Federal Court of Appeal

Cour d'appel fédérale

Date: 20240529

Docket: A-45-23

Citation: 2024 FCA 100

CORAM: **DE MONTIGNY C.J.**
LASKIN J.A.
WALKER J.A.

BETWEEN:

SAULTEAUX FIRST NATION

Applicant

and

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

Respondent

Heard at Vancouver, British Columbia, on April 18, 2024.

Judgment delivered at Ottawa, Ontario, on May 29, 2024.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

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

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] This application for judicial review relates to the 1960 surrender of 207 acres of Jackfish Lake waterfront lands on Indian Reserve Number 159 (IR 159) in Saskatchewan by the Saulteaux First Nation (the applicant) (the Surrender Land), in exchange for 4,970 acres of provincial Crown land near Birch and Helene Lakes (the Exchange Land) and $20,000. The applicant argues that the Crown failed to meet its pre-surrender fiduciary obligation, and should

have withheld its consent or at least guaranteed a minimal impairment of the First Nation's interest in the reserve land because the exchange was so foolish and improvident that it amounted to an exploitative bargain.

[2] After a 6-day hearing involving 5 experts, 5 oral history witnesses and 3 days of oral arguments, the Specific Claims Tribunal (the Tribunal) ruled that the Saulteaux Band's understanding of the terms of the surrender was adequate, that the surrender did not constitute an exploitative bargain, and that Canada was not required to ensure minimal impairment of the Saulteaux Band's interests in the reserve land in the context of the 1960 surrender: *Saulteaux First Nation v. Canada*, 2023 SCTC 1 (the SCT Decision).

[3] For the reasons that follow, I am of the view that the Tribunal did not make any reviewable error justifying the intervention of this Court. Indeed, most of the arguments raised by the applicant amount to a mere disagreement with the Tribunal's assessment of the evidence. Needless to say, it is not the role of a reviewing Court to reweigh or reassess the evidence, nor to interfere with the decision-maker's factual findings.

I. FACTUAL BACKGROUND

[4] Treaty 6 was signed at Forts Carlton and Pitt in 1876; its provisions included reserves set apart for the signatory First Nations. At the time, the Saulteaux First Nation did not enter the treaty. It only adhered to Treaty 6 in 1954 and 1956.

[5] In 1905, some members of Saulteaux First Nation petitioned the Indian Agent for a reserve on Jackfish Lake, where they lived and supported themselves by fishing and hunting. Numerous letters were then exchanged between the Department of the Interior and the Department of Indian Affairs to determine the amount and exact location of lands to be set apart as a reserve for the members of Saulteaux First Nation at Jackfish Lake. The lands marked off for the members of Saulteaux First Nation at Jackfish Lake were then surveyed, and by Order in Council P.C. 2617, IR 159 was confirmed. It consisted of three parcels of land totalling 9,010.869 acres. Two of the three parcels (the Surrender Land)—totalling approximately 207 acres—were located on the waterfront of Jackfish Lake. These two parcels included plenty of sandy beach shorelines and provided excellent fishing resources. For the history surrounding the creation of IR 159, see SCT Decision at paras. 15–20.

[6] Jackfish Lake has been known as a prime recreational destination in Saskatchewan since as early as 1905. The Province made numerous attempts to acquire the Surrender Land and commissioned two reports which made recommendations with respect to the purchase or lease of parcels of IR 159. On June 12, 1947, the Saskatchewan Premier wrote to the Minister of Mines and Resources of Canada, alleging that the Saulteaux First Nation "petitioned" to transfer their residence from IR 159 to the north side of Birch Lake. In response to the Premier's letter, the Inspector of Indian Agencies noted that he was "very doubtful that the majority of the Indians of this band desire to make the exchange". As a result of a Band meeting on August 18, 1947, where the idea of transferring their residence to Birch Lake was rejected, the Acting Minister of Mines and Minerals of Canada informed the Saskatchewan Premier on September 12, 1947 that

the Saulteaux First Nation had “no desire of making a move to the suggested location” and advised “that there is no further action the Indian Affairs Branch can take in the matter”.

[7] In 1953, the Government of Saskatchewan commissioned a report (*Investigation of Recreational Facilities and Potentials in Northwestern Saskatchewan*, also known as the “Brown Report”) investigating lakes in northwestern Saskatchewan for recreational potential. Jackfish and Murray Lakes were identified as “an exceedingly attractive recreational area”, with Jackfish Lake especially having recreational beaches and good fishing. The report stated there were only two potential multi-use recreational sites on Jackfish Lake that were unoccupied and undeveloped, and these were two non-contiguous lakeshore parcels both within IR 159. The Brown Report recommended that the province obtain title to the northern parcel only, and leave the southern parcel for the Band.

[8] In a further report released in September 1956 (*A Report on Recreation Conditions of Jackfish & Murray Lakes*, also known as the “Baker Report”), which focused on the recreational conditions at Jackfish and Murray Lakes, the opposite recommendation was made, *i.e.*, that the southern non-contiguous lakeshore parcel of IR 159 be purchased or leased by the province, and the northern section be left as reserve because “some first-class beach must be left to the Reservation”.

[9] In the wake of these two reports, the Deputy Minister of Natural Resources of Saskatchewan asked the Deputy Minister of Citizenship and Immigration of Canada on March 4, 1958, about procuring title of certain portions of IR 159. Following a Band meeting to discuss

the issue, the Superintendent of the Battleford Agency reported to the Regional Supervisor of the Department of Citizenship on March 18, 1958, that members "came forward one after another objecting to the disposal of these parcels of land and advised that they would not entertain any further discussion relating to the selling of any part of their Reserve". This was confirmed by the Regional Supervisor of Indian Agencies of Saskatchewan to the Superintendent of Reserves and Trusts of Canada in a letter dated March 21, 1958.

[10] In a letter dated March 26, 1958, the Deputy Minister of Citizenship and Immigration of Canada notified the Deputy Minister of Natural Resources of Saskatchewan of the Band's decision to unanimously vote against disposing of their land, as it would close off access to fishing grounds and would make the Reserve too small for the needs of the Band. The letter also added that the Saulteaux First Nation might be convinced to change their mind if certain conditions were met. Because the applicant is making much of that part of the letter, it is worth reproducing it in full:

> I do not know whether it would be possible to induce the members of the Band to alter their opinion, but if the Indians can be assured of continuing access to the fishing grounds and should there be conveniently located land under the control of the Province that could be exchanged for the land required by your Department, it might be worthwhile to discuss the matter further with the Indians. If the matter is to be taken up with the Indians again, it might be helpful if a representative of your Department met with them to explain your requirements in detail and to work out an acceptable arrangement for compensation either in terms of money or an exchange for other land owned by the Province.

[11] In a subsequent letter to his provincial counterpart, Deputy Minister Fortier stated that "it may be that an arrangement can be worked out that will be acceptable to the Indian band", and expressed the opinion that the best way to deal with the matter would be for a representative of Saskatchewan to meet with members of the Band. He added that his officials would attempt to

facilitate such a meeting. On June 13, 1958, the Superintendent of the Battleford Agency wrote to his regional supervisor to let him know that there had been no further development, and expressed the view that "the Band members would not consider to sell any part of their reserve" and that "it will not serve any good purpose to re-open the talk with the members of the Band unless the Provincial Government has a very generous offer to make". It appears from the record that no meeting took place between Saskatchewan and the Saulteaux Band before October 1959.

[12] While the Saulteaux First Nation was against the idea of selling their land in exchange for other provincial lands during that period of time, they demonstrated an interest in leasing. In a letter dated March 17, 1958, the Superintendent of Reserves and Trusts of Canada wrote to the Regional Supervisor of Indian Agencies of Saskatchewan, noting that "there might be a possibility of some sort of lease offered" but no possibility of selling "under any circumstances".

[13] There is further evidence of an interest in leasing in the Battleford Agency's quarterly report dated March 31, 1958. It was noted that "[f]or the last two years, it had been brought to the attention of the Saulteaux Indian Band to consider the leasing for camping". The report indicated that a meeting was held for the purpose of leasing and a "majority of the members were favourable toward the project", as it could be a "good source of revenue". Moreover, on August 7, 1959, a Band meeting was held, where "most of the voting members favoured leasing the land".

[14] Notwithstanding the Saulteaux First Nation's initial refusals to sell the Surrender Land in exchange for other provincial lands, and their documented interest in leasing, a "Band Council

Document" with typed signatures dated October 13, 1959, indicated that a meeting was held at the Chief of the Saulteaux First Nation's home the day prior, and that the "Band was willing to negotiate with the Government of Saskatchewan for the sale of certain portions of the Saulteaux Reserve bordering the North Shore of Jack Fish Lake". The Band Council Document contained a detailed description of the requested exchange land, a request for a supplementary payment of $20,000 and "as a condition of sale, that all mineral rights be included". It appears that the meeting was held without the presence of any federal official.

[15] On October 23, 1959, that Document was sent to the Regional Supervisor of Indian Agencies of Saskatchewan by the Superintendent of the Battleford Agency. On October 29, 1959, the Deputy Minister of Natural Resources of Saskatchewan sent to the Band a proposal for the exchange of Indian Reserve lands on Jackfish Lake for lands in the Provincial Forest at Birch Lake. The proposal included the transfer of 297 acres of IR 159 in exchange of 5,363 acres of provincial land, $20,000 and mineral rights on one section of the land.

[16] In response, the Saulteaux Band Council prepared a signed Band Council Resolution on November 2, 1959, stating that the proposal "has been read and is fully understood by us", and "is accepted", and requesting that the "Indian Affairs Branch proceed with … the surrender vote".

[17] The next day, the Superintendent of the Battleford Agency wrote to the Regional Supervisor of Indian Agencies of Saskatchewan, describing the Exchange Land and asking to arrange for a surrender vote. In that letter, the Exchange Land was described as significantly

larger—about 4,400 more acres than the Surrender Land. Moreover, part of the Exchange Land was suitable for growing “fair quality slough hay”, offered some hunting and trapping of “plentiful” wild game and fur-bearing animals, had potential for livestock raising and grazing, and had more attractive mineral rights than Jackfish Lake. That being said, the Superintendent of the Battleford Agency also wrote that the remaining portions of the Exchange Land were “rolling and sandy, of no agricultural value”, had limited fishing resources and had little timber of limited commercial value. He nevertheless expressed the opinion that the transaction “will be of benefit for the Indians”.

[18] On November 5, 1959, the Regional Supervisor for Saskatchewan wrote a letter to the Chief of Reserves and Trusts Division of Canada, expressing how the transaction “will definitely benefit the Indians”, does not “hesitate in recommending it be approved”, and finally, “admit[s] that the proposal presented to the Indians by the Province of Saskatchewan is very fair and reasonable”. Further, the Regional Supervisor acknowledged how Saskatchewan was “doing the best they can in granting the mineral rights on 640 acres in the exchange area to the Indians concerned”.

[19] On December 2, 1959, the Deputy Minister of Natural Resources of Saskatchewan wrote to the Deputy Minister of Citizenship and Immigration of Canada, stating how it was pleased that its proposal was found to be acceptable, and that the Saulteaux First Nation would “enjoy the same privileges as the public for lake access and recreation”. On that same date, the Chief of Reserves and Trusts Division of Canada wrote to the Regional Supervisor for Saskatchewan stating that the surrender documents would be sent to the Superintendent of the Battleford

Agency for consideration by the Saulteaux First Nation once a legal description was completed and on receipt of confirmation from the provincial government authorities that the terms were acceptable from a provincial point of view.

[20] Yet on October 8, 1959—just five days before the Saulteaux First Nation Council expressed its intention to negotiate with Saskatchewan for the sale of certain portions of IR 159—the Chief of Reserves and Trusts Division of Canada allegedly sent surrender documents to the Superintendent of the Battleford Agency relating to a proposal to lease. Having been made aware of that correspondence in early December, he therefore wrote to the Regional Supervisor for Saskatchewan on December 7, 1959, suggesting that the lease proposal be withheld. The Chief of Reserves and Trusts Division of Canada stated:

> Further to my letter of December 2, 1959, it has now come to our attention that we have been carrying out correspondence with the Agency office with respect to a surrender of the Fractional N.E. ¼ of Section 10-48-17 W3M. It appears that the Saulteaux Band would like to lease this area for summer resort purposes.
>
> The above proposal conflicts with the exchange to the Province as the area in question is part of the 207 acres it is proposed to transfer. It is suggested that if the surrender documents sent to the Agency with our letter of October 8, 1959, have not yet been presented to the Band, that they be withheld until surrender documents are forwarded with respect to the 207 acres it is proposed to exchange. with the Province.
>
> It is interesting to note that at a Band meeting held August 7, 1959, most of the voting members favoured leasing the land, and perhaps while the Band Council favours the proposed exchange, the majority could well disapprove.

[21] Then, on December 21, 1959, the Regional Supervisor of Indian Agencies of Saskatchewan asked the Superintendent of the Battleford Agency to "advise if there is some misunderstanding amongst the Indians in regards to surrender for sale, as it would appear that the Saulteaux Band would like to lease this area for summer resort purposes". Two days later, the

Superintendent of the Battleford Agency responded, stating that it "returned the Surrender Document for a proposed lease of Saulteaux Indian land to headquarters" because they are "no longer interested in leasing" following the Government of Saskatchewan's second proposal for acquiring IR 159 in exchange for other provincial lands.

[22] It is in this context that a vote was held on January 25, 1960 on the proposed surrender of portions of IR 159 in exchange for other provincial lands at Helene Lake and Birch Lake, located approximately 65 kilometres northeast of IR 159. By memorandum dated December 30, 1959, the Chief of Reserves and Trusts Division of Canada asked the Superintendent of the Battleford Agency "that the proposed surrender meeting be given the widest publicity possible in order to insure that as many voting members attend as is possible to have".

[23] Of the 82 voting members that were eligible to vote, 60 were present. Of the 60, 52 were in favour of selling, while 8 were against. The Minutes taken at the meeting showed that 1) the Saulteaux First Nation recommended an interpreter who was sworn to interpret the meeting from English to Cree, and vice versa, and no objections were noted regarding the selection of the interpreter; 2) the Superintendent of the Battleford Agency read the terms of the surrender—which were translated by the interpreter—and asked if the terms were understood, and there were no recorded questions; and 3) a representative of Saskatchewan stated that "the Indian people would have the same right to use the [surrendered] land as the White people".

[24] Following the majority vote, the Chief of the Saulteaux First Nation and two councillors executed the surrender form with the Superintendent of the Battleford Agency signing on behalf

of Canada. The proposal made its way up to official government channels, and on February 18, 1960, Canada passed Order in Council PC 1960-178, officially accepting the surrender.

[25] On March 10, 1960, Canada passed Order in Council PC 1960-297, transferring administration and control of the land described in the surrender to Saskatchewan. On May 9, 1960, Saskatchewan passed Order in Council 785/60, authorizing the purchase of the Surrender Land, as well as the transfer of the administration and control of the land at Birch Lake with payment of $20,000 to the Superintendent General of the Department of Citizenship and Immigration of Canada, in trust for the Saulteaux First Nation.

[26] Ultimately, the Surrender Land became “The Battlefords Provincial Park”, and the Exchange Land was designated as Saulteaux Indian Reserve No. 159A.

II. THE SPECIFIC CLAIMS TRIBUNAL DECISION

[27] On December 10, 2008, the applicant filed a claim with the Minister of Indian Affairs and Northern Development, alleging a breach of fiduciary duties by the respondent. This claim was not accepted for negotiation, on the basis that Canada had no outstanding obligation. As a result, the applicant filed a Declaration of Claim with the Specific Claims Tribunal on December 3, 2013, seeking compensation and damages for the respondent’s alleged breach of its pre-surrender fiduciary obligations that it owed to the applicant.

[28] On January 18, 2023, the Tribunal reached its decision and determined that Canada did not breach its pre-surrender fiduciary duty owed to the applicant since the surrender did not

constitute an exploitative bargain. To arrive at its conclusion, the Tribunal reviewed the jurisprudence to define the nature of the fiduciary obligation between the Crown and First Nations in the context of a surrender, which includes "loyalty, good faith, full disclosure" and the "protection … of the First Nation's quasi-proprietary interest from exploitation" (SCT Decision at para. 87, citing *Southwind v. Canada*, 2021 SCC 28 at para. 64 (*Southwind*)). In addition to exploring what constitutes exploitation in the context of reserve land surrenders, the Tribunal equally noted that the avoidance of exploitative bargains was at the very heart of the Crown's fiduciary duty, and that there must also be a balance between autonomy and protection (SCT Decision at paras. 83–84).

[29] The Tribunal then made the following findings, on the basis of the record before it:

- The surrender and exchange were neither foolish nor improvident when viewed from the Band's perspective at the time, and Canada did not breach its fiduciary duty to the Band by accepting the surrender;
- The Band's understanding of the surrender terms was adequate;
- There were no tainted dealings on the part of Canada that would make it unsafe to rely on the Band's understanding and intention;
- Canada was not required to ensure minimal impairment of the Band's interest in the reserve land in the context of the 1960 surrender.

III. ISSUES

[30] In its written and oral submissions, the applicant raises a number of issues, most of which go to the assessment of the evidence or to the interpretation of certain documents. It also raises a few questions of mixed fact and law pertaining to Canada's pre-surrender fiduciary duty and to its duty of minimal impairment. Ultimately, I am of the view that the issues to be decided on this application for judicial review are the following:

A. Did the Specific Claims Tribunal err in finding that Canada met its pre-surrender fiduciary duty?

B. Did the Specific Claims Tribunal err in determining that there was no duty of minimal impairment?

C. Did the Specific Claims Tribunal breach the principles of procedural fairness?

IV. ANALYSIS

[31] The parties are in agreement, and rightly so, that the applicable standard of review is that of reasonableness on the first two questions. This is the presumptive standard of review when considering the merits of an administrative decision. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*), the Supreme Court indicated that this presumption will be rebutted when the legislature has opted for a different standard, or where the rule of law requires the standard of correctness. This will be the case for constitutional questions, general questions of central importance to the legal system as a whole, and for questions related

to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras. 23–25, 53, 55, 58–62, 69–70).

[32] These circumstances do not arise here, nor do they in most instances where the Tribunal rules on the scope and asserted breach of fiduciary duties owed by Canada to Indigenous peoples. The jurisprudence of the Supreme Court and of this Court in that respect has been consistent over the years (see, e.g., *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 27; *Williams Lake First Nation v. Canada (Indian Affairs and Northern Development)*, 2021 FCA 30; *Witchekan Lake First Nation v. Canada*, 2022 FCA 52 at para. 2; *Ahousaht First Nation v. Canada (Indian Affairs and Northern Development)*, 2021 FCA 135 at paras. 44–45 leave to appeal to SCC refused, 39847 (3 March 2022); *Kahkewistahaw First Nation v. Canada (Crown-Indigenous Relations)*, 2024 FCA 8 (*Kahkewistahaw*)).

[33] When applying the reasonableness standard, a reviewing court must show deference to the decision-maker. The focus of the reasonableness review must be the decision that was made, and courts should refrain from deciding the issue afresh or coming up with the decision it would have made had it been seized of the issue in the first place. Attention must therefore be given to the reasons provided, with a view to determining whether the decision falls with a range of acceptable outcomes. As the Supreme Court cautioned, the reasons given by an administrative body must not be assessed against a standard of perfection. The reviewing court must therefore look at the reasons with sensitivity to the institutional setting and in light of the record, and ask itself whether the decision bears the hallmark of reasonableness—justification, transparency and

intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para. 99; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 47, 74). That being said, a reviewing court should resist the temptation to supplement the reasons of the decision-maker when they contain a fundamental gap or when the chain of analysis is defective. As the Supreme Court cautioned in *Vavilov*, “even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome” (*Vavilov* at para. 96).

[34] As for issues pertaining to procedural fairness, there is no need for a standard of review analysis. As this Court stated in *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 34–56, the ultimate question in assessing procedural fairness is whether the applicant knew the case to meet and had a fair chance to respond.

A. *Did the Specific Claims Tribunal err in finding that Canada met its pre-surrender fiduciary duty?*

[35] As previously mentioned, the Tribunal first set out the law with respect to the *sui generis* fiduciary duty owed to Indigenous peoples in respect of surrendered reserve lands. As mentioned in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (*Guerin*), where the Supreme Court of Canada, for the first time, characterized the relationship between the Crown and First Nations as a fiduciary relationship, the Crown first took this responsibility upon itself in the Royal Proclamation of 1763, and the surrender provisions of the *Indian Act*, R.S.C. 1985, c. I-5 (the Act) requiring that Canada consent to a surrender of reserve land still recognize this duty (*Guerin* at 379, 383–384;

the Act, ss. 18(1)). The requirement that Canada consent to a surrender of reserve land is clearly meant to prevent First Nations from being exploited by third parties.

[36] The nature of the duty owed by the Crown when a band wishes to surrender its reserve was taken up again by the Supreme Court in *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (*Blueberry*). In that case, the Bands contended that the Crown should not have allowed them to surrender their reserve since this was not in their long term best interest. According to the Bands, the paternalistic tone of the Act imposes a duty upon the Crown to protect the Indians from themselves. The Court rejected that contention, being of the view that the Act strikes a balance between autonomy and protection, and reiterating that the purpose of the requirement of the Crown's consent is to prevent exploitation, not to substitute the Crown's decision for that of the Band. While that view was expressed in separate reasons by McLachlin J. (with the support of Cory and Major JJ.), it was endorsed by all seven members of the Court. It is also worth noting that the exploitative character, improvidence or foolishness of a surrender must be considered from the perspective of the Band at the time of the surrender, not with the benefit of hindsight (*Blueberry* at para. 36). Also of interest is the caveat expressed by Gonthier J., writing for the majority, that the Band's understanding of terms of the surrender must be adequate, and that the conduct of the Crown must not have tainted the dealings to such an extent that it would be unsafe to rely on the Band's understanding or intention (*Blueberry* at para. 14).

[37] In its latest pronouncement on that issue, the Supreme Court reviewed its earlier jurisprudence and summarized the Crown's fiduciary duty applicable to the surrender of reserves in the following manner:

> 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. The standard of care is that of a person of ordinary prudence in managing their own affairs. 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 [citations omitted].
>
> *Southwind* at para. 64, cited by the Tribunal at para. 87 of its decision.

[38] With these guiding principles in mind, I will now determine whether it was unreasonable for the Tribunal to find that Canada met its pre-surrender fiduciary duty.

[39] The applicant put forward a number of submissions in support of their claim that the surrender bargain was foolish and exploitative. First, they claim that the Tribunal erred in fact when it concluded that the mineral rights on the Exchange Land were more attractive than the mineral rights on the Surrender Land. The applicant argues that not only was the Tribunal's conclusion based on a single "offhand opinion", but it also did not take into account Saskatchewan's position that it was "doing the best they can" by granting mineral rights on 640 acres of land, considering that most of the mineral rights on the Exchange Land were held by the Canadian Pacific Railway Company.

[40] The applicant also claims that the commercial fishery on Jackfish Lake was of utmost importance for the Saulteaux Band, and that approving a transaction that did not contain an

assurance of access to Jackfish Lake was a breach of fiduciary duty. Yet, the applicant argues, the Tribunal failed to consider that issue.

[41] Furthermore, the applicant contends that the Tribunal erred in preferring the valuation method used by two expert witnesses which valued the Exchange Land similar to, or even higher than, the Surrender Land, as opposed to a different valuation method used by a different expert witness that valued the Exchange Land less than the Surrender Land. More particularly, the applicant is of the view that the Tribunal erred in choosing to use exclusively the Direct Comparison Approach (DCA) instead of using it in conjunction with the Subdivision Development Approach (SDA), on the basis that the Surrender Land was not ripe for development. In the applicant's opinion, such a conclusion is unreasonable as it ignores the context in which the surrender took place. The applicant also questions the exclusion by the two Crown experts of two lands directly adjacent to the Surrender Land in their assessment of the historic market value of the Surrender Land. Finally, the applicant argues that the Tribunal erred when it stated that the opinion of both Crown experts was that the surrender bargain was fair and reasonable from the perspective of the Saulteaux Band, as it is not for experts to opine on a legal issue.

[42] In my opinion, the applicant has not met its burden of demonstrating that the Tribunal's assessment of the evidence is unreasonable. The Tribunal carefully considered the record and the submissions of the Saulteaux Band, and concluded that the surrender it negotiated with Saskatchewan was neither foolish nor improvident when viewed from the Band's perspective at

the time. This conclusion is grounded in the evidence that was before the Tribunal, and its reasons are justified, transparent, and intelligible.

[43] On the loss of access to fishing grounds, the Tribunal noted that the Saulteaux First Nation remained in possession of 8,803 acres of IR 159, and that this portion of the reserve borders Murray Lake and provided good fishing (SCT Decision at para. 91). As for the attractiveness of the mineral rights in the Exchange Land, it was based on the available evidence and it was only one consideration among many. The Tribunal also considered the following factors: a) 207 acres of land at Jackfish Lake was exchanged for 4,970 acres at Birch Lake and Helene Lake; b) the Exchange Land was neither remote nor inaccessible; c) the Exchange Land was suitable for growing slough hay, limited livestock grazing, some hunting and trapping and some development potential in the nature of large acreage locations for residential structures associated with the surrounding agricultural use land; d) the sum of $20,000 was paid in addition to the Exchange Land; and e) the mineral rights on the Exchange Land were more attractive than those on the Surrender Land. It is on the basis of all these factors that the Tribunal came to its conclusion that the exchange was not foolish and that Canada did not breach its fiduciary duty by consenting to the surrender.

[44] As for the applicant’s submissions regarding the Tribunal’s assessment of the historical values of the Surrender Land and the Exchange Land, I am of the view that they are without merit. The Tribunal conducted a thorough analysis of the three expert land appraisals submitted in evidence, and explained why the DCA assessment approach was in its view the preferable methodology. In particular, the Tribunal accepted the expert evidence of Mr. Love, who testified

on behalf of the respondent, that the Surrender Land was not ripe for immediate development, and that too much speculation would be required on a number of variables to make the SDA an appropriate method of land assessment. It is not for a reviewing court to decide the issue for itself, or to conduct a *de novo* analysis of the issue. When conducting a reasonableness review, the focus must always be on the reasons provided by the decision-maker, with a view to ascertaining their internal coherency and to determining whether the decision is justified in light of the applicable facts and law. The applicant has not convinced me that the Tribunal made a reviewable error in concluding, based on the record that was before it, that the surrender and exchange it had negotiated with the Government of Saskatchewan was either foolish or improvident.

[45] The Tribunal then considered whether the Band's understanding of the terms of the surrender was adequate. After having carefully considered the evidence and the applicable law on the subject, the Tribunal came to the conclusion that the Saulteaux First Nation had an appropriate understanding of the surrender and understood as early as 1947 Saskatchewan's desire to purchase the Surrender Land. The Tribunal found that while the Band opposed Saskatchewan's efforts in 1947 and again in 1958, it took steps to open negotiations in late 1959 and set out terms and conditions to the bargain that had not been historically offered by Saskatchewan and not previously considered by the Saulteaux First Nation. The Tribunal further found that at a meeting held at the home of the Chief of the Saulteaux First Nation on October 12, 1959, the Band Council defined the terms and condition of the bargain contemplated, the most significant of which was the exchange of portions of its reserve land bordering Jackfish

Lake for land bordering Helene Lake and Birch Lake. The Tribunal concluded that Saskatchewan essentially accepted those terms and merely refined them for clarity and detail.

[46] Saskatchewan approved the offer made by the Band Council on October 30, 1959, and on November 2, 1959, the Saulteaux Band Council prepared a Band Council Resolution (BCR) stating that Saskatchewan's proposal "has been read and is fully understood by us. Said proposal is accepted and it is our request that the Indian Affairs Branch proceed with the preparation of the necessary documents for the surrender vote". Canada therefore recommended the proposal upon request of the Band, and made reasonable efforts to ensure informed participation in the surrender vote by Saulteaux First Nation members, including; a) appointing an interpreter who was chosen at the recommendation of the Saulteaux First Nation Band Council; b) asking Saulteaux First Nation members in attendance whether they were satisfied with the selection of the interpreter and confirming there were no objections, and; c) asking attendees if the conditions of surrender were understood and if anyone had any questions after the conditions of the surrender were translated.

[47] Counsel for the applicant challenges this narrative, and claims that the surrender proposal did not originate with the Saulteaux Chief and Council but rather with Saskatchewan. They rely for that proposition on a number of facts. First, they note that there were no federal officials in attendance at the October 12, 1959 meeting that purportedly gave rise to the October 13, 1959 document. Second, they refer to a letter by Saskatchewan Deputy Minister of Natural Resources to the Battleford Agency Superintendent dated October 28, 1969 wherein he referred to "our proposal" for the exchange of Indian lands at Jackfish Lake for lands at Birch Lake. Third, they

note that the October 13, 1959, document mentions specific plots of land, which they argue the Band could not have independently known were all Crown-held lands. Finally, they point to the language of the BCR dated November 2, 1959, which accepted the "proposal of the Department of Natural Resources, Government of Saskatchewan".

[48] I think it is fair to say that the genesis of the potential land exchange is far from clear. While the documents to which counsel for the applicant draws the Court's attention appear to confirm that the proposal originated with Saskatchewan, the fact remains that the language of the October 13, 1959 document is to the effect that the Band is willing to negotiate with Saskatchewan for the sale of some portions of its reserve land on the basis of specific terms and conditions. Furthermore, the Superintendent of the Battleford Agency sent a copy of the Saulteaux First Nation Band Council's proposal to the Regional Supervisor for Saskatchewan on October 23, 1959, referring to it as a copy of proposals "as set forth by the Saulteaux Band Council" in which they set forth their terms of negotiation. It may well be that the Saskatchewan Government, having endorsed the First Nation's proposal, came to consider it as its own.

[49] Be that as it may, a reviewing court should refrain from reweighing or reassessing the evidence, and should not interfere with the Tribunal's factual findings absent exceptional circumstances. In the case at bar, the Tribunal's findings were based on the evidence, and its interpretation of the record was not unreasonable. More importantly, it cannot convincingly be argued that the Saulteaux First Nation did not understand the terms of the surrender. In its resolution dated November 2, 1959, the Band Council states that Saskatchewan's proposal "had been read and fully understood by us".

[50] At the meeting called to vote on the proposed surrender, a Court interpreter was chosen on the recommendation of the Band Council, and the conditions of the surrender were translated and read out. As noted by the Tribunal, when asked by the Superintendent of the Battleford Agency if the terms of the surrender were understood, no questions from those in attendance were recorded. The applicant does not dispute these facts (SCT Decision at para. 108).

[51] On the basis of the record, I am therefore of the view that the Tribunal could reasonably conclude that the Saulteaux First Nation had an adequate understanding of the surrender terms.

[52] Finally, the Tribunal looked into the allegations of the applicant that the Crown's conduct tainted the dealings to such an extent that it made it unsafe to rely on the Band's understanding and intention. After reviewing its previous decisions on tainted dealings in *Makwa Sahgaiehcan First Nation v. Her Majesty the Queen in Right of Canada*, 2019 SCTC 5 (*Makwa Sahgaiehcan*); *Doig River First Nation and Blueberry River First Nations v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 6, the decision of the Ontario Court of Appeal in *Chippewas of Kettle & Stony Point v. Canada (AG)*, (1996) 141 D.L.R. (4th) 1, and considering the evidence relating to Saulteaux First Nation's understanding of the surrender and knowledge of leasing as an option, the Tribunal found that there were no tainted dealings.

[53] Counsel for the applicant submits that this conclusion is unreasonable for the following reasons. It is argued that the Tribunal failed to properly take into account the advice given by the Deputy Minister of Citizenship and Immigration Canada to his counterpart as to how the Saulteaux Band could be induced to reverse its refusal to surrender any of its land, in his March

26, 1958 letter. In providing Saskatchewan with such advice, and by offering to facilitate a meeting between Saskatchewan and the Saulteaux Band, it is said that the Deputy Minister refused to recognize the autonomy of the Saulteaux Band and took a position that was not that of a neutral observer, let alone that of a fiduciary. In disregarding the substance and the weight of that March 26, 1958 letter, the Tribunal failed to acknowledge that Canada was the true architect of the 1960 surrender, and did not interpose itself between the Saulteaux Band and Saskatchewan to prevent the exploitation of one by the other as it should have done.

[54] According to the applicant, this conduct of the Crown is compounded by the fact that it knew the Saulteaux Band was entitled to additional reserve land under the reserve clause of Treaty 6. The applicant argues that the Crown therefore stood to benefit from the surrender since the Saulteaux Band could use the funds received from Saskatchewan in exchange for part of their existing asset to purchase land, thereby absolving Canada of its treaty land entitlement obligation.

[55] However, the insinuation that Canada's conduct was somehow motivated by a desire to fulfill an outstanding treaty land entitlement obligation at the expense of the Saulteaux Band is entirely speculative. Whether there was such an outstanding obligation has not been established, is not supported by the evidentiary record, and is not an issue in this claim.

[56] As for the March 26, 1958 letter, it is true that the Tribunal did not specifically address its significance in its analysis. Nonetheless, I do not think that this omission is critical. After all, the Deputy Minister's letter was not an encouragement for Saskatchewan to thwart the Saulteaux

Band's will or to otherwise find a way around it, but could reasonably be interpreted as a common-sense approach to find a compromise that would be agreeable to both sides. Indeed, it is not at the request of Saskatchewan that Canada eventually set in motion the necessary steps for the surrender vote, but upon the reception of the BCR and after having assessed that the transaction would benefit Saulteaux First Nation.

[57] What is perhaps of more significance is the argument put forward by counsel for the applicant to the effect that the Tribunal unreasonably limited its analysis to whether Saulteaux First Nation's understanding of the surrender was adequate and whether the surrender was so foolish or improvident as to constitute exploitation, and failed to address the Crown's duty of full disclosure in the context of a land surrender. More precisely, the applicant submits that the Crown's fiduciary duty required it to disclose the leasing option to band membership in advance of the surrender vote. Whether that failure is analyzed through the prism of tainted dealings by the Crown, or a lack of full and informed consent by the Saulteaux First Nation, or as a breach of Canada's duty of minimal impairment, I believe this argument deserves more careful examination.

B. *Did the Specific Claims Tribunal err in determining that there was no duty of minimal impairment?*

[58] Counsel for the applicant claims that the Tribunal erred when it concluded that the duty of minimal impairment is inapplicable to a surrender and therefore that there was no breach of such a duty. This concept of minimal impairment emerges from the decision of the Supreme Court in *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 (*Osoyoos*). In that case, the

highest court determined that the fiduciary duty of the Crown is not restricted in its application to cases of surrender. When, pursuant to section 35 of the Act, the Crown determines that an expropriation of reserve land is in the public interest, a fiduciary duty arises "to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band" (*Osoyoos* at para. 52).

[59] As the Tribunal noted, the requirement to minimally impair does not arise until the decision to expropriate has been made. This is consistent with *Osoyoos*, where the Supreme Court held that no fiduciary duty exists at the stage where the Crown determines whether an expropriation involving Indian lands is required. It is only at the stage when the Crown decides to take back designated reserve land for a public purpose that the requirement to minimally impair arises. This is justified by the fact that the purpose and means by which the reserve land is transacted are different in the contexts of an expropriation and of a surrender. In the first case, the Crown makes a unilateral decision, whereas the First Nation makes an autonomous decision in a surrender. This is why the obligation to ensure consent in a surrender is replaced by an obligation to minimally impair the protected interest in an expropriation. That distinction has been made quite explicit in *Southwind*, where the Supreme Court clarified that "[i]n an expropriation, the obligation to ensure consent is replaced by an obligation to minimally impair the protected interest" (at para. 64).

[60] However, this is not the end of the matter. In supplemental submissions filed with the Court's permission to address the decision released on January 12, 2024 in *Kahkewistahaw*,

counsel for the applicant argued that the Tribunal made the same mistake that was corrected in that case in failing to acknowledge the Crown's multifaceted fiduciary duties. Writing for the Court, Gleason J.A. made it clear that the fiduciary duty owed by the Crown to Indigenous peoples in the context of a surrender goes beyond the obligation to ensure that the First Nation has consented and that the bargain is not improvident. As was stated in *Southwind*, the fiduciary duty also imposes on the Crown obligations of loyalty, good faith, full disclosure, and management of the process to advance the best interests of the First Nation. As she added, the context may sometimes require the Crown to go beyond the terms found in the surrender document and to make sure that the First Nation knows of other available choices:

> 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"
>
> *Kahkewistahaw* at para. 81, citing *Makwa Sahgaiehcan* at para. 149.

[61] On the basis of these comments, which I fully endorse, the applicant claims that the Tribunal failed to address the Crown's duty of full disclosure, and did not disclose the leasing option to band membership in advance of the surrender vote. Indeed, the applicant submits that Canada had already prepared surrender documents for lease, pursuant to the previously stated desires of the community, but subsequently withheld them in favour of the absolute surrender for sale to Saskatchewan. As a result, contends the applicant, the relative merits of leasing as opposed to selling was not discussed, full disclosure was not made, and Saulteaux First Nation's consent was not informed.

[62] In my view, this argument is untenable. The context in *Kahkewistahaw* leading the Court to determine that the consent given to the surrender by the First Nation was not an informed one was different from the circumstances surrounding the surrender vote in the present case. In *Kahkewistahaw*, the only evidence that the First Nation understood that leasing was an option was contained in a letter from an agent of the Indian Affairs Branch. Furthermore, an exchange of letters between two senior officials shortly after the surrender took place revealed that the value of the surrendered land was expected to increase significantly since there would be a greater demand for cottage lots in the near future, and that even greater returns could be expected if the land was subdivided and leased for cottage sites. Yet, the Tribunal dismissed that correspondence as being merely the views of two individuals which bore no relevance to the adequacy of the First Nation's understanding of the terms of the surrender. Finally, the evidence also revealed that the balance in Kahkewistahaw First Nation's capital account far exceeded the cost of purchasing an equivalent amount of alternate land, which was part of the rationale for surrendering the reserve lands in the first place.

[63] In the case at bar, there is no such misapprehension of the evidence indicating that the Department of Indian Affairs withheld facts or information that would have been relevant to Saulteaux First Nation's decision to surrender its lands, or that would undermine its consent. A careful reading of the record shows that Saulteaux First Nation knew, at all material times before the 1960 surrender vote, that it could lease rather than sell its lands. Indeed, objections to the surrender of all of Jackfish Lake waterfront reserve land had been expressed more than once, and the majority of voting members continued to favour leasing the land at a Band meeting held August 7, 1959, just a few months before the surrender vote was held on January 25, 1960.

[64] It is true that Canada had already prepared surrender documents for lease, pursuant to the previously stated desires of the community, but subsequently withheld them in favour of the absolute surrender for sale to Saskatchewan. But as pointed out by the Tribunal, Canada took that course of action because it believed that the Saulteaux First Nation was no longer interested in leasing. In those circumstances, and in the context of the entire record, the Tribunal could reasonably conclude that Canada did not conceal a surrender for lease option in favour of an absolute surrender. After all, Canada presented the second proposal for a vote at the request of the Band Council.

[65] Consequently, it would be specious to argue that Canada breached its fiduciary duty by not disclosing the leasing option to band membership in advance of the surrender. It was a safe assumption for the Tribunal to conclude that Band members were well aware of the leasing option when they attended the January 25, 1960 meeting. As the Tribunal stated, in a key passage of its decision:

> Considering their opinion expressed in August 1959, the voting members of the Saulteaux First Nation understood that leasing a smaller portion of IR 159 for summer resort purposes was an option when they attended the January 26, 1960 meeting for the purpose of taking a vote on the proposed surrender of the 207 acres of IR 159. It was within their right to express their preference to do so by voting against the surrender proposal. A majority of the members had expressed their objection to selling the 207 acres in the past. For the first time, however, they were asked to vote on the sale with conditions designed by their Council. Of the 60 voting members, 52 voted in favour of approving the surrender proposal as presented. The evidentiary record does not therefore support a finding that presenting a vote only on the proposed surrender of the 207 acres of IR 159 vitiated the free and informed consent of the members.
>
> SCT Decision at para. 125.

[66] The applicant has failed to establish that the Tribunal came to an unreasonable conclusion. It thoroughly reviewed the evidence, applied the relevant legal principles, and found in a well-articulated and intelligible decision that Canada satisfied its duties of loyalty, good faith, and full disclosure prior to the surrender.

[67] Could the Crown have gone further, as suggested by the applicant, and discussed the relative merits of leasing as opposed to selling prior to the vote? Possibly. But we must pay heed to McLachlin J.'s admonition in *Blueberry* that the Act "strikes a balance between the two extremes of autonomy and protection" (at para. 35). The fiduciary duty of the Crown is not meant to substitute the Crown's will for that of the First Nations. The decision of the Crown to refuse its consent to a surrender must be exercised with caution, and with a view to preventing exploitative bargains. When, as here, the Crown is of the view that the surrender is not prejudicial to the interests of the First Nation, and the record shows that its voting members fully understand the terms of the bargain, are aware of alternative options, and had an opportunity to ask questions before voting, it is reasonable to conclude that the Crown has fulfilled its fiduciary duty. To ask for more from the Crown would tip the balance and risk returning us to an era when First Nations were treated in a paternalistic way.

[68] For all of the above reasons, I therefore find that the Tribunal's decision falls within the range of reasonable outcomes based on the applicable law and the facts that were before it, and does not warrant our intervention.

C. *Did the Specific Claims Tribunal breach the principles of procedural fairness?*

[69] The applicant alleges that the Tribunal created confusion by changing the wording of the issues and the manner in which they would be presented at the hearing after it had filed its memorandum of fact and law. It claims that following the filing of the parties' memoranda of fact and law, the Tribunal advised the parties that it wished to hear final submissions within the framework of a different sequence of questions than that devised in a prior direction that predated the filing of the applicant's memorandum. Following a case management conference, however, the Tribunal agreed to leave the questions as originally set out. The applicant nevertheless contends that it was prejudiced by the confusion created by the Tribunal.

[70] In my view, the applicant's assertion, which amounts to an allegation of procedural unfairness, is without merit. First, it would appear that the applicant was successful in convincing the Tribunal not to change the hearing format and the sequence of questions. Second, the applicant did not raise its allegation of procedural unfairness at the earliest opportunity. While it opposed the restatement of the issues proposed by the respondent, it did so on the basis that it would not have time to reorganize its oral submissions to fit in the new parameters, not on the basis of confusion or of a breach of procedural fairness.

[71] In any event, the issues set out in the Agreed Statement of Issues, the April 19, 2022 Direction and the email sent to the parties by the Tribunal on May 30, 2022 in anticipation of the case management conference, were all substantially the same. The differences were minor, and the applicant has not substantiated how they could have created confusion.

[72] Finally, the parties each had a meaningful opportunity to present their cases fully and fairly. In its June 2, 2022 Endorsement, the Tribunal clearly set out how oral submissions would proceed, and showed flexibility in the way each party could present their case. The Tribunal stated explicitly that the hearing would proceed on the basis of questions as originally set out in its April 19, 2022 Direction, and added that it would afford the parties "latitude to discuss some topics in the order they believe is necessary to put forward their argument in the best way possible". In those circumstances, I am unable to find any breach of procedural fairness.

V. CONCLUSION

[73] The application for judicial review should therefore be dismissed, with costs.

"Yves de Montigny"
Chief Justice

"I agree.
John Laskin J.A."

"I agree.
Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	LASKIN J.A. WALKER J.A.
DATED:	MAY 29, 2024

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