



CANADA'S SETTLEMENT LETTER
INTERPRETING SS. 21(1) OF THE SCTA

THE CONTEXT

- Kahnawà:ke currently has three claims eligible to bring before the Specific Claims Tribunal (Mercier Bridge, Hydro Line 3, CSX Railway-partial acceptance)



THE SCTA (2008)

- Excludes comprehensive claims through clear legislative intent
- Specifically excludes as grounds for a specific claim, one that:

15(1)

[...]

(f) is based on, or alleges, aboriginal rights or title; or

(g) is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights.

SUBSECTION 21(1)

Unlawful disposition

21 (1) If compensation is awarded under this Act for an unlawful disposition of all of the interests or rights of a claimant in or to land and the interests or rights have never been restored to the claimant, then all of the claimant's interests in and rights to the land are released, without prejudice to any right of the claimant to bring any proceeding related to that unlawful disposition against a province that is not a party to the specific claim.

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- The terms "rights" and "interests" to the land are not defined anywhere in the Act, and the MCK has not found any interpretation of these terms by the SCT (up until 2021). MCK felt that there was uncertainty as to what ss. 21(1) meant, whether this could include Aboriginal rights to title rights and how it could be applied to Kahnawà:ke claims. Should be noted that ss. 21(1) applies automatically by operation of law.

THE LITIGATION

The Council of Chiefs provided a mandate to file one of our claims with the SCT on the condition that certainty was obtained that subsection 21(1) does not include Aboriginal rights or title. The position is that the community will not accept financial compensation if this results in the extinguishment of Aboriginal rights and title.

LEGISLATIVE HISTORY

[Mr. Louis Harper \(Legal Counsel, Manitoba Keewatinook Ininew Okimowin\)](#) raised the following concerns at the Parliamentary Standing Committee on Wednesday, February 27, 2008:

“ Further to our presentation and more specifically to the legislation itself, by settling the specific claims only by payment of moneys and by imposing the release and extinguishment of first nation interests and rights in lands, [Bill C-30](#) will have the effect of extinguishing those interests and rights of first nations. The honour of the crown requires the recognition and the continuance of aboriginal title and rights and treaty rights and demands the replacement and restoration of first nation lands, particularly where such lands were part of the original bargain between Her Majesty the Queen and first nations to reconcile aboriginal title [...]”

ORDER SOUGHT

We filed our application with the Tribunal in February 2021, asking that the Tribunal conclude:

That subsection 21(1) of the *Specific Claims Tribunal Act* ("the Act") does not include or affect Aboriginal rights and title. In the alternative, should this Tribunal find that subsection 21(1) affects Aboriginal rights, treaty rights and title, then it must be struck down for it violates section 35, of the *Constitution Act, 1982* cannot be saved and is without force or effect as per subsection 52(1) of the *Constitution Act, 1982*. In the further alternative, should this Tribunal find the provision ambiguous, a presumption of compliance with the Constitution must apply and the provision should be deemed not to include or affect Aboriginal rights, treaty rights and title.

THE LITIGATION

The Respondent argued in its Motion to Dismiss:

- The Tribunal had no jurisdiction to decide over these issues since a claim has not been filed, the requirements for a court to grant a declaratory relief were not met, constitutional questions should not be assessed in a factual vacuum (which was disturbing since the implication of this argument was that Aboriginal rights/title rights could potentially be included depending on the facts of a particular claim).

The MCK Responded:

- The requirements for declaratory relief are met
- The Tribunal has all of the powers of a Superior Court and is best positioned to interpret its enabling statute
- The questions before the Tribunal can be answered without reference to the constitution, by statutory interpretation and, in any case, a law is unconstitutional by operation of the constitution, not by judgment of any court requiring special standing of an applicant

THE LITIGATION

- Following the exchange of our positions on Canada's motion to dismiss, discussions between MCK and Canada regarding a potential settlement of the file intensified and the case was put into abeyance
- Canada then offered to provide MCK with a letter of interpretation confirming our interpretation of ss. 21(1) to settle the litigation. The Council of Chiefs decided to accept this letter.

THE SETTLEMENT LETTER OF INTERPRETATION

"In line with the *Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* and in order to approach this file in a manner that promotes resolution based on the principles of reconciliation and recognition of rights, Canada wishes to submit the following proposal for your consideration."

THE LETTER

"Canada acknowledges that s. 21(1) of the *SCTA* does not have the effect of releasing existing Aboriginal rights, title, and treaty rights related to activities of an ongoing and variable nature, which are recognized and affirmed by s. 35 of the *Constitution Act, 1982*."

THE LETTER

“That being said, pursuant of s. 35 of the SCTA, in the event that the SCT would award compensation in regard to any specific claims, such compensation could be invoked by Canada in any pending or subsequent case or negotiation where, for example, the infringement of an existing Aboriginal right, title, or treaty right related to activities of an ongoing and variable nature is alleged, in order to avoid double compensation for the same loss, if applicable.”

SUBSECTION 35

Canada included reference to s. 35 of the SCTA to reaffirm that “double-dipping” was not permitted:

“Release and indemnity

35 If the Tribunal decides that a specific claim is invalid or awards compensation for a specific claim,

(a) each respondent is released from any cause of action, claim or liability to the claimant and any of its members of any kind, direct or indirect, arising out of the same or substantially the same facts on which the claim is based; and

(b) the claimant shall indemnify each respondent against any amount that the respondent becomes liable to pay as a result of a claim, action or other proceeding for damages brought by the claimant or any of its members against any other person arising out of the same or substantially the same facts.”

LETTER IS BINDING

- The settlement letter of interpretation was not submitted on a without prejudice basis.
- The letter was not marked as “confidential”.
- The letter is therefore binding on the Crown and MCK can rely on it in any future negotiations. The MCK can also share it with other communities throughout Canada (i.e. through specific claims research directors’ group).

LEGISLATIVE AMENDMENT

- In spite of the letter of interpretation, the MCK remains concerned with the wording of subsection 21(1). This provision should be amended to clarify that it does not include any Aboriginal rights or title.
- While we have more clarity on what ss. 21(1) doesn't include (Aboriginal rights and title), it remains unclear as to what ss. 21(1) actually does include and when it applies.

LEGISLATIVE AMENDMENT

- As part of a separate initiative, Canada has indicated that they are currently working on a broad amendment to the *Interpretation Act* that would state that all of Canada's laws must be interpreted as not affecting Aboriginal rights and title
- Canada has also indicated that subsection 21(1) will be looked at when the statute is revised (likely in 2-3 years)
- MCK suggests that First Nations remain vigilant and participate in the SCTA legislative review process.

OTHER NEXT STEPS

- MCK would like to see this letter of interpretation circulated widely and used by First Nations, if necessary, before the Tribunal or at claims settlement negotiation tables (negotiation of “certainty clauses”)
- MCK would like First Nations to be aware of ss. 21(1) and how it could apply to claims you have before the Tribunal.
- MCK would like to see the Tribunal turn its mind to what ss. 21(1) does mean and how it applies to claims



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BY EMAIL

December 21st, 2021

Me Stacey Douglas
Me Francis Walsh
Mohawk Council of Kahnawà:ke
P.O. Box 720, Mohawk Territory of
Kahnawà:ke, J0L 1B0

RE: *Mohawk Council of Kahnawà:ke v. Her Majesty the Queen in Right of Canada*, SCT: 2004-20
Our File No: 500043153

Dear Colleagues,

We thank you in advance for submitting the present proposal to the Mohawk Council of Kahnawà:ke, for their consideration.

We are writing to you regarding your Application for declaratory judgment (hereafter the "Application"), filed in the Specific Claims Tribunal (hereafter the "SCT") on February 5th, 2021, which essentially seeks a declaration to the effect that s. 21(1) of the *Specific Claims Tribunal Act*, SC 2008, c. 22 (hereafter the "SCTA") does not affect Aboriginal rights, title or treaty rights.

In line with the *Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* and in order to approach this file in a manner that promotes resolution based on the principles of reconciliation and recognition of rights, Canada wishes to submit the following proposal for your consideration.

Canada acknowledges that s. 21(1) of the *SCTA* does not have the effect of releasing existing Aboriginal rights, title, and treaty rights related to activities of

an ongoing and variable nature,¹ which are recognized and affirmed by s. 35 of the *Constitution Act*, 1982.

That being said, pursuant to s. 35 of the *SCTA*, in the event that the SCT would award compensation in regard to any specific claims, such compensation could be invoked by Canada in any pending or subsequent case or negotiation where, for example, the infringement of an existing Aboriginal right, title, or treaty right related to activities of an ongoing and variable nature is alleged, in order to avoid double compensation for the same loss, if applicable.

We sincerely hope that your client is of the view that this acknowledgment from Canada's part warrants the withdrawing of the Application in the above stated file.

We remain available to discuss the implementation of this proposal or should you have any question.

Sincerely yours,



Me Marie-Emmanuelle Laplante
Me Éric Gingras
Me Benjamin Chartrand
For the Respondent

¹ Pursuant to s. 15(1)(g) of the *SCTA*.