Federal Court of Appeal | Cour d'appel fédérale

Date: 20240712

Dockets: A-303-19
A-328-19

Citation: 2024 FCA 119

CORAM: **GLEASON J.A.**
WOODS J.A.
HECKMAN J.A.

Docket: A-303-19

BETWEEN:

LITTLE BLACK BEAR FIRST NATION

Applicant

and

KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION, DAY STAR FIRST NATION, STAR BLANKET FIRST NATION, STANDING BUFFALO DAKOTA FIRST NATION, PEEPEEKISIS FIRST NATION, and HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondents

Docket: A-328-19

AND BETWEEN:

STAR BLANKET FIRST NATION

Applicant

and

KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION, DAY STAR FIRST NATION, LITTLE BLACK BEAR FIRST NATION, STANDING BUFFALO DAKOTA FIRST NATION, PEEPEEKISIS FIRST NATION, and HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondents

Heard at Regina, Saskatchewan, on September 26 and 27, 2023.

Judgment delivered at Ottawa, Ontario, on July 12, 2024.

REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	HECKMAN J.A.
DISSENTING REASONS BY:	GLEASON J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

I. Introduction

[1] The Applicants, Little Black Bear First Nation (Little Black Bear) and Star Blanket First Nation (Star Blanket), seek judicial review of a Decision of the Specific Claims Tribunal (Tribunal) reported as *Kawacatoose First Nation v. Canada*, 2019 SCTC 3.

[2] The Decision by the Honourable W.L. Whalen determined which First Nations were beneficiaries of Indian Reserve No. IR 80A (IR 80A). The reserve, whose Indigenous name is Kinookimaw, was created in 1889 by Order in Council PC 1151 (PC 1151), and was described simply as a "Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians." The Decision turned on the proper interpretation of this phrase.

[3] The Tribunal concluded that of the 11 First Nations purporting to be beneficiaries, either as Indians of the Touchwood Hills or Qu'Appelle Valley, 8 of the 11 were beneficiaries. The two Applicants are among the First Nations who were denied beneficiary status.

[4] The Crown took no position before the Tribunal or this Court on who the proper beneficiaries were. In this Court, submissions were made by the Applicants, as well as two First Nations who were accorded beneficiary status by the Tribunal, those being Kawacatoose First Nation (Kawacatoose) and Standing Buffalo Dakota First Nation (Standing Buffalo).

[5] The primary issue in these applications is whether the Court should set aside the Tribunal's decision in so far as it excluded Little Black Bear and Star Blanket from the class of beneficiaries. For the reasons that follow, I would dismiss the applications.

II. Background

A. *Procedural history*

[6] There is a larger context to the Decision under review. Determining who the beneficiaries of IR 80A were will resolve a larger question of who the Crown owed duties to upon a purported surrender of the reserve in 1918. Alleged breaches of these duties are the subject of a claim (Claim) before the Tribunal.

[7] The Claim was bifurcated into two phases. These judicial review applications concern the Tribunal's standing sub-phase, in which the Tribunal determined which of the First Nations alleging to be beneficiaries would be accorded standing to pursue the Claim.

B. *Parties*

[8] In these reasons, First Nations are sometimes referred to as "Indian Bands" or "Bands", and their individual members are occasionally referred to as "Indians". This terminology corresponds with the historical records that form part of the evidence and is used solely to avoid confusion.

[9] Before the Tribunal, the parties included 11 First Nations (Claimants) who sought to have standing in the Claim. The Crown was the sole respondent.

[10] In this Court, the Applicants are Little Black Bear and Star Blanket, and the remaining 9 First Nations and the Crown are Respondents.

[11] I sometimes refer to the Claimants by the geographic location of their residential reserves. These locations are set out in the chart below, and are reflected in a map of the region appended to these reasons.

Touchwood Hills Bands	Day Star, George Gordon, Muskowekwan, and Kawacatoose First Nations
Qu'Appelle River/Lake Bands	Pasqua, Muscowpetung, Piapot, and Standing Buffalo First Nations
File Hills Bands	Little Black Bear, Star Blanket, and Peepeekisis First Nations

[12] I also sometimes refer to a subgroup consisting of seven First Nations who the Crown historically recognized as being beneficiaries of IR 80A. These were the Bands that the Crown considered as Indians of the Touchwood Hills or Qu'Appelle Valley. This subgroup was referred to by the Tribunal as the "Kawacatoose Group". I use the same terminology in these reasons. The Bands in this group are the Bands located in the Touchwood Hills and the Qu'Appelle River/Lake area, with the exception of Standing Buffalo who was not recognized by the Crown as being a beneficiary. It is noteworthy that the File Hills Bands, which include the Applicants, are not in the Kawacatoose Group.

C. *Treaty 4*

[13] Historically, the Claimants were nomadic peoples in what is now southern Saskatchewan who followed a migratory route through the Qu'Appelle region. All but one of the Claimants are Cree and Saulteaux people. The lone exception is Standing Buffalo, who are Dakota/Sioux.

[14] In 1874, all the Claimants except Standing Buffalo entered into Treaty 4 with Canada. Treaty 4 encompasses a large geographic area in parts of what are now Saskatchewan, Alberta and Manitoba.

[15] All of the Claimants were provided with residential reserves in the larger Qu'Appelle region. The Cree and Saulteaux Claimants were entitled to the reserves pursuant to Treaty 4. Standing Buffalo did not enter into any Treaty, and was independently provided with a reserve in consideration of services it rendered to the Crown.

[16] The relevant text of Treaty 4 provides that reserves will be assigned by the Crown, after conference with each Band, and the Indians will have the right to pursue fishing and other avocations throughout the ceded area, except on tracts taken up by the Crown for other purposes. These provisions are reproduced below.

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families …

…

> And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government.

D. *Process of reserve creation*

[17] The boundaries of the Claimants' reserves were determined by surveys. Much of the surveyors' work, which began on the ground around 1876, ultimately translated into the confirmation of the Claimants' reserves in PC 1151.

[18] PC 1151 was an omnibus Order in Council, which formally approved a great many reserves. It comprised a total of 84 residential reserves for individual Bands, two fishing stations, one hay ground and two timber limits (Decision at para. 52).

[19] Fishing station reserves were first developed in 1881 to replace a system of designating entire lakes for the exclusive use of First Nations for fishing. The reserves were tracts of land along bodies of water for the exclusive use of designated Bands so as to provide access to fishing (Decision at para. 28). Whereas residential reserves were set aside for a particular Band, these special use reserves were sometimes for more than one Band.

[20] PC 1151 contained copies of all the reserves' plans of survey, with the name of the surveyor and the signature of John C. Nelson indicating that, as the person in charge of reserve surveys, he had checked and approved them. Mr. Nelson, himself a Dominion Land Surveyor, had also surveyed many of the Claimants' reserves, including IR 80A.

E. *Creation of IR 80A*

[21] The first reference in the record to a fishing station at IR 80A was in a list of as yet unsurveyed reserves dated January 1, 1883 and prepared by Mr. Nelson. It identified the reserve as a "fishing station of 320 acres for Qu'Appelle and Touchwood Indians" to be surveyed at Last Mountain Lake.

[22] On June 5, 1884, Mr. Nelson reported to the Office of the Commissioner of Indian Affairs that he had visited the Long or Last Mountain Lake to set aside "fishing stations for the Touchwood Hills and Qu'Appelle Valley Indians." While he identified the location for the fishing station, he did not survey it at that time. The location was near Last Mountain Lake and the Qu'Appelle River.

[23] The survey for IR 80A was completed in 1885, at which time Mr. Nelson reported to the Indian Commissioner that he had surveyed "a fishing station for the Touchwood Hills and Qu'Appelle Valley Indians." This description matched the wording in PC 1151, which is at issue in these applications.

F. *Purported surrender of IR 80A*

[24] In the early 1900s, the Department of Indian Affairs (Department) began considering a disposition of IR 80A. Surrender documents were purportedly signed by the seven chiefs of the Kawacatoose Group, and the surrender was confirmed in 1918 by PC 1815.

[25] Subsequent to the purported surrender, the land was subdivided and a number of lots were sold. The distribution of the proceeds to the Kawacatoose Group sparked a discussion within the Department on entitlement as some of the Claimants expressed dissatisfaction with the outcome. One concern that resonated with some Department officials was that the File Hills Bands should have been included as "Qu'Appelle Valley Indians" and beneficiaries of IR 80A because their reserves were not in close proximity to fishing lakes (Decision at para. 70). However, the Department's position that the Bands belonging to the Kawacatoose Group were the only intended beneficiaries of IR 80A did not change. Some of the Bands continued to express dissatisfaction at least up until 1954.

G. *Decision of the Tribunal*

[26] As mentioned earlier, when a Claim was instigated against the Crown regarding its administration of IR 80A's surrender, the Tribunal had to first decide which of the Claimants were beneficiaries of the reserve and therefore had standing to continue in the litigation.

[27] The Tribunal concluded that, in addition to the seven First Nations in the Kawacatoose Group, the only other beneficiary was Standing Buffalo. None of the File Hills Bands were included. Little Black Bear and Star Blanket seek to set aside the Decision in so far as it determined that they were not beneficiaries.

[28] The Decision is described more fully below.

III. Issue

[29] The issue is whether the Decision should be set aside with respect to the Tribunal's finding that the Applicants were not beneficiaries of IR 80A. The issue is not whether the Applicants should have been included as beneficiaries, but is whether they actually were.

IV. Standard of review

[30] The Decision will be reviewed on the deferential standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 [*Williams Lake*]).

[31] The approach to reasonableness review articulated by the Supreme Court in *Vavilov* is concerned with both the decision-making process as well as the outcome reached (*Vavilov* at para. 83).

[32] The following principles from *Vavilov* are particularly useful in reviewing this Decision:

(i) The "burden is on the party challenging the decision to show that it is unreasonable." "[A]ny shortcomings or flaws relied on by the party challenging the decision [must be] sufficiently central or significant to render the decision unreasonable." (*Vavilov* at para. 100);

(ii) A decision will be unreasonable if the reasoning process is not rational or logical. In particular, "a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis …" (*Vavilov* at para. 103);

(iii) A decision will also be unreasonable when the "decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it." (*Vavilov* at para. 101); and

(iv) With respect to factual determinations, generally the court must "refrain from 'reweighing and reassessing the evidence considered by the decision maker'." However, "[t]he decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. … The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it." (*Vavilov* at paras. 125, 126).

[33] The reasonableness standard of review as applied to decisions of the Specific Claims Tribunal was considered by the Supreme Court in *Williams Lake*, which was decided a year prior to *Vavilov*. The Court commented that reviewing judges should be aware of the particular challenges faced by the Specific Claims Tribunal when it resolves legal issues arising from the application of legal principles and doctrines to historical claims and noted that the Specific Claims Tribunal is particularly suited to adjudicate these issues (*Williams Lake* at paras. 34-35).

V. Analysis

[34] This analysis is divided into two parts. First, I set out the relevant findings made by the Tribunal. Then, I analyze whether the Decision is reasonable.

A. *Tribunal's findings*

[35] The relevant findings of the Tribunal are set out below under the following headings used by the Tribunal:

- Overview of law
- Conclusions on oral history evidence
- Analysis of the documentary record
- Changes in Agency administration and later administrative confusion

- Use of IR 80A and the pass system
- Concluding comments

(1) Overview of law

[36] The Tribunal provided an overview of the legal principles which, in its view, bore on the issues before it. The overview also commented on how some of the legal principles should be applied in the case. Below, I summarize central aspects of this overview.

[37] The Tribunal first set out general principles of interpretation. Relying on *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 [*Osoyoos*], the Tribunal concluded that an Order in Council should be interpreted based on principles of statutory interpretation. It then stated the well-known approach to statutory interpretation: "[W]ords of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 54 D.L.R. (4th) 193 at para. 21, citing Driedger, *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983) at 87).

[38] The Tribunal also considered principles applicable in determining whether a reserve has been created. In one authority, *Ross River Dena Council Band v. Canada*, 2002 SCC 54, at paragraph 67, the Supreme Court instructed that the Crown must have an intention to create a reserve. The Tribunal concluded that the jurisprudence places great emphasis on Crown intent in resolving questions about reserve creation.

[39] The Tribunal also reviewed a decision with an issue similar to these applications: *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band*, [2003] 1 C.N.L.R. 6, 2002 CanLII 15761 (ON SC) [*Anishnabe*], aff'd [2004] 1 C.N.L.R. 35, 2003 CanLII 13835 (ON CA) [*Anishnabe OCA*]. In *Anishnabe*, the Court interpreted an Order in Council setting aside a reserve under Treaty 3 "for the Saulteaux Tribe, generally" in order to determine which specific Bands were the beneficial owners of the reserve. The Tribunal noted that, in this context also, the Court in *Anishnabe* focused its analysis on determining the Crown's intention in creating the reserve.

[40] The Tribunal also discussed interpretive principles applicable to statutory provisions that impact Indigenous interests. These are to generously interpret ambiguous provisions, and to approach such provisions in a manner that upholds the honour of the Crown. The Tribunal (at paragraph 145) reproduced the general description of these principles from *R. v. Badger*, [1996] 1 S.C.R. 771 at paragraph 41:

> [41] First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. … Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. … Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

[41] With respect to the interpretation of ambiguous provisions, the Tribunal also set out the principle of generous interpretation from *Osoyoos* at paragraph 68, which involved the interpretation of an Order in Council:

> [68] … if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application that impairs the Indian interests as little as possible should be preferred, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment …

[42] With respect to honour of the Crown, at paragraph 147 of the Decision the Tribunal referred also to the following excerpts from *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis*]:

> [147] . . . "The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples . . ." (para 73(4)). The Court continued that the "honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation", and the "honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests".

[43] Finally, the Tribunal considered precedents on the use of oral history evidence in the adjudication of historical claims. The Tribunal employed the term "Indigenous perspectives" to describe the perspectives of the First Nation Elders and life speakers (Elders) who appeared as witnesses, regardless of whether or not the information was passed down by ancestors or these witnesses had personal knowledge.

[44] The Tribunal noted that the oral history authorities referred to by the parties arose in a different context – Indigenous rights and title litigation. However, it observed that "the principles of necessity, reliability, relevance, and reconciliation are not logically restricted to that setting." (Decision at para. 153).

[45] Ultimately, the Tribunal concluded that since the interpretation of the Order in Council turns on the Crown's intent, the oral history evidence should be considered from the perspective of whether it had a bearing on the intent of the Crown. Paragraph 166 of the Decision provides an example of where the Tribunal adopted this approach:

> [166] . . . If, however, the Crown's intent was found on the facts to include some but not all of the Claimants in PC 1151, then a Claimant's sense of itself as belonging to, or having belonged to, the "Qu'Appelle Valley Indians" would not change that intention. Nor can the law relating to treaty interpretation, honour of the Crown and fiduciary obligations retroactively revise an order in council that the evidence clearly established had a more limited focus.

(2) Conclusions on oral history evidence

[46] The Tribunal heard evidence from 14 Elders called by some of the Claimants to testify as to their First Nation's use of, sense of entitlement to, and historical relationship with IR 80A.

[47] The Tribunal found that, in sharing their Indigenous perspectives, the Elders had "accurately recounted the information passed down to them" (Decision at para. 250). However, the Tribunal also concluded that the Elders had different understandings regarding the entitlement of their First Nations and other First Nations to IR 80A. The oral history evidence of

the witnesses "conflicted from one First Nation to another as well as internally among witnesses from the same First Nation" (Decision at para. 245). The Tribunal comments that the differences, variations and inconsistencies "undermined their evidence, both on an individual and overall basis" (Decision at paras. 249, 251). This finding included the Applicants' witnesses (Decision at paras. 245-246).

[48] In addition to its comment concerning inconsistencies, the Tribunal expressed skepticism about the testimony of some of the Claimants that their entitlement to IR 80A stemmed from an oral promise that was part of, or related to, Treaty 4. The Tribunal stated that this testimony came "with little elaboration or underlying factual basis" and the evidence as presented "was not sufficiently developed to support a finding that a promise of fishing station reserves was made at the time of Treaty adherence…" (Decision at para. 252).

[49] Finally, the Tribunal discussed evidence to the effect that all Claimants used IR 80A. The Tribunal found that this evidence demonstrated all Claimants had a strong attachment to IR 80A through their historical use and cultural perspective. However, it added that this attachment would not be enough to establish entitlement to IR 80A "unless it can be shown that the Crown was aware of it and was motivated to act upon it." (Decision at para. 262).

(3) Analysis of the documentary record

[50] The Tribunal commenced its consideration of the documentary record by stating that its focus was to determine the Crown's intent in enacting PC 1151 (Decision at para. 264). To undertake this task, the Tribunal meticulously reviewed a large number of documents.

[51] From this review the Tribunal made two important findings. First, "[Mr. Nelson's] intention in creating the [IR 80A] survey and describing it must surely govern in the sense that his work was the basis for PC 1151, which was in turn the stamp of approval of the content he had generated." Second, Mr. Nelson did not intend to include the File Hills Bands as beneficiaries of this reserve. "His intention was that IR 80A would be for the shared benefit of the bands residing in the geographic area known as the Touchwood Hills, and also in the Qu'Appelle Valley itself along the shores of the Qu'Appelle River or Lakes." (Decision at paras. 268, 289, 293, 300).

[52] At paragraph 301 of the Decision, the Tribunal discussed the role played by Indigenous perspectives in the selection of the beneficiaries of IR 80A. In this regard, the Tribunal acknowledged that the Claimants had self-identified as Indians of the Qu'Appelle region. However, the Tribunal stated that "Mr. Nelson's perspective and underlying intent were informed by geography and a professional surveyor's mandate in relation to situating bands on particular land within a particular time frame. The Indigenous perspectives were informed by the broad sweep of their histories and traditions. … The Indigenous and non-Indigenous perspectives apparently developed and thrived separately from each other, without connection or adoption by

one culture or the other." The Tribunal concluded that there was no evidence that "Mr. Nelson took a more inclusive view of 'Qu'Appelle Valley Indians'."

(4) Changes in Agency administration and later administrative confusion

[53] The Government set up Agencies to administer groups of Bands located in a particular area. The Tribunal noted that, during and following the period of reserve creation, the Agencies which administered the Claimants were reorganized on several occasions. This resulted in the names of the Agencies that administered the File Hills Bands and the Touchwood Hills Bands being changed from time to time. For example, the File Hills Bands were at times administered by the Qu'Appelle Agency and at other times by the File Hills Agency. Similarly, the Touchwood Hills Bands were sometimes administered by the Qu'Appelle Agency and at other times by the Touchwood Hills Agency.

[54] The Tribunal commented that these changes might have caused confusion and misunderstanding among the Claimants and some government officials as to the meaning of "Touchwood Hills and Qu'Appelle Valley Indians" in PC 1151. However, the Tribunal concluded that the names of the Agencies did not affect the Crown's intent with respect to IR 80A. The Crown adopted Mr. Nelson's perspective, which was geographic, not administrative (Decision at paras. 298-299).

[55] The Tribunal also considered events that took place after IR 80A was confirmed by PC 1151. In the early 1900s, a decade after IR 80A was created, the government decided to seek a

surrender of the reserve. In 1913, the Crown sought surrenders from the Bands that now comprise the Kawacatoose Group. They did not seek surrenders from the File Hills Bands. (Decision at paras. 67, 303).

[56] A debate then developed within the Department as to who the beneficiaries of IR 80A were. The Touchwood Hills Bands had voiced the view that the File Hills Bands also had an interest in the reserve. Some Department officials had sympathy for this view because the File Hills Bands, like the Touchwood Hills Bands, did not border on a fishing lake. However, the Department did not accept this view. (Decision at para. 304).

[57] The Tribunal noted that, despite the differing views described above, the Department never changed its view that the beneficiaries were the seven First Nations comprising the Kawacatoose Group, and this view was consistently maintained by senior Department officials and surveyors (Decision at para. 304).

[58] The Tribunal concluded that the Department's view was the correct one, and it was consistent with Mr. Nelson's intent, with the exception of the exclusion of Standing Buffalo. The Tribunal determined that Standing Buffalo had been improperly excluded by the Department on the basis that the Band was American Sioux. As Standing Buffalo's reserve was in the Qu'Appelle Valley, it had a beneficial interest in IR 80A. (Decision at paras. 307-309).

(5) Use of IR 80A and the pass system

[59] The Tribunal considered that several Bands used IR 80A after it was surveyed and formally set aside. It found that the Claimants did not pay great attention to boundaries at the time and they moved about each other's reserves. The Tribunal determined that this did not confer beneficiary status under PC 1151 (Decision at paras. 311-312).

[60] The Tribunal also commented on the relevance of the pass system, a brutal and illegal policy brought in by the Department around 1885 following the Riel Rebellion. The effect of the policy was that the government at its discretion could restrict the movement of First Nations' people outside their assigned reserves. The Tribunal noted that the overall use of IR 80A was diminished by both the imposition of the pass system and the forced transition of Indigenous people from a nomadic way of life to a controlled, stationary and agrarian existence. Nevertheless, the Tribunal found that the pass system had no effect on the entitlement to benefit from IR 80A (Decision at para. 313).

(6) Concluding comments

[61] The Tribunal provided concluding comments in its reasons. The relevant comments at paragraphs 315-323 include important findings which are outlined below.

[62] First, as "the authorized surveyor," Mr. Nelson was attentive to the nature and character of the land he surveyed. He consulted with the leadership of the Bands for which he was

surveying reserves. He also "tried to understand the needs of the communities he was serving and he was consistently accommodating in this region." (Decision at para. 315).

[63] Second, Mr. Nelson was not aware of the File Hills Bands' need for a fishing station at any relevant time, including when he surveyed IR 80A and supervised its confirmation. "Had he been [aware], or had he been asked for a fishing station or inclusion in IR 80A, I think it probable that he would have tried to accommodate." In addition, "there was no evidence that the File Hills Bands experienced difficulty obtaining fish, other than the interference created by the pass system and imposed on all Bands in the District." (Decision at paras. 316-317).

[64] Third, the perspective of the File Hills Bands did not change Mr. Nelson's "motivation and intent" with respect to IR 80A. "None of the principles of interpretation, applied liberally and to the best advantage of the File Hills Bands, can expand Mr. Nelson's intent …" Mr. Nelson understood the Touchwood Hills, File Hills and Qu'Appelle Valley as three distinct geographic locations. (Decision at para. 318).

[65] Fourth, "Canada treated the benefits of IR 80A as Mr. Nelson had intended them, and it was consistent in doing so." (Decision at para. 319).

[66] Fifth, the Tribunal had difficulty accepting some Elders' testimony that there were oral promises of fishing stations around the time Treaty 4 was negotiated. The concluding comments provide three reasons for this: the evidence of such promises was "limited and conflicting"; there was nothing to indicate that the device of the fishing station had been conceived of at the time of

the signing of Treaty 4; and the Tribunal believed that the oral promise of a fishing station would have been a more prominent, common and consistent feature of the Elders' testimony if such promises had been made. (Decision at para. 320).

[67] Sixth, there was no evidence that the Indigenous community had difficulty accessing fishing grounds or catching adequate amounts of fish. While the pass system controlled access, it did not eliminate it. All of the Claimants used IR 80A; they were not excluded by the Crown or the First Nations in the Kawacatoose Group. Further, how the Crown administered the surrender of IR 80A was beyond the scope of the standing sub-phase (Decision at para. 321).

[68] Seventh, the pre-contact perspective of the Claimants does not directly assist in the interpretation of PC 1151 and the wording used in IR 80A. Unlike Treaty 4, which was a joint framework, "reserves were entities devised by the Crown according to Anglophone common law legal structures." (Decision at para. 322).

[69] Eighth, as for whether ambiguities around the Crown's intentions regarding entitlement to IR 80A should be resolved in favour of the Applicants because the Crown's records were poor, there was no evidence that the records were of such a state to engage this principle. In any event, "the subject ambiguity was capable of clarification on the basis of the evidence adduced." (Decision at para. 323).

B. *Is the Decision unreasonable?*

(1) Introduction

[70] The Applicants have the burden to show that the Decision is unreasonable. In general, a decision may be unreasonable if it is untenable in light of the relevant factual or legal constraints, or if it fails to reveal a rational chain of analysis.

[71] Accordingly, the analysis below considers the submissions of the Applicants. As far as I am able to discern, the Applicants do not submit that the Decision is irrational. They only allege that it contains factual and legal flaws.

[72] Before proceeding further, I would mention that it is not enough for the Applicants to demonstrate that the Decision contained a legal or factual flaw. In light of the principles from *Vavilov* summarized above, they must also show that the flaw is significant enough to render the Decision unreasonable.

[73] I have tried to read the Decision holistically, and find that the Tribunal's concluding comments are helpful in understanding the reasoning process. These comments appear to summarize how the Tribunal reached its conclusion after a meticulous consideration of the evidence and the law.

[74] Although the Tribunal considered a number of issues, the outcome of the case is predicated on two central conclusions. First, the beneficiaries of IR 80A as described in PC 1151 should be determined in accordance with the intention of the Crown. Second, the Crown did not intend that the beneficiaries of IR 80A include the Applicants. If the Decision is unreasonable, it is likely because one of these findings is unreasonable.

[75] I turn now to the Applicants' arguments.

(2) Did the Tribunal unreasonably find that PC 1151 was not ambiguous?

[76] The Applicants submit that the Tribunal unreasonably found that the phrase "the Touchwood Hills and Qu'Appelle Valley Indians" is not ambiguous. They submit that the term "Qu'Appelle Valley Indians" is ambiguous and that the Tribunal should have interpreted it in their favour by finding it included the File Hills Bands.

[77] The Tribunal reasoned that, although the words by themselves are ambiguous, the ambiguity is resolved by the evidentiary record. The Tribunal did not express any doubts about this. It stated that it was "quite satisfied" with the conclusion. (Decision at paras. 300, 323).

[78] I will first address a submission of Little Black Bear that the Tribunal did not apply the proper principle in determining whether there is an ambiguity sufficient to engage the interpretive presumption in favour of the Applicants. Little Black Bear submits that the

ambiguity is obvious since Mr. Nelson never articulated the individual Bands for which IR 80A was intended and this was never definitively resolved.

[79] I do not agree. The essence of Little Black Bear's submission is that an ambiguity on the face of PC 1151 is sufficient to warrant applying a presumption in its favour. However, the Tribunal did not adopt this view and reasonably supported its approach at paragraphs 139-141 of the Decision.

[80] At paragraph 141 of the Decision, the Tribunal referred to the principle discussed in *Osoyoos* at paragraph 68. There, the Supreme Court stated that the presumption that courts should prefer the interpretation of an enactment that "impairs the Indian interests as little as possible" will apply only "if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law" [emphasis added]. The ambiguity must be "a genuine one" and the construction favourable to Indian interests must be "one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment." As for whether an interpretation should be considered sustainable as a matter of law, the Supreme Court recently confirmed the proper test in *La Presse inc. v. Quebec*, 2023 SCC 22 [*La Presse*]. At paragraph 24 of *La Presse*, Wagner C.J. stated:

> [24] Second, a provision is only "ambiguous" in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, if its words can reasonably be interpreted in more than one way *after* due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the *Canadian Charter of Rights and Freedoms* — only if

> differing readings of the same provision *cannot* be decisively resolved through the contextual and purposive approach set out by Driedger (*ibid*.).

[81] The Tribunal's approach took into account the text, context and purpose surrounding PC 1151 for the purpose of construing the description of IR 80A and assessing whether there was a genuine ambiguity. This approach was reasonable when viewed in light of these authorities.

[82] The Applicants also submit that, even if the proper principles were applied, the evidentiary record does not resolve the ambiguity. In my view, the Tribunal's finding to the contrary was also reasonable. In its interpretation of PC 1151, the Tribunal undertook an extensive consideration of the evidence and provided cogent reasons for its conclusion that the evidentiary record clearly resolves the ambiguity. There is no reasonable basis for this Court to reweigh or reassess this evidence.

[83] I would examine in particular three of the Applicants' arguments that the evidentiary record does not resolve the ambiguity. My focus will be on whether the Tribunal has "fundamentally misapprehended or failed to account for the evidence before it." (*Vavilov* at para. 126).

[84] First, the Applicants submit that "the Touchwood Hills and Qu'Appelle Valley Indians" could be a reference to Indian Agencies rather than geographic areas as the Tribunal had found. I disagree. The Tribunal reasonably rejected this submission at paragraphs 299-300 of the Decision when it found that, as a surveyor and the individual with the governing perspective with

respect to IR 80A, Mr. Nelson used the words in their geographic sense, not an administrative one.

[85] The Applicants also suggest that the geographic bounds of the "Qu'Appelle Valley" were not clear. Again, the Tribunal's consideration of this, and its conclusion at paragraph 293 that Mr. Nelson and the Department regarded the Touchwood Hills, File Hills and Qu'Appelle Valley as separate and distinct geographic locations, were grounded in the evidentiary record and are therefore reasonable. The Applicants have not demonstrated that this finding fundamentally misapprehends or fails to account for the evidence.

[86] The Applicants further submit that the ambiguity is demonstrated by the fact that certain government officials and the Touchwood Hills Bands advocated a different interpretation of "the Touchwood Hills and Qu'Appelle Valley Indians". In my view, the Tribunal reasonably rejected this submission at paragraph 304 when it found that the position taken by frontline officials did not amount to confusion on the part of the Department itself and the Department never altered its position on the correct interpretation.

[87] In summary, the Applicants' submissions on whether there was a genuine ambiguity justifying the invocation of the principle of generous construction favourable to Indian interests have failed to demonstrate how the Tribunal "misapprehended or failed to account for the evidence before it." I conclude that the Applicants have not demonstrated that the Tribunal's finding on ambiguity is unreasonable.

(3) Did the Tribunal unreasonably conclude that the interpretation of PC 1151 is determined by the Crown's intent?

[88] The Applicants submit that the Tribunal unreasonably concluded that the interpretation of PC 1151 is determined by the Crown's intent alone. They submit that the Tribunal should have also taken Indigenous perspectives into account. Little Black Bear submits the two perspectives should be given equal weight.

[89] The Tribunal's approach was based on general principles of statutory interpretation. At paragraph 139, the Tribunal stated:

> [139] Principles of statutory interpretation apply to orders in council (*Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, 2001 CarswellBC 2703 (WL Can). The general rule from *Rizzo & Rizzo Shoes Ltd, (Re)* 1998 CanLII 837 (SCC), [1998] 1 SCR 27, 1998 CarswellOnt 1 (WL Can), is that statutes must be interpreted in light of their purpose and context:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [para 21; citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87]

[90] In addition to these general principles, the Tribunal referred to reserve creation jurisprudence. While acknowledging that the reserve creation context is different, the Tribunal found that this jurisprudence provided guidance. According to the Tribunal, Crown intention is emphasized in these authorities. (Decision at paras. 131-135).

[91] Through reliance on these principles, the Tribunal concluded that Crown intention should govern. This led the Tribunal to make an important finding that Indigenous perspectives cannot be taken into account unless the Crown's intent is somehow linked to these perspectives. For example, in considering evidence of pre-contact history, the Tribunal stated: "In this Claim, the Tribunal has been tasked with interpreting an order in council created by the Crown in furtherance of relationships established jointly between the Crown and the Claimants." (Decision at para. 158). As a result, although it is essential that pre-contact history be considered, it "misses the mark, unless it can be established that such pre-contact history was in the Crown's mind, or that the Crown's intent was somehow linked to that context." (Decision at para. 158). This conclusion is referenced many times in the Decision, sometimes being described as requiring a "nexus" between the two perspectives.

[92] The Applicants submit that judicial authorities have accepted that Indigenous perspectives should be taken into account when interpreting an Order in Council, citing *Anishnabe*. However, *Anishnabe* is consistent with the approach taken by the Tribunal because *Anishnabe* considered Indigenous perspectives as part of the analysis to ultimately determine the intentions of the Crown (Decision at para. 169). The intention of the Crown was still the focal point of the analysis.

[93] In *Anishnabe*, the Crown created a reserve "not to be for any particular Chief or Band, but for the Saulteaux Tribe, generally" for the purpose of maintaining an Indian agency. In deciding for which of the Rainy River and Rainy Lake Bands the reserve was set apart pursuant to the Order in Council, the Court focused on determining the Crown's intention when

establishing the reserve (*Anishnabe* at paras. 51, 54, 80, 83). In its determination of the Crown's intent, the judge considered the language of the Order in Council; evidence of the broader historical context, including the circumstances contemporaneous with or immediately following the Order in Council; and the conduct and actions of the parties following the date of a purported surrender of the reserve. The Court of Appeal for Ontario endorsed this approach to determining the Crown's intent (*Anishnabe OCA* at para. 27).

[94] The Court in *Anishnabe* also considered Indigenous perspectives expressed in the oral evidence of Elders. However, it noted the Supreme Court's guidance in *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 30 [*Mitchell*], that oral tradition evidence "must be useful in the sense of tending to prove a fact relevant to the issues in the case" and observed that oral evidence should be weighed against documentary evidence whose accuracy is established. The Court found that the oral evidence, "while of some help, was vague and frequently not directly related to the issues before the court" (*Anishnabe* at para. 58). Concluding that the historical record of events contemporaneous with the creation of the reserve was "inconclusive, frequently vague and often conflicting," the Court held that the best evidence of the Crown's intention with respect to beneficial entitlement to the reserve were three "unequivocal" acts of surrender taken by Crown representatives and signed by the Rainy Lake Bands (*Anishnabe* at para. 83). This conclusion was upheld on appeal (*Anishnabe OCA* at para. 43).

[95] The Tribunal's approach to determining the question of entitlement is entirely consistent with that adopted in *Anishnabe*. The Tribunal looked not only at the wording of PC 1151 but at the historical record in order to ascertain the Crown's intention regarding entitlement to IR 80A.

Like the Court in *Anishnabe*, the Tribunal was open to considering the Indigenous perspectives expressed in the oral history evidence so long as these were relevant to the crucial question before it: which Bands did the Crown intend to benefit? As noted by the Tribunal, evidence regarding the Applicants' perspectives "might reveal that the Crown's intentions were informed by the Indigenous organization and collectivities of the time" (Decision at para. 166). Accordingly, the Tribunal's search for a nexus between the oral history evidence and the Crown's intention in creating IR 80A was consistent with *Anishnabe*.

[96] Finally, Little Black Bear relies on certain judicial decisions which gave significant weight to Indigenous perspectives as adduced through oral history evidence. However, this jurisprudence involved a much different context. For example, in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture & Lands)*, 2010 BCSC 1699, the Court sought to decide how to determine the members of a class of Indigenous plaintiffs who could claim an Aboriginal right to fish by virtue of their ancestral connection to an identifiable collective which engaged in that practice in pre-contact times. The Tribunal decided that this jurisprudence did not support Little Black Bear's claim that "Qu'Appelle Valley Indians" should be interpreted consistently with pre-contact collectives that existed on the Prairies, because it did not involve the interpretation of an Order in Council created by the Crown (Decision at para. 158). In my view, Little Black Bear has not shown that this conclusion is unreasonable.

[97] Accordingly, I conclude that the Applicants have not demonstrated the Tribunal acted unreasonably in determining that Crown intent governs the interpretation of PC 1151 and that

Indigenous perspectives do not assist this inquiry unless the evidence establishes a nexus between the two perspectives.

(4) Was the Tribunal's approach to the oral history evidence unreasonable?

[98] The Applicants submit that the Tribunal took an overly-restrictive approach to the oral history evidence.

[99] Little Black Bear submits that the Tribunal erred in rejecting its testimony that IR 80A was set aside for Little Black Bear alone. It refers to a decision of the Ontario Superior Court which stated: "Even if oral history is not definitive or precise, it may be useful …" (*Saugeen First Nation v. Canada*, 2021 ONSC 4181, at para. 47).

[100] In essence, Little Black Bear appears to suggest that the Tribunal should have found that the Crown made it some sort of promise, short of it being solely entitled to IR 80A. However, the trouble with this submission is that reasonableness review requires that deference be given to the factual findings of the Tribunal. In this case, Little Black Bear has not established that the Tribunal fundamentally misapprehended or failed to consider evidence. It would not be in accordance with reasonableness review for this Court to reassess this evidence.

[101] Star Blanket also submits that the Tribunal's approach to the oral history evidence was too restrictive. It submits that the Tribunal should not have required specific evidence of a nexus between Indigenous and Crown perspectives and should not have required more complete

evidence of an oral promise of a fishing station at the time of the treaty. Star Blanket refers to *Mitchell*, where at paragraph 34 the Supreme Court cautions against rejecting oral histories simply because the testimony lacks precise detail.

[102] The excerpt from *Mitchell* cited by Star Blanket was referred to by the Tribunal at paragraph 152. However, in the same paragraph the Tribunal also referred to another excerpt from *Mitchell* which adds a caveat to the statement referred to by Star Blanket. The caveat is at paragraph 39 of *Mitchell*:

> [39] There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*Marshall v. Canada*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456 (S.C.C.), at para. 14). . . . Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities.

[103] As further noted by the Supreme Court in *Mitchell* at paragraph 30, "the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case."

[104] Star Blanket's submission failed to note the Supreme Court's caveat in *Mitchell*. Rules of evidence are not to be abandoned, and "persuasive evidence" is required.

[105] For the reasons I have previously explained, it was reasonable for the Tribunal to find that the central issue before it was the Crown's intention with regards to who would be entitled

to the benefit of IR 80A. Accordingly, it reasonably required a "nexus" between Indigenous and Crown perspectives.

[106] The Tribunal found that the Applicants had adduced no evidence that Mr. Nelson was made aware of the Applicants' perspectives, including their self-identification as Indians of the Qu'Appelle Valley, or of the importance of Kinookimaw to their community. It found no evidence that the File Hills Bands had communicated their need for a fishing station to Mr. Nelson in such a manner that it could be inferred that he intended to include them as "Qu'Appelle Valley Indians" entitled to IR 80A (Decision at paras. 301, 317-322). In such circumstances, it was open to the Tribunal to come to the conclusion, on the basis of the documentary evidence before it, including the Department's Annual Reports and Mr. Nelson's Chronicles and notes, that "Qu'Appelle Valley Indians" included those Bands located within the Qu'Appelle Valley, a geographic location distinct from the Touchwood Hills or File Hills.

(5) Did the Tribunal misunderstand the evidence?

[107] The Applicants also submit that the Tribunal failed to properly account for some of the evidence before it. Below, I discuss two instances that are illustrative of this line of argument.

[108] First, the Applicants submit that the Tribunal erred when it stated that there was nothing in the record to suggest the File Hills Bands did not have the ability to fish (Decision at para. 321). The Applicants submit that this fails to take into account that there is a reasonable

explanation for their failure to raise a concern about having an ability to fish. The explanation they suggest is that the File Hills Bands thought they had the right to fish at IR 80A.

[109] This submission implies that the Tribunal inferred that the File Hills Bands had access to fishing and therefore did not need to be beneficiaries of IR 80A. But the Tribunal made no such finding. Instead, the Tribunal appeared to focus on the state of the record so that it could assess whether Mr. Nelson was made aware of the File Hills Bands' needs for fishing. This was ultimately relevant to determining whether there was a nexus with the Crown's intent. In my view, the Tribunal's conclusion with respect to the evidence as to the File Hills Bands' access to fishing is not unreasonable.

[110] Another alleged error, raised by Star Blanket, concerns the Tribunal's finding that Star Blanket's Elders gave inconsistent evidence. Star Blanket submits this misunderstands the Elder evidence.

[111] The Tribunal took into account the evidence of three Star Blanket Elders. One of them was Elder Margaret Starblanket. According to the Tribunal, this Elder did not support the evidence of the other two Elders. The Tribunal noted that Elder Starblanket testified IR 80A "was a place for people who needed a place to fish, including members of Little Black Bear, George Gordon, Muscowpetung, and Peepeekisis, although she understood it to have been a part of Little Black Bear's lands" (Decision at para. 245).

[112] The Tribunal was correct that Elder Margaret Starblanket's evidence was not consistent with Star Blanket's other witnesses. However, there is a reasonable explanation for this and it appears that the Tribunal did not take this into account. Elder Margaret Starblanket grew up on Little Black Bear's reserve, but married a Star Blanket Chief and lived on the Star Blanket reserve after that. She testified that she was told about Kinookimaw by her father. (Decision at paras. 235, 104).

[113] Therefore, it appears that Elder Margaret Starblanket was testifying about the oral history of Little Black Bear, not Star Blanket. Accordingly, I agree with Star Blanket that the Tribunal did not have a satisfactory explanation for finding that Star Blanket's oral history evidence was inconsistent.

[114] The remaining question is whether this shortcoming is significant enough to taint the reasonableness of the Decision. In my view, it is not, because the Tribunal relied more heavily on other reasons for ultimately rejecting Star Blanket's oral history evidence.

[115] In particular, the Tribunal focussed mainly on the testimony of life speaker Noel Starblanket. According to the Tribunal, life speaker Starblanket testified that Star Blanket was originally given fishing rights at another location and "the rights shifted to Kinookimaw although he did not explain how" (Decision at para. 245).

[116] Life speaker Noel Starblanket was not the only witness who testified to an oral promise of fishing rights which was part of Treaty 4 or related to it. Other Claimants' witnesses did the

same. The Tribunal considered this evidence collectively and found it to be particularly problematic. The Tribunal stated that the testimony "came with little elaboration or underlying factual basis"—and "[w]ithout more, I am skeptical." (Decision at para. 252). This comment includes life speaker Starblanket's evidence as described above.

[117] The Tribunal also raised other shortcomings with the witnesses' testimony concerning an oral promise of fishing rights. It concluded that, if an oral promise had been made, the evidence would have been stronger and the Crown would have likely had a record of it (Decision at para. 245). The Tribunal also observed that the concept of fishing stations had not been developed when Treaty 4 was signed. At that time, "no reserves were yet in existence and settlement was in its infancy. … [T]hey could fish anywhere in this vast territory, except as limited by Treaty." Fishing stations were not developed until 1881. (Decision at paras. 28, 256).

[118] Accordingly, the Tribunal provided many reasons for rejecting Star Blanket's oral history evidence. The Applicants have not shown that, when the reasons are read holistically, the apparent flaw concerning inconsistencies stemming from the evidence of Elder Margaret Starblanket is "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para. 100).

[119] In any event, the Tribunal considered the evidence of the Applicants for its ultimate ability to demonstrate a nexus with Crown intent in creating IR 80A. In the end, the outcome rested on a finding that there was no such nexus between the Indigenous and Crown perspectives (Decision at para. 318).

[120] Therefore, the shortcomings raised by the Applicants with respect to the Tribunal's evaluation of their oral history evidence does not make the Decision unreasonable.

(6) Did the Tribunal misunderstand the Agreed Issues?

[121] The parties agreed that there were two issues to be determined in the standing sub-phase: (1) For the benefit of which Claimants was IR 80A set aside and confirmed? and, (2) Which Claimants made use of IR 80A? (Decision at para. 17). Star Blanket submits that the Tribunal erred by not correctly applying the second agreed issue concerning the use of IR 80A.

[122] The Tribunal determined that all of the Claimants made use of IR 80A. Star Blanket does not take issue with this, but submits that the parties agreed that use by a Claimant would be sufficient to establish that it was a beneficiary. For clarity, Star Blanket did not explain why use would be sufficient as a matter of law, a proposition flatly rejected by the Tribunal (Decision at para. 311). Star Blanket's argument was simply that the parties agreed to it.

[123] There is no merit to this submission. I first note that Star Blanket provided no support for its position that there was such an agreement. I also observe that Star Blanket's position appears to be inconsistent with the position it took before the Tribunal. At paragraph 182 of the Decision, the Tribunal comments that the Applicants submitted that "the requirements of *Ross River* [reserve creation] were complete when they used IR 80A." [Emphasis added]. There is a material difference between completing requirements and there being only one requirement, as Star Blanket now submits.

[124] Accordingly, Star Blanket has not demonstrated that the Tribunal failed to correctly apply the agreed issues.

(7) Did the Tribunal err at paragraph 148 of the Decision?

[125] Little Black Bear submits that the Tribunal erred when it stated in its overview of the law that "principles of treaty interpretation and the honour of the Crown … have less useful application where, as here, the Indigenous beneficiaries of a Crown promise have conflicting perspectives and interests in the subject of the promise" (Decision at para. 148).

[126] Even assuming that the Tribunal's statement at paragraph 148 is flawed, the flaw is not sufficiently central or significant to render the Tribunal's decision unreasonable (*Vavilov* at para. 100). That is because the Tribunal did not rely on this statement to justify its analysis and conclusion regarding the interpretation of PC 1151. That the statement was *obiter* is made clear in the Tribunal's concluding comment at paragraph 318. There, the Tribunal states that "[n]one of the principles of interpretation, applied liberally and to the best advantage of the File Hills Bands, can expand Mr. Nelson's intent. … I cannot import or expand an intent that Mr. Nelson did not have when the evidence indicates otherwise" [emphasis added]. The state of the evidence led the Tribunal to conclude that these principles were inapplicable. Accordingly, whether the Claimants and beneficiaries had "conflicting interests and perspectives in the subject of the promise" was of no moment to the Tribunal's interpretation of PC 1151.

(8) Did the Tribunal fail to apply principles stemming from the honour of the Crown?

[127] Little Black Bear submits that given the connection between IR 80A and the treaty promise of fishing rights, a purposive, honourable interpretation of PC 1151 should have included Little Black Bear, a landlocked Band, within IR 80A's beneficiary class so as to grant them access to fishing.

[128] As noted by Little Black Bear, the Tribunal acknowledged that "[f]ishing stations were a mechanism through which both the Crown and Indigenous treaty adherents' concerns about fishing access could be addressed." (Decision at para. 257). While this general statement is clearly supported by the record, the question remains as to whether the Crown intended Little Black Bear to be a beneficiary of IR 80A.

[129] Little Black Bear asserts that the Tribunal acknowledged the government's intent to include it as a beneficiary. Little Black Bear referred to the following excerpt at paragraph 180 of the Decision: "By creating the fishing station, the Government facilitated settlement, maintained the peace and met its obligations under Treaty 4. Landlocked bands, including the File Hills Bands, would be assured of fishing grounds and access to them."

[130] I disagree with Little Black Bear that this excerpt is such an acknowledgement. When paragraph 180 is read in context of the surrounding text, it is very clear that the Tribunal was simply summarizing the submissions of the File Hills Bands. These submissions were ultimately

rejected by the Tribunal. In fact, the excerpt goes against the central conclusion of the Tribunal, which is that the Crown did not intend to include the File Hills Bands as beneficiaries of IR 80A.

[131] As for the merits of Little Black Bear's argument that an honourable interpretation of PC 1151 should have included it as a beneficiary of IR 80A, the Tribunal addressed this at paragraphs 252 and 320 of the Decision. As discussed at paragraph 48 above, the Tribunal concluded that there was insufficient evidence "to support a finding that a promise of fishing station reserves was made at the time of Treaty adherence, either as part of the Treaty or in some related way" (Decision at para. 252). Little Black Bear has not convinced me that this conclusion is unreasonable.

[132] Little Black Bear also submits that the Tribunal was obliged to consider its longstanding traditional use of IR 80A. It cites *Manitoba Metis*, at paragraph 66, where the Supreme Court states that "the 'ultimate purpose' of the honour of the Crown is reconciliation." Little Black Bear suggests that reconciliation should be achieved "by interpreting PC 1151 generously and with a view to fulfilling the treaty promise of fishing."

[133] The Tribunal was aware of the Supreme Court's jurisprudence on honour of the Crown principles (Decision at paras. 145-147). These principles include the comments from *Manitoba Metis* at paragraphs 77-78 that "the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation," and the "honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests." However, as stated above the Tribunal concluded that these

principles cannot be applied to require it to "import or expand" the Crown's intent with respect to IR 80A "when the evidence indicates otherwise" (Decision at para. 318).

[134] The Tribunal's conclusion is supported by two recent appellate level decisions involving the interpretation of treaties.

[135] In one, the Court of Appeal for British Columbia stated that the honour of the Crown is not to be used to alter promises made by the Crown: "The honour of the Crown is not applied to rewrite history. It should not be used to retroactively alter the promises the Crown actually made to Indigenous peoples to make these promises more honourable." (*West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 416, leave to appeal to SCC refused, 39292 (21 January 2021)).

[136] The second case is a recent decision of the Court of Appeal for Ontario. In *Fletcher v. Ontario*, 2024 ONCA 148 at para. 125 [*Fletcher*], the Court noted with approval the following comment made by the trial judge: "[I]t is not the role of treaty interpretation to distort the meaning of the treaty in an attempt to redress an historical wrong." The appellate Court concluded that this statement was consistent with the jurisprudence that "generous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (citing *Marshall v. Canada*, [1999] 3 S.C.R. 456, at para. 14 [*Marshall*]).

[137] As for Little Black Bear's submission that there is a connection between IR 80A and a treaty promise of fishing rights, the Tribunal recognized this connection, but commented that it

consisted of a very general "promise of access to unsettled, undeveloped land for fishing." It noted further that "there was nothing to indicate that the device of fishing stations had been conceived of at the time of the signing of the Treaty." Ultimately, the Tribunal did not accept that a right to a fishing station could be inferred from the Treaty. (Decision at para. 320). The Applicants have not convinced me that this conclusion is unreasonable.

[138] If Little Black Bear's suggested approach to honour of the Crown principles were accepted, it would require the Tribunal to adopt a meaning of "the Touchwood Hills and Qu'Appelle Valley Indians" in PC 1151 that the Tribunal concluded its words, context and purpose cannot reasonably bear. The Tribunal reasonably rejected this approach. To use the words of the Court of Appeal for Ontario in *Fletcher* at paragraph 125, the honour of the Crown "cannot alter the terms of the treaty [or Order in Council] by exceeding what 'is possible on the language' or realistic" (citing *Marshall* at paras. 14 and 78). In essence, this is what Little Black Bear's submission attempts to do.

(9) Conclusion

[139] These reasons address the central submissions of the Applicants. Ultimately, I conclude that the Applicants have not met their burden to demonstrate that the Decision is unreasonable.

VI. Disposition

[140] I would dismiss these applications for judicial review.

[141] With respect to costs, Standing Buffalo requested an opportunity to make written submissions on costs following the release of this decision. Accordingly, I would permit the Respondents to make submissions (each not to exceed eight pages in length, excluding supporting documentation) within 15 days from the date hereof. The Applicants may make submissions on costs (again, each not to exceed eight pages in length, excluding supporting documentation) within 15 days after service of the Respondents' submissions. The Respondents may make submissions in reply (each not to exceed four pages in length) within 10 days after service of the Applicants' submissions.

"Judith Woods"
J.A.

"I agree.
Gerald Heckman J.A."

GLEASON J.A. (Dissenting Reasons)

[142] I have had the opportunity of reading the majority reasons and regret that I cannot agree that the Specific Claims Tribunal's decision is reasonable.

[143] The majority takes the position that nothing turns on the Tribunal's finding at paragraph 148 of the Decision that principles of treaty interpretation and the honour of the Crown related to the interpretation of PC 1151 "have less useful application where … the Indigenous beneficiaries of a Crown promise have conflicting perspectives and interests in the subject of the promise". I disagree. In my view, the Tribunal's minimization of these principles tainted its approach to statutory interpretation and very possibly skewed its interpretation of PC 1151. Given this, these findings cannot be characterized as merely non-binding *obiter* or an unfortunate comment. Rather, in my view, they constitute a fundamental flaw in the Tribunal's reasoning that renders the Decision unreasonable.

[144] The comments in question appear at the end of the Tribunal's discussion of the principles of statutory interpretation applicable to PC 1151 and represent its conclusion on these issues. As the majority notes, the Tribunal cited from the case law regarding the honour of the Crown and the principles applicable to interpreting provisions in enactments relating to Indigenous people, but at the end of that discussion, concluded that these principles are of limited application to situations where two or more Indigenous beneficiaries have competing interests and perspectives. In my view, this conclusion is unsustainable in light of the governing case law.

[145] It is trite law that the principle of the honour of the Crown is "always at stake" in circumstances where it is engaged: *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] S.C.J. No. 39 at para. 41 [*Badger*]; *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55 at paras. 49, 51; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 16 [*Haida Nation*], *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para. 74 [*Manitoba Metis*]. As Chief Justice McLachlin stressed in *Haida Nation*, the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices": at para. 16.

[146] The duties that flow from the honour of the Crown vary according to the circumstances in which they arise: *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15 at para. 22; *Manitoba Metis* at para. 74; *Haida Nation* at para. 27.

[147] One such circumstance involves the interpretation of statutes or other enactments that directly impact Indigenous people and their interests in reserve lands. Since the honour of the Crown speaks to how Crown obligations and duties to Indigenous people must be fulfilled, the interpretation of statutes that have an impact upon treaty or aboriginal rights must be approached "in a manner that maintains the integrity of the Crown": *Badger* at para. 41; *Manitoba Metis* at para. 68.

[148] According to the jurisprudence, this means that legislation directly relating to the interest of Indigenous people in lands set aside as reserves should receive a large, liberal, and purposive

interpretation and that any “doubtful expression”, where a true ambiguity exists, is to be resolved in favour of Indigenous interests, provided the interpretation favouring Indigenous interests is one that the enactment can reasonably bear: *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746 at paras. 124–125 [*Osoyoos*]; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, [1990] S.C.J. No. 63 at 98-99, 107–108, 117, 143 [*Mitchell*]; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5 at 36 [*Nowegijick*].

[149] These principles are just as applicable in a case involving multiple Indigenous communities with conflicting perspectives and interests on the interpretation of a federal statute or Order in Council as they would be where an Indigenous community is pitted directly against the Crown. This is because what is at issue in both types of cases is the interpretation of an enactment governing reserve lands. The principles regarding the interpretation of enactments directly relating to the interest of Indigenous people in lands set aside as reserves and resolution of ambiguities in such enactments in favour of Indigenous people were developed, in large part, to further reconciliation subsequent to the Crown’s assertion of sovereignty over Indigenous peoples and its assumption of *de facto* control of the lands and resources that were formerly in the control of those peoples: *Manitoba Metis* at para. 66; *Haida Nation* at para. 32. Given this, there can be no doubt that the honour of the Crown, and the related interpretive principle of resolving true ambiguities in favour of Indigenous people, apply to the interpretation of enactments that directly affect an Indigenous community’s interest in reserve lands, as is the case here, whether there are conflicting Indigenous perspectives or not.

[150] Where there are competing Indigenous interests, I agree with one of the applicants, Star Blanket First Nation, that the interpretation that minimally impairs all of the Indigenous interests at stake must be adopted to resolve true ambiguities. Here, a resolution in favour of the applicants would at worst minimally impair the interests of the Indigenous respondents, who might have to share an eventual damages award, if one were made, with two additional First Nation communities. On the other hand, the Tribunal's adverse finding against the applicants completely disentitles them. Thus, the interpretive principle of resolving ambiguity in favour of Indigenous people would favour recognizing the applicants as being among the intended beneficiaries of IR 80A in the event there is a true ambiguity in PC 1151.

[151] I appreciate that, in some instances, an administrative tribunal, whose decisions are to be accorded deference under the reasonableness standard of review, need not necessarily apply principles from case law in the same way a court would: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 113 [*Vavilov*]; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at paras. 5–6, 44–45, and 60. However, to be reasonable, a decision must be justified in relation to the constellation of law surrounding that decision: *Vavilov* at para. 105. This includes relevant statutory or common law, the principles of statutory interpretation, as well as any case law precedents on the issue: *Vavilov* at paras. 106 and 111-112. Indeed, where there is relevant jurisprudence in which a court considered a statutory provision, it is generally unreasonable for an administrative decision maker to interpret or apply the provision without regard to those precedents: *Vavilov* at para. 112. According to *Vavilov*, such a departure would only be appropriate if "a decision maker [is] able to explain why a different interpretation is

preferable by, for example, explaining why the court's interpretation does not work in the administrative context": at para. 112; *Canada (Attorney General) v. Poupart*, 2022 FCA 77, 2022 CarswellNat 1371 at para. 49; *Burlacu v. Canada (Attorney General)*, 2022 FCA 10, 2022 CarswellNat 60 at para. 54.

[152] The majority finds that the Tribunal's minimization of the fundamental principles applicable to interpreting enactments like PC 1151 is not determinative because the Tribunal in any event determined that the context resolved the ambiguities in PC 1151 in a fashion that was reasonable. The majority also finds that it was reasonable for the Tribunal to conclude that interpreting the phrase "Touchwood Hills and Qu'Appelle Valley Indians" as including the applicant communities was not an interpretation that PC 1151 could reasonably bear.

[153] With respect, I disagree. Since the Tribunal completely discounted the need to apply the interpretive principle of resolving ambiguity in favour of Indigenous people, I have no confidence that it adequately considered whether a true ambiguity exists in PC 1151. Further, the context relied upon by the Tribunal is largely limited to the documents of one Crown surveyor and does not consider the other pertinent contextual factors surrounding the executive's promulgation of PC 1151: Decision at para. 305. The Tribunal also ignored the ambiguous nature of the text and the purpose of PC 1151.

[154] Among the matters glossed over by the Tribunal in finding no ambiguity in PC 1151, I start with the important fact that, as concerns the issues at play in this application, the text of PC 1151 is clearly facially ambiguous, a proposition that is not disputed. It is impossible from

the text of PC 1151 to determine the intended beneficiaries of IR 80A since it is impossible to ascertain from the text of the Order in Council creating IR 80A what is meant by the "Touchwood Hills and Qu'Appelle Valley Indians" for whose benefit the fishing station was set aside.

[155] Secondly, the Tribunal glossed over and gave little importance to the purpose for which fishing stations, including IR 80A, were created by the Crown. The historical record demonstrates that such stations were created to provide fishing access for Indigenous people when settlers were rapidly moving into the region and taking up lands, including along the shores of many lakes suitable for fishing. Treaty No. 4 promised its signatories, which included the applicants, fishing rights "…throughout the tract surrendered, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement…". The reserves of the applicants (and of two other adjacent First Nations who did not appear before the Court) were landlocked, with no border on a river. The Tribunal gave no weight to these considerations in its interpretation of PC 1151, despite recognizing that reserve creation under PC 1151 was part of the implementation of Treaty No. 4: Decision at para. 252.

[156] Thirdly, many contextual factors were ignored by the Tribunal in its statutory interpretation analysis when it chose to rely almost exclusively on documents from Surveyor Nelson to ascertain the Crown's intent: Decision at paras. 301, 315. These include the fact that all of the communities involved in this application for judicial review had strong cultural and

socio-economic ties to the IR 80A. The record before the Tribunal highlighted that, since time immemorial, the applicants visited, fished, and gathered at Kinookimaw: Decision at para. 96. It is clear that they regarded Kinookimaw as a sacred place. Indeed, Chiefs of two File Hills Bands "had both died and been buried" there before the reserve was created: Decision at paras. 98–99. The evidence also suggested that others from these Bands were buried there as well: Decision at para. 98. Further, all of the Indigenous groups implicated in these proceedings, both applicants and respondents, considered themselves to be people of the Qu'Appelle Valley. Before reserve creation, they all lived a nomadic life over the same lands in what is now southern Saskatchewan and followed a migratory route through the entire Qu'Appelle Valley region: Decision at paras. 19, 84-87. In addition, until 1885, the year after Surveyor Nelson visited Last Mountain Lake to begin to survey what was to become IR 80A, the provisional reserves of the applicants were administered by the Qu'Appelle Agency of the Department of Indian Affairs and later returned to be administered by that Agency: Decision at paras. 178, 298.

[157] One assumes that at least some of the foregoing surrounding facts would have been known to Crown officials and/or the federal cabinet when PC 1151 was promulgated. In any event, there appears to be no evidence to support a conclusion that Crown officials did not know about the applicants' affiliation to the area and their need for a fishing station.

[158] Fourthly, contemporaneous notes of Surveyor Nelson, made in 1883 to outline his plan of survey for the following year, show that he identified that the applicants' reserves, those in the Touchwood Hills, and a fishing station on Last Mountain Lake as all being in the Qu'Appelle

District. This is not far from the wording that appears in PC 1151 of "Qu'Appelle Valley Indians".

[159] Fifthly, post-reserve creation, members of the applicant First Nations continued to visit and fish at IR 80A, without complaint from the respondent First Nations or the Crown. In addition, evidence in the record indicates that at least one Crown official in the Department of Indian Affairs, the Indian Commissioner, shared the applicants' view that they were among the "Qu'Appelle Valley Indians": Decision at para. 70.

[160] Had the Tribunal correctly understood that it was to apply the interpretive principles introduced in *Nowegijick*, and refined later in *Mitchell* and *Osoyoos*, it may well have given greater weight to the foregoing considerations, determined that a true ambiguity exists in PC 1151, and resolved this ambiguity in favour of the applicants. Without a purposive and contextual analysis of PC 1151, consistent with the aforementioned interpretive principles, I cannot accept that the Tribunal's conclusion is reasonable. In effect, the Tribunal's approach relegates the interpretive principles to being no more than a tool of last resort. As Ruth Sullivan compellingly argues in *The Construction of Statutes*, 7th ed (Lexis Nexis, 2022) at § 20.01:

> The Indigenous entitlement to social justice follows from the need to uphold the honour of the Crown in its dealings with Indigenous peoples. Seen from this perspective, the liberal construction of legislation relating to Indigenous peoples is in part an attempt to remedy injustice resulting from the Crown's past failures to live up to its commitments and to discharge its fiduciary responsibilities. From this perspective, there is no justification for treating it as a presumption of last resort.

[161] I therefore conclude that the Decision is unreasonable.

[162] The applicants urged this Court to decide this application and not remit it to the Tribunal given the passage of time since the date of the Decision and the subsequent retirement of the Chairperson of the Tribunal who authored the Decision. I would decline this invitation.

[163] It is exceptional for a court to render a decision in a judicial review application as opposed to remitting the matter back to the administrative decision maker for redetermination in accordance with the court's reasons. As the majority noted in *Vavilov*, at paragraph 140, "…the choice of remedy must be guided by the rationale for applying [the reasonableness standard of review] to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide".

[164] While a court possesses the discretion to not remit a dispute to an administrative decision maker, it will usually be appropriate to do so only if a particular outcome is inevitable or where there are circumstances that make it inappropriate to do so. As the majority noted at paragraph 142 in *Vavilov*:

> Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed:

[165] Here, it cannot be said that a single result is inevitable. Of the foregoing discretionary factors mentioned in paragraph 142 of *Vavilov*, the only one present is delay. Yet much of the delay in question was occasioned by the parties, who, on consent, requested multiple

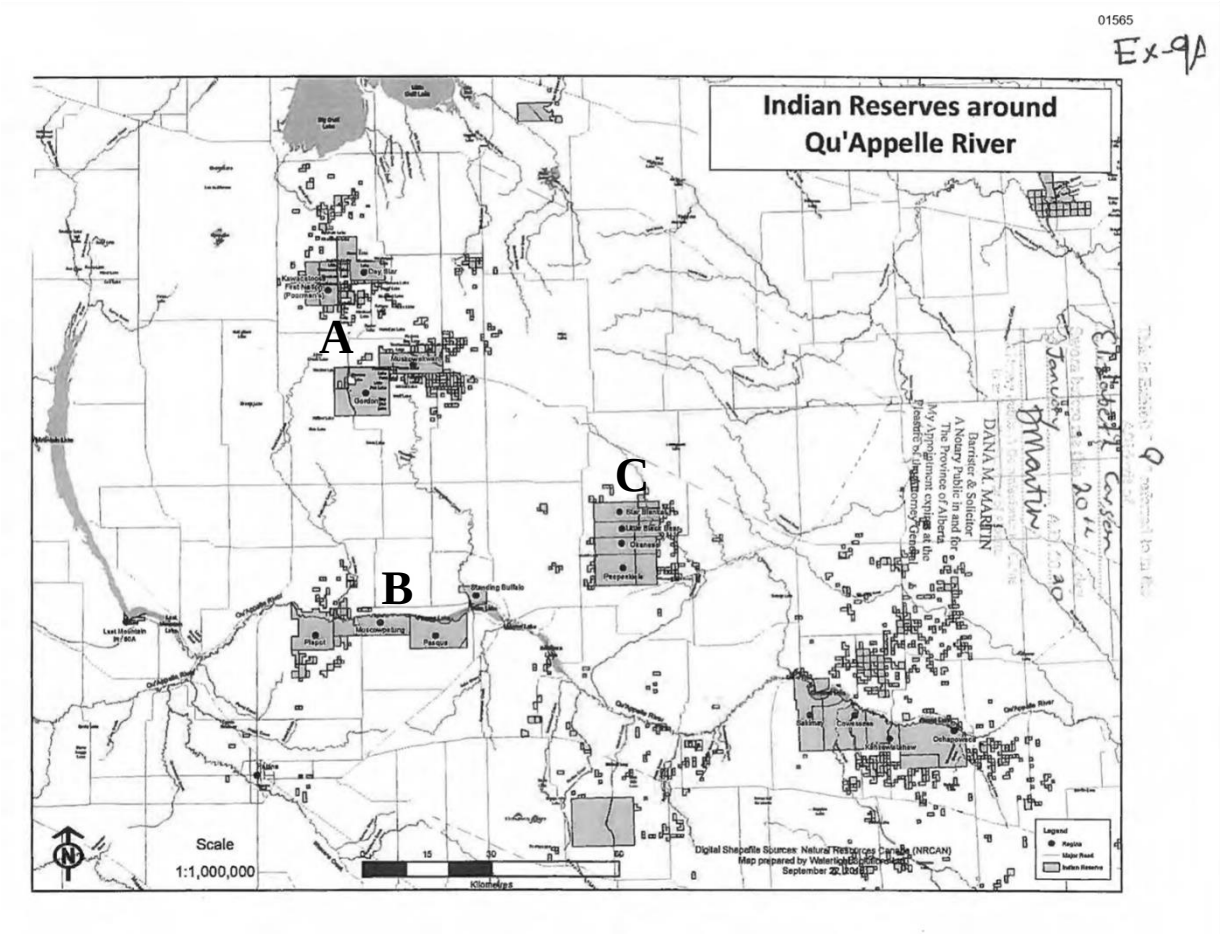
adjournments of this application to explore settlement possibilities, until the matter was eventually scheduled for hearing when some of the respondents withdrew their consent. Given this, the delay does not warrant the Court stepping in and deciding the case.

[166] For these reasons, I would grant the application for judicial review, with costs, and would remit this matter to the Specific Claims Tribunal for redetermination in accordance with these reasons.

"Mary J.L. Gleason"
J.A.

APPENDIX

Map of area which includes Claimants' reserves



Map Legend	
Touchwood Hills Bands	"**A**"
Qu'Appelle River/Lake Bands	"**B**"
File Hills Bands	"**C**"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-303-19 and A-328-19
DOCKET:	A-303-19
STYLE OF CAUSE:	LITTLE BLACK BEAR FIRST NATION v. KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION, DAY STAR FIRST NATION, STAR BLANKET FIRST NATION, STANDING BUFFALO DAKOTA FIRST NATION, PEEPEEKISIS FIRST NATION, and HIS MAJESTY THE KING IN RIGHT OF CANADA (As represented by the Minister of Indian Affairs and Northern Development)
AND DOCKET:	A-328-19
STYLE OF CAUSE:	STAR BLANKET FIRST NATION v. KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION, DAY STAR FIRST NATION, LITTLE BLACK BEAR FIRST NATION, STANDING BUFFALO DAKOTA FIRST NATION, PEEPEEKISIS FIRST NATION, and HIS MAJESTY THE KING IN RIGHT OF CANADA (As represented by the

Minister of Indian Affairs and Northern Development)

PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	SEPTEMBER 26 and 27, 2023
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	HECKMAN J.A.
DISSENTING REASONS BY:	GLEASON J.A.
DATED:	JULY 12, 2024

APPEARANCES:

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