved in the comprehensive land claims process with Canada and Yukon. Canada acknowledged RRDC as the authorized representative of its members in respect of its comprehensive land claims in and to the Kaska traditional territory in Yukon: *Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 59 at para. 1.

[32] The underlying proceeding is a continuation of the trial for the 2005 Action, which originally commenced in November 2011. It was initially agreed that the 2005 and 2006 Actions would be tried together. At the commencement of trial, the parties asked the judge two threshold questions: (1) is the Transfer Provision justiciable (i.e., does it give rise to obligations that are enforceable in court); and (2) does the Transfer Provision give rise to fiduciary obligations? The trial judge answered both questions in the negative: *Ross River Dena Council v. The Attorney General of Canada*, 2012 YKSC 4.

[33] RRDC successfully appealed to the Court of Appeal on the first question. The Court of Appeal found that the judge erred in severing the issue for determination prior to trial and in assuming the Crown's contemporary obligations under the 1870

Order were determined by the original intentions of the Canadian Parliament and British Privy Council in 1867 and 1870: 2013 YKCA 6 at paras. 32-33, 37-40. The judge's order was quashed, and the first question was remitted back to the Supreme Court. The judge's decision on the second threshold question was not appealed.

[34] The trial resumed in September 2014, with the parties agreeing that only the 2005 Action would be tried. Following the appeal, both RRDC and Canada amended their pleadings to make reference to the honour of the Crown. RRDC pleaded that the Transfer Provision engages the honour of the Crown and that the honour of the Crown was not upheld by Canada. Canada argued that it acted honourably in its dealings with RRDC by engaging in comprehensive land claim negotiations from 1973 to 2002.

[35] On July 14, 2015, the judge suspended his decision in the 2005 Action until after the 2006 Action was tried (the "2015 Procedural Decision"): *Ross River Dena Council v. The Attorney General of Canada*, 2015 YKSC 33. The judge did so in order to receive all of the evidence on whether Canada negotiated in good faith from 1973 to 2002. The judge reasoned:

> [44] In conclusion, I agree with Canada that, in these particular circumstances, it is appropriate to suspend my decision on the modern-day interpretation of the *1870 Order* until the issues in the '06 Action are tried. RRDC's asserted right to obtain a treaty before their lands were opened up for settlement is not absolute. Rather, it is subject to infringement by Canada, providing the infringement can be justified. For the sake of this argument, I will assume that the *1870 Order* gives rise to a binding constitutional obligation on Canada to consider and settle RRDC's claims before opening up their lands for settlement. I will further assume that there was an historic breach of that obligation by Canada by opening up the lands before commencing negotiations in 1973. However, if Canada can establish that it conducted itself in accordance with the honour of the Crown throughout the modern era negotiations, and was unable to obtain a treaty with RRDC notwithstanding, then that finding may have an ameliorating effect on any historic breach. Thus, the issue of whether the honour of the Crown was upheld during the negotiations is inextricably intertwined with whether Canada can be held liable for any historic breach. Accordingly, Canada should be given a full opportunity to establish that it interpreted the [Transfer Provision] in a purposive manner and diligently pursued fulfillment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis*, [citation omitted].
>
> [Emphasis in original.]

[36] The 2006 Action was tried over six days in April 2017. In reasons for judgment released concurrently with the reasons for the decision on appeal, Mr. Justice Gower found that RRDC had not proven that Canada failed to negotiate in good faith towards a settlement of RRDC's comprehensive land claim from 1973 to 2002: *Ross River Dena Council v. Canada (Attorney General),* 2017 YKSC 59. RRDC appealed but has since abandoned its appeal in the 2006 Action.

C. Trial Judge's Decision in the 2005 Action

[37] The reasons for judgment of the decision under appeal (the decision in the 2005 Action) are indexed as *Ross River Dena Council v. Canada (Attorney General),* 2017 YKSC 58 ("RFJ"). In his reasons, the judge concluded that the Transfer Provision is part of the Constitution of Canada, engages the honour of the Crown and remains binding on Canada. He also held that Canada did not uphold the honour of the Crown in respect of the Transfer Provision from at least 1969, when development of the townsite of Faro began, to 1973, when Canada began good faith attempts to settle RRDC's land claims. The judge also found that Canada's good faith negotiation efforts from 1973 to 2002 "ameliorated" Canada's liability for its earlier breach, which persisted from at least 1969 to 1973.

[38] The judge found that the Transfer Provision imposed a mandatory constitutional obligation on Canada. Relying on the evidence of two historical experts, the judge concluded, however, that Parliament and the British Privy Council intended to create a moral obligation on Canada at the time the Transfer Provision was enacted but not a legal obligation that was enforceable in the courts.

[39] The trial judge held that four established legal norms—(1) the honour of the Crown; (2) progressive interpretation of the Constitution over originalism; (3) generous and liberal interpretation of constitutional documents affecting Aboriginal peoples; and (4) respect for minority rights—suggest that the Transfer Provision creates a binding constitutional obligation on Canada to consider and settle the claims of Indigenous peoples for compensation for their traditional lands required for the purposes of settlement, notwithstanding the original legislative intent not to create a legal obligation. The judge held that the Transfer Provision's ordinary

meaning and the legislative scheme incorporating it into the Constitution also suggested that the Transfer Provision created a binding constitutional obligation.

[40] The judge held that the "equitable principles" referenced in the Transfer Provision are the principles emanating from the *Royal Proclamation of 1763*. Neither party takes issue with that proposition.

[41] The judge declined to declare that Canada was obliged to consider and settle RRDC's land claim before opening the subject lands to settlement. The judge concluded that, unlike the other provisions in the 1870 Order that provided clear timelines, the Transfer Provision did not impose any temporal deadline to compensate RRDC before opening lands for settlement. The judge also held, relying on *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 26-27 and 48, that imposing a "land freeze" before claims are settled would be inconsistent with the modern-day Aboriginal rights and title claims process, in which the Crown has a duty to consult and accommodate but no duty to halt the management and development of land pending settlement of claims. There is not a veto but a balancing of interests.

[42] The judge also held that the subject territory was not "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*. The judge found no evidence from which to infer that Canada had intended to reserve the subject territory as "Lands reserved for the Indians". He found the references to "territories" and "lands" in the 1870 Order to be too general to constitute a formal expression of intent.

[43] The judge held that ss. 19(1) and 45(1) of the *Yukon Act*, S.C. 2002, c. 7, which concern the Yukon government's powers respecting natural resources, were consistent with RRDC's constitutional rights under the 1870 Order. The judge found that the *Yukon Act* was subject to Canada's constitutional obligation to consider and settle RRDC's land claim. Although the judge concluded that RRDC's claim did not arise from s. 35 of the *Constitution Act, 1982*, he nevertheless held that s. 3 of the *Yukon Act*, which protects the s. 35 rights of Aboriginal peoples, protected RRDC's

claim since the claim's underlying basis was RRDC's pre-contact use and occupation of the subject territory.

D. Chronology

[44] The parties provided a useful chronology of events leading up to and including the litigation history which I have consolidated as follows:

October 7, 1763	*Royal Proclamation of 1763* issued by King George III.
1865	*Colonial Laws Validity Act* (U.K.) is enacted.
July 1, 1867	*Constitution Act, 1867* comes into force.
December 16-17, 1867	First Address by the Canadian Parliament to Her Imperial Majesty (the 1867 Joint Address).
1868	*Rupert's Land Act, 1868* (U.K.) is enacted.
1869	*Temporary Government of Rupert's Land Act, 1869* is enacted.
May 29 & 31, 1869	Second Address by the Canadian Parliament to Her Imperial Majesty (the 1869 Joint Address).
June 23, 1870	The 1870 Order, admitting Rupert's Land and the North-western Territory into Canada as of July 15, 1870, is enacted.
1872	*Dominion Lands Act* is enacted.
January 23, 1875	Report of the Minister of Justice recommending disallowance of the *B.C. Lands Act, 1875* is approved by the Governor-General-in-Council.
1898	*Yukon Act* is enacted.
1908	*Dominion Lands Act* is amended such that Yukon is largely exempted from its application by s. 4(2).
1912	*Quebec Boundaries Extension Act, 1912* is enacted.
January 31, 1973	Supreme Court of Canada releases its decision in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.
1973	Canada announces its comprehensive land claims policy. The Kaska's claims are accepted for negotiation.
April 17, 1982	*Constitution Act, 1982* is enacted.
June 22, 2005	Writ is issued in the 2005 Action.

October 16, 2006	Writ is issued in the 2006 Action.
June 6, 2011	Trial judge directs that threshold question #1 be tried from November 14-25, 2011.
August 26, 2011	Trial judge directs that threshold question #2 be tried with threshold question #1.
November 24, 2011	Trial judge holds that Dr. McHugh's report and testimony are admissible (2011 YKSC 87).
January 31, 2012	Trial judge holds that threshold questions #1 and #2 should be answered in the negative (2012 YKSC 4).
February 29, 2012	RRDC files notice of appeal in regard to judge's decision on threshold questions.
May 9, 2013	Court of Appeal of Yukon overturns trial judge's decision on the threshold questions (2013 YKCA 6).
September 2014	Trial of the 2005 Action recommences.
July 14, 2015	Trial judge makes 2015 Procedural Decision to suspend judgment in the 2005 Action until after the 2006 Action is tried (2015 YKSC 33).
August 3, 2015	RRDC files notice of appeal in regard to 2015 Procedural Decision.
February 19, 2016	RRDC files notice of abandonment in regard to appeal of 2015 Procedural Decision.
April 5, 2017	Trial of 2006 Action commences.
October 23, 2017	Reasons for judgment released for both the 2005 Action (2017 YKSC 58) and the 2006 Action (2017 YKSC 59).
November 21, 2017	RRDC files notice of appeal in the 2005 and 2006 Actions.
December 7, 2017	Canada files cross appeal in the 2005 Action.
March 9, 2018	Order made that the appeals of the 2005 and 2006 Actions shall be held together in November 2018.
April 3, 2018	RRDC files notice of abandonment of appeal in 2006 Action.

III. ISSUES ON APPEAL

[45] RRDC says the trial judge erred in:

1. interpreting the Transfer Provision of the 1870 Order as intending to be a moral but not a legal obligation;
2. failing to find that the Transfer Provision constitutes a condition precedent to opening the lands at issue for settlement and disposing of interests in the lands;
3. failing to find sections 19(1) and 45(1) of the *Yukon Act* inconsistent with the Transfer Provision and therefore of no force and effect with respect to the lands at issue;
4. suspending judgment of the 2005 Action until after the 2006 Action was tried; and
5. concluding that Canada's post-1973 conduct ameliorated its historic breach of RRDC's constitutional rights from 1969 to 1973.

[46] Canada supports the decision of the trial judge on these issues.

IV. INTERPRETATION OF 1870 ORDER

[47] As the first three issues concern the interpretation and legal effect of the Transfer Provision of the 1870 Order, I will deal with them under one heading.

[48] RRDC submits that the judge erred in two ways. First, RRDC says the judge erred by finding that Parliament and the British Privy Council intended the terms and conditions of the 1870 Order to have moral but not legal effect. In doing so, the judge erroneously conflated legal enforceability with constitutional effect by finding that the Transfer Provision did not create a condition precedent requiring Kaska claims to be settled prior to opening their traditional lands for settlement. Second, RRDC submits the judge erred by applying the interpretive principles applicable to asserted but unproven s. 35 Aboriginal rights, and consequently erred in failing to find ss. 19(1) and 45(1) of the *Yukon Act* inconsistent with Canada's constitutional obligations in the Transfer Provision.

[49] RRDC frames as an issue the judge's finding that the Transfer Provision of the 1870 Order created a moral obligation and not a legal obligation at the time of enactment. In characterizing the Transfer Provision in this way, the judge was contrasting the Transfer Provision with laws that, at the time, could be enforced through litigation. The judge correctly found that the Transfer Provision created constitutional obligations that are now enforceable by litigation.

[50] Whether it is appropriate to characterize such an obligation, at the time of enactment, as merely "moral" or "political", as opposed to "legal", seems, with respect, of no moment. Ultimately, RRDC argues that the proper interpretation of the Transfer Provision of the 1870 Order is to create a binding condition precedent that requires Kaska claims to be settled prior to opening their traditional lands for settlement. The submissions supporting that are founded on the interpretation issues raised in the appeal which I will now address.

A. Legal Enforceability and Constitutional Effect

[51] RRDC submits that the judge erred in his approach to interpreting the Transfer Provision. The most fundamental error alleged is that he confused or conflated two concepts: legal enforceability and constitutional effect.

[52] RRDC says this general error pervaded the judge's analysis and contributed to his erroneous findings that: (1) the 1870 Order was only of moral and not legal effect at the time of enactment; (2) the terms and conditions of the 1867 Address did not constitute a condition precedent requiring the Kaska claims to be settled prior to opening their traditional lands for settlement or disposition; and (3) ss. 19(1) and 45(1) of the *Yukon Act* were consistent with the Kaska's constitutional rights under the 1870 Order and thus could not be declared of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[53] Thus, RRDC submits, the judge asked himself the wrong question: instead of considering whether the Transfer Provision was intended to constitute a legally binding condition precedent, the judge asked whether the Transfer Provision was

intended to be a “legally enforceable obligation”. According to RRDC, this question is “of little, if any, relevance” to the determination of the issues.

[54] It is apparent from the judge’s reasons that he treated the meaning of the Transfer Provision separately from the question of whether it creates a legal obligation. He approached the interpretation question by considering general principles regarding statutory interpretation, principles of interpretation applicable to constitutional documents, the ordinary meaning of the Transfer Provision, the legislative intent behind the Transfer Provision and the Transfer Provision’s compliance with established legal norms, as well as the evidence of experts and critiques offered of the expert opinions.

[55] The judge found that the original legislative intent (to create a moral but not a legal obligation) was not determinative of the interpretation issue. This finding was consistent with this Court’s reasons in *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6 at para. 39, that original intent is only pertinent insofar as it sheds light on how the Transfer Provision should be interpreted today. The judge therefore concluded that the Transfer Provision gives rise to a constitutional obligation that is legally binding today.

[56] I cannot agree that the judge conflated or confused the concepts of legal enforceability and constitutional effect. The judge treated the meaning of the Transfer Provision separately from whether it creates a legal obligation. In his reasons he addressed both legal enforceability and constitutional effect. I am not persuaded that the manner in which the judge approached the question led to any error as alleged.

[57] Despite finding that Parliament’s original intent in 1870 was for the Transfer Provision to create a moral and not a legal obligation, the judge concluded, in conjunction with other established principles, that today the Transfer Provision imposes a legally binding constitutional obligation on Canada to consider and settle the claims of Indian tribes for compensation for their lands required for purposes of

settlement (RFJ at paras. 167-169). The judge therefore found the Transfer Provision legally enforceable today, as RRDC asserts.

[58] The judge then went on to interpret the Transfer Provision and concluded that it does not impose any temporal requirement on Canada to compensate Indian tribes before opening their traditional lands for settlement (at paras. 198-206). The judge held that interpreting the Transfer Provision as imposing such a "land freeze" does not conform with the modern-day realities of Aboriginal rights and title settlement and litigation (at para. 200). Nor does it comport with the Transfer Provision's plain and ordinary meaning.

[59] As noted by the judge, it would be problematic to conclude that Canada was obliged to consider and settle RRDC's claim "[u]pon the transference of the territories" in circumstances where it is entirely unclear whether Canada was aware of the extent or location of all of its Indigenous peoples. Rather, the Transfer Provision conveyed responsibility to Canada to deal with "the claims of the Indian tribes for compensation". Beyond that, there was "no prescription for considering or settling claims at a certain time" (RFJ at para. 197).

[60] The judge found support for that interpretation in article 14 of the 1870 Order, which states that "[a]ny claims of Indians to compensation for lands required for the purposes of settlement shall be disposed of by the Canadian Government" (RFJ at para. 97). This provision relieved the Imperial Government and the Hudson's Bay Company of any further responsibility for the claims of Indigenous peoples to compensation for lands.

[61] In my view, these conclusions, stemming from the judge's interpretation of the Transfer Provision, were not in error.

[62] I turn now to the specific errors that RRDC asserts the judge made in the course of his analysis.

B. Weight to Opinion Evidence

[63] RRDC argues that the judge gave unwarranted weight to the expert opinion evidence of Dr. McHugh and Dr. Binnema. These two experts gave opinion evidence on the historical legislative intent of the Transfer Provision. In making this argument, RRDC does not reference any specific errors in the opinions, nor did RRDC put the experts' reports before this Court.

[64] In general, the weight of evidence does not give rise to a legal question, and thus a decision concerning the weight of evidence is entitled to a deferential standard of review: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 23-24, 58. Expert witnesses testify to provide the trier of fact with ready-made inferences which, due to the technical nature of the facts, the trier of fact is unable to formulate: *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42. In this case, the inferences concerned historical facts. However, the trier of fact is not obliged to accept every or any aspect of an expert opinion.

[65] The weighting of expert evidence requires an assessment of the expert witness's credibility and the reliability of the facts upon which his or her opinion is based. These assessments are necessarily fact-based. The experts were cross-examined in this case. I am not persuaded that the judge committed a palpable and overriding error or a legal error in his weighting of Dr. McHugh and Dr. Binnema's opinions as to the historical legislative intent of Parliament and the British Privy Council from 1867 to 1870.

[66] Indeed, apart from offering competing interpretations of historical legislation, RRDC does not reference any specific errors in the opinions in its submissions. The opinions are not before this Court. I turn, then, to the only basis proffered for these assertions: the failure to consider or give weight to certain legislation in the judge's analysis.

C. Legislative Facts

[67] RRDC argues that the judge failed to consider or failed to give appropriate weight to relevant legislative facts in his analysis of legislative intent. As evidence of

Parliament's recognition that Indian title must be cleared before lands can be opened up for settlement, RRDC refers to legislation directly related to the lands in question (s. 5 of the *Temporary Government of Rupert's Land Act, 1869*, and s. 42 of *An Act respecting the Public Lands of the Dominion* (1872), 35 Vict., c. 23 (Canada) [*Dominion Lands Act*]), and to the treatment of British Columbia and Quebec legislation (*An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia* (1875), 38 Vict., No. 5 (B.C.) [*B.C. Lands Act, 1875*], and *An Act to extend the Boundaries of the Province of Quebec* (1912), 2 Geo. V, c. 45 (Canada) [*Quebec Boundaries Extension Act, 1912*]). RRDC says this legislation supports its position that settlement of Indigenous peoples' claims was a condition precedent to the settlement and transfer of the lands at issue.

[68] I will deal with each statute advanced as evidence of legislative intent in turn. However, I note at the outset that the judge generally accepted the evidence of Drs. McHugh and Binnema, whose opinions addressed the legislation at issue. The judge addressed some of the specifics of this legislation in his earlier reasons in this proceeding indexed as 2012 YKSC 4 at paras. 48-70. In my view, those reasons inform the decision under appeal.

[69] For example, with respect to the *Temporary Government of Rupert's Land Act, 1869*, the judge said:

> [49] The Canadian Parliament enacted the *Temporary Government of Rupert's Land Act* in 1869, when it appeared probable that Rupert's Land and the North-western Territory were going to be transferred to Canada. Section 5 of that *Act* states:
>
> > "All the Laws in force in Rupert's Land and the North-Western Territory, at the time of their admission into the Union, shall so far as they are consistent with "the British North America Act, 1867,"—with the terms and conditions of such admission approved of by the Queen under the 146th section thereof,—and with this Act,—remain in force until altered by the Parliament of Canada, or by the Lieutenant Governor under the authority of this Act."
>
> RRDC argues that the Canadian Parliament's recognition that the laws in the two territories would only remain in force insofar as they were "consistent with ... the terms and conditions" of their admission as approved by the Queen under s. 146 is support for the view that the terms and conditions of admission so approved were understood to have constitutional force and effect. I agree that the "terms and conditions" of the admission of the

> territories into the Dominion of Canada did, by virtue of s. 146 of the *BNA Act*, become part of the Constitution of Canada. However, although it is necessary for a provision to be part of the Constitution in order for it to have constitutional effect, its mere inclusion is not sufficient to conclude that it has justiciable constitutional effect.

[70] With respect to the *Dominion Lands Act*, the judge said:

> [50] Section 42 of the *Dominion Lands Act* of 1872 stated:
>
> > "None of the provisions of this Act respecting the settlement of agricultural lands, or the lease of timber lands, or the purchase and sale of mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."
>
> This legislation was enacted in 1872, about two years after the acquisition of the two territories under the *1870 Order*. RRDC argues that s. 42 supports the view that the Canadian government understood that the extinguishment of Aboriginal title was required before lands acquired under the *1870 Order* could be available for settlement, agriculture, forestry or mining. RRDC further argues that this legislation helps to explain why the Canadian government embarked on the post-Confederation treaty process shortly after acquiring the two territories.
>
> [51] As Canada's counsel properly points out, it is difficult to compare another statutory instrument with the one at issue, without also doing a statutory interpretation analysis of that other statutory instrument pursuant to the modern principle. That, in turn, involves more than simply looking at the words of the statutory instrument. It requires an analysis of the entire context of the statutory instrument, including the aspects of legislative intent and historical context. I have little or no evidence to pursue such an analysis with respect to s. 42 of the *Dominion Lands Act*. What evidence there is comes from Dr. McHugh, and he disagreed with the suggestion by RRDC's counsel that s. 42 can be seen as evidence of the Parliament of Canada's understanding of the duties it undertook in *1870 Order*. Rather, Dr. McHugh referred to s. 42 as a "prophylactic" provision preventing a particular class of land (i.e. that to which Indian title had not yet been extinguished) from coming under the "fairly rigorous regime" for the management of public lands. While Dr. McHugh agreed that the provision was consistent with the executive's "protection function" with respect to lands still subject to Indian title …, he did not agree that the provision rendered the extinguishment processes justiciable. [Footnote omitted.]

[71] With respect to an Order-in-Council in which the Federal Cabinet agreed that the *B.C. Lands Act, 1875* did not respect the rights of Indigenous peoples living in British Columbia, the judge said:

> [53] RRDC also relied upon an Order in Council, dated January 23, 1875, by which the federal Cabinet accepted the recommendation of the Minister and Deputy Minister of Justice that [the *B.C. Lands Act, 1875*], which had been enacted by the provincial Legislature, be disallowed on the grounds that

it failed to respect the rights of the Indians in that province. The relevant passages of the Report of the Minister and Deputy Minister of Justice for Canada to the Governor General, dated January 19, 1875, are 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."

[54] Then, after quoting at considerable length the provisions of the Royal Proclamation of 1763 relating to Indian lands, 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.
>
> ...
>
> 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 ..."
>
> [55] RRDC argues that the foregoing is evidence that the decision by the Government of Canada to disallow British Columbia's land legislation was made on the grounds that it failed to respect "the legal or equitable rights" of the Indians in that province, as well as "the policy of England in respect to the acquisition of the Indians territorial rights", as expressed by the Royal Proclamation of 1763. RRDC further argues that this is consistent with its view that the [Transfer Provision] in the *1870 Order* was intended to be justiciable.
>
> [56] Once again, I am troubled about the relative lack of evidence, apart from the Report just referred to, regarding the historical context of the 1875 Order in Council.
>
> [57] Further, there were contrary views expressed by Dr. McHugh in cross-examination. For example, he emphasized that the two law officers referred to "such legal or equitable claim as may be found to exist on the part of the Indians." He also highlighted the repeated use of the word "policy" with respect to the extinguishment of Aboriginal title, which suggests it was a matter exclusively within the Crown prerogative. He further noted that, notwithstanding the language used by the two law officers, there was no pattern of matters of Aboriginal title being enforced in courts at that time and that this particular Report was "not indicative of a general understanding" in that regard. Finally, Dr. McHugh opined that the eventual exercise of the power of disallowance under s. 90 of the *BNA Act* by the Government of Canada was entirely consistent with his views, discussed below, about the "protective duty assumed by the Dominion" under the *1870 Order*. [Footnotes omitted.]
>
> [58] Canada's counsel underscored these points by noting that the government chose to use the "political tool" of disallowance rather than seeking a judicial remedy in court.
>
> [Emphasis added by the trial judge.]

[72] With respect to the legislation concerning Quebec, the judge referred to RRDC's arguments but ultimately discounted their probative value:

> [69] Finally, with respect to the Supreme Court's comment about the *Québec Boundaries Extension Act* in *Sparrow*, Canada's counsel submits that the Court was clearly deciding the case in the modern era of Aboriginal law, by which time ss. 25 and 35 of the *Constitution Act*, *1982* had been enacted, and a host of interpretive principles specific to the *sui generis* nature of Aboriginal law were starting to take hold.
>
> [70] I generally agree with Canada's position in this regard. I would add that there does not appear to have been the type of evidence before Malouf J. in *Kanatewat* that I have here on the intention of Parliament at the time of the enactment of the *Québec Boundaries Extension Act*. Further, the wording of s. 2(c) of that *Act*, is more clear (e.g. the reference to Indian "rights") than the comparatively "loose and general language" used in the

> [Transfer Provision]: [citation omitted]. Thus, I conclude that the probative value of the *Boundaries Extension Act* to the question of the justiciability of the [Transfer Provision] in *1870 Order* is significantly less than what was suggested by RRDC's counsel.

[73] While the judge was not bound by his earlier decision (as held by this Court in 2013 YKCA 6 at para. 47), embedded in the judge's acceptance of the evidence of Drs. McHugh and Binnema is ongoing acceptance of the above-quoted propositions. RRDC appears to submit that the judge ought to have ascribed more weight to RRDC's interpretation of the legislative provisions as indications of historical legislative intent from 1867 to 1870 than he did to the expert evidence. Respectfully, I am not convinced.

1. *Temporary Government of Rupert's Land Act, 1869*

[74] The *Temporary Government of Rupert's Land Act, 1869* was enacted in anticipation of Rupert's Land and the North-western Territory's admission into Canada to ensure continuity of law and to expressly provide for how the laws of those territories might be amended (by the Parliament of Canada or by the Lieutenant-Governor acting under the *Act*). Section 5 of that *Act* provides that all laws in force in Rupert's Land and the North-western Territory as of July 15, 1870, will remain in force insofar as they are consistent with the *British North America Act, 1867* (now the *Constitution Act, 1867*) and the terms and conditions of the admission of Rupert's Land and the North-western Territory into Canada.

[75] The 1870 Order specifies that the terms and conditions of the North-western Territory's admission into Canada are set out in the 1867 Joint Address, which included the Transfer Provision. The 1870 Order did not exist at the time that s. 5 of the *Temporary Government of Rupert's Land Act, 1869* was drafted and enacted. RRDC argues that s. 5 effectively elevates the terms and conditions of the North-western Territory's admission into Canada to constitutional status capable of supporting review of laws and constraining the Crown's dealings with Indigenous peoples as early as 1869, indicating Parliament's intent for the Transfer Provision to be legally biding at that time. With respect, such an interpretation seems strained at

best. Why would legislators choose such a circuitous route to constrain the Crown's dealing with Indigenous peoples?

[76] Canada argues that not all parts of the 1870 Order were intended to create legal obligations and that s. 5 of the *Temporary Government of Rupert's Land Act, 1869* does not provide any insight into the intended legal effect of the Transfer Provision. In my view, the judge's conclusion that the *Temporary Government of Rupert's Land Act, 1869* simply ensured continuity of law in Rupert's Land and the North-western Territory, and therefore, that it does not shed light on the Transfer Provision's intended legal effect, was consistent with the plain meaning of the Transfer Provision and was correct.

2. *Dominion Lands Act*

[77] The first *Dominion Lands Act* was enacted in 1872 to provide for the administration, sale and disposition of public lands in the North-West Territories (as it was then renamed). This *Act* applied to Yukon until 1908, when it was replaced by an amended version.

[78] RRDC argues that s. 42 of the *Dominion Lands Act* expressly stated Parliament's understanding in 1872 that Dominion lands were to be cleared of Indian title before they could be sold or disposed of to settlers. RRDC further submits that the *Dominion Lands Act* should have been construed in light of the 1870 Order, as it deals with the same subject matter, being the administration of lands and resources in the North-West Territories. RRDC's position contradicts the opinion of Dr. McHugh, the legal historian whose opinion was accepted by the judge in his decision on the two threshold questions: 2012 YKSC 4 at paras. 138-139.

[79] Canada argues there is no evidence that Parliament enacted s. 42 of the *Dominion Lands Act* in contemplation of the 1870 Order's requirements or that the 1870 Order required extinguishment of Indian title before settlement.

[80] RRDC did not adduce expert evidence to counter the opinion of Dr. McHugh or provide its own expert evidence on the issue. It did adduce various academic

articles in support of its position, but the judge gave them little weight: 2012 YKSC 4 at paras. 108-117. In my view, the judge was at liberty to prefer the opinion of Dr. McHugh over the opinions of authors who did not testify.

[81] Canada further submits that Parliament's removal of s. 42 from the *Dominion Lands Act* and the removal of Yukon from the *Act*'s application in 1908 indicate that Parliament did not consider itself bound to maintain RRDC's interpretation of s. 42 in relation to the lands at issue. Moreover, if s. 5 of the *Temporary Government of Rupert's Land Act, 1869* has the force RRDC argues for, then s. 42 of the *Dominion Lands Act* would have been wholly unnecessary. If the Transfer Provision had the legal effect RRDC contends, it would be unnecessary for s. 42 to apply to Yukon. Moreover, repeal of s. 42 would have been ineffective. I agree with Canada's submissions on this point.

3. *B.C. Lands Act, 1875*

[82] The *B.C. Lands Act, 1875* purported to open all of British Columbia to settlement by non-Indigenous people only and without any form of protection for claims of Aboriginal rights or title. On January 19, 1875, the Minister of Justice for Canada recommended in a report to the Governor General that the *B.C. Lands Act, 1875* be disallowed on the grounds that it failed to respect the rights of Indigenous peoples in British Columbia. The Federal Cabinet approved the recommendation in an Order-in-Council dated January 23, 1875.

[83] RRDC argues that the disallowance of the *B.C. Lands Act, 1875* for failing to follow the policies expressed in the *Royal Proclamation of 1763* that the "Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them" indicates that the Transfer Provision was intended as a constraint on Parliament's ability to enact legislation to open the lands at issue for the purposes of settlement.

[84] Canada argues that, while Parliament in 1875 was clearly of the opinion that the *B.C. Lands Act, 1875* was inconsistent with the Crown's policies regarding

Indigenous peoples, there is no legislation analogous to the *B.C. Lands Act, 1875* in this case. Rather than a province-wide abrogation of protection for Aboriginal rights as was the case in the *B.C. Lands Act, 1875*, Canada argues that the case at bar involves a single settlement (Faro) within a group trapping area where the Crown required lands for settlement.

[85] The judge considered the *B.C. Lands Act, 1875* at paras. 158-160 of his reasons for judgment in the 2005 Action, while discussing the source of the "equitable principles" referred to in the Transfer Provision. In review of the *Act*'s disallowance, the judge concluded that "[w]hatever 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 suggest that it should be seen, today, as the source of the 'equitable principles' in the [Transfer Provision]" (at para. 160, emphasis in original).

[86] The judge considered alternative historical views regarding the disallowance of the *B.C. Lands Act, 1875* and ultimately concluded that, while there was insufficient evidence to conclude that the *Royal Proclamation of 1763* was uniformly followed throughout the Dominion from 1867 to 1870 as suggested by RRDC, there was sufficient evidence suggesting that the *Royal Proclamation of 1763* should be seen as a source of equitable principles today. I see no error in this analysis. In my view, the *B.C. Lands Act, 1875* does not inform the interpretation of the Transfer Provision.

4. *Quebec Boundaries Extension Act, 1912*

[87] Section 2(c) of the *Quebec Boundaries Extension Act, 1912* provided that the north and westward extension of the boundaries of Quebec was made subject to the condition that:

> … the province of Quebec will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained a surrender thereof, and that said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders.

[88] The meaning of this provision was discussed in *Kanatewat v. James Bay Development Corporation*, [1973] Q.J. No. 8 (S.C.). In *Kanatewat,* Cree and Inuit people living within an area potentially affected by the proposed James Bay hydroelectric project were granted an interlocutory injunction to halt construction of the project. The motion judge concluded that the Crown had an obligation arising from the *Quebec Boundaries Extension Act, 1912* to settle Indigenous claims prior to opening the subject lands for settlement. The motion judge's injunction was overturned on appeal in *Kanatewat v. James Bay Development Corp.*, [1974] Q.J. No. 14 (C.A.).

[89] RRDC argues that, although ultimately overturned, the motion judge's reasoning was eventually vindicated by reference in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1104, where the Supreme Court of Canada stated that:

> … the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the *Quebec Boundary Extension Act*, 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.

[90] Canada argues that neither the *Quebec Boundaries Extension Act, 1912* nor the interlocutory decision in *Kanatewat* support the proposition that Indigenous peoples' rights, in what was known as Rupert's Land, included the right to have their claims of rights and title settled *prior* to permitting activity on lands over which the claimed rights pertain. Rather, Canada submits that Quebec's Court of Appeal found the opposite.

[91] The judge considered the above excerpt from *Sparrow* at para. 176 of his reasons for judgment. The judge then went on to distinguish the lands at issue from the James Bay development because it was unclear whether the lands at issue were opened up for settlement before the construction of the townsite of Faro around 1969, at which time the judge concluded the Transfer Provision had acquired legal effect (RFJ at paras. 177-183).

[92] In any event, in my view, the *Quebec Boundaries Extension Act, 1912* coupled with the *obiter* reference to *Kanatewat* in *Sparrow* do not inform interpretation of the Transfer Provision. There is nothing in the discussion in *Sparrow* that supports the proposition that the "consideration" of claims in the Transfer Provision means that settlement of claims is a condition precedent.

[93] In the result, I am not convinced that consideration of the legislation referenced, either individually, or as a whole, supports the propositions asserted by RRDC, namely that settlement of claims was a condition precedent to transfer.

D. Interpretive Principles

[94] RRDC asserts that the judge's reliance on s. 35 of the *Constitution Act, 1982* as an aid in interpreting the Transfer Provision is an error of law. RRDC argues that its established constitutional rights under the 1870 Order are analytically distinct from asserted but unproven Aboriginal rights under s. 35, and therefore, should not be analyzed in relation to the framework for adjudicating s. 35 rights.

[95] RRDC cites Justice Sopinka's concurring reasons (dissenting on this point) in *R. v. Badger*, [1996] 1 S.C.R. 771, for the proposition that s. 35 has no application to constitutional rights established prior to 1982:

> 12 … Section 35(1) was intended to provide constitutional protection for aboriginal rights and treaty rights that did not enjoy such protection. It cannot have been intended to be redundant and provide constitutional protection for rights that already enjoyed constitutional protection. Moreover, para. 12 of the [*Natural Resources Transfer Agreement* (*Constitution Act, 1930,* Schedule 2)] is a constitutional provision and, as such, s. 35(1) has no direct application to it. Infringements of constitutional rights cannot be remedied by the application of a different constitutional provision. …

[96] Canada argues that the judge was expressly aware of the analytical distinction between the constitutional statuses of the 1870 Order and s. 35 rights, as he states as much at para. 203 of his reasons for judgment. Canada further argues that RRDC mischaracterizes Sopinka J.'s reasons in *Badger*, which go on to state:

> 13 That is not to say, however, that the principles underlying the interpretation of s. 35(1) have no relevance to the determination of whether a particular legislative enactment has an acceptable purpose and whether it

> constitutes an acceptable limitation on the rights granted by the *NRTA*. There is no method provided in the *NRTA* whereby government measures that may impinge upon the rights the same document grants to Indians can be scrutinized. It is clear, however, that the *NRTA* does require a balancing of rights. The right of the province to legislate with respect to conservation must be balanced against the right granted to the Indians to hunt for food. Thus, it falls to the Court to develop a test through which this task can be accomplished. In *Sparrow*, this Court developed principles for balancing the constitutionally protected right to fish for food against the federal government's power to pass laws for conservation. Although the *Sparrow* test was developed in the context of s. 35(1), the basic thrust of the test, to protect aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para. 12 of the *NRTA* as to federal power to legislate in respect of Indians.
>
> 14 In this way, the *Sparrow* test is applied to the *NRTA* by analogy, with the result that the Court will have a means by which to ensure that the rights in the *NRTA* are protected, but that provincial governments are also provided with some flexibility in terms of their ability to affect those rights for the purpose of legislating in relation to conservation. As Cory J. points out [for the majority], the criteria set out in *Sparrow* do not purport to be exhaustive and are to be applied flexibly. In applying them in this context, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces, which power is made subject to the right to hunt for food. Both are contained in a constitutional document. The application of the *Sparrow* criteria should be consonant with the intention of the framers as to the reconciliation of these competing provisions.

[97] Canada therefore argues that the principles underlying s. 35 are pertinent to interpreting the Transfer Provision insofar as they can assist the court to reconcile the Crown's obligation to consider and settle Indigenous peoples' claims for compensation with the Crown's obligations to legislate for peace, order and good government and the general public interest. Canada submits that the Transfer Provision identifies "equitable principles" as such a balancing mechanism.

[98] Respectfully, in my view, RRDC's position misapprehends Sopinka J.'s reasons in *Badger.* As set out in that judgment, the principles underlying the interpretation of s. 35 are relevant to the interpretation of other enactments and can assist the court in balancing the rights and interests of Canada and its Indigenous peoples. Following *Badger*, the principles underlying the interpretation of s. 35 are relevant to the interpretation of the Transfer Provision of the 1870 Order. The judge's reasons disclose that he was aware that RRDC's action was not a s. 35 claim and

further that RRDC's constitutional rights under the 1870 Order were analytically distinct from its s. 35 rights (RFJ at para. 203). The judge correctly followed Sopinka J.'s reasoning in *Badger*.

[99] It was not a legal error for the judge to consider s. 35 jurisprudence as an interpretive aid in relation to the Transfer Provision. Both s. 35 and the 1870 Order are part of the same statutory scheme, the Constitution of Canada, and both address the same subject matter, the constitutional rights of Indigenous peoples. The principles of statutory interpretation presume harmony, coherence and consistency between statutes within the same statutory scheme and dealing with the same subject matter: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 52; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 27. The judge did not err by considering s. 35 jurisprudence to conclude that settlement of the lands at issue was not subject to a "land freeze" and that ss. 19(1) and 45(1) of the *Yukon Act* were not inconsistent with the 1870 Order. I see no reversible error in either holding.

[100] The Transfer Provision's plain and ordinary meaning, its legislative intent and the practical realities of Aboriginal rights settlement and litigation support the finding that the Transfer Provision did not impose a temporal requirement on Canada to obtain surrender before permitting activity on the lands at issue. Rather, the Transfer Provision transferred the duty to "consider and settle" the claims of the "Indian tribes to compensation for lands required for purposes of settlement" from the Imperial government to the government of Canada.

[101] For similar reasons, the impugned provisions of the *Yukon Act* are also not inconsistent with the Transfer Provision. The *Yukon Act*'s clarification in s. 3 that it does not abrogate or derogate from the protection of any s. 35 rights, and the *Act*'s silence as to other constitutional rights, does not lead to the conclusion that other constitutional rights are not protected. The *Yukon Act* is subject to the Constitution of Canada, including the 1870 Order and s. 35. The *Yukon Act*'s delegation of jurisdiction to promulgate laws does not, by itself, have any impact on constitutional rights.

V. PROCEDURAL ISSUE

[102] RRDC submits that the judge made an overarching error of law by affirming and adopting his 2015 Procedural Decision to suspend his decision on the interpretation of the Transfer Provision in the 2005 Action until after the 2006 Action was tried.

[103] Canada submits that RRDC is essentially asking this Court to review an interlocutory procedural decision after the appeal period has expired and that RRDC has abandoned its appeal of that decision and not sought any further leave to appeal it.

[104] I agree with Canada that RRDC is trying to indirectly appeal an order that is not actually under appeal. The judge released his reasons for the 2015 Procedural Decision on July 14, 2015. RRDC filed a notice of appeal in regard to that decision in August 2015. It then filed a notice of abandonment of its appeal in February 2016. RRDC cannot continue to challenge the 2015 Procedural Decision when it expressly abandoned its appeal and the appeal period has expired.

[105] In any event, in my view, the judge did not err by suspending judgment in the 2005 Action until after the 2006 Action was decided. Orders to try one issue before others are discretionary and will not be interfered with unless the judge erred in principle or exercised discretion on an improper basis: 2013 YKCA 6 at para. 16, citing *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107, leave to appeal ref'd [2008] S.C.C.A. No. 222. While determination of the 2006 Action was not ultimately dispositive of the 2005 Action, it was within the judge's discretion to consider evidence of Canada's post-1973 conduct in a related matter involving overlapping (though not identical) parties before reaching judgment on the Transfer Provision in the 2005 Action.

[106] It was not, in principle, improper on a procedural basis for the judge to examine the parties' efforts to negotiate the comprehensive settlement of a constitutionally enshrined Aboriginal right before deciding whether the legal source of that right was justiciable. The interpretation of Aboriginal rights is necessarily

rooted in historical context. It was not inherently unreasonable for the judge to assume that evidence as to the conduct and contents of attempts to negotiate the settlement of a right could be relevant to analysis of that right's legal effect.

VI. AMELIORATION OF HISTORIC BREACH

[107] RRDC submits that the judge erred in concluding that Canada's post-1973 conduct ameliorated its breach of RRDC's constitutional rights from 1969 to 1973. While RRDC argues this error under the heading of procedural ruling, in my view, it represents a substantive issue: can a historic breach of a constitutional right be "ameliorated" by subsequent conduct amounting to good faith negotiations?

[108] RRDC advances two principal arguments in support of its position. First, it says that the judge confused RRDC's different status in the 2005 and 2006 Actions and that a breach of a constitutional obligation owed to the Kaska Nation as a whole cannot be ameliorated by subsequent good faith negotiations with RRDC alone. Second, it argues that the concept of amelioration has no application at all to the case at bar. It says that a breach of its constitutional rights cannot be ameliorated by subsequent conduct of the Crown.

[109] Canada supports the trial judge's holding on this issue and further argues that RRDC's appeal of the amelioration issue is an improper challenge to two decisions that are not actually under appeal: the 2015 Procedural Decision and the judge's decision in the 2006 Action.

A. Challenge to Other Decisions

[110] Canada argues that RRDC is trying to challenge decisions that are not under appeal. It says RRDC cannot challenge the 2015 Procedural Decision, in which the judge held that if Canada engaged in negotiations consistent with the honour of the Crown throughout the modern-era negotiations, then "that finding may have an ameliorating effect on any historic breach" (at para. 44). Canada also says that RRDC cannot challenge the declaration that Canada made a good faith attempt to consider and settle RRDC's land claim from 1973 to 2002 because that declaration

is based on specific findings from the judge's decision in the 2006 Action, which is not under appeal.

[111] I do not agree with Canada that RRDC's challenge to the judge's amelioration holding is an attempt to appeal either the 2015 Procedural Decision or the decision in the 2006 Action. While RRDC cannot challenge the judge's decision to suspend the 2005 Action until the 2006 Action was tried, as discussed above, in my view, RRDC's challenge of the amelioration issue is not a collateral attack on any of the judge's previous decisions in this action.

[112] An appeal is brought from the order, not from the reasons for judgment: *Knapp v. Town of Faro*, 2010 YKCA 7 at para. 6; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287 at para. 28. In the within action, the order included the following declaration:

> ii. that Canada made a good faith attempt to consider and settle the Ross River Dena Council'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.
>
> [Emphasis added.]

[113] As the judge's holding regarding amelioration forms part of the order from which this appeal was brought, it is a proper issue for determination in this appeal. RRDC's appeal of this holding is not, as Canada submits, an attempt to appeal the 2015 Procedural Decision.

[114] Canada's concern that RRDC's appeal of the amelioration issue was an attempt to challenge the 2015 Procedural Decision arose from a statement in RRDC's factum which provided that "the trial judge made an overarching error of law in a procedural ruling …, in which he decided to suspend his decision on the interpretation of the 1870 Order in [the 2005 Action] until the [20]06 Action is tried." After this assertion, however, RRDC cited the following paragraph from the judge's reasons for the 2015 Procedural Decision, in which the judge raised the possibility of amelioration in his explanation of why he was suspending his decision in the 2005 Action until the 2006 Action was tried:

> [44] In conclusion, I agree with Canada that, in these particular circumstances, it is appropriate to suspend my decision on the modern-day interpretation of the [Transfer Provision] 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 [Transfer Provision] 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 [a] 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 [Transfer Provision] in a purposive manner and diligently pursued fulfillment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis*, cited above.
>
> [Underlining in original, bolding added by RRDC.]

[115] The above-quoted reference to amelioration is the only discussion of this concept in the proceeding. Although the judge's finding regarding amelioration forms part of the order in the 2005 Action, the judge does not discuss amelioration in his reasons for judgment in the 2005 Action. Nor does the judge discuss amelioration in any detail in his reasons for judgment in the 2006 Action. Given the lack of discussion of amelioration in the reasons in the 2005 Action, RRDC's reference to the reasons for the 2015 Procedural Decision is understandable. While RRDC was incorrect to frame this issue as an "error of law in [the] procedural ruling", the issue is an appropriate subject for this appeal as it is included in the order from which the appeal was brought.

[116] I also cannot agree that RRDC is attempting to challenge the judge's decision in the 2006 Action. RRDC is not challenging the judge's holding that Canada upheld the honour of the Crown through good faith negotiations from 1973 to 2002, as was found in the 2006 Action. RRDC is instead challenging the portion of the order that provides that such good faith negotiations ameliorated Canada's liability for the

breach from 1969 to 1973. The findings in the 2006 Action do not dispose of this issue.

B. RRDC's Status in 2005 and 2006 Actions

[117] RRDC points to the different status it had in the 2005 Action and the 2006 Action in support of its argument that the judge erred in his amelioration holding. The proceeding before the Court in the 2005 Action was a representative action brought by RRDC on its own behalf, on behalf of its members *and* as the representative for the Kaska Nation as a whole. The 2006 Action, however, was brought by RRDC on its own behalf and on behalf of its members but *not* on behalf of the Kaska Nation as a whole. On this basis, RRDC argues that the judge erred in concluding that Canada's conduct throughout the modern-era negotiations, which the judge concluded in the 2006 Action upheld the honour of the Crown in relation to RRDC alone, had an ameliorative effect on any historic breach of Canada's constitutional obligations to the Kaska Nation as a whole. RRDC says the judge confused its status in the 2005 and 2006 Actions.

[118] Canada asserts that the judge was aware of, and expressly referred to, the difference between RRDC's status in the 2005 and 2006 Actions in his reasons for judgement in the 2006 Action. Canada argues that the judge's declarations on appeal specifically state that Canada's post-1973 negotiations "with RRDC" ameliorated its liability for the breach, and that reference to "the other Kaska" is deliberately and purposefully excluded from that declaration, whereas "the other Kaska" are referenced in the accompanying holdings in which the judge declined to grant various declarations sought: see 2017 YKSC 58 at para. 239. In this regard, Canada submits that the judge properly confined the declaration to the evidence in the 2006 Action, which pertained specifically to the post-1973 negotiations between Canada and RRDC, as the issue of good faith negotiations with the other Kaska was not before the Court. Alternatively, Canada says that as a representative plaintiff in the 2005 Action, RRDC purports to share the same legal interests as all Kaska members and that it adequately represents the interests of all Kaska members.

[119] If the judge had concluded that a breach of the rights of the Kaska Nation as a whole could be ameliorated by subsequent good faith negotiations with RRDC alone, then it would have been an error. However, in my view, the judge appropriately confined his declarations to his findings of fact in the two actions, as suggested by Canada, such that the distinction in RRDC's status in the two claims did not affect the result in the manner suggested by RRDC. The judge's declarations, as well as his holdings respecting his refusal to grant the other declarations sought, indicate his awareness of the distinction in RRDC's status in the two actions.

[120] The impugned declaration cannot be interpreted to mean that subsequent good faith attempts to consider and settle RRDC's land claim from 1973 to 2002 ameliorated its liability to other member nations of the Kaska or to the Kaska Nation as a whole. It remains to be considered whether the concept of amelioration applies at all in this case.

C. Amelioration of Canada's Breach

[121] RRDC challenges the proposition that amelioration has any application to the case at bar. It argues that the concept of amelioration only arises in Canadian constitutional law in the context of equality rights under s. 15 of the *Charter*, and therefore, it has no application to this case. Relying on Justice Iacobucci's warning in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 72, that legislation which, though ameliorative, excludes members of a historically disadvantaged group will "rarely escape the charge of discrimination", RRDC says that the concept of amelioration cannot be used to deprive a disenfranchised group of its constitutionally protected rights. It says the judge did not provide any analysis, nor cite any authority, in support of his ruling that subsequent good faith negotiations can ameliorate previous breaches of constitutional obligations.

[122] At the outset I note that RRDC abandoned its claims for an accounting, an injunction and damages at trial, such that the only relief it sought was declaratory (RFJ at para. 239). RRDC was not asking the judge to grant any substantive relief

beyond declarations concerning the 1870 Order. This concession was material to the judge's discussion on this issue and, in my view, led to the form of the judge's declaration.

[123] The wisdom of making declarations in the absence of a practical purpose is questionable: see e.g., *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, leave to appeal ref'd [2000] S.C.C.A. No. 625. In the case at bar, a declaration that Canada breached its constitutional obligation to consider and settle RRDC's claims to compensation for land arguably served no practical purpose, given RRDC's abandonment of its claims for relief other than declarations and Canada's negotiations with RRDC from 1973 to 2002. Resolution of the interpretation issue was foremost in this proceeding and was decided by the declaration regarding the interpretation of the Transfer Provision in the 1870 Order. Why it was necessary for the judge to proceed further and make declarations concerning Canada's conduct in different time periods is not explained. Declarations b(i) and b(ii) were made, however, and only one declaration—b(ii)—is under appeal.

[124] For ease of reference, I reproduce declaration b in its entirety:

> THIS COURT ORDERS AND DECLARES that:
>
> …
>
> b. this commitment [in the Transfer Provision] is a part of the Constitution of Canada and that it is binding on Canada:
>
> i. 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. that Canada made a good faith attempt to consider and settle Ross River Dena Council'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.

[125] The meaning of declaration b(ii) is not clear. Whether the judge erred in making this declaration depends on its meaning. On a broad reading, declaration b(ii) could be interpreted to mean that subsequent good faith negotiations by the Crown can ameliorate prior breaches of substantive constitutional rights. On a narrow reading, declaration b(ii) merely says that Canada's failure to engage in good

faith negotiations of RRDC's claims during a limited period was effectively remedied by the subsequent good faith negotiations.

[126] In his reasons, the judge referred to the development of a townsite and mine within traditional territories but without negotiations for a treaty as an example of a breach (see paras. 178-184). The constitutional obligation referred to by the judge at para. 184 is the obligation to negotiate the claims arising from the Transfer Provision. In my view, the judge thus narrowly defined the breach as a failure to negotiate without regard to what took place on the ground, as he received no evidence of that.

[127] In my view, the judge would have erred if he had concluded generally that a historic breach of a constitutional right can be ameliorated simply by subsequent good faith negotiations. There is no legal basis to conclude that breaches of constitutionally enshrined Aboriginal rights generally can be ameliorated by undertaking good faith negotiations without reaching settlement of those rights.

[128] While the judge did not cite any authority for the proposition that good faith negotiation alone on the part of the Crown, subsequent to a historic breach of a constitutional obligation, can "ameliorate" the Crown's liability for that breach, he cited several BC cases at paras. 21-24 of his reasons for the 2015 Procedural Decision as authority for the proposition that all Aboriginal rights, whether arising by operation of s. 35, treaty or otherwise, are not absolute and may be infringed where the Crown meets the burden of justifying the infringement: *Cheslatta* at paras. 18-19; *Hereditary Chiefs Tony Hunt et al v. Attorney General of Canada et al*, 2006 BCSC 1368 at paras. 16-18; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 119; *Chief Joe Hall v. Canada Lands Company Limited*, 2014 BCSC 1704 at para. 54.

[129] The concept of "amelioration" has never been applied to historic breaches of constitutionally enshrined Aboriginal rights. The Supreme Court of Canada has held that infringement of Aboriginal title can be justified where it is necessary to achieve the government's goal (rational connection), it goes no further than necessary to

achieve that goal (minimal impairment), and the expected benefits outweigh the adverse effects on the Aboriginal interest (proportionality of impact): *Tsilhqot'in Nation* at para. 87. The Supreme Court of Canada characterized these three requirements as forming part of the Crown's fiduciary duty to Aboriginal peoples. Notably, these are the same justification factors considered in relation to breaches of other constitutional rights under s. 1 of the *Charter*.

[130] The Supreme Court of Canada goes on at para. 88 of *Tsilhqot'in Nation* to remark that:

> [88] … Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

[131] Though decided in the context of Aboriginal title, *Tsilhqot'in Nation* contemplates a framework of Aboriginal rights litigation where Aboriginal claimants prove infringement of Aboriginal rights and then the Crown is required to prove that such infringement is justified based on the Crown's fulfilment of its fiduciary duties to that Aboriginal group. While this framework includes consideration of the Crown's duty to consult and accommodate, it does not contemplate the amelioration, mitigation or remedying of past breaches by simply undertaking subsequent good faith negotiations: *Tsilhqot'in Nation*, para. 125. A breach is either justified or it is not.

[132] If, after nearly 30 years of good faith negotiations, no settlement is reached, the rights at issue in the negotiations are not extinguished and breaches of the rights are not ameliorated, mitigated or somehow remedied. Rather, the result of unsuccessful negotiations, no matter how honourably conducted, is that the rights at issue remain justiciable in the same way they were before negotiations were undertaken—in court, if necessary.

[133] An exception to this general principle is a situation where the only breach of constitutional rights is a failure to entertain good faith negotiations. This exception arises on the narrow interpretation of declaration b. A remedy for a failure to engage in constitutionally required good faith negotiations is to order that such good faith

negotiations commence. Thus, on this interpretation, the use of the term “ameliorate” means that the subsequent good faith negotiations rectified, from a practical perspective, Canada’s earlier failure to negotiate. That is, the breach of the constitutional obligation to negotiate was effectively remedied by subsequent negotiations.

[134] In summary, in my view, Canada cannot defeat a claim for a historic breach of a constitutionally enshrined Aboriginal right, other than a right to good faith negotiations, by simply arguing that it has already attempted to settle that claim unsuccessfully. If the claim is not settled, then it remains to be addressed. Violation of a constitutional right, with the exception noted, cannot be remedied through good faith efforts to negotiate its settlement after the fact. It can only be settled by consent or resolved in court.

[135] Thus, it would be an error to make the general declaration that Canada’s good faith efforts to negotiate a settlement with RRDC after 1973 “ameliorated” Canada’s liability for its breach of RRDC’s constitutionally enshrined rights under the Transfer Provision in the 1870 Order from at least 1969 to 1973, unless the words “and have ameliorated its liability for the breach” are confined to mean that such good faith negotiations remedied the previous failure to enter into good faith negotiations. In my view, consideration of the context shows that “the breach” in declaration b(i) referred to Canada’s failure to negotiate the claims, and thus the “amelioration” in declaration b(ii) is confined to remedying the failure to negotiate. In my view, the words of the order must be so interpreted and confined for the reasons I have given.

VII. PROPER INTERPRETATION OF DECLARATION

[136] Declaration b(ii) reaffirms the judge’s finding in the 2006 Action that Canada’s good faith attempts to negotiate a settlement with RRDC from 1973 to 2002 have upheld the honour of the Crown during that period and remedied the failure to enter into negotiations during the prior period.

[137] Declaration b(ii) does not have any effect on Canada's liability for any other historic breach of RRDC's constitutionally enshrined rights under the Transfer Provision prior to 1973, if any such breaches occurred, although I note that RRDC abandoned its specific claims for damages and an injunction in the within proceeding and did not otherwise pursue any specific relief in this proceeding.

VIII. CONCLUSION

[138] In the result, I would dismiss the appeal. The judge did not err in making the declarations challenged on appeal or in failing to make the other declarations sought.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Madam Justice Smallwood"

Concurring Reasons for Judgment of the Honourable Madam Justice Fisher:

[139] I have had the benefit of reading in draft the reasons for judgment of Mr. Justice Savage. I agree with his interpretation of declarations b(i) and (ii), in that "amelioration" in b(ii) is confined to remedying the failure to negotiate in the period described in b(i). I also agree with his concerns about the wisdom of making declarations in the absence of a practical purpose.

[140] I would go a step further, however, to express the view that the judge in this case ought not to have made either declaration b(i) or (ii) once he determined that the Transfer Provision in the 1870 Order did not constitute a condition precedent to opening the lands of the RRDC for settlement. RRDC withdrew its other claims for relief and the judge declined to grant the declaratory relief sought. In that circumstance, nothing further was required of the court. Declarations b(i) and (ii) were redundant.

[141] However, given that only declaration b(ii) was before this Court on appeal, I agree with Savage J.A. that the appeal should be dismissed.

"The Honourable Madam Justice Fisher"

SCHEDULE A

S.C. No.: **05-A0043**

SUPREME COURT OF YUKON

BETWEEN:

ROSS RIVER DENA COUNCIL

Plaintiff

AND:

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

BEFORE THE HONOURABLE	)	Monday, the 23rd
	)	
MR. JUSTICE L. F. GOWER	)	day of October, 2017

THIS ACTION coming on for trial at Whitehorse, Yukon, on September 2, 3, 8, 9, 12, 15-19, 2014; March 13, 2015; and June 11, 2015, and on hearing Stephen Walsh, lawyer for the plaintiff, and Suzanne Duncan and Geneviève Chabot, lawyers for the defendant, AND JUDGMENT being reserved to this date:

THIS COURT ORDERS AND DECLARES that:

a. 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 the Ross River Dena Council 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. this commitment is a part of the Constitution of Canada and that it is binding on Canada:

   i. 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. that Canada made a good faith attempt to consider and settle the Ross River Dena Council'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.

AND THIS COURT FURTHER ORDERS that

c. Each party shall bear its own costs.

By the Court

Lisa Robinson Fernandes

D / Clerk of the Court

Approved as the Order made:

Stephen Walsh,
Lawyer for the Plaintiff

Suzanne Duncan
Lawyer for the Defendant