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National Claims Research Workshop: Legal Update

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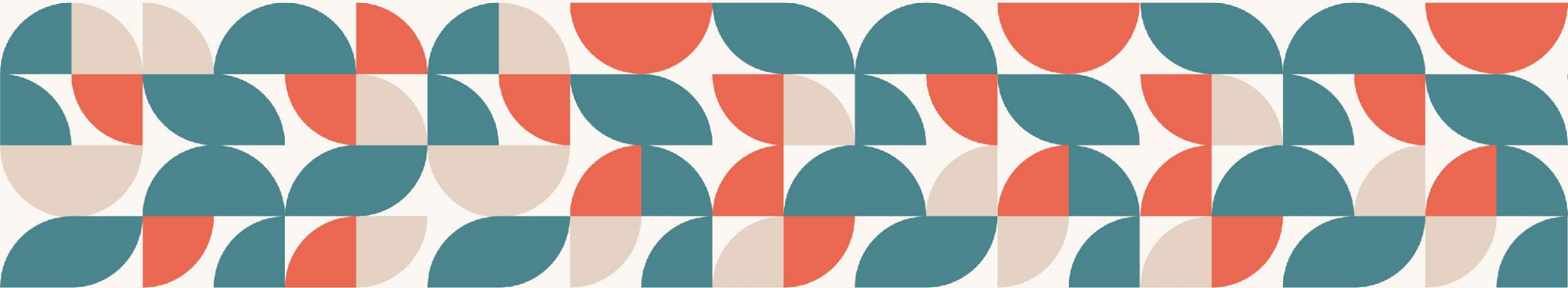

Overview

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1. *Restoule v Canada,* 2021 ONCA 779
2. *Kwakiutl v Canada,* 2022 SCTC 1
3. *Kahkewistahaw First Nation v Canada,* 2022 SCTC 5
4. Take Aways for Claim Research and Development
5. Questions

Restoule v Canada, 2021 ONCA 779

Restoule – Trial Decision

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- This case concerns a claim by Anishinaabe peoples of the upper Great Lakes against Canada and Ontario for failure to honour the Crown's promises to increase annuities under two 1850 treaties
- Anishinaabe law was present in the trial court, both as evidence and as ceremony/protocol
- The Annishinaabe succeeded at trial, with the court ruling that the Crown must share in the value of the land covered by the treaties by increasing the annuity
- The court's conclusion was based in part on the evidence of Anishinaabe law, which the court used to interpret the mutual intention of the treaty parties at the time the treaties were made

Restoule – Appeal Decision (2021 ONCA 779)

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- Despite splitting on some issues, the Ontario Court of Appeal unanimously concluded that the doctrine of the honour of the Crown requires the Crown to increase annuities

  > "[t]he notion of fairness in interpretation seemed to indicate, even at a relatively early stage, that the honour of the Crown was meant to ensure just outcomes, rather than solely procedural fairness." (para 251)

- The Court highlighted the importance of the Anishinaabe perspective, and confirmed that treaties are not one-time transactions

Restoule – Next stop, SCC

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- Ontario has been granted leave to appeal to the Supreme Court of Canada (SCC), and the Robinson-Huron plaintiffs have been granted leave to cross-appeal

- UBCIC intervened in the *Restoule* case at the Ontario Court of Appeal, focusing on the following submissions:
  - Treaty promises must be interpreted in light of the constitutional imperatives of reconciliation and the honour of the Crown
  - Indigenous laws and perspectives must be considered in the interpretation of treaty promises.

- UBCIC is leading a coalition applying for leave to intervene in the appeal at the SCC

Restoule – Implications

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- While *Restoule* arose in a treaty context, it has broad implications for the law regarding Crown-Indigenous relations because the decision set out important principles regarding the honour of the Crown and the role of Indigenous laws and perspectives in interpreting Crown promises to Indigenous nations

- The *Restoule* appeal presents an opportunity for the SCC to firmly establish that claims for breach of a Crown promise to an Indigenous nation must be decided based on an understanding of the promise to the nation informed by its own laws and principles

- If recognized by the SCC, this principle could lay the groundwork for a new approach to the resolution of historical claims of Indigenous nations against the Crown both within and outside of the treaty context

Kwakiutl v Canada, 2022 SCTC 1

Kwakiutl – Overview

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- Specific Claims Tribunal decision interpreting the Fort Rupert Treaty of 1851 (northeastern Vancouver Island)
- Claim concerns Kwakiutl's village of "Suquash" and whether it was intended by the Parties to the Treaties that Suquash be included in the meaning of the phrase "village site or enclosed field" in 1851 when the Treaties were signed
- Kwakiutl claimed that Canada breached its fiduciary duties following the signing of the Treaties which resulted in the loss of Suquash
- Canada said that the location at Suquash was included in the lands subject of the transfer, and that it was the intention of the Parties to to transfer Suquash as the HBC desired that location for its coal deposits

Kwakiutl – Decision

- Tribunal found that the Claimant failed to establish that it was the common intention of the Parties to the Treaties to exclude Suquash from the transfer
- There was no evidence led that the Fort Rupert First Nations constructed and used house frameworks at Suquash, or archaeological or ethnographic evidence to suggest that Suquash was a seasonal place of occupation
- The post-treaty conduct of the Parties was consistent with the understanding and intention that control of Suquash was to transfer to the HBC by the treaty terms
- Suquash was not identified as a village site in later submissions by Kwakiutl to the McKenna-McBride Commission

Kwakiutl – Implications

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- While the interpretation of treaty promises must be informed by Indigenous perspectives and grounded in the honour of the Crown, evidence of historical use and occupation is an important component in making a successful specific claim for historical village sites
- The Tribunal does not accept that all resource sites are to be understood as village sites – it is important to demonstrate sustained and seasonal use, including for communal purposes as well as for residency, even if seasonal
- The village site must also be known to the Crown (cognizable)
- Treaties carry a lot of weight and are highly persuasive - even though Suquash was mentioned as a site that Kwakiutl wanted reserved in submissions before the McKenna-McBride Commission, the Tribunal found the Treaty to be more directly persuasive

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Kahkewistahaw First Nation v Canada, 2022 SCTC 5

Kahkewistahaw First Nation – Overview

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- Specific Claims Tribunal validity decision finding that Canada breached its post-surrender fiduciary duties to Kahkewistahaw in the surrender of their Indian Reserve No. 72A in 1944

- Canada repeatedly failed to act with reasonable diligence or to meet the standard of a person of ordinary prudence managing their own affairs in the post-surrender period

- The Tribunal also found that Canada had fiduciary obligations to take steps to remove trespassers from the Reserve both prior to and after the Reserve was surrendered – the Tribunal rejected Canada's argument that because the First Nation did not complain, Canada did not owe a fiduciary duty

Kahkewistahaw – Facts

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- Kahkewistahaw, located about 150 km east of Regina, SK, brought this Claim in respect of four separate events:
  - the construction of the Craven Dam in 1909
  - the diversion of a road across the Reserve in 1944
  - the surrender of the entire Reserve in 1944; and
  - a delay of almost 12 years prior to the surrender land being sold for the benefit of the Band
- The Craven Dam negatively affected fishing at Round and Crooked Lakes, and there was no evidence that KFN was consulted about the construction of the dam

Kahkewistahaw – Facts

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- At some point before 1944, a road allowance on the Reserve was in use without KFN's consent to provide access, municipal use occurred as well
- Early in 1944, the Crown approached KFN to discuss a surrender of 1.5 acres of reserve lands for a road relocation. In response, KFN expressed interest in surrendering the 68.16 acre Reserve. The reserve was sold in August 1944.
- Following the surrender, Canada delayed to sell the Reserve – it was finally sold in 1956
- When the Reserve was finally sold, Canada did not subdivide the lands into individual lots and instead sold the land in 3 large parcels

Kahkewistahaw – Decision

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- Pre-surrender duties:
  - Tribunal ruled that the Crown had not breached any duties – fiduciary, statutory, or Treaty – in allowing the surrender
  - Tribunal held that non-compliance with the surrender requirements of the *Indian Act* did not invalidate the surrender in this case
  - Balance needs to be struck between "autonomy and protection"

- Post-surrender duties:
  - Canada owes a fiduciary duty, even after a surrender
  - Tribunal ruled that the Crown's 12-year delay in selling the Reserve was a breach of its fiduciary obligations
  - Tribunal ruled that the Crown ought to have fully analyzed the option of subdividing the land and its failure to do so was a breach of fiduciary duty

Kahkewistahaw – Decision

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- On the issue of trespass, the Tribunal:
  - Found that Canada had breached its fiduciary duty to KFN prior to the surrender by failing to prevent the unauthorized use of the road allowance, and by not taking steps to remove the buildings built on IR 72A before 1944
  - Dismissed Canada's argument that under the *Indian Act,* it was only required to address trespass upon receiving a complaint from KFN, and that under the *Indian Act* Bands are empowered to address trespass so no fiduciary duty is triggered
  - Confirmed that the Crown's fiduciary duty is grounded in the Crown's discretionary control over First Nation's interest in the Reserve – the Crown must use ordinary diligence to protect a First Nation's quasi-proprietary interest by taking steps to remedy a trespass even in the absence of a complaint by the First Nation

Kahkewistahaw – Implications

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- Even without complaints about trespass, Canada still owes a fiduciary duty to protect the quasi-proprietary interest in a First Nation's reserve lands

- Even after a surrender, Canada still owes a fiduciary duty to the First Nation to act with diligence and ordinary prudence with respect to the surrendered lands

- The Tribunal will make inferences to resolve issues when there are gaps in the evidence - the evidence in this claim appears to have come primarily from DIA's written records, with some community evidence

- The written record was clear that Kahkewistahaw initiated the surrender in order to further their best interests as they saw them in 1944 - there was no evidence from the community showing divided opinions about the surrender, or that the community did not understand the terms of the surrender – the surrender was not exploitative

Take Aways for Claim Research and Development

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Indigenous perspectives and legal principles can form meaningful and impactful additions to specific claims:

- *Is there oral history evidence that can be incorporated as evidence in your specific claim?*
- *What were the Indigenous perspectives and legal principles at the time when agreements were being entered into with Canada?*
- *Is there oral history evidence that contradicts or completes the narrative set out in the federal record?*
- *Is there archaeological and ethnographic evidence or Indigenous traditional knowledge that can expand on the Crown's definition of a village site?*

Comments / Questions?

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