

## Waiting for the Honour of the Crown

### Case Comment on *Mohawks of the Bay of Quinte v. Canada*, 2013 FC 669

Aboriginal people hear a lot about the honour of the Crown, but rarely encounter it. The Federal Court's recent decision in *Mohawks of the Bay of Quinte v. Canada* is a welcome example of a First Nation succeeding in enforcing, on a practical level, the Crown's obligations to engage honourably and negotiate in good faith.

#### What it is about

In 1995 the Mohawks of the Bay of Quinte filed a specific claim under Canada's Specific Claims Policy seeking the return of 923 acres of land that had been taken from them in 1837. Canada agreed to negotiate the claim in accordance with the Policy, which stated that Canada could compensate a First Nation either with the return of land, money or both.

Despite the plain wording of the Policy, throughout the negotiation process Canada repeatedly took the position that it would not consider acquiring the lands and returning them to the Mohawks as part of a negotiated settlement.

In Court, the Mohawks argued that the Minister of Aboriginal Affairs had breached his fiduciary duty to negotiate in good faith by failing to consider all the available options in the negotiation process, including the possibility of the Crown acquiring land from a willing seller and returning it to the Mohawks.

#### What the Court said

The Court concluded that the Minister had breached his obligation to negotiate in good faith by denying the possibility of the land being returned to the Mohawks.

The Court was careful to avoid getting directly involved in the ongoing negotiations between the Mohawks and Canada, but it nevertheless made declarations that the Policy did allow for the return of land and that Canada had to differentiate between options available under the Policy and its negotiation position.

## Why it matters

The decision is a rare example of a court stepping in to enforce the Crown's obligations to engage with First Nations meaningfully and in good faith. By holding Canada accountable to its own policy, the Court sent a message to the Crown and First Nations that the Crown's responsibility to act honourably in its dealings with First Nations is a legally-enforceable duty.

The decision will be welcome news for First Nations involved in the specific claims process, where First Nations across the country are increasingly frustrated by Canada taking non-negotiable positions contrary to its own Policy.

The decision will also have implications beyond the specific claims context. The decision builds on the recent *Manitoba Métis Federation v. Canada* decision, in which the Supreme Court of Canada confirmed that the honour of the Crown is a legally-enforceable obligation. The *Mohawks of the Bay of Quinte* decision is further support for the principle that the Crown must negotiate with Aboriginal peoples in good faith, and that if it fails to do so, the courts may step in and enforce that obligation.

The underlying message is that courts may be more willing to enforce the Crown's duties when dealing with Aboriginal peoples at the negotiation table and beyond. The decision demonstrates that the courts have an important role to play in ensuring that the honour of the Crown evolves from rhetoric to reality.

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