Federal Court of Appeal  Cour d'appel fédérale

Date: 20230517

Docket: A-359-21

Citation: 2023 FCA 105

CORAM: **RENNIE J.A.**
MONAGHAN J.A.
ROUSSEL J.A.

BETWEEN:

HIS MAJESTY THE KING IN RIGHT OF SASKATCHEWAN as represented by the ATTORNEY GENERAL OF SASKATCHEWAN

Appellant

and

WITCHEKAN LAKE FIRST NATION and HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by the ATTORNEY GENERAL OF CANADA

Respondents

Heard at Regina, Saskatchewan, on October 26, 2022.

Judgment delivered at Ottawa, Ontario, on May 17, 2023.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: MONAGHAN J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

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RENNIE J.A.

I. The Saskatchewan Treaty Land Entitlement Framework Agreement

[1] The failure of Canada to fully honour the terms of the historic treaties entered into with Indigenous Canadians has been well documented in decisions of this Court and others (*Canada v. Jim Shot Both Sides*, 2022 FCA 20, 468 D.L.R. (4th) 98, leave to appeal to SCC granted, 40153 (2 February 2023); *Pasqua First Nation v. Canada (Attorney General)*, 2016 FCA 133, [2017] 3 F.C.R. 3 [*Peigan 1*]; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 [*Long Plain*]; *Canada v. Brokenhead First Nation*, 2011 FCA 148, 419 N.R. 289; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *George Gordon First Nation v. Saskatchewan*, 2022 SKCA 41, 2022 CarswellSask 136 (WL Can), leave to appeal to SCC refused, 40184 (16 March 2023) [*George Gordon*]; *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365, 418 D.L.R. (4th) 157, leave to appeal to SCC refused, 37899 (5 July 2018) [*Goodswimmer*]). For reasons ranging from indifference and error, to neglect and deceit, treaty commitments with respect to land entitlement were not always fully implemented. Treaties No. 4, 6 and 10 are cases in point.

[2] The 1992 Saskatchewan Treaty Land Entitlement Framework Agreement (Framework Agreement or Agreement)—a tripartite agreement between Canada, Saskatchewan and Saskatchewan First Nations—was designed to redress some of these breaches.

[3] Executed in 1992 by the Prime Minister, the Premier of Saskatchewan, the Chief of the Federation of Saskatchewan Indian Nations (the FSIN), the Treaty Commissioner of Saskatchewan, and the Chiefs of many Saskatchewan First Nations, the Framework Agreement establishes the process by which First Nations can purchase private, provincial and federal Crown lands to fulfil outstanding treaty land entitlement (TLE) obligations owed to Saskatchewan First Nations. The FSIN negotiated the Framework Agreement on behalf of 25 bands in Saskatchewan, including the respondent, Witchekan Lake First Nation (WLFN). Eight additional bands subsequently signed on, and four Saskatchewan bands are currently in negotiations of the band-specific agreements contemplated by the Agreement (WLFN executed its band-specific agreement in June 1993). The Agreement also committed Canada and Saskatchewan to provide financial assistance to the signatory First Nations in purchasing their TLE.

[4] Under the Agreement, over 877,000 acres of provincial Crown land have been acquired by bands and added to existing reserve lands. The vast majority of those lands carried with them Crown mineral rights. The respondent WLFN acquired all 7,923 acres of its TLE shortfall by 1998, and has acquired a further 8,310 acres since that time. Not all of the reserve lands that WLFN acquired under the Framework Agreement have been Crown lands; some 60% of its acquisitions were of private lands.

[5] Canada and Saskatchewan have paid “hundreds of millions of dollars” (Saskatchewan’s Memorandum of Fact and Law at para. 3) to facilitate acquisitions under the TLE agreements. Saskatchewan made its final payment to Canada in respect of its specific obligations to WLFN

two decades ago, in 2003, and has paid approximately $273 million to Canada in full satisfaction of its obligations under the Agreement.

II. **WLFN's action against Saskatchewan and Canada**

[6] On July 22, 2016, Saskatchewan wrote to the Chief and Council of the WLFN advising of its intention to sell certain Crown lands. Entitled "Duty to Consult Notification of Proposed Sale of Vacant Crown Lands", the letter indicated that the "[g]overnment [was] seeking to understand how [WLFN was] using this land to hunt, fish and trap for food and carry out traditional uses, and how the proposed decision [had] the potential to adversely impact the community's rights and traditional uses."

[7] The evidence is uncontroverted that no decision had been made to sell the land when the letter was sent, and that the lands would not have been sold pending the outcome of consultations had there been a response.

[8] WLFN did not respond to the letter.

[9] On January 26, 2017, Saskatchewan notified WLFN that it intended to sell further vacant Crown lands. No response was received. Later that same year, on September 15, 2017, Saskatchewan wrote again, this time to the FSIN, advising of an upcoming auction through which it intended to sell the lands. Again, no response was received.

[10] The auction commenced on October 23, 2017. The next day, WLFN wrote to Saskatchewan and requested to purchase three parcels of land that Saskatchewan intended to sell through the auction. Saskatchewan refused WLFN's request on the basis that the three parcels had already been placed in the auction, and that costs had been incurred in relation to the auction sale.

[11] On January 19, 2018, Saskatchewan wrote to WLFN and advised that Saskatchewan intended to sell vacant Crown lands once more. On February 19, 2019, Saskatchewan sent an email to the FSIN stating that the province "wanted to ensure [the FSIN was] aware of Sask. Ag Crown Lands that are for sale through public auction in advance of the 'go live' date," and that "[t]he auction [would open] on February 25, 2019." Again, no response was received until two days after the auction had commenced, when WLFN wrote to Saskatchewan "selecting" its desired lands under the Agreement. Saskatchewan rejected WLFN's mid-auction selection.

[12] In the letters of July 22, 2016, January 26, 2017, and January 19, 2018, Saskatchewan offered to discuss the proposed sale of vacant Crown lands with WLFN and invited a response by email or telephone.

[13] WLFN commenced an action in the Federal Court against Saskatchewan and Canada. It principally contended that the Framework Agreement included an implied term requiring Saskatchewan to provide notice of any impending auction and a reasonable opportunity to purchase lands before they were put up for auction. It claimed that in refusing to sell the lands to WLFN, Saskatchewan had frustrated the purpose of the Framework Agreement. WLFN also

sought declarations that Saskatchewan and Canada were in breach of certain express terms of the Agreement. Relying on these asserted failures, WLFN sought consequential declarations and monetary relief against Canada.

[14] Saskatchewan moved for summary judgment dismissing WFLN's statement of claim, arguing that the sought-after implied term contradicted the express terms of the Framework Agreement and that Saskatchewan had not frustrated the Framework Agreement. Saskatchewan argued that the issue before the Federal Court was a matter of contractual interpretation, that the evidentiary record before the Federal Court established every fact necessary to adjudicate the issue, and that none of these facts were in dispute. WLFN, on the other hand, argued that there were gaps in the evidence adduced by Saskatchewan such that a trial would be required to resolve the remaining issues.

[15] Canada filed no evidence in response to Saskatchewan's motion for summary judgment, and instead relied on its written submissions on the motion (Reasons at para. 23).

[16] In its reasons, the Federal Court (2021 FC 1074, *per* Favel J.) considered Rule 215 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), as well as the criteria applicable to motions under this Rule that were first articulated by Mactavish J., as she then was, in *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2018 FC 1112, 159 C.P.R. (4th) 275 at paragraphs 25-41 [*Milano Pizza*] and later recapitulated in *Rallysport Direct LLC v. 2424508 Ontario Ltd.*, 2019 FC 1524, 315 A.C.W.S. (3d) 756 [*Rallysport*]. The Federal Court noted that Saskatchewan bore the burden of establishing the facts necessary for summary judgment, that WLFN bore the burden of

proving a genuine issue for trial, and that both parties had to "put their best foot forward" on the motion (Reasons at para. 27, citing *Gemak Trust v. Jempak Corporation*, 2020 FC 644, 174 C.P.R. (4th) 176 at para. 133).

[17] The judge dismissed the motion. He determined that "Saskatchewan ha[d] not met its onus under Rule 215 and the legal principles set forth in [*Rallysport*]," whereas "WLFN ha[d] established that there [was] a genuine issue for trial" (Reasons at para. 40). The reasons turn on the judge's conclusion that Saskatchewan had not submitted a "complete record of the surrounding circumstances known to [the] parties at the time that the Framework Agreement was executed" (Reasons at para. 43), and that "it would be unjust to make factual findings based on the limited affidavit evidence and cross-examination transcripts provided" (Reasons at para. 45).

[18] The Attorney General of Saskatchewan appeals and asks that this Court set aside the Federal Court's order and grant its application for summary judgment. The Attorney General of Canada advised, in a letter to the Court dated April 4, 2022, that it "does not advocate for a given disposition of this appeal" and therefore would not be presenting written or oral submissions before this Court. The Attorney General did, however, make written submissions to the Federal Court on his understanding of the operation of the Agreement (Appeal Book at 822-833). As I will explain later, the Attorney General's analysis and understanding of the Agreement and its operation aligns with the Attorney General of Saskatchewan's.

[19] Appeals from judgments and orders of the Federal Court are reviewed on the appellate standard of review. Questions of law are reviewable on a correctness basis and questions of fact

and of mixed fact and law are reviewable on the basis of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). Whether the Federal Court identified the correct legal test or properly instructed itself on the law is assessed on a correctness basis. Whether the Federal Court erred in concluding that there was no genuine issue requiring a trial is a question of mixed fact and law that must be reviewed on the standard of palpable and overriding error (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 81 [*Hryniak*]).

[20] For the reasons that follow, I would allow the appeal, set aside the order of the Federal Court, and grant the motion for summary judgment. The Federal Court erred in its understanding of the Rules and jurisprudence, including that of the Supreme Court of Canada, with respect to summary judgment. With respect to the merits of the motion, there is no foundation, in law or in the evidence, to grant the declarations sought by WLFN. The declarations are not necessary to make the Agreement efficacious; they also collide, directly, with express terms of the Agreement. To imply the terms sought would result in a very different Agreement from that negotiated by the parties.

[21] Before setting forth my analysis, it is important to be clear on what this appeal is about and what it is not about. This appeal is not about whether the Crown in right of Saskatchewan has discharged its duty to consult with respect to the sale of public lands. The jurisprudence with respect to the process and content of meaningful consultation was not argued before us, nor does WLFN contest the adequacy of the notices received. Rather, this appeal is about WLFN's pursuit of an implied term: a right to receive notice of an intention to sell coupled with a right to purchase the lands in respect of which the notice has been sent.

III. **General principles on motions for summary judgment**

[22] The Federal Court, and both parties to this appeal, rely on the following summary of principles relevant to motions for summary judgment (*Rallysport* at para. 42):

> In *Milano Pizza*, Mactavish J (as she then was) thoroughly canvassed the law of summary judgment as applied to the Federal Courts following the Supreme Court's decision in *Hryniak*, above: *Milano Pizza*, above at paras 24-41. These principles are as follows:
>
> A. The purpose of summary judgment is to allow the Court to (i) dispense summarily with an action if there is no genuine issue to be tried, (ii) conserve scarce judicial resources, and (iii) improve access to justice: *Milano Pizza*, above at para 25.
>
> B. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication; to be "fair and just" the process "must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found": *Milano Pizza*, above at para 29, citing *Hryniak*, above at paras 5 and 28.
>
> C. The test of whether no genuine issue for trial exists is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; or, alternatively, whether there is "no legal basis" to the claim based on the law or the evidence brought forward. It is not restricted to the "clearest of cases": *Milano Pizza*, above at paras 31 and 33, citing *Canada (Citizenship and Immigration) v Campbell*, 2014 FC 40 at para 14, *Itv Technologies Inc. v Wic Television*, 2001 FCA 11 at paras 4-6, *Premakumaran v Canada*, 2006 FCA 213 at paras 9-11; *Canada (Minister of Citizenship and Immigration) v Schneeberger*, 2003 FC 970 at para 17; *Manitoba v Canada*, 2015 FCA 57 at para 15-16; and *Burns Bog Conservation Society v Canada*, 2014 FCA 170 at paras 35-36.
>
> D. Where the necessary facts cannot be found to resolve the dispute fairly and justly, or where it would be unjust to make a finding on those facts alone, summary judgment should not be granted: *Milano Pizza*, above at paras 29 and 36, citing *Hryniak*, above at para 28.
>
> E. It would be unjust to make a finding on the facts alone where issues were not raised by one party, as doing so would preclude them from knowing the case to meet: *Milano Pizza*, above at paras 107-108 and 112,

citing *Albian Sands Energy Inc. v Positive Attitude Safety System Inc.*, 2005 FCA 332 [*Albian Sands*] at para 45.

F. Issues of credibility should not be decided on a motion for summary judgment. Observing live testimony and cross-examination often places a judge in a better position to draw appropriate inferences, and to weigh evidence, than can be done on affidavit evidence alone: *Milano Pizza*, above at paras 37-38, citing *TPG Technology Consulting Ltd. v Canada*, 2013 FCA 183 at para 3; *Newman v Canada*, 2016 FCA 213 at para 57; *Suntec Environmental Inc. v Trojan Technologies, Inc.*, 2004 FCA 140 [*Suntec*] at paras 20, 28-29; *MacNeil Estate v Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50 at para 38.

G. Not all conflicting evidence will raise credibility issues and preclude summary judgment. Courts should "take a hard look at the merits of the case" to determine if credibility issues need be resolved: *Milano Pizza*, above at para 39, citing *Granville Shipping Co. v Pegasus Lines Ltd. SA*, 1996 CanLII 4027 (FC) at para 7.

H. The effect of granting summary judgment will be to preclude a party from presenting any evidence at trial; in other words, the unsuccessful party will lose its day in court: *Milano Pizza*, above at para 40, citing *Apotex Inc. v Merck & Co. Inc.*, 2004 FC 314 at para 12, aff'd 2004 FCA 298.

[23] The bar to be met by the moving party on a motion for summary judgment is high (*Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 11 [*Lameman*]). It must show that no genuine issue for trial exists (*CanMar Foods Ltd. v. TA Foods Ltd.*, 2021 FCA 7, [2021] 1 F.C.R. 799 at para. 27 [*CanMar*]). If the moving party meets this threshold, then "the evidentiary burden falls on the responding party, who cannot rest on its pleadings and must come up with specific facts showing that there is a genuine issue for trial" (*CanMar* at para. 27). While both parties must "put [their] best foot forward" in establishing that no genuine issue for trial exists (*Lameman* at para. 11), a responding party may do so by identifying gaps in the moving party's evidence that can only be addressed by evidence at trial

(*Apotex Inc. v. Merck & Co. Inc.*, 2004 FC 314, 248 F.T.R. 82 at para. 28 [*Apotex FC*], aff'd 2004 FCA 298).

[24] However, and importantly for the purposes of this appeal, "[a] summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed" (*Lameman* at para. 19). The point was also made in *CanMar* that a party must come up with "specific facts" to establish a genuine issue for trial (*CanMar* at para. 27). This principle is expressly codified in Rule 214:

A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

[25] I note that *Lameman* addressed the question of whether limitations legislation barred an Indigenous band's claim against the Crown for breach of fiduciary duty. The Supreme Court of Canada was clear that there are no special rules or exceptions to the use of summary judgment simply because Indigenous issues are involved (*Lameman* at para. 19).

[26] I conclude this review of the principles governing summary judgment by noting that, in the decision under appeal, the Federal Court relied on *Ochapowace v. Canada*, 2019 FC 1288, [2019] F.C.J. No. 1619 (QL) [*Ochapowace*] in support of its conclusion that whether the Framework Agreement contained an implied term was an issue to be resolved at trial (Reasons at

para. 52). It erred in so doing. *Ochapowace* involved a motion to strike, not a motion for summary judgment. This is a distinction with consequences.

[27] While the reasons a court gives on a motion to strike may inform the consideration of a subsequent motion for summary judgment (*Apotex FC* at para. 19), the two types of relief are fundamentally different. On a motion to strike under Rule 221(1)(*a*), a court will take the facts pleaded as true, whereas a court hearing a summary judgment motion will determine the outcome based on the evidence tendered (*Cabral v. Canada (Citizenship and Immigration)*, 2018 FCA 4, 56 Imm. L.R. (4th) 175 at para. 50). Further, motions to strike require courts to measure the merits of a claim against a low legal threshold, whereas motions for summary judgment require courts to decide whether there is a genuine legal basis for the claim based on the law and evidence (*Hryniak* at para. 66).

[28] Unlike a motion to strike, a motion for summary judgment requires a judge to weigh the parties' arguments and evidence to determine whether there is a genuine issue that can only be resolved at trial. That is the *raison d'être* of the rule. Again, in contrast to the motion to strike that was before the Federal Court in *Ochapowace*, the judge here had the parties' best evidence and best arguments on the merits of their respective positions regarding the question of whether a genuine issue for trial existed.

[29] To conclude on this point, the dismissal of a motion to strike an action asserting the existence of an implied term in the Agreement does not necessarily lead to the conclusion on a

motion for summary judgment that the question is both genuine and in need of a trial for its resolution.

IV. **What constitutes a genuine issue**

[30] Rule 215 must be interpreted and applied consistently with the objectives in Rule 3 (*ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, 2021 FCA 122, 460 D.L.R. (4th) 272 at para. 37 [*ViiV Healthcare*]). Rule 3 seeks to "secure the just, most expeditious and least expensive outcome of every proceeding," and to do so in a manner proportionate to the proceeding's complexity, the importance of the issues involved, and the amount in dispute.

[31] Rule 215 provides that the Federal Court shall grant summary judgment where it is satisfied that there is no genuine issue for trial with respect to a claim or defence. There is no genuine issue for trial where the judge has the evidence required to fairly and justly adjudicate the dispute on a summary basis, *i.e.*, where the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result (*Hryniak* at paras. 49 and 66; *ViiV Healthcare* at paras. 32-34; see also *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 25 [*Aga*] and *Manitoba v. Canada*, 2015 FCA 57, 470 N.R. 187 at para. 11 [*Manitoba*]).

[32] Put another way, a case ought not to proceed to trial, with the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial (*CanMar* at para. 24).

Even if there is a genuine issue of fact or law for trial with respect to a claim or defence, the Court may nevertheless determine that issue by way of summary trial (Rule 215(3)). In such cases, judges have greater powers to decide disputed questions of fact (*Manitoba* at para. 16; *Milano Pizza* at para. 32).

[33] Summary judgment has been refused where there are issues of fact that cannot be resolved on the basis of the affidavits and cross-examinations. I note, however, that complicated and important cases, constitutional and otherwise, often proceed by way of applications and affidavit evidence alone. The critical point is not whether the legal issue is important, but whether the matter presents credibility concerns or complex evidence that can only be adequately appreciated by means of a trial (*Kyorin Pharmaceutical Co. v. Novopharm Ltd.*, 132 F.T.R. 307, 1997 CanLII 17736 (FC) at para. 24; *Brown v. Canada*, 2014 FC 831, 252 A.C.W.S. (3d) 320 at paras. 47 and 114, rev'd on other grounds 2016 FCA 37; *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996, 375 F.T.R. 38 at para. 10, aff'd 2012 FCA 48).

[34] The mere fact that a summary judgment motion might have broader implications is not a ground for refusing it. Matters with legal, social and economic dimensions have been determined by way of summary judgment. For example, the Supreme Court has upheld or restored orders granting summary judgment in cases that required examination of the scope of Crown copyright (*Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418), the duty of care that a manufacturer owes franchisees when supplying food products (*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, 450 D.L.R. (4th) 181), the legal implications of membership in a religious association (*Aga*), and the degree of knowledge required to discover a claim and

thereby trigger a limitation period (*Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613).

[35] *Hryniak* marked a departure from the pre-existing approach to summary judgment, in which courts had found that it was not fair and just to grant summary judgment unless the facts were incontrovertible and the ultimate trial outcome was obvious. Echos of that old approach are still heard today. However, the standard for granting summary judgment now requires that the judge have sufficient confidence in the state of the record that he or she is prepared to exercise judicial discretion to resolve the dispute (*Hryniak* at para. 57; *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49, 86 Alta. L.R. (6th) 240 at para. 47 [*Weir-Jones*]; *Hannam v. Medicine Hat School District No. 76*, 2020 ABCA 343, 15 Alta. L.R. (7th) 213 at paras. 12 and 135, leave to appeal to SCC refused, 39442 (18 March 2021)).

[36] Broader public policy considerations are also in play. The Supreme Court has observed that summary judgment rules lighten the burden on parties to the litigation and to the justice system as whole (*Lameman* at para. 10):

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[37] It is in this spirit that this Court has noted that judges have a responsibility to ensure that the publicly funded judicial process is used to its greatest efficiency (*Canada v. Olumide*, 2017

FCA 42, [2018] 2 F.C.R. 328 at paras. 17-20; *ViiV Healthcare* at para. 24). The Court of Appeal of Alberta has made similar remarks (*Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432, 66 Alta. L.R. (6th) 33 at para. 77). Allowing a case to proceed to trial that could be decided by summary judgment delays the hearing of a case that does require a trial. Litigants do not have a right of access to all stages of the litigation process, nor do they presumptively have a right to a trial (*Stoney Tribal Council* at para. 79, citing *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, 91 Alta. L.R. (5th) 1 at para. 33). Judges' responsibility in this regard, together with the call for judicial confidence in *Hryniak*, frames the approach to summary judgment motions.

[38] The determination of whether a genuine issue for trial exists must, either explicitly or implicitly, follow a certain analytical path. The legal issues in dispute and their associated evidentiary requirements must be identified. The factual issues in dispute must then be extracted and assessed in light of their relevancy to the legal issues. Only when these questions have been answered can the sufficiency of the motion record be assessed. As I will canvass in the course of these reasons, no genuine issue, procedural or substantive, has been identified that requires the question raised in the motion for summary judgment to go to trial.

[39] Issues of credibility are generally not to be decided on motions for summary judgment; a judge who hears and observes witnesses giving evidence orally will often be better positioned to assess witnesses' credibility than a judge who has only affidavits and documentary evidence before them (*Gemak Trust v. Jempak Corporation*, 2022 FCA 141, 196 C.P.R. (4th) 215 at para. 68 [*Gemak*]).

[40] Credibility disputes do not, however, presumptively defeat a motion for summary judgment. The Court may grant summary judgment even where an apparent conflict in the evidence exists, if a “hard look” at the merits of the case indicates that the credibility issue need not be resolved to dispose of the matter (*Gemak* at para. 72). Indeed, to dismiss a motion for summary judgment, the disputed facts or credibility issues must be relevant to an issue that needs to be determined. Some credibility disputes can be settled on the face of the record and, where a live issue remains, the motions judge can direct a summary trial on that issue alone (Rule 215(3)(*a*)). It is not necessary to leap to the conclusion that a full trial is required when in fact only narrow or singular issues are contested.

[41] Turning to the case at hand, the statement of claim filed by WLFN asserts that the Agreement contains implied terms necessary to render it efficacious and without which the Agreement is frustrated. Consideration of whether a genuine issue for trial exists begins with an appreciation of the legal content of these doctrines; implied terms, contract efficacy and frustration, and what they require by way of evidence. As the Federal Court did not analyze the legal requirements of the issues—and in particular, the jurisprudence of the Supreme Court on implied terms, contract efficacy, and frustration—no decision could be made whether there was a genuine issue for trial.

V. **Rule 214 and the evidence before the Federal Court**

(i) *Reliance on evidence that might be adduced and might shed light on the Agreement*

[42] In assessing the sufficiency of the evidence adduced by Saskatchewan, the Federal Court noted that individuals who observed the negotiations leading to the execution of the Framework Agreement "may have relevant evidence to provide with respect to the surrounding circumstances," and that the individual Chiefs who signed the Framework Agreement "may be available to provide some additional insight into the process and discussions leading to the signing of the Framework Agreement" (Reasons at para. 43; emphasis added).

[43] This was an error.

[44] Supreme Court jurisprudence, jurisprudence of this Court, and the express requirements of Rule 214 preclude consideration of "what might be adduced as evidence at a later stage in the proceedings." On a motion for summary judgment, a judge is limited to assessing the evidence on the record and is not to proceed on the basis of potential evidence that might exist beyond the motion (*Lameman* at para. 19).

[45] The Federal Court dismissed Saskatchewan's motion for summary judgment on the basis of what it described as a lack of information about the surrounding circumstances that existed when the Agreement was executed. However, the judge did not identify any specific evidentiary element in this additional factual matrix that was missing. While the Federal Court did not accept Saskatchewan's evidence as a complete record, it did not identify the nature of any further

evidence that it required, nor how that evidence might be relevant. Nor did the Court identify an ambiguity in the Framework Agreement that required clarification through contextual evidence. It instead found Saskatchewan's evidence to be incomplete on the basis that additional relevant evidence *might* arise at trial through witnesses who *might* be available to the parties. I emphasize the layers of speculation in this reasoning.

[46] The judge assumed that other evidence might be attainable, reliable, admissible, and relevant, and therefore that the record was insufficient. This assumption was not one that the judge could legally make, nor, in any event, was it one that was open to him in light of the evidence before him.

(ii) *Evidence of surrounding circumstances does not require a trial*

[47] The judge found that none of the witnesses who filed affidavits on the motion had direct knowledge of the negotiations, and therefore only a trial could provide the additional factual matrix necessary to resolve the legal issues (Reasons at para. 45).

[48] The judge also referenced generic witnesses who might have evidence to give. There was no evidence of who the phantom witnesses might be, whether they were still alive, the role they had in the negotiations, and how their recollection, today, might shed light on either of the main questions at the heart of the motion: whether a term should be implied into the Agreement or how the express terms of the Agreement should be interpreted. Rather, the judge's reasons pivot on the conclusion that, as the purpose of the Framework Agreement was to remedy treaty commitments, and as the Agreement developed from complex negotiations, a "full trial [was]

needed to interpret [the Agreement]" and "may" give rise to "gaps" in the evidence (Reasons at paras. 64-65).

[49] This latter comment is telling. It is an admission that while no further relevant evidence has in fact been specifically identified, maybe, in the course of a trial, it might appear.

[50] This approach to summary judgment collides with the overarching objective of the Rules, which is to ensure that disputes are resolved as expeditiously and inexpensively as possible. It also diverges from the express requirements of Rule 215 and the guidance of the Supreme Court in *Hryniak* and *Lameman* regarding summary judgment's role in streamlining the litigation process where possible (*Hryniak* at para. 27; *Lameman* at para. 10). It is an error of law to defer making a final determination due to speculation that additional evidence might arise during a trial. This reticence is precisely what Rule 3, *Hryniak*, and *Lameman* seek to eliminate.

[51] The issue is whether the record is sufficient to allow the fair and just adjudication of the matter. This standard aligns with the guidance of *Hryniak*, which calls for judicial *confidence* instead of judicial *certainty* (*Hryniak* at para. 50). The Federal Court failed to consider this standard, along with its underpinning principles of proportionality and economy, in dealing with the motion for summary judgment before it.

[52] To dismiss a motion for summary judgment on the possibility that something might show up at trial undermines the culture shift toward proportionate adjudication processes endorsed in *Hryniak* at paragraphs 2 and 28. As the Court of Appeal of Alberta wrote, "[p]resuming that

summary disposition will always be ‘unjust’ unless it meets some high standard of irrefutability defeats the whole concept of the ‘culture shift’ [towards alternative forums of adjudication] mandated by *Hryniak v. Mauldin*” (*Weir-Jones* at para. 25). I agree with the Court of Appeal of Alberta that imposing standards like “high likelihood of success” or “obvious” or “unassailable” is inconsistent with the purposes of summary judgment motions (*Weir-Jones* at para. 33). A disposition does not have to be beyond doubt to be fair. Perfection in the record is not the standard.

[53] I turn to the third error.

(iii) *The evidence was already before the Court*

[54] Again, the Federal Court speculated that witnesses, observers and signatories to the Agreement might be able to shed light on the meaning of the Agreement’s terms (Reasons at para. 43). To the extent that this evidence might be relevant and admissible, it was already in the hands of WLFN itself.

[55] Chief Mike Fineday and Mr. Ron Fineday attended the plenary negotiations on behalf of WLFN, and the former signed the Framework Agreement on behalf of WLFN; neither provided an affidavit in response to Saskatchewan’s motion. Notably, Heather Bear, who did swear an affidavit on behalf of WLFN, was the Vice Chief of the FSIN, which was the principal signatory to the Agreement. If the observers to the negotiations had something relevant to say with respect to the existence of a genuine issue, the motion was the time to say so. As this Court has said, the responding party must “lead trump or risk losing” (*Gemak* at para. 67).

[56] *Hryniak* and Rule 214 prohibit a party from simultaneously contending that there is a genuine issue for trial while not disclosing evidence that supports the argument. This is precisely what WLFN did here. I note as well that WLFN only cross-examined two of the four Saskatchewan affiants.

[57] As I have noted, the Federal Court concluded that there was a "gap" in Saskatchewan's evidence relating to the circumstances surrounding the Framework Agreement's execution (Reasons at paras. 64-66). According to the Federal Court, as the purpose of the Agreement was to remedy broken treaty promises related to outstanding TLE claims (Reasons at para. 66), a trial was necessary to fill gaps in the evidence concerning the negotiations.

[58] The purpose and objective of the Framework Agreement in satisfying treaty obligations is well known and understood. Treaty No. 6 required Canada to set aside "one square mile for each family of five, or in that proportion for larger or smaller families"; however, the land set aside did not fulfil the Crown's obligations. This outstanding obligation was recognized in the 1930 Canada-Saskatchewan *Natural Resources Transfer Agreement* (Schedule 3 of *Constitution Act, 1930* (U.K.), 20-21 George V, c. 26, reprinted in R.S.C. 1985, Appendix II, No. 26). Saskatchewan had an obligation to Canada to facilitate the transfer of what were to become provincial Crown lands to Canada. The Preamble to the Framework Agreement notes that these mutual obligations would be satisfied by the Agreement's terms.

[59] WLFN's statement of claim also describes the context giving rise to the Framework Agreement, and the affidavits filed by WLFN itself on the motion further recount the events

leading up to the implementation of the Framework Agreement (Bear Affidavit at paras. 3-7; Wendy Jim Affidavit at paras. 4-8).

[60] In addition to the evidence filed by both Saskatchewan and WLFN, the historical context, purpose, and mechanics of the Framework Agreement have been extensively considered by three appellate courts: by this Court in *Peigan 1*, *Long Plain*, and *Saskatchewan (Attorney General) v. Pasqua First Nation*, 2018 FCA 141 [*Peigan 2*]; by the Court of Appeal for Saskatchewan in the recent scholarly analysis in *George Gordon*; and by the Court of Appeal of Alberta in *Goodswimmer*. In sum, the "gap" in the evidence of the Agreement's "surrounding circumstances" evidence urged by WLFN and accepted by the Federal Court was not a gap at all.

[61] Further, the Treaty Commissioner's *Report and Recommendations on Treaty Land Entitlement* is the seminal document that motivated the Framework Agreement and informed both the content of the Framework Agreement and the mechanisms necessary to achieve its objectives. So too was the document entitled *Chiefs Policy Committee: Principles in the Settlement of Treaty Land Entitlements in Saskatchewan*. In this latter document, the FSIN established its specific land acquisition objectives, described how they were to be achieved, and identified potential issues that might arise during the negotiations. Both of these documents were before the Federal Court.

[62] I note, parenthetically, that the Framework Agreement was signed by the Chief of the FSIN and the Treaty Commissioner. If there were something in the deep context leading up to the execution of the Framework Agreement that supported the declarations sought by WLFN, or

raised an uncertainty that warranted a trial, it presumably would lie in these documents. Yet WLFN pointed to nothing specific in these seminal documents that could sustain its position.

[63] To conclude, the "surrounding circumstances" of the execution of a contract or agreement must be defined with some precision if a party wishes to rely on them to defeat a motion for summary judgment; the party must also establish the surrounding circumstances' relevancy to the issues that the Federal Court must decide. The mere assertion that additional context will be helpful is insufficient to require a full trial on an issue. To the extent that the observers to the negotiations might have had something to add, it was WLFN's obligation to file affidavits outlining what that evidence might be and demonstrate its relevance to a genuine legal issue.

VI. **Implied term – no genuine issue for trial**

(i) *Implied term – General Principles*

[64] I turn to the substance of the motion and the question of whether the declarations sought—principally that of an implied term of notice of an impending auction and a reasonable opportunity to purchase the lands—raised a genuine issue that required a trial.

[65] There is no genuine issue for trial if there is no legal basis for the claim based on the law or evidence brought forward or if the judge has the evidence necessary to adjudicate the dispute (*Canada v. Bezan Cattle Corporation*, 2023 FCA 95 at para. 138; *Manitoba* at para. 15; *Hryniak* at para. 66). As I will explain, the terms sought to be read into the Agreement are inconsistent

with the Agreement itself and would, if accepted, result in a much different Agreement than the one negotiated.

[66] The clear language of a contract must always prevail over the surrounding circumstances when interpreting contractual obligations (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at para. 57 [*Sattva*]; *Toronto Real Estate Board v. Canada (Commissioner of Competition)*, 2017 FCA 236, [2018] 3 F.C.R. 563 at paras. 168-169; *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135, 414 D.L.R. (4th) 165 at para. 59).

[67] While evidence of surrounding circumstances can be helpful, it cannot be used to rewrite the express terms of an agreement such as the Framework Agreement (*Sattva* at para. 57):

> The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[68] A party may show that an implied term exists within a contract by establishing that the term is necessary "to give business efficacy to a contract or [by] otherwise meeting the 'officious bystander' test [by describing] a term which the parties would say, if questioned, that they had obviously assumed" (*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 1999 CanLII 677 (SCC) at para. 27 [*Defence Construction*], citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 1987 CanLII 55 (SCC) at 775). WLFN relies on this principle, along with the doctrine of frustration.

[69] The Federal Court put particular emphasis on the fact that the Agreement was designed to fulfil treaty obligations, and because of this, concluded that the matter could not be disposed of fairly or justly by summary judgment (Reasons at para. 66). But the parties took a very different view of the nature of the Agreement during their negotiations, and expressly said so in the Agreement.

[70] Article 20.22 of the Framework Agreement states that "[e]ach of the parties agrees that nothing in this Agreement is intended, nor shall it be interpreted or construed in any way… as confirming, acknowledging or creating any obligation under any treaty as between Saskatchewan and any Band." What was before the Court was the interpretation of a tripartite agreement, not a treaty. The fact that the Agreement is remedial of treaty commitments does not overwhelm the carefully crafted and plain language of the Agreement, which WLFN itself describes as setting out a "robust procedural framework" (WLFN's Statement of Claim at para. 27); nor does it displace the principles relevant to interpreting agreements and determining when an implied term is to be read in.

[71] In *Peigan 2*, this Court explained how the Framework Agreement was to be interpreted (at para. 12). The reasons bring the errors below into sharper relief:

> The honour of the Crown as it relates to this agreement requires that the terms of the agreement be implemented in a fair and forthright manner (*Peigan 1* at para. 64; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 (*Wewaykum*))… This does not mean that the terms of the agreement are to be ignored or require that important aspects of the agreement be re-written or interpreted in a manner both at odds with the terms of the agreement and as expressly contemplated by the parties to the agreement. The respondents are, in effect, asking the Court to re-write the agreement through a series of constitutionally based declarations. The agreement is not a treaty nor was it meant to determine all aspects of treaty land entitlements that may be outstanding as

> between the Crown and the respondents. Rather, it is an important tool in settling these outstanding treaty land entitlements in an orderly and fair way as agreed by the parties to the agreement.

[72] To conclude on this point, having failed to canvass the jurisprudence governing implied terms, having overlooked the express terms of the Agreement, and having adopted the incorrect approach to its interpretation, the Federal Court was in no position to properly analyze the question of whether a genuine issue for trial existed.

(ii) *The term sought to be implied*

[73] WLFN argues that its sought-after implied term does not amount to a right of first refusal. However, the judge noted that WLFN had "state[d] that notice of a sale of provincial Crown lands and a reasonable opportunity to purchase those lands prior to their committal to auction must be read into the Framework Agreement as implied terms" (Reasons at para. 50), and determined that "[w]hether or not notice and a reasonable opportunity to purchase amounts to a right of first refusal is an issue for the trial judge" (Reasons at para. 62).

[74] I disagree. So too does the Court of Appeal for Saskatchewan, as I will explain.

[75] WLFN has not defined the extent of "notice" required by the implied term, suggesting only that notice must be sufficient to give it a "reasonable opportunity" to purchase any Crown lands that Saskatchewan intends to sell. Nor has WLFN proposed any parameters as to what may constitute a "reasonable opportunity". As will later become self-evident, the amorphous nature of the term sought to be read into the Agreement contrasts with the precise, carefully delineated

terms of the Agreement that address when and how bands may purchase land, and when, and for how long, Saskatchewan's ability to dispose of lands is fettered.

[76] In *George Gordon*, the Court of Appeal for Saskatchewan determined that the content of a similarly argued implied term in the Framework Agreement effectively amounted to a right of first refusal, regardless of a First Nation's assertion otherwise (*George Gordon* at para. 115).

[77] There, the George Gordon First Nation cloaked what was in essence a right of first refusal with language suggesting an implied right to notice of upcoming sales of mineral rights to third parties. Although no third parties are involved in the present matter, the content of the notice provision sought by WLFN amounts to the same as that sought by the George Gordon First Nation: an alert when any public sale of Crown land/mineral rights is anticipated, followed by the opportunity to intervene in the sale and purchase of the land/rights if desired.

[78] At the outset of these reasons, I set out the factual background of WLFN's original claim, including the relevant timelines, steps taken, and correspondence sent by Saskatchewan to WLFN. Certain conclusions may be drawn from this background. First, WLFN had adequate notice of the government's intention to sell the lands in question. Second, at no time did WLFN engage with Saskatchewan's offer to consult on the proposed sale of Crown lands. Finally, WLFN only expressed an interest in the purchase of the lands one or two days after the auction had commenced.

[79] It is evident that the implied term sought by WLFN is something more than the notice that it received under Saskatchewan's duty to consult. The implied term comprises a right to notice, but notice coupled with a power, which is a power to hold sales of Crown land in abeyance while WLFN—or any other of the 33 bands that are party to the Agreement—determines whether it wishes to buy the lands.

[80] To read in the term sought would create a new right, one that was not included in the Framework Agreement. It is also inconsistent with the onus that the Agreement puts on First Nations to move forward with the selection of lands they wish to purchase. The Agreement puts First Nations in the "driver's seat", giving them "the right and the responsibility to find and acquire lands" (*George Gordon First Nation v. Saskatchewan (Attorney General Of Canada)*, 2020 SKQB 90 at para. 120, aff'd 2022 SKCA 41).

[81] WLFN's interpretation stands this principle on its head.

(iii) *Efficacy and frustration*

[82] The law will imply a term into an agreement where it is necessary to ensure a result that accords with the intention of the parties. It does so where an "officious bystander" would assume that the term was understood and necessary to render the agreement efficacious. These principles are equally relevant to the interpretation of the Crown's obligations to Indigenous peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, 1999 CanLII 665 (SCC) at para. 43). Here, the question of the implied term is necessarily interwoven with the question of whether the contract is efficacious or frustrated in its absence.

[83] Although Saskatchewan raised contract efficacy before the Federal Court, the Federal Court did not address the issue.

[84] The evidence demonstrates, beyond any shade of doubt, that the Framework Agreement is efficacious without the implied term.

[85] WLFN admits that it was aware of the specific lands in question prior to the auctions (Jim Affidavit at paras. 14 and 19). WLFN also admits that it entered into its band-specific agreement to give effect to the Framework Agreement in 1993 (Jim Affidavit at para. 9) and that it could have made an offer to purchase the lands at any time after 1993.

[86] The Agreement has allowed 29 of the 33 signatory First Nations to acquire their TLE lands—lands of their own choosing, pursued in their own time, and funded by the Crown in right of Canada and Saskatchewan. The evidence also demonstrates that, using the process and funding mechanisms of the Agreement, bands have significantly expanded reserve lands beyond their TLE. As a matter of necessary repetition, by 1998, WLFN itself had acquired all of its 7,923 shortfall acres, and it has acquired an additional 8,310 acres since that time. Put otherwise, the objective of the Framework Agreement has been fulfilled, rendering the Agreement efficacious without the implied term that WLFN seeks.

(iv) *Inconsistent with express provisions in the Agreement*

[87] A term will not be read into an agreement where the matter has been expressly addressed elsewhere by the parties. Here, the implied term sought is inconsistent with and would defeat

express provisions of the Agreement. I note, parenthetically, that while the Attorney General of Canada took no position on the disposition of the appeal, his analysis and understanding of the Agreement and its operation aligns with the Attorney General of Saskatchewan's.

[88] The Framework Agreement addresses the circumstances in which Saskatchewan's ability to dispose of Crown land is fettered. A band may offer to purchase any lands, and if the government is willing to sell them, an 18-month freeze period commences during which the parties are to come to an agreement on the terms of sale. Articles 4.05(c) and (d) of the Agreement govern this procedure:

> (c) If Canada or Saskatchewan agree to sell any federal or provincial Crown Lands or Crown Improvements as aforesaid, then for a period of eighteen (18) months following delivery by Canada or Saskatchewan of a notification to the Entitlement Band confirming their intention to sell, the identified Crown Lands or Crown Improvements shall be available for sale to the Entitlement Band, subject only to an agreement (or a determination hereunder) respecting the purchase price and satisfaction of any applicable conditions precedent.
>
> (d) During the eighteen (18) month period referred to in subsection (c), neither Canada nor Saskatchewan shall (other than for the benefit of the Entitlement Band) permit the sale of such federal or provincial Crown Lands or Crown Improvements, or grant any Third Party Interests in respect thereof without the prior written consent of the Entitlement Band, except:
>
> (i) any interests which any existing Third Party Interest Holder is entitled to pursuant to the terms of a contractual arrangement with Saskatchewan or Canada or pursuant to provincial legislation;
>
> (ii) Public Utility Easements; or
>
> (iii) any new Third Party Interest with a term of less than one (1) year.

[89] The proposed implied term would directly conflict with Article 4.05, which stipulates that the freeze periods would last only 18 months, and only in relation to lands that Saskatchewan has agreed to sell to a band.

[90] The implied term sought would also constitute an administrative and legal encumbrance on Crown lands, fettering Saskatchewan's ability to alienate Crown lands beyond that contemplated by the Agreement. Lands put up for auction would be subject to the schedules of 33 bands, as each would be permitted to consider whether it wished to make an offer to purchase the lands. What constitutes a reasonable opportunity for one band may not for another, and this uncertainty may deter other potential bidders.

[91] The implied term argument faces other hurdles.

[92] Article 20.12 provides that the Agreement shall not be varied, modified, amended, supplemented or replaced except by written agreement executed by all parties to the Agreement. Article 20.04 reinforces the point, providing that no modification or waiver of the Agreement is binding unless it is in writing and has been executed by all parties affected, "with the same formality as the execution of the Agreement." This latter point is critical. The Agreement was the result of tripartite negotiations over many years. A court should be skeptical about reading in new terms in these circumstances.

[93] Article 20.13 provides that the terms within the Agreement represent the entire agreement between the parties, and establishes that "[n]o representation, inducement, promise, understanding, condition or warranty not set forth herein or therein has been made or relied upon by any party."

[94] Finally, were there any doubt about the parties' intentions, Article 15.05 provides that the Agreement sets forth, "in [a] full and complete manner, the actions necessary to implement and fulfil the terms of [Treaty Number 6] in respect of land entitlement."

[95] In further support of Saskatchewan's position, under Article 10.05 of the Framework Agreement, signatory First Nations confirmed that they received independent legal advice during negotiations up to and including the execution of the band-specific agreements that gave effect to the Framework Agreement. The late Dr. Lloyd Barber was the FSIN's lead negotiator throughout the Framework Agreement negotiations. Dr. Barber's expertise, credibility and reputation as a negotiator in disputes between governments and Indigenous Canadians is unquestioned. Article 10.05 also requires signatory First Nations to fully inform their members of the "nature and effect" of the band-specific agreements. WLFN's negotiation, execution, and implementation of its band-specific agreement was informed by professional advice and undertaken in consultation with its membership (see Article 10.04 of WLFN's band-specific agreement).

[96] The proposed implied term undermines the purpose of the Agreement, which was to satisfy the TLE obligations in a fair, predictable and transparent manner. It is hard to imagine a more potent disrupter of the Agreement than to read in a new term, judicially, 30 years after the Agreement's execution. Agreements such as this—which are, at their core, efforts at reconciliation—should not be interpreted in ways that upset the carefully negotiated agreement of the parties (*Goodswimmer* at paras. 47-50).

VII. **Other asserted genuine issues**

(i) *Willing buyer/willing seller*

[97] In the face of these evidentiary and legal hurdles to its arguments regarding the implied contractual term, WLFN falls back on the "willing buyer/willing seller" provision in Article 4.05(a). It argues that in placing the lands up for auction, Saskatchewan became a "willing seller" and was required to sell the lands to WLFN in those circumstances.

[98] This argument has been fully canvassed and rejected by the Saskatchewan Court of Queen's Bench (*Muskoday First Nation v. Saskatchewan*, 2016 SKQB 73, [2016] 3 C.N.L.R. 123 [*Bear*]; *One Arrow First Nation v. Saskatchewan*, [2000] 1 C.N.L.R. 162, 1999 CanLII 12857 (SKQB) [*One Arrow*]). I agree with the reasons of the Court of Queen's Bench, the basis for which is best set forth in the Attorney General of Saskatchewan's written submissions, which I reproduce here:

> 111. However, the willing seller/willing buyer principle governs the process by which, if Saskatchewan has agreed to sell to a Band, Saskatchewan and that Band "are to reach a *consensus ad idem* on a purchase price": *Bear* at para 45; *One Arrow* at para 28. Nothing in the Agreement can be interpreted as requiring Saskatchewan to sell any particular lands to a Band: Article 4.06.
>
> 112. Para 4.05(b) states that, if Saskatchewan agrees to sell to a Band, it must identify conditions precedent that the Band must satisfy to conclude the sale. Para 4.05(c) creates an eighteen-month period for the parties to negotiate a sale price and for the satisfaction of conditions precedent.
>
> 113. Para 4.05(d) identifies the limits on Saskatchewan's ability to sell lands to third parties. It provides that, during the eighteen-month negotiation period (known as a "freeze period"), Saskatchewan cannot sell the lands in question to third parties without the Band's consent. This provision shows that the parties turned their minds to the circumstance in which Saskatchewan would be fettered in its right to sell Crown lands to third parties. A parallel obligation burdens Saskatchewan with respect to selling mineral rights to third parties: Art 5.03(e).

[99] The critical word, of course, is *if*. The 18-month freeze period and the willing buyer/willing seller provisions are only triggered *if* Saskatchewan has agreed to sell the lands.

[100] In *One Arrow*, the Saskatchewan Court of Queen's Bench assessed the "willing seller/willing buyer" provision in Article 4.05, as well as Saskatchewan's obligations during the 18-month freeze period. The Court of Queen's Bench determined that the term "willing seller" requires that "the terms and price [Saskatchewan] seeks [during negotiations] must not only be made in good faith but must also be commercially reasonable to the extent that they would be acceptable to a notional willing buyer" (*One Arrow* at para. 34). The Saskatchewan Court of Queen's Bench in *Bear* endorsed this view (*Bear* at para. 45). It also found that the "willing seller/willing buyer" term references the process by which the First Nation and Saskatchewan set a price for the selected land, and does not relate to Saskatchewan's decision to accept or decline the First Nation's purchase requests (*Bear* at paras. 44-45).

[101] I agree with this analysis.

(ii) *The release provision*

[102] The Federal Court held that "[t]he practical legal effect of a full release and indemnity provision requires a full consideration of the parties' legal position and evidence of the negotiations leading to the Framework Agreement" (Reasons at para. 70). This, with respect, is not a reason; it is a conclusion made without analysis. The judge also found that as negotiations for four remaining band-specific agreements were outstanding, it might be helpful to interpret the release agreement. This was an irrelevant consideration.

[103] Canada was released from its TLE obligations to WLFN upon ratification, execution, and delivery of a band-specific agreement under Article 15.01. Article 16.02 provides for Saskatchewan's release:

> Canada and each of the Entitlement Bands hereby agree that, after ratification, execution and delivery of a Band Specific Agreement, as long as Saskatchewan is paying to Canada and the Treaty Land Entitlement (Saskatchewan) Fund the amount required to be paid by Saskatchewan in respect of each of the said Entitlement Bands in accordance with this agreement, and Saskatchewan has not failed, in any material way, to comply with its other obligations hereunder… Canada and each of the Entitlement Bands further agrees to forever release and discharge Saskatchewan…

[104] Article 15.06 sets out precise and limited circumstances when Canada's release may not be relied upon, *none* of which have been pled by WLFN. There is no evidence that either Saskatchewan or Canada has failed to make the financial contributions required or that either has failed "in any material way" to comply with its obligations as required. If there were evidence of that nature, it was WLFN's to lead.

[105] In its written submissions on the Framework Agreement's release provisions, WLFN argues that the interpretation of the Agreement must acknowledge Canada's history of broken treaty promises, and that, because a number of other First Nations might be affected by the judicial interpretation of the release provisions, "[i]t would be unjust to resolve issues of such significance on the basis of the limited record that Saskatchewan filed" (WLFN's Memorandum of Fact and Law at para. 58).

[106] There is no definition of the factual or legal issues with respect to the release; the genuine issue remains a chimera. At its highest, judicial consideration of the release might provide

guidance for the four remaining bands. This is a speculative, academic justification that in reality would delay the negotiations of the remaining four agreements until the completion of WLFN's action, which, if pursued, would not conclude for years. Quite apart from the fact that no uncertainty regarding the release was identified, if the terms of the release were to present an issue, it would be for the four bands affected to raise.

(iii) *Favourable consideration*

[107] WLFN argued that Saskatchewan did not give WLFN's notice that it had "selected" the lands it wished to purchase the "favourable consideration" that was required under the Agreement. The Federal Court agreed and found that the interpretation of the "favourable consideration" provision in the Framework Agreement raised a genuine issue for trial.

[108] The judge did not ask what more could have been added through a trial that was not already before him; all of the evidence as to how Saskatchewan organized the auction and why it declined to interrupt the auction was before the Federal Court.

[109] WLFN invites this Court to substitute its own view of whether Saskatchewan reached the correct conclusion in deciding not to withdraw the lands from public auction, which would effectively amount to a judicial review of that decision on a correctness basis. That is not this Court's task. It is sufficient that Saskatchewan considered WLFN's requests in good faith and reached a reasoned decision based on relevant considerations.

[110] I will explain why I reach this conclusion.

[111] Article 4.06 of the Framework Agreement confirms that Saskatchewan is not required to sell any specific parcel of Crown land to an entitlement band. It stipulates, though, that Canada and Saskatchewan shall give "favourable consideration" to offers from WLFN to purchase Crown land:

> Subject to applicable law, each of Canada and Saskatchewan agrees to give favourable consideration to offers from an Entitlement Band to purchase federal or provincial Crown Land, including federal or provincial Crown Improvements thereon, and not to unreasonably withhold acceptance of the same, provided that nothing in this Agreement [(with the exception of subsection 4.05(c))] shall be interpreted as requiring Canada or Saskatchewan to sell or transfer any specific parcel of federal or provincial Crown Land (including Crown Improvements thereon) to, or for the benefit of, any Entitlement Band.
>
> [Emphasis added.]

[112] The obligation to give "favourable" consideration to offers to purchase and to "not unreasonably withhold acceptance of the same" has been considered by the Saskatchewan Court of Queen's Bench.

[113] In *Bear*, the Saskatchewan Court of Queen's Bench interpreted the meaning of the "willing seller/willing buyer", "favourable consideration", and "best efforts" phrases within the Framework Agreement. The Court of Queen's Bench held that, reading the terms through the lens of the honour of the Crown, Saskatchewan was required to consider the requests in good faith and without engaging in sharp practice (*Bear* at para. 50). *Bear* at paragraph 72 is particularly apposite in that it also speaks to a situation where Saskatchewan declined to sell:

> Reasonable people may disagree about the validity of the reasons, but Saskatchewan's reasons were arrived at through a process consonant with Saskatchewan's obligations under the TLE Settlement Agreement and the honour of the Crown. As noted in articles 4.06 and 5.03, Saskatchewan has the right to say no.

[114] Here, the request by WLFN to remove the lands from auction and allow WLFN to formulate an offer to purchase was reviewed and considered by thirteen different branches of the Saskatchewan government (Transcript of Cross-Examination of Megan Shaefer (1 October 2020) at 6-7, Appeal Book at 854-855). WLFN led no evidence that Saskatchewan's consideration was anything but conducted in good faith and based on relevant public policy considerations.

[115] To the contrary, the Federal Court had evidence before it demonstrating, both procedurally and substantively, that Saskatchewan had considered the public interest before denying WLFN's requests to purchase the Crown lands. Indeed, the Federal Court itself specifically acknowledged Saskatchewan's argument on this point at paragraph 60 of its reasons:

> Saskatchewan also states that removing land parcels for TLE purposes during an auction would disrupt the auction process and have financial costs for Saskatchewan. Saskatchewan points out that the extensive internal and external reviews that the province conducts before including any land parcel in an auction would be in vain if parcels had to be removed from auctions due to untimely TLE requests. They further point out that WLFN had since 1993 to select the lands in question.

[116] While I do not put much weight on this, the motion record also included letters from Saskatchewan (Ministry of Agriculture) to the Lands Manager of WLFN that explained that it had denied WLFN's requests because the lands had already been placed in the auction and that to withdraw them would incur additional fees (Schaefer Affidavit, Exhibits K and L, Appeal Book at 684-689).

[117] The favourable consideration requirement from Article 4.06 of the Agreement applies to offers to purchase. No offer to purchase was made. However, assuming that it also applies to

WLFN's request that the lands be withdrawn from auction, I conclude that no genuine issue arises that requires a trial.

[118] There is no dispute that, many months prior to each auction, Saskatchewan sent WLFN letters notifying it of the proposed sale of Crown land pursuant to Saskatchewan's duty to consult. There is also no dispute that WLFN did not respond to these letters and instead, on all three occasions, waited until the auction was underway before it sent Saskatchewan a letter expressing an interest in the lands. No formal offer was ever made.

[119] If it elects to sell lands through a public auction, Saskatchewan sets the minimum price for which the lands may be sold at 90% of the lands' estimated fair market value. First Nations that participate in the auction may possibly pay less for their desired parcels of land than what they would pay for the parcels if they made a purchase request under the TLE agreements.

[120] Where Crown lands do not sell at auction, they remain available for the First Nations to purchase through the Agreement selection process as Crown lands. Needless to say, a band may also bid on the lands placed in auction, which is one of the purposes of the province giving notice to bands of an impending auction. Lands sold to third parties by auction also remain available for First Nations to purchase as private lands under the Agreement. As noted, approximately 60% of all lands acquired under TLE agreements have been private lands.

[121] Saskatchewan has provided publicly accessible information about the location and status of available provincial Crown lands since the Framework Agreement came into force in 1993.

This information has been available to the public through the provincial land titles system and, since at least 2009, through databases on Saskatchewan's website.

VIII. **Miscellaneous issues**

[122] The Federal Court also dismissed the motion on the basis that there was an outstanding issue of credibility regarding WLFN's receipt of Saskatchewan's consultation letters. This was an error.

[123] Saskatchewan sent three letters to notify WLFN that Saskatchewan was considering selling Crown lands, acknowledging that this had triggered Saskatchewan's duty to consult WLFN as a First Nation. These letters are dated July 2016, January 2017, and January 2018. Wendy Jim, Lands Manager of WLFN, asserts that she was "not aware" of the first two letters that Saskatchewan had sent, and only learned that Saskatchewan intended to sell certain parcels of vacant Crown land through a public auction in or around September 15, 2017. I note that Wendy Jim was not the Lands Manager of WLFN until April 2017, and her lack of awareness of the first two letters is therefore not suprising, and consequently of no value.

[124] This issue is, in any event, a red herring.

[125] The first two consultation letters were addressed to the Chief of WLFN (Chief Kenneth Thomas in 2016 and Chief Annie Thomas in 2017) and Council. There is no evidence that these letters did not reach the members of WLFN to whom they were addressed. As Saskatchewan points out, WLFN does not deny that it received duty to consult notices from Saskatchewan prior

to the auctions. The auction did not commence until October 23, 2017. WLFN remained silent during that five-week window. Copies of the notices that Saskatchewan sent to WLFN were in evidence before the Federal Court (Reasons at para. 46).

[126] There was, therefore, no issue of credibility arising on the evidence. Further, the issue is irrelevant to the question of whether, as a matter of law, a term is to be implied into the Agreement.

IX. **Honour of the Crown / Reconciliation**

[127] Agreements such as this are important facilitators of reconciliation. This, and the honour of the Crown, requires that the Agreement be interpreted in a fair and purposeful manner, in accordance with those twin objectives. While not a Treaty, the Agreement redresses historical grievances in a fair and orderly manner as agreed by the three parties.

[128] This interpretive frame or lens, however, does not entitle a court to reopen and rewrite the settled terms of a modern agreement negotiated between sophisticated parties over many years and with independent legal advice. Failing to respect the finality and legal certainty of the Framework Agreement undermines reconciliation by allowing parties to renegotiate and to seek more favourable terms than those originally settled on. Allowing the parties "[t]o seek ambiguities [in the agreement] at all costs" in the hopes of reinterpreting its provisions can only diminish the value of the settlement, and "other signing parties [must] not feel themselves at the mercy of constant attempts to renegotiate in the courts" (*Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 F.C. 501, 1992 CanLII 14828 (FCA) at 518-519). A paradigm under

which each generation can reopen, renegotiate, and rewrite previously settled matters is untenable (see also *Goodswimmer* at para. 49; *Manitoba Metis Federation Inc v. Brian Pallister et al.*, 2021 MBCA 47, 458 D.L.R. (4th) 625 [*Pallister*] at para. 56).

[129] While the Crown can never contract out of its constitutional responsibilities, the honour of the Crown cannot be used to read in obligations supplementary to or different from those that have been expressly agreed to by the parties, or to renegotiate a better deal than that agreed to. The point was made in *Peigan 2* at paragraph 13:

> Counsel for the respondents repeated several times that the Crown cannot contract out of constitutional and treaty rights. This is not disputed. However, in my view it follows that one cannot later "contract in" constitutional and treaty rights arguments into every term of a modern agreement between the parties even where the parties agreed on specific terms to address outstanding issues, in a way that fundamentally changes the terms of the agreement retrospectively. Rather, the honour of the Crown requires that the Crown adhere to and implement the terms of the agreement in an open and fair manner (*Wewaykum*).

[130] Put more simply, the honour of the Crown does not mean that an agreement can be rewritten, ignored or renegotiated simply to seek more favourable terms (*Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557 at para. 6; *Peigan 2* at paras. 12-13; *Pallister* at para. 56). The honour of the Crown as it relates to the Agreement requires that the terms of the Agreement be implemented in a fair and forthright manner (*Peigan 1* at para. 64; *Peigan 2* at para. 12). This serves to protect the First Nations' interests as much as the signatory governments'.

[131] The declarations sought by WLFN would result in a very different agreement than that negotiated. The role of the courts in the interpretation of agreements such as this is to interpret

the agreement generously and purposefully, but not to rewrite, under the guise of reconciliation, the bargain struck. Viewed at a distance, the fundamental error that courses through the reasons under appeal is the failure to examine the bargain struck by the parties. Had that been done, the inconsistency of the terms sought to be implied with the Agreement would have been self-evident.

[132] I would therefore allow the appeal, set aside the order of the Federal Court, grant the motion for summary judgment and dismiss the action. The parties may make written submissions on costs not exceeding three pages in length within 15 days of the date of this judgment.

"Donald J. Rennie"
J.A.

"I agree.
Monaghan J.A."

"I agree.
Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	HIS MAJESTY THE KING IN RIGHT OF SASKATCHEWAN v. WITCHEKAN LAKE FIRST NATION ET AL.
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CONCURRED IN BY:	MONAGHAN J.A. ROUSSEL J.A.
DATED:	MAY 17, 2023

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