Specific Claims Legal Update

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May 18, 2023

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Overview

1. Specific Claims Tribunal in 2022-2023
2. *Kwakiutl v Canada*, 2022 SCTC 1
3. *Kahkewistahaw First Nation v Canada*, 2022 SCTC 5
4. *Metlakatla Indian Band v Canada*, 2022 SCTC 6
5. *Saulteaux First Nation v Canada*, 2023 SCTC 1
6. *Restoule v Canada* SCC intervention

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Specific Claims Tribunal in 2022-2023

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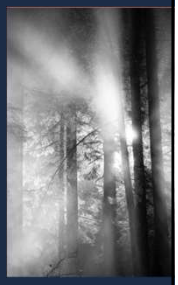
Specific Claims Tribunal in 2022-2023

- Reasons for Decision:
  - *Kwakiutl v HMTQ,* 2022 SCTC 1
  - *Kahkewistahaw First Nation v HMTQ,* 2022 SCTC 5
  - *Metlakatla Indian Band v HMTK,* 2022 SCTC 6
  - *Saulteaux First Nation v HMTK,* 2023 SCTC 1
- Reasons on Application:
  - *Enoch Cree Nation v HMTQ,* 2022 SCTC 2
  - *Cook's Ferry Indian Band v HMTQ,* 2022 SCTC 3
  - *Atikameksheng Anishnawbek v HMTQ,* 2022 SCTC 4
  - *Cook's Ferry Indian Band v HMTK,* 2023 SCTC 2
  - *Waterhen Lake First Nation v HMTK,* 2023 SCTC 3
- *Restoule v Canada* will be heading to the Supreme Court of Canada, UBCIC is part of a coalition that has been granted leave to intervene



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Kwakiutl v Canada, 2022 SCTC 1

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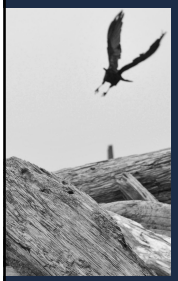
Kwakiutl – Overview



- Specific Claims Tribunal decision interpreting the Fort Rupert Treaties of 1851 (northeastern Vancouver Island)
- The Crown promised in the Treaty to reserve and survey all Kwakiutl village sites and enclosed fields within the treaty area
- Claim concerned 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

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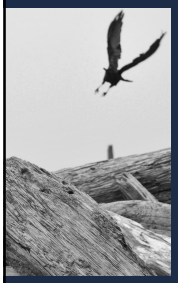
Kwakiutl – Decision



- 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 of lands to the Crown
- 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

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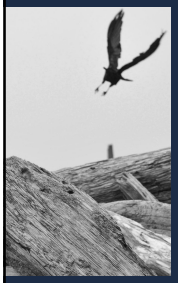
Kwakiutl – Implications



- While the interpretation of treaty promises must be informed by Indigenous perspectives and grounded in the honour of the Crown, evidence of sustained use and occupation (seasonal or permanent) 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
- The village site must be known to the Crown or cognizable with ordinary diligence

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Kahkewistahaw First Nation v Canada, 2022 SCTC 5

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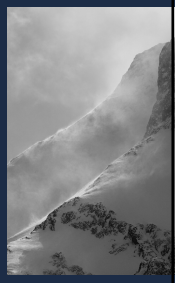
Kahkewistahaw – Overview

- Kahkewistahaw First Nation, located about 150 km east of Regina, SK, brought this Claim in respect of four separate events:
  - 1909 construction of the Craven Dam,
  - 1944 diversion of a road across the Reserve,
  - 1944 surrender of the entire Reserve, and
  - a delay of 12 years prior to the surrendered land being sold for the benefit of the Band in 1956
- Claim alleged Canada failed to fulfill its statutory, fiduciary and Treaty obligations in relation to the 1944 surrender of IR 72A, and failed to consult and accommodate regarding construction of the Craven Dam



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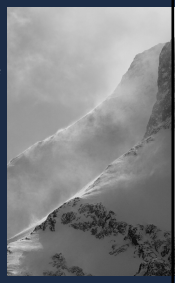
Kahkewistahaw – Decision

- 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 continues to owe a fiduciary duty after a surrender of reserve lands
  - 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



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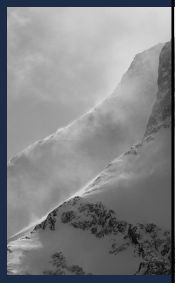
Kahkewistahaw – Decision

- On the issue of trespass, the Tribunal:
  - Found that Canada had breached its fiduciary duty to KFN prior to *and after* 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
- Tribunal found it did not have jurisdiction to decide the duty to consult issue raised re the Craven Dam



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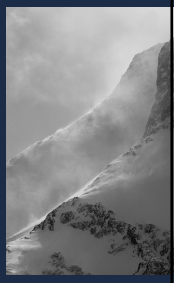
Kahkewistahaw – Implications

- Even without complaints about trespass, Canada still owes a fiduciary duty to protect a First Nation's reserve lands from trespass
- 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
- **Kahkewistahaw is seeking judicial review of this decision at the Federal Court of Appeal**



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Metlakatla Indian Band v Canada, 2022 SCTC 6

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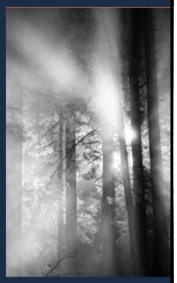
Metlakatla – Overview

- Metlakatla alleged that Canada had breached its fiduciary obligations in the surrender and sale of a portion of Tsimpsean IR No. 2 in 1906-07 for the western terminus of the Grand Trunk Pacific Railway
  - 1906: Metlakatla surrendered 13,519 acres of reserve lands for $7.50 per acre
  - 1907: Canada transferred 14,160 acres to the railway company



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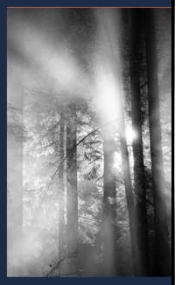
Metlakatla – Decision

- The Tribunal found Canada transferred more lands to the railway company than Metlakatla had surrendered, and that this was an illegal disposition of reserve lands
- Tribunal found that Canada had consented to the sale of the land at a price well below market value
  - $7.50/acre vs $31/acre
  - The "principle of anticipation" was an important factor in determining market value
- The Tribunal further found that Canada withheld material information from Metlakatla and failed to act with loyalty and good faith
  - Canada did not disclose to Metlakatla that Canada was a partner in the construction of the railway, or that that there was no reasonable prospect of the railway terminus being located elsewhere



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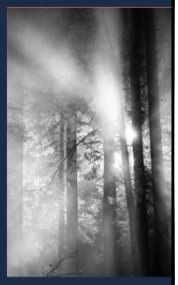
Metlakatla – Implications

- The Tribunal suggested that the Crown's fiduciary duty to deal with surrendered reserve lands in the best interests of the First Nation does not arise from the *Indian Act,* but rather from the *Royal Proclamation of 1763*
- Unlawful sales of provisional reserve lands can constitute an illegal disposition of reserve lands for the purposes of the *Specific Claims Tribunal Act*



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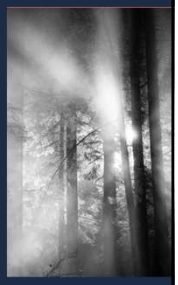
Metlakatla – Implications

- The Tribunal found that the Crown has a fiduciary duty to avoid improvident bargains with respect to surrenders of provisional reserve lands
- The Tribunal suggested that the duty to avoid an improvident bargain stems from the *Royal Proclamation of 1763*
- The Tribunal also highlighted the importance of the principle of anticipation in the assessment of land values



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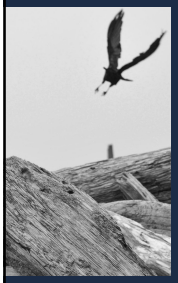
Saulteaux – Overview



- Claim alleged that Canada had breached its fiduciary duties to Saulteaux First Nation
- The Claim was brought with respect to the 1960 surrender for sale of a portion of Saulteaux's Reserve No. 159 which bordered Jackfish Lake in northwest Saskatchewan
- Saulteaux surrendered these lands to the Province for provincial park purposes in exchange for a cash payment and a larger tract of land elsewhere

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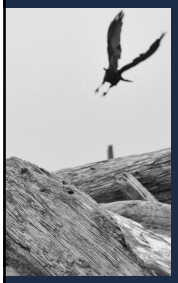
Saulteaux – Decision



- The Crown's fiduciary obligations in the context of a surrender of reserve lands arise from the *Royal Proclamation of 1763* – when the Crown took upon itself a responsibility to prevent exploitative bargains
- A bargain concerning surrendered reserve lands is exploitative when an outsider's efforts to obtain the surrender are based on fraud or abuse, or if the First Nation's decision to surrender their lands was "foolish or improvident"
- The Tribunal held that the bargain was fair and reasonable when viewed from Saulteaux's perspective at the time

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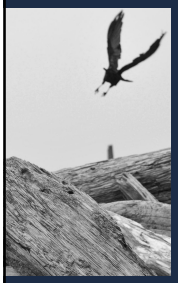
Saulteaux – Implications



- This decision offers guidance on the content of Canada's fiduciary obligation to prevent an exploitative or improvident surrender
- The Tribunal suggested that Canada will be in breach when:
  - it allows an outsider to push a First Nation into a surrender through fraud or abuse
  - a significant discrepancy exists between the market value of the land surrendered and the land received by the First Nation
  - the First Nation is not given sufficient information to protect its own best interest
  - the Crown acts in a way that taints the proceeding and makes it unsafe to rely on the First Nation's expressed intention or understanding
- The Tribunal indicated that the question of whether a First Nation's freely taken decision to surrender a reserve is improvident must be viewed from the perspective of the band at the time and **without the benefit of hindsight**

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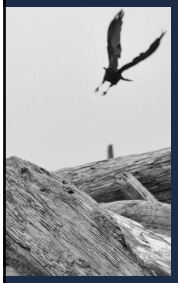
Saulteaux – Implications



- This decision also provides guidance on when it will be more effective to employ a direct comparison approach to historical land valuations, versus a subdivision development approach
- Finally, the Tribunal held that Canada's fiduciary duty to minimally impair reserve lands, which applies in the context of an expropriation of reserve lands, does not apply in the context of a freely given surrender untainted by Crown misconduct
- **Saulteaux Frist Nation is seeking a judicial review of this decision at the Federal Court of Appeal**

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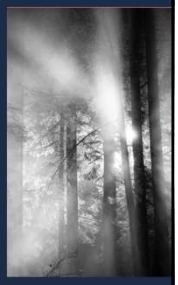
Restoule – Trial Decision

- 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 Anishinaabe 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



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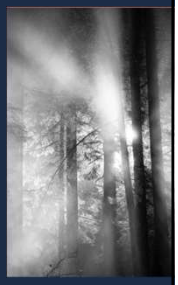
Restoule – Appeal Decision (2021 ONCA 779)

- 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



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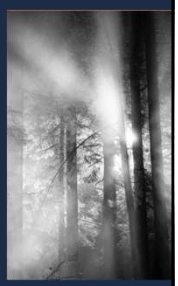
Restoule – Next stop, SCC

- 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 (hearing date TBD)
- UBCIC intervened in the *Restoule* case at the Ontario Court of Appeal, and is leading a coalition to intervene at the SCC
- The coalition has focused on the following submissions:
  - Treaty promises and other historical Crown promises must be interpreted in light of the constitutional imperatives of reconciliation and the honour of the Crown, and Canada's commitment to UNDRIP
  - Indigenous laws and perspectives must be considered in the interpretation and implementation of historical treaty and other Crown promises, and must inform redress for Crown breaches of those promises



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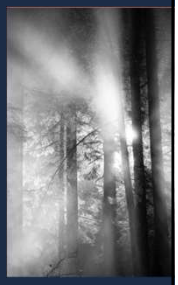
Restoule – Implications

- 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 in part on the nation's understanding of the promise as informed by its own legal traditions and laws
- 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



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Thank you.

Questions? Comments?

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