Federal Court of Appeal | Cour d'appel fédérale

Date: 20240112

Docket: A-156-22

Citation: 2024 FCA 8

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

BETWEEN:

KAHKEWISTAHAW FIRST NATION

Applicant

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations

Respondent

Heard at Ottawa, Ontario, on June 28 and 29, 2023.

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

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant, the Kahkewistahaw First Nation (the KFN), is a First Nation located approximately 150 kilometres east of what is now Regina, Saskatchewan. It lies between Crooked Lake and Round Lake, the two most easterly lakes in the Qu'Appelle Lakes chain. In 1887, the KFN adhered to Treaty No. 4.

[2] In 1889, the respondent, whom I refer to as simply the Crown, set aside a fishing station on Crooked Lake as a Reserve, IR 72A, for the benefit of members of the KFN, whose primary Reserve, IR 72, was landlocked. IR 72 and IR 72A were confirmed by the same Order in Council, namely, P.C. 1151, issued on May 17, 1889.

[3] In 1944, the Crown requested that the KFN consent to a surrender of a small portion of IR 72A for a road allowance requested by a local municipality. In response, KFN members told the Indian Agent with whom they were dealing that they wished to surrender the whole of IR 72A because they preferred to fish in Round Lake, which was close to the residential school their children had attended. They contemplated using the funds from the sale of IR 72A to purchase or lease a fishing station on Round Lake. There is no indication that the option of leasing as opposed to selling the lands comprising IR 72A was canvassed by the Crown with the KFN.

[4] In 1944, the KFN surrendered all of IR 72A to the Crown for sale "upon such terms as the Government … may deem most conducive to [the welfare of KFN members]".

[5] However, the Crown did not sell the lands that comprised IR 72A until 1956. It then sold them via three tenders to a single purchaser, who operated a resort adjacent to the reserve. In so doing, the Crown did not consult with the KFN to confirm that it was still its wish to sell the land, nor did it confirm that the manner of sale reflected what the KFN wanted.

[6] The Crown also did not consult with the KFN about how circumstances that affected the sale had changed significantly since the surrender. More specifically, in the years between 1944

and 1956, the residential school at Round Lake had been closed and cottage lots were being sold with increasing frequency in the area.

[7] On October 5, 2013, the KFN filed a Declaration of Claim with the Specific Claims Tribunal (the Tribunal), seeking compensation in respect of several alleged failures by the Crown to fulfil its duties owed to the KFN with respect to IR 72A and its surrender. More specifically, the KFN claimed that the Crown:

- breached the pre-surrender fiduciary duty owed to the KFN relating to the surrender of IR 72A;
- breached the *Indian Act,1927*, R.S.C. 1927, c. 98 and Treaty No. 4 in respect of the surrender of IR 72A;
- breached the post-surrender fiduciary duty owed to the KFN in respect of the lands surrendered, including by failing to have consulted with the KFN before making the sale and by failing to pursue the more advantageous option of leasing the lands as cottage lots;
- breached its pre and post-surrender fiduciary duties related to trespass on the lands that comprised IR 72A; and
- breached the duty to consult in respect of the 1909 construction of a dam at Craven, Saskatchewan, which impeded water flow into Crooked Lake.

[8] In its decision in *Kahkewistahaw First Nation v. Her Majesty the Queen in Right of Canada*, 2022 SCTC 5 (the Decision), the Tribunal made the following findings:

- The Crown did not breach its pre-surrender fiduciary duty owed to the KFN relating to the 1944 surrender of IR 72A;
- The Crown did not breach its duty under the *Indian Act, 1927* owed to the KFN relating to the 1944 surrender of IR 72A;
- The Crown did not breach its duty under Treaty No. 4 owed to the KFN relating to the 1944 surrender of IR 72A;
- The Crown breached its post-surrender fiduciary duty owed to the KFN, but not to the full extent claimed by the KFN. The Tribunal held, among other things, that it was not a breach of fiduciary duty for the Crown to have failed to consult with the KFN before making the final sale more than twelve years after the surrender or to have neglected to pursue the potentially more advantageous option of leasing the lands as cottage lots;
- The Crown breached its fiduciary duty owed to the KFN with respect to a pre-surrender trespass on IR 72A;
- The Crown owed a fiduciary duty to the KFN with respect to a post-surrender trespass on IR 72A and breached such fiduciary duty; and

- The Tribunal did not have jurisdiction to hear the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam.

[9] The KFN has filed an application for judicial review with this Court, seeking to set aside the Decision in part. More specifically, the KFN asks this Court to overturn the Tribunal's finding regarding a pre-surrender fiduciary duty. It submits that the Tribunal's conclusion that the Crown did not breach the pre-surrender fiduciary duty owed to the KFN relating to the 1944 surrender of IR 72A was unreasonable. The KFN also seeks to have us expand the basis upon which the Crown should be found to have breached its post-surrender fiduciary duty owed to the KFN. It asserts that it was unreasonable for the Tribunal to have concluded that the Crown did not breach its post-surrender fiduciary duty in failing to have consulted with the KFN before making the sale and by failing to pursue the option of leasing the lands.

[10] As is more fully discussed in the Reasons that follow, I agree with the KFN that the Tribunal committed reviewable errors in respect of its consideration of the Crown's pre and post-surrender breach of fiduciary duty. Thus, I would set aside the Tribunal's decision in part, with costs, and remit to it the issues of the Crown's breach of its pre and post-surrender fiduciary duties for redetermination in accordance with these Reasons.

I. Relevant Factual Background

[11] To put these issues into context, a little more background is required. In providing this context, I set out only those facts relevant to the issues before this Court.

[12] As noted, IR 72A, a fishing station on Crooked Lake, was set aside in 1889 as a reserve for the benefit of the KFN, whose primary reserve was landlocked. Although originally intended to be somewhat larger, IR 72A was approximately 68.5 acres in size. It comprised lands located along the shoreline of Crooked Lake and adjacent lands extending back from the shoreline.

[13] In 1924, the Crown transferred 2.64 acres of IR 72A to the province of Saskatchewan for construction of a roadway, but did not obtain a surrender of the lands in question from the KFN nor its consent to the transfer. It also provided no compensation to the KFN for the lands transferred to the Province. In addition, another road over the reserve lands was in use prior to 1944, without the consent of the KFN. This road provided access to Sunset Beach Resort, a waterfront resort adjacent to IR 72A, operated by the Criddle family.

[14] In 1944, following a flood of the road to Sunset Beach caused by a dam built on Crooked Lake, the municipality of Grayson, Saskatchewan approached the federal government and requested that 1.5 acres of IR 72A be transferred to it for purposes of building a new road to Sunset Beach. This time, the Crown sought the consent of the KFN to a surrender of the portion of IR 72A required for the new road.

[15] On February 1, 1944, the General Superintendent of Indian Agencies, Mr. Christianson, wrote to Crooked Lake Indian Agent Kerley, noting the latter's comment that the Chief of the KFN was in favour of granting the requested 1.5 acres and wished to take the matter up with the Band. Mr. Christianson stated in his letter that he had been in touch with Ottawa, which would approve the surrender of the 1.5 acres if the KFN were willing to surrender the land. He asked

Agent Kerley to take up the issue with the Chief and Council of the KFN, and if they were willing, to take a surrender of 1.5 acres of IR 72A. In March of 1944, Agent Kerley was sent surrender forms for a surrender of 1.5 acres of IR 72A.

[16] In early April 1944, Agent Kerley held a meeting with some members of the KFN to discuss the surrender. There were insufficient members of the KFN present at this meeting to authorize the surrender under the provisions of the *Indian Act, 1927*, so a second meeting was held later that same month.

[17] In a letter that he sent back to the Indian Affairs Branch dated April 27, 1944, Agent Kerley stated that the Band had decided unanimously at the second meeting to surrender the entire fishing station. He explained that the KFN did not use IR 72A as most of them fished in Round Lake. He added that the KFN "…had in mind selling IR 72A and if possible leasing or purchasing a fishing station and camp near the Round Lake School as the majority of their children attended there".

[18] At the time, the KFN had over $200,000.00 in the capital account maintained on its behalf, which appears to have far exceeded the cost of purchasing an equivalent amount of alternate land on Round Lake.

[19] On May 3, 1944, Agent Kerley was sent surrender forms for the surrender of the entirety of IR 72A.

[20] On July 8, 1944, Agent Kerley sent a letter to the Indian Affairs Branch, Department of Mines & Resources, in Ottawa, enclosing the completed surrender forms and reporting that he had obtained a surrender of all of IR 72A. The surrender forms were dated July 4, 1944 and were signed by the Chief and two Principal men of the KFN, whose signatures were witnessed by other members of the KFN. The surrender document read as follows in relevant part:

> … WE, the undersigned Chief and Principal men of Kahkewistahaw Indian Band resident on our Reserve Kahkewistahaw No. 72 in the Province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or trust of land and premises, situate, lying and being in the whole of Kahkewistahaw Indian Reserve No. 72A in the … Province of Saskatchewan containing by admeasurement 68.16 acres be the same more or less…
>
> TO HAVE AND TO HOLD the same unto His said Majesty the King, his Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people.
>
> AND upon further condition that all moneys received from the sale thereof, shall be credited to Band funds.

[21] Enclosed with Agent Kerley's July 8, 1944 letter was also the list of voters for the meeting held on July 4, 1944, shortly following which the surrender documents were signed. That list shows that 25 of 43 eligible KFN members were present for the vote and that all but two of them had voted in favour of the surrender. Also enclosed was a July 8, 1944 affidavit signed by the Chief and two Principal men of the KFN, as well as Agent Kerley. In that affidavit, they affirmed, among other things, that the surrender had been accepted by a majority of the male members of the KFN who were 21 years or older and that their assent was given at a meeting summoned for that purpose.

[22] The Crown accepted the surrender via Order in Council P.C. 6171, issued on August 7, 1944. Its text stated that the Crown accepted the surrender of the lands that formerly comprised IR 72A "in order that the said lands may be sold on such terms as may be determined most conducive to the welfare of the Indians".

[23] Shortly after the surrender was taken, there was an exchange of correspondence between D.J. Allan, who was employed as the Superintendent Reserves and Trusts, and General Superintendent Christianson regarding the surrendered lands. This exchange reveals that both expected that the surrendered lands abutting Crooked Lake would increase in value since there would be a greater demand for cottage lots after the war ended. Both expressed the view that greater returns might be realized if the lands were subdivided and sold as cottage lots than if they were sold in a block, via public tender, which was the usual manner of selling surrendered lands. In two letters, dated September 25, 1944, and October 17, 1944, General Superintendent Christianson stated that he felt that the government could get ten times the value out of the land by subdividing it in the future, rather than by selling it whole to Mrs. Criddle for the $500 she had offered.

[24] Superintendent Allan further noted in an October 4, 1944 letter to General Superintendent Christianson that:

> Our experience has been that should such a subdivision be decided upon it is more profitable to rent the cottage sites than to attempt an outright sale of lake frontage lots. For example, it should be an easy matter to obtain an annual rental or $10.00 a lot, while to fix a sale price on the said lots as $100.00 a piece might be considered excessive, but the results in Indian revenue would be the same.

[25] Following the surrender, the Municipality of Grayson built a road to access the Sunset Beach Resort in 1944 that cut across the former IR 72A lands close to the beach, thereby compromising their value as potential cottage lots. The lands on which the road was situated had not yet been conveyed by the Crown to the Municipality, and a dispute arose between the federal government and the Municipality over the location of the road. After much correspondence back and forth, the Municipality agreed in 1947 to relocate the road to its original position.

[26] By 1944, lands in the area were beginning to be leased or sold as cottage lots. Certain reserve lands of the Sakimay First Nation, also abutting Crooked Lake, were beginning to be leased as cottage lots for the benefit of that First Nation. In addition, the Criddle family had subdivided their lands at Sunset Beach and, by 1945, had sold all but six of the 24 cottage lots on their lands. In subsequent years, cottage lots were surveyed and sold with increasing frequency in the area.

[27] It appears that nothing was done by the Crown to further the sale of the surrendered former IR 72A lands between 1944 and 1953. No documentation was found relating to the sale of the lands over that period.

[28] In July 1953, an individual acting on behalf of Mr. Criddle expressed an interest in purchasing the lands. On July 8, 1953, L.L. Brown, the new Superintendent, Reserves and Trusts, wrote to J.B.P. Ostrander, Regional Supervisor of Indian Agencies, noting that he had received an inquiry from a friend of Mr. Criddle about purchasing the lands. Superintendent

Brown thought the lands had not yet been surrendered and inquired if a surrender could be arranged.

[29] In his reply letter of July 17, 1953, Regional Supervisor Ostrander stated that he had spoken to Agent Kerley, who was under the impression that the lands had already been surrendered. Regional Supervisor Ostrander also expressed the view that the lands should be offered for sale via public tender, as opposed to being sold privately to Mr. Criddle, as the tender process might lead to a higher price. He also wrote that he was of the view that the land should not be subdivided because this would cause delay, and the difference in the amount that the sale following subdivision might realize "would not be worth the trouble and expense".

[30] Superintendent Brown replied on August 6, 1953 and confirmed that the lands had been surrendered. He stated as follows in his letter:

> We now find that this Reserve was surrendered for sale in July, 1944, and the surrender was accepted by Order in Council P.C. 6171 dated August 4th, 1944. We are therefore in a position to proceed with the proposed sale without further reference to the Band.

[31] The lands to be sold were subsequently surveyed at the request of the Crown and found to comprise approximately 65 acres. The lands were appraised in 1955 by the Department of Veteran's Affairs as having a value of $1,920.00. At the direction of the Honourable J.W. Pickersgill, the then Minister, Department of Citizenship and Immigration, the lands were divided into three lots and offered for sale by public tender on November 2, 1955. The call for tenders expressly reserved the mine and mineral rights. Three offers were received; the highest

was from Mr. Criddle, who offered $2,500.00 for all three parcels. His offer was accepted and a patent was issued to Mr. Criddle in June of 1956 for 64.36 acres of what was formerly IR 72A.

[32] The KFN was not consulted about the manner of disposition of the lands, save to obtain its concurrence to bearing the costs for advertising the sale. Nor was it asked whether it still desired that the lands be sold.

[33] By Band Council Resolution dated October 11, 1955, the KFN resolved that the costs for advertising the sale of the lands were to be paid from the revenue account of the Band.

[34] Sometime between 1944 and 1954, the Round Lake Residential School closed. On September 21, 1954, by Band Council Resolution, the KFN decided to buy the former Round Lake Residential School lands for $10,000.00, resolving to lease these lands until they were needed by the KFN for farming purposes. These lands were purchased by the Crown on behalf of the KFN, and were added to IR 72 by Order in Council, dated November 10, 1960.

[35] The experts who testified before the Tribunal on behalf of the KFN and the Crown agreed that the highest and best use of the portion of the lands that formerly comprised IR 72A contiguous to the shoreline would have been as a cottage lot subdivision, which would have yielded 42 waterfront lots. They further agreed that the highest and best use of the backlands would have been for agricultural purposes. They also agreed that, had the lands been leased for the benefit of the KFN, the revenue from leasing the lands between 1945 and 2018 would have been equivalent to nearly 4 million dollars in 2018.

II. The Decision

[36] I turn next to review the portions of the Decision relevant to the issues before this Court.

[37] As concerns the alleged breach of pre-surrender fiduciary duties, the Tribunal focussed its discussion on whether the KFN's understanding of the terms of surrender was adequate and whether its decision to surrender the entirety of IR 72A was so foolish or improvident as to constitute exploitation.

[38] The Tribunal commenced its discussion of these issues by quoting from the decisions of the Supreme Court of Canada in *Southwind v. Canada,* 2021 SCC 28, 459 D.L.R. (4th) 1 [*Southwind*] and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 S.C.R. 344, 1995 CanLII 50 (SCC). The Tribunal then noted that it was required "…to strike [a] balance between the two pillars of autonomy and protection" (at para. 47). It continued by stating that the KFN had the right to surrender the land and that its decision to do so was to be respected "…unless [its] understanding of the terms of surrender was inadequate or the decision to surrender IR 72A was so foolish or improvident that it constituted exploitation" (at para. 47).

[39] The Tribunal then moved to assess the adequacy of the KFN's understanding of the terms of surrender and concluded that the evidence did not support a conclusion that such understanding was inadequate. The Tribunal noted that the surrender documents were signed by the Chief and five members of the Band and clearly set out the nature of the surrender, stating

that the lands were being surrendered for sale. Based largely on this fact and the fact that the impetus for the surrender of the whole of IR 72A came from the KFN, the Tribunal concluded that the KFN's understanding of the terms of surrender was not inadequate.

[40] In terms of the contrary arguments advanced by the KFN, the Tribunal gave little weight to the fact that certain members of the KFN continued to fish in Crooked Lake after 1944 or to the fact that the KFN had adequate funds in the capital account to purchase those lands it wished to purchase on Round Lake. The Tribunal inferred that the Chief and Council would have been aware of the amount in the capital account. The Tribunal thus concluded that the amount of the funds on deposit in that account did not evidence an inadequate understanding of the terms of surrender, which were plainly set out in the documents that were signed by the Chief and members of the KFN.

[41] The Tribunal also gave little weight to the opinions of Superintendent Allan and General Superintendent Christianson, set out in their letters regarding the most profitable way of proceeding, holding that their letters "… speak only to their opinions at the time of writing and not an inadequate understanding by the [KFN] of the terms of the surrender" (at para. 48).

[42] Despite concluding that the evidence did not demonstrate an inadequate understanding by the members of the KFN of the terms of surrender, the Tribunal was critical of the Crown's conduct in taking the surrender. It wrote as follows at paragraph 49 of the Decision:

> Still, it is difficult to consider the facts surrounding the pre-surrender without concluding that the Crown could have better guided Kahkewistahaw when they

> decided that they wished to sell all of IR 72A. It could have investigated the land around Round Lake to determine availability and cost and inform Kahkewistahaw of its findings, considering the money in Kahkewistahaw's capital account. The Crown ultimately did not offer Kahkewistahaw lands on Round Lake to purchase until 1953 and the purchase price was a small fraction of the amount in their capital account at the time of surrender. The Crown could have informed and discussed leasing with the Claimant as an alternative to selling the land, pre-surrender. The Crown's pre-surrender fiduciary obligation, however, is one of "ordinary diligence" to avoid an exploitative bargain.

[43] After discussing the adequacy of the KFN's understanding of the terms of surrender, the Tribunal assessed whether its terms were foolish or improvident. The Tribunal compared the situation to that in *Blueberry River* and *Wewaykum Indian Band v. Canada,* 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*], where the First Nations involved were found to have possessed good reasons for decisions they made: see Decision at paras. 49-50. The Tribunal reasoned that the KFN also had similar reasons in the case at bar, which were "… grounded in reflection evidenced by a clear explanation why land near Round Lake would be more suitable to the members": see para. 51. It therefore held that the surrender was not so foolish or improvident as to constitute exploitation.

[44] The Tribunal concluded as follows concerning the alleged pre-surrender breach of fiduciary duty: "[w]hile the Crown could have communicated further details to the [KFN] at the time they expressed their desire to sell IR 72A, its failure to do so falls short of breaching its pre-surrender fiduciary obligation to avoid an unconscionable bargain": see para. 51.

[45] Turning to the claimed post-surrender breach of fiduciary duty, the Crown conceded that the delay in selling the surrendered lands between 1948 and 1953, during which there was no movement to sell the lands, amounted to a breach of fiduciary duty: Decision at para. 101. The

Tribunal also held that the Crown breached its fiduciary duty over the period from 1944 to 1947 by failing to exercise reasonable diligence to source revenue for the surrendered lands or to make an effort to sell them: Decision at para. 106. The Tribunal further held that the Crown breached its post-surrender fiduciary duty by failing to assess whether it would have been more profitable to subdivide the lands before the sale, particularly as there was a steady sale of cottage lots in the area between 1959 and 1967: see Decision at para. 111.

[46] However, the Tribunal held that the Crown had no duty to consider leasing the lands on behalf of the KFN because the terms of surrender provided that the lands were surrendered for sale: see Decision at para. 107.

[47] The Tribunal also held that the Crown did not breach its duty to consult the KFN about the sale before the lands were eventually sold, because delay, in and of itself, does not give rise to such a duty: see Decision at para. 113.

III. Analysis

[48] I turn now to address the arguments the KFN advanced before this Court.

A. *Standard of Review*

[49] I commence by noting that the standard of review that we are to apply to the Decision is the deferential standard of reasonableness, as was held in by the Supreme Court of Canada in

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4, [2018] 1 S.C.R. 83 at para. 27 [*Williams Lake 2018 SCC*] and by this Court in *Williams Lake First Nation v. Canada (Indian Affairs and Northern Development)*, 2021 FCA 30 [*Williams Lake 2021 FCA*], 458 D.L.R. (4th) 722 at para. 33; *Witchekan Lake First Nation v. Canada*, 2022 FCA 52, 2022 CarswellNat 7119 at para. 2; and *Ahousaht First Nation v. Canada (Indian Affairs and Northern Development)*, 2021 FCA 135, 342 A.C.W.S. (3d) 1, leave to appeal to SCC refused, 39847 (3 March 2022) at paras. 44-45 [*Ahousaht*].

[50] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653, 2019 SCC 65 (CanLII) [*Vavilov*], a majority of the Supreme Court underscored that a decision of an administrative decision-maker may be unreasonable either because of a failure of rationality in its reasoning process, where it gives reasons, or because the decision is untenable in light of the factual and legal constraints that bear on it: *Vavilov*, at para. 101.

[51] As concerns the second possibility, the majority noted that the requisite inquiry is contextual. The Court provided a non-exhaustive list of contextual factors that may constrain an administrative decision maker. Those include the relevant common law precedents, precedents from the administrative decision maker, itself, and the evidence before the decision-maker.

[52] With respect to common law precedents from the courts, the majority held that, provided adequate explanations are given, an administrative decision-maker may sometimes decline to follow a decision from the courts, depending on the circumstances. More specifically, at paragraphs 112-113 of *Vavilov*, the majority stated:

> **Any precedents** on the issue before the administrative decision maker or on a similar issue **will act as a constraint on what the decision maker can reasonably decide.** An administrative body's **decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent** in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be 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: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: Stare Decisis and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119, at p. 146. **There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent**. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c.27, ss.35-37), it would **clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it**.
>
> That being said, administrative decision makers will **not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable.** For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.
>
> [Emphasis added.]

[53] With respect to a decision maker's own prior decisions, *Vavilov* recognizes that decision makers may enjoy greater latitude in departing from their own prior decisions, given the absence of *stare decisis*, but nonetheless must still provide adequate reasons for declining to follow the decision maker's own case law. As the majority stated at paragraphs 129 and 131:

> **Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by stare decisis**. As this Court noted in Domtar, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.
>
> […]
>
> **Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable**. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[54] As concerns the constraints imposed by the evidence before the decision maker, the majority found that it is axiomatic that a reviewing court may not second guess the factual findings of an administrative decision maker or re-weigh the evidence before the administrative decision maker. That said, the majority also recognized that a decision must nonetheless be justified in terms of the facts that were before the decision maker. More specifically, at paragraphs 125-126 of *Vavilov*, the majority found:

> It is **trite law** that the decision maker may assess and evaluate the evidence before it and that, **absent exceptional circumstances, a reviewing court will not interfere with its factual findings**. The reviewing court must refrain from

> "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> That being said, **a reasonable decision is one that is justified in light of the facts:** *Dunsmuir*, at para. 47. The 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: see *Southam*, at para. 56**. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it**. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

[55] In judicial review applications before the Federal Courts, paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 sets out the sets out both the grounds of review and the parameters of what reasonableness requires for review of factual errors: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 46; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, [2021] F.C.J. No. 848 (QL) at para. 103 [*Best Buy*].

[56] Paragraph 18.1(4)(d) of the *Federal Courts Act* uses terms very similar to those used by the Supreme Court of Canada in *Vavilov* to define unreasonable factual errors. Paragraph 18.1(4)(d) of the *Federal Courts Act* provides that factual findings made by a federal administrative decision maker are subject to being set aside only if the decision maker has

"based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

[57] As noted in *Best Buy* at paragraph 123 and *Walls v. Canada (Attorney General)*, 2022 FCA 47, [2022] F.C.J. No 399 (QL) at paragraph 41, this Court has held that the notion of perversity has been interpreted as wilfully going contrary to evidence, whereas the notions of capriciousness and factual findings being made without regard to the evidence include circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings (see also *Page v. Canada (Attorney General)*, 2023 FCA 169, 483 D.L.R. (4th) 742 at para. 79 and *Brown v. Canada (Attorney General)*, 2022 FCA 104, 2022 A.C.W.S. 2040 at para. 22).

[58] While the test for setting aside a decision due to an unreasonable factual finding is an exacting one, reviewable factual errors do occur, and have, for example, resulted in decisions being set aside by this Court in *Williams Lake 2021 FCA* (an application for judicial review of a Tribunal decision); *Canada (Attorney General) v. Fauteux*, 2020 FCA 165, 329 A.C.W.S. (3d) 231; and *Bergey v. Canada (Attorney General)*, 2017 FCA 30, [2017] F.C.J. No. 142.

B. *Is the Tribunal's Decision on Pre-surrender and Post-Surrender Fiduciary Duty Unreasonable?*

[59] With this general background regarding reasonableness review in mind, I move on now to assess whether the Tribunal's treatment of the Crown's fiduciary obligations was reasonable.

Having already reviewed the Tribunal's reasoning on this issue, it is useful to next discuss the applicable common law precedents.

(1) Precedents from the Courts

[60] In *Williams Lake 2018 SCC*, the Supreme Court of Canada explained that there are two different ways in which a fiduciary obligation may arise between the Crown and Indigenous peoples. Writing for the majority, Chief Justice Wagner stated as follows at paragraph 44:

> A fiduciary obligation may arise from the relationship between the Crown and Indigenous peoples in two ways. First, it may arise from the Crown's discretionary control over a specific or cognizable Aboriginal interest: *Manitoba Metis Federation*, at paras. 49 and 51; *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18; *T.R.*, at para. 180-81. Because this obligation is specific to the relationship between the Crown and Indigenous peoples, it has been characterized as a "*sui generis*" fiduciary obligation: *Wewaykum*, at para. 78; *Guerin*, at p. 385; *Sparrow*, at p. 1108. Second, a fiduciary obligation may arise where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary: *Manitoba Metis Federation*, at para. 50; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36; T.R., at paras. 182 and 217.

[61] As noted in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at paragraph 50 and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 [*Elder Advocates*], at paragraph 36, a private law *ad hoc* fiduciary relationship requires that the following conditions be met:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons

> vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[62] The duties cast upon an *ad hoc* fiduciary are those of utmost loyalty and good faith, requiring the fiduciary to act in the best interests of the beneficiary and no other: see *Elder Advocates* at para. 43, citing Timothy G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Royal Society of Canada, 1989) at p. 27; *Williams Lake 2018 SCC* at para. 165 (Brown J.'s dissenting reasons). Given their multifaceted obligations and responsibilities, as was noted at para. 37 of *Elder Advocates*, governments will not owe private law duties of an *ad hoc* fiduciary in many circumstances.

[63] The *sui generis* fiduciary duty owed to Indigenous people, on the other hand, has been held to exist whenever the Crown has discretionary control over a cognizable Aboriginal interest, and particularly with respect to the surrender and expropriation of reserve lands.

[64] The *sui generis* fiduciary duty owed to Indigenous peoples in respect of surrendered reserve lands was first recognized by the Supreme Court of Canada in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; Jack Woodward, Aboriginal Law in Canada (Proview) at § 3:57 at paras. 3.1300, 3.1310; Leonard I. Rotman "Conceptualizing Crown-Aboriginal Fiduciary Relations," in *Law Commission of Canada, In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin, 2002) at 26. There, the Court found that the Crown breached its fiduciary duty to the Band when it leased surrendered reserve lands on less favourable terms than were discussed with the Band and failed to disclose its inability to have the

lessee agree to the terms discussed with the Band. Rather than proceeding to sign the lease, the Supreme Court held that the Crown ought to have instead disclosed to the Band its inability to obtain the terms discussed with the Band and should have sought new instructions before signing a lease. Even though the terms in issue were only discussed orally and were not incorporated into the terms of the surrender, the Court held that the Crown could not rely on the written terms contained in the formal surrender document. Writing for the majority in *Guerin*, Dickson J. (as he then was) stated at pp. 388-389:

> Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

[65] In *Blueberry River*, the Band surrendered its mineral rights and reserve lands to the Crown to use the funds obtained to purchase alternate lands closer to its hunting grounds. The terms of the surrender for the mineral rights were for them to be leased and the terms of the surrender of the lands were for lease or sale. The Court found no breach of fiduciary duty in respect of the surrender because its terms were fully discussed and understood by the Band. Importantly, the option of leasing was shown to have been fully discussed with the Band. However, the Court went on to find a breach of fiduciary duty in respect of the Crown’s failure

to reserve the mineral rights in the eventual sale in circumstances where the Crown's usual practice was to reserve the mineral rights in all sales of Crown lands.

[66] On the issue of the surrender, in her oft-cited concurring reasons, McLachlin J. (as she then was) noted that, while the Band had trusted the Crown to provide it with information as to its options and their foreseeable consequences, the Band had not abdicated its decision making power in respect of the surrender. In the circumstances, the Court found that the scope of the fiduciary duty owed by the Crown in respect of the surrender was limited to preventing an exploitative bargain as opposed to preventing the sale. The Band had argued that the Crown had an obligation to prevent the surrender in circumstances where, with the decline of hunting and trapping and the subsequent discovery of oil and gas on the former reserve, hindsight showed the decision to surrender to have been unfortunate. The Court rejected this contention. McLachlin J. noted at paragraph 35:

> My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident -- a decision that constituted exploitation -- the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

[67] Gonthier J., who penned the majority reasons, noted that he would have been “reluctant to give effect” to the surrender if he thought that the “Band’s understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention” (at para. 14).

[68] The failure to reserve the mineral rights, on the other hand, was found to be a breach of fiduciary duty because the Crown failed to exercise ordinary prudence when, through mistake, it neglected to follow its usual practice of reserving the mineral rights from the sale. In the words of McLachlin J. at paragraph 104:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. The Crown Permanent Trust Co.*, 1976 CanLII 14 (SCC), [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

[69] *Wewaykum* also concerned reserve lands. There, the Supreme Court of Canada clarified that a fiduciary duty does not cover all aspects of the relationship between the Crown and Indigenous peoples and does not necessarily arise before reserve creation: see para. 81. The Court held that, depending on the circumstances, a fiduciary relationship can arise prior to reserve creation, where its scope is limited to the obligations of good faith, providing full disclosure with respect to the subject matter, and acting with ordinary prudence. However, after a reserve is created, the scope of the Crown’s obligations are expanded to include protection of Indigenous interests in reserve land from exploitative bargains: see paras. 98-99.

[70] In *Williams Lake 2018 SCC*, Chief Justice Wagner, writing for a majority of the Supreme Court, described the scope of the *sui generis* fiduciary duty owed to Indigenous peoples, as developed through the case law, in the following terms at paragraph 46:

> A fiduciary obligation requires that the Crown's discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary (*Guerin*, at p. 384; *Wewaykum*, at para. 80). **This is embodied, for example, in the fiduciary duties of loyalty, good faith and full disclosure**. The standard of care to which a fiduciary is held in its pursuit of the beneficiary's interests is "that of a man of ordinary prudence in managing his own affairs": *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development*), 1995 CanLII 50 (SCC), [1995] 4 S.C.R. 344, at para. 104 (McLachlin J., as she then was), citing *Fales v. Canada Permanent Trust Co*., 1976 CanLII 14 (SCC), [1977] 2 S.C.R. 302, at p. 315; *Wewaykum*, at para. 94.

[71] In *Southwind*, the most recent decision of the Supreme Court concerning fiduciary duties owed to Indigenous peoples, Karakatsanis J., writing for the majority, described the nature of the *ad hoc* fiduciary duty owed by the Crown to Indigenous peoples with respect to reserve lands as follows at paragraphs 63-64:

> In a case involving reserve land, the *sui generis* nature of the interest in reserve land informs the fiduciary duty. Reserve land is not a fungible commodity. Instead, reserve land reflects the essential relationship between Indigenous Peoples and the land. In *Osoyoos*, Iacobucci J. wrote that Aboriginal interests in land has an "important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community" (para. 46). The importance of the interest in reserve land is heightened by the fact that, in many cases such as this one, the reserve land was set aside as part of an obligation that arose out of treaties between the Crown and Indigenous Peoples.
>
> **The fiduciary duty imposes the following obligations on the Crown: loyalty, good faith, full disclosure, and, where reserve land is involved, the protection and preservation of the First Nation's quasi-proprietary interest from exploitation** (*Williams Lake*, at para. 46; *Wewaykum*, at para. 86). The standard of care is that of a person of ordinary prudence in managing their own affairs

> (*Williams Lake*, at para. 46). **In the context of a surrender of reserve land, this Court has recognized that the duty also requires that the Crown protect against improvident bargains, manage the process to advance the best interests of the First Nation, and ensure that it consents to the surrender** (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (SCC), [1995] 4 S.C.R. 344, at paras. 35 and 96). In an expropriation, the obligation to ensure consent is replaced by an obligation to minimally impair the protected interest (*Osoyoos*, at para. 54).
>
> [Emphasis added.]

[72] In *Southwind*, the Supreme Court also underscored that a breaching fiduciary who fails to disclose material facts is prevented by what has been called the "*Brickenden* rule" from arguing that the outcome would have been the same regardless of whether the facts were disclosed, citing to *Brickenden v. London Loan & Savings Co*. [1934] 3 D.L.R. 465 (P.C.), 1934 CanLII 280 (UK JCPC) (at para. 82).

[73] One other court decision merits mention, namely, the decision of our Court in *Semiahmoo Indian Band v. Canada (C.A.)*, 148 D.L.R. (4th) 523, 1997 CanLII 6347 (FCA) [*Semiahmoo*]. There, this Court found a breach of fiduciary duty when the Crown requested the surrender of land to expand a customs facility without any definite plans to construct the facility. This Court upheld the trial judge's finding that the initial surrender as well as a failure to re-convey the land when the Band requested a re-conveyance were both breaches of fiduciary duty by the Crown. Importantly for our purposes, this Court confirmed that the Crown's post-surrender fiduciary obligations required it to consider and adjust to changed circumstances, which in that case, involved a request by the Band that the land be re-conveyed back to Band when it was no longer needed for the purposes it was surrendered.

[74] From the foregoing cases, the following principles emerge of relevance to the instant case.

[75] First, the nature of the *sui generis* fiduciary duty owed by the Crown to Indigenous peoples in the context of a surrender of reserve land is multifaceted. The obligations imposed on the Crown in such circumstances include duties of loyalty, good faith, full disclosure, protection of the First Nation's interest in the reserve lands from exploitative or improvident bargains, managing the process in the best interests of the First Nation, and ensuring that the First Nation consents to the surrender. These duties require decision makers tasked with assessing a claim of breach of fiduciary duty to consider factors that go well beyond the existence of consent by the First Nation and whether the bargain was improvident, the only two factors assessed by the Tribunal in the present case.

[76] Second, the terms of the formal written surrender document are not determinative of the scope of the Crown's fiduciary obligations. Rather, the nature of those obligations will fall to be determined based on all the relevant surrounding circumstances. Sometimes those circumstances may require the Crown, in the discharge of its fiduciary obligations, to go beyond the terms contained in the surrender document and to explore other options.

[77] Third, the Crown's post-surrender fiduciary obligations may require it to consider and adjust to changed circumstances relevant to the surrender where the surrendered land has not yet been sold. Depending on the facts, the Crown's fiduciary duties may require it to consult with the First Nation or re-convey to the First Nation lands that have been surrendered and not yet sold.

(2) Precedents from the Tribunal

[78] I turn next to briefly review relevant precedents from the Tribunal, itself.

[79] The Tribunal has recognized many times that the obligations imposed on the Crown when reserve land is surrendered go beyond preventing exploitative bargains and accepting a surrender that the First Nation has consented to sign. These additional obligations include, among other things, the need for full disclosure to the First Nation by the Crown of all relevant facts that the Crown has knowledge of prior to taking the surrender: see *e.g. Metlakatla Indian Band v. His Majesty the King in Right of Canada*, 2022 SCTC 6 at paras. 186-189, 194 [*Metlakatla*]; *Makwa Sahgaiehcan First Nation v. Her Majesty the Queen in Right of Canada*, 2019 SCTC 5 at para. 144 [*Makwa Sahgaiehcan*]; *Lac La Ronge Band and Montreal Lake Cree Nation v. Her Majesty the Queen in Right of Canada*, 2014 SCTC 8, aff'd 2015 FCA 154 at para. 164.

[80] In all of the foregoing cases, the Tribunal found the Crown breached the fiduciary duty it owed to Indigenous Peoples, in part because it failed to disclose or consult on facts the Crown had knowledge of that were relevant to the decision to surrender. As the Tribunal noted in *Metlakatla*, "the failure by Canada to offer disclosure of material facts to [a] Band" is "a failure to act with loyalty and good faith towards [that] Band": see para. 340.

[81] Where there is a failure to disclose relevant facts, any consent given to the surrender is not an informed one, and therefore cannot be valid. This is because "where actions are a matter

of choice, the exercise of an actor's autonomous will depend on the actor's knowledge of the available choices": *Makwa Sahgaiehcan,* at para. 149.

[82] Where appropriate disclosure has not been made, the Tribunal has held that the burden falls on the Crown to establish that the First Nation would have suffered the same loss regardless of the breach. In in *Doig River First Nation and Blueberry River First Nations v. Her Majesty the Queen in Right of Canada* 2018, SCTC 5, the Tribunal outlined the applicable principles as follows:

> [161] ….Where the breach of duty includes a failure to inform the beneficiary about important aspects of the impugned transaction, the principle in *Brickenden,* as interpreted in *Hodgkinson*, applies. The Court in *Brickenden* at page 469 said:
>
> > When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constitutent's [sic] action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosure facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.
>
> [162] In *Hodgkinson*, the Supreme Court of Canada framed the principle in *Brickenden* as a reverse onus: "…the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach…"; the defendant must provide "concrete evidence"; and, "mere 'speculation'" is inadequate (*Hodgkinson* at para 76). The focus of the inquiry then is whether the ill-informed "constituent" would have continued with the deal if properly informed.

[83] The Tribunal has also found that where there is a change in circumstances relevant to a decision to surrender or to the sale of resources harvested from reserve lands, the Crown must

consult with the First Nation before proceeding: see especially *Doig River First Nation and Blueberry River First Nations v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 6 at paras. 155, 168 [*Doig River 2015*]; *Huu-Ay-Aht First Nations v. Her Majesty the Queen in Right of Canada*, 2014 SCTC 7 at paras. 72, 86-87, 104 [*Huu-Ay-Aht*].

[84] As will soon become apparent, it is my view that the Tribunal's failure to recognize the foregoing principles drawn from the relevant court and Tribunal cases renders its decision in the case at bar unreasonable.

(3) Reasonableness of the Tribunal's Decision on Pre-surrender Breach of Fiduciary Duty

[85] I turn first to review in more detail the Tribunal's assessment of the allegations of pre-surrender breach and find that it reached an unreasonable factual conclusion. This, in turn, led it to bypass consideration of the adequacy of the information the KFN had when it consented to the surrender of IR 72A and of the adequacy of disclosure made by the Crown to the KFN.

[86] In this regard, it will be recalled that the Tribunal characterized what was said by two government officials in correspondence between them about the value of the surrendered lands as being merely the views of two individuals, which bore no relevance to the adequacy of the KFN's understanding of the terms of surrender. With respect, this characterization is so untenable that it meets the high bar of being unreasonable because it fails to reasonably account for critical evidence that runs counter to its findings. In the words used by the Supreme Court in *Vavilov*, the Tribunal fundamentally misapprehended the evidence before it.

[87] Superintendent Allan and General Superintendent Christianson were not mere individuals, but, rather, were key officials employed in the very federal government department that was charged with responsibility for protecting the interests of Indigenous Peoples in Saskatchewan in their reserve lands. Moreover, in his October 4, 1944 letter to General Superintendent Christianson, Superintendent Allan stated that it had been "our" experience that leasing cottage lots was more profitable than selling them. His use of the pronoun "our" can only be understood as meaning that he was speaking of the collective experience of officials in the Department and not just his own experience. The timing of the letter is also significant. It was sent just months after the surrender was taken.

[88] The knowledge of individuals acting for the Crown in these key roles that it was more profitable at the time to lease than sell lots that could be used for building cottages is highly relevant to the adequacy of the KFN's understanding of the terms of the surrender and to the adequacy of the Crown's disclosure to the KFN.

[89] There is no suggestion that the Crown discussed the relative merits of leasing versus selling the IR 72A lands with the KFN before the surrender was taken by Agent Kerley. In the absence of any discussion by the Crown with the KFN of the comparative value of leasing versus sale of the IR 72A lands, it is impossible to conclude that the KFN had an adequate understanding of the terms of the surrender or that appropriate disclosure was made by the Crown.

[90] As the applicant rightly notes, the lack of evidence that these facts were discussed with the KFN distinguishes this case from *Blueberry River* and reduces the requirement for an adequate understanding of the terms of the surrender to "little more than a question of whether the First Nation members were literate": see Applicant's Memorandum of Fact and Law at para. 46.

[91] I therefore conclude that the unreasonable characterization of the correspondence between Superintendent Allan and General Superintendent Christianson led the Tribunal to commit a reviewable error.

[92] In addition to the foregoing unreasonable factual determination, the Tribunal also failed to account for or to reconcile its decision in the present case with the long line of authority from the courts and the Tribunal, itself, holding that the Crown's fiduciary duties in cases of this nature include the requirement for full disclosure. The conclusions of the Tribunal in paragraphs 49 and 51 of the Decision, regarding the additional disclosures that could have been made by the Crown about the potential benefits of leasing, are incompatible with the authorities that require full disclosure by the Crown of relevant information when a surrender is taken.

[93] I therefore conclude that the Tribunal's determination that there was no pre-surrender breach of fiduciary duty by the Crown was unreasonable.

(4) Reasonableness of the Tribunal's Decision on Post-surrender Breach of Fiduciary Duty

[94] I turn now to the Tribunal's assessment of the post-surrender breach of fiduciary duty by the Crown.

[95] The case law discussed above recognizes that changed circumstances affecting a decision to surrender, where the land in still owned by the Crown, typically require that the Crown consult with the First Nation and seek fresh instructions. As this Court held in *Semiahmoo*, "reasonable diligence" requires that the [Crown] disclose—and "move to correct"—any material facts that would affect a community's interests in the context of a surrender for sale. The Crown is remiss in meeting its post-fiduciary duties when it fails to do so (see para. 68). Investigation and disclosure are important in this context. Like this Court concluded in *Semiahmoo*, "had the Crown moved with some degree of alacrity, the band could have benefitted from an earlier termination of what had turned out to be a bad deal for them" (see para. 68, citing *Lower Kootenay Indian Band v. Canada,* [1992] 2 C.N.L.R. 54 (F.C.T.D.)).

[96] The Tribunal came to similar conclusions in *Doig River 2015*at para. 167; and *Huu-Ay-Aht* at paras. 100, 104. In both cases, the Tribunal held that the Crown's failure to investigate and disclose the changed circumstances affecting surrendered lands prevented the Indigenous community involved from making an informed choice about its best interests.

[97] It is clear from this line of jurisprudence that the Crown does not discharge its fiduciary duty by merely acting on the terms contained in the surrender document.

[98] Contrary to the foregoing, the Tribunal in the instant case held that the Crown was not required to consider leasing the former IR 72A lands after the surrender was taken because the terms of the surrender were for sale. However, in the intervening years, during which the Crown failed to take any action on the matter, the reason that prompted the surrender in the first place may well have disappeared with the closure of the Round Lake Residential School. In addition, cottage development in the area was proceeding apace.

[99] These were important changed circumstances that merited consideration by the Tribunal and assessment as to whether the Crown ought to have consulted with the KFN before proceeding with the sale and whether, in such consultations, the possibility of leasing ought to have been discussed. It was unreasonable for the Tribunal to have concluded that all that had transpired in the intervening years was the mere passage of time.

[100] The Tribunal's characterization of the facts was therefore, once again, unreasonable. This characterization prevented it from assessing whether further consultation with the KFN or consideration of the option of leasing in 1956 was required.

[101] I accordingly find that the Tribunal's assessment of these issues was unreasonable. It follows that the Tribunal's Decision on the impugned issues cannot stand.

IV. Proposed Disposition

[102] I would therefore set aside the Decision in part and remit to the Tribunal the issue of the Crown's breach of its pre and post-surrender fiduciary duties for redetermination, the whole in accordance with these Reasons. As I would find the KFN entirely successful, I would award it costs.

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

"I agree.
Judith Woods J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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