Federal Court of Appeal | Cour d'appel fédérale

Date: 20250228

Docket: A-106-23

Citation: 2025 FCA 49

CORAM: **DE MONTIGNY C.J.**
LOCKE J.A.
HECKMAN J.A.

BETWEEN:

WATERHEN LAKE FIRST NATION

Applicant

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 7, 2024.

Judgment delivered at Ottawa, Ontario, on February 28, 2025.

REASONS FOR JUDGMENT BY: HECKMAN J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
LOCKE J.A.

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REASONS FOR JUDGMENT

HECKMAN J.A.

I. OVERVIEW

[1] In June 2021, Waterhen Lake First Nation [Waterhen or the Applicant] filed a specific claim submission with the Minister of Indian Affairs and Northern Development [the Minister], pursuant to the Specific Claims Policy, seeking compensation for:

1. The 1954 unlawful taking of approximately 11,650 square kilometers of Waterhen's treaty hunting, fishing and trapping lands for the Primrose Lake Air Weapons Range [Primrose Range];

2. The loss of Waterhen's property rights under commercial trapping licenses issued under the Saskatchewan *Fur Act*, R.S.S. 1940, c. 252 [*Fur Act*] for land that was subsequently taken up for the Primrose Range; and

3. Losses for the abrogation of treaty rights to hunt, fish and trap for commercial purposes by the 1930 *Natural Resources Transfer Agreement* with Saskatchewan [NRTA].

[2] In January 2022, the Director General of the Specific Claims Branch, Resolution and Partnerships Sector, advised Waterhen that their claim submission could not be addressed under the Specific Claims Policy since it appeared to include allegations in relation to traditional harvesting.

[3] As a result, Waterhen filed a Declaration of Claim [the Claim] with the Specific Claims Tribunal [the Tribunal] in May 2022. The Minister filed a motion to strike the Claim in September 2022, pursuant to paragraph 17(*a*) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 [the Act]. After a hearing in January 2023, the Tribunal granted the Minister's motion in March 2023 [the Decision]. It held that the Claim was based on treaty harvesting rights and that it did not fall within the jurisdiction of the Tribunal as defined by section 14 of the Act,

particularly given that claims of this nature were specifically excluded from its jurisdiction by paragraph 15(1)(*g*) of the Act.

[4] Waterhen seeks judicial review of the Decision before this Court.

[5] For the reasons that follow, I am of the view that the Applicant has not established that the Decision is unreasonable and that its application for judicial review should therefore be dismissed.

II. CONTEXT

[6] Waterhen submits that, in interpreting the jurisdiction-conferring provisions of the Act and in deciding that the Claim fell outside its jurisdiction, the Tribunal erred in failing to consider the decades-long history of the Claim and the evolution of the Specific Claims Policy underlying the Act. Accordingly, to properly contextualize Waterhen's submissions, it is necessary to review the history of the Claim and the evolution of the Policy.

A. *History of the Claim*

(1) Historical events leading to the Claim

[7] The Claim explains that the members of the Waterhen Lake Band, which was and is part of the Plains Cree, traditionally lived as hunters and trappers in the area of Waterhen Lake, in

northern Saskatchewan. With the arrival of settlers and the Hudson's Bay Company, their economy became centred on commercial hunting and trapping.

[8] In 1876, Canada and some First Nations signed Treaty 6, which acknowledged the rights of the First Nation signatories to pursue their avocations of hunting and fishing throughout the land surrendered, subject to regulations and the power of the Crown to take up land for other purposes. The Claim explains that Waterhen signed an adhesion to Treaty 6 in 1921.

[9] In 1930, Canada concluded an NRTA with the province of Saskatchewan which transferred the administration and control of natural resources held by the federal Crown to the province. Paragraph 12 of the NRTA addressed the province's power to regulate game and the rights of First Nations in respect of hunting, trapping and fishing:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
>
> [Natural Resources Transfer Agreement, 1930, being Schedule 4 to the Constitution Act, 1930, 20-21 George V, c 26 (UK), reprinted in R.S.C. 1985, App II, No 26, s. 12.]

[10] The NRTA was held by the Supreme Court of Canada to have extinguished the treaty right to hunt commercially: *R. v. Horseman*, [1990] 1 SCR 901 at 933, 108 N.R. 1; *R. v. Sundown*, [1999] 1 SCR 393 at 399, 170 DLR (4th) 385. However, Saskatchewan enacted the

Fur Act, which designated areas of land in northern Saskatchewan as fur conservation areas. Under this regime, Waterhen and another First Nation shared the exclusive right to trap in an area defined as Fur Conservation Block A37 [Fur Block A37].

[11] In 1954, Canada agreed with Saskatchewan and Alberta to reserve a vast area of land to use as a bombing and gunnery range. The Claim explains that the lands that made up the Primrose Range were part of the traditional lands of several First Nations, including Waterhen, and comprised 207,360 acres of Fur Block A37. Entry to these lands was forbidden. The Claim states that the creation of the Primrose Range led to the loss of treaty lands and the harvesting rights associated with these lands, without consultation or compensation.

(2) The 1975 claim

[12] In April 1975, four First Nations, including Waterhen, submitted a claim to the federal government's Office of Native Claims seeking, *inter alia*, compensation for the loss of livelihood resulting from the loss of their traplines and hunting and fishing rights caused by the taking of Treaty lands for the Primrose Range. Canada rejected this claim.

[13] Beginning in 1993, the Indian Specific Claims Commission [ICC or Commission], an independent review body established by Canada to make non-binding recommendations to Canada on rejected specific claims, conducted an inquiry into Canada's rejection of the 1975 claim.

[14] In its final report, delivered in 1995, the Commission determined that the Crown did not breach its treaty obligations towards Waterhen and the other claimant First Nations. It found that the establishment of the Primrose Range had reduced the area over which they could exercise their treaty food-harvesting rights, but not to the extent that they were unable to continue their traditional food-harvesting activities. However, it determined that:

> Canada did breach its fiduciary duty by failing to ensure that First Nations people were compensated for lost commercial harvesting rights, consistent with its undertaking to compensate all those whose "property rights in trap lines, etc.," were affected by the creation of the [Primrose Range].

The ICC recommended that the Minister accept for negotiation, pursuant to the Specific Claims Policy, the claim of the Waterhen, Flying Dust and Buffalo River First Nations, with respect to lost commercial harvesting rights only.

[15] Nearly seven years later, in March 2002, the Minister informed Waterhen that he could not accept the ICC's recommendation to enter negotiations with Waterhen under the Specific Claims Policy. The Minister explained that the Policy addressed only "claims by a First Nation collective, and not individual rights" and that the commercial harvesting rights were held by individuals or groups of individuals, not the claimant First Nations. The Minister added that compensation for lost commercial harvesting rights under the terms of a 1953 agreement between Canada and Saskatchewan, on which the ICC had based its recommendation that the claim for lost commercial harvesting rights be accepted for negotiation, "was not based on either Indian status or membership in an Indian Band," but was to be paid to anyone who held a licence on the land that became the Primrose Range.

(3) The 2021 claim

[16] As outlined above, in June 2021, Waterhen filed a specific claim submission to the Specific Claims Branch for compensation for the unlawful taking of its treaty, hunting, fishing and trapping lands, the loss of its property rights under commercial trapping licenses for land taken up for the Primrose Range and the abrogation by the NRTA of its treaty rights to hunt, fish and trap for commercial purposes. In January 2022, the Branch advised the applicant that the claim could not be assessed under the Specific Claims Policy since it appeared to include allegations in relation to Aboriginal rights and title or traditional harvesting rights. The Branch stated that "Crown-Indigenous Relations officials were actively looking at other possible venues" to address the issues raised by the claim. Waterhen states that when the Branch made no efforts in this regard, and in the absence of ongoing dialogue or progress or any prospects for resolution, it filed its Declaration of Claim with the Tribunal in May 2022.

B. *History of the Specific Claims Policy*

[17] Waterhen claims that the Tribunal failed to consider the evolution of the Specific Claims Policy and that this led it to adopt a narrow and technical reading of the Act in its Decision. In order to assess this argument, it will be useful to briefly address that evolution, relying on the final report of the Indian Specific Claims Commission, entitled "A Unique Contribution to the Resolution of First Nations' Specific Claims in Canada," to which Waterhen referred in its arguments before the Tribunal (Canada, Indian Claims Commission, *Indian Specific Claims Commission, final report, 1991-2009 : a unique contribution to the resolution of First Nations'*

specific claims in Canada, (Ottawa: Indian Claims Commission, 2009)). This report summarizes the Commission's major achievements and makes some recommendations on the future of specific claims. The evolution of the Specific Claims Policy was also considered by the Tribunal in its decision in *Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at paras. 333-362 [*Beardy's*].

[18] Until the development of the first Specific Claims Policy in 1973, specific claims were dealt with in an *ad hoc* fashion by the federal government. The ICC suggests that the Supreme Court of Canada's decision in *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, which for the first time recognized aboriginal title to land as a legal right in Canada, pressed the federal government to rethink its approach to claims by emphasizing negotiation rather than litigation.

[19] The federal government established the Office of Native Claims in 1974, within the Department of Indian Affairs, and tasked it with the review of claims and the formulation of policies. There were concerns that the Office was not independent since it was meant to represent the Minister and the federal government in claims assessment and negotiation with First Nations while also being the body empowered to make decisions on claim validation.

[20] The ICC stated that, by 1982, only 12 of the 250 specific claims presented between 1970 and 1981 had been settled, for a total of $2.3 million. Since this scheme was not working, the federal government reviewed and clarified its policy for the resolution of specific claims, which it detailed in the 1982 document entitled *Outstanding Business: A Native Claims Policy* (Canada,

Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy*, No. Q5-5171-000-BB-A1 (Ottawa: Department of Indian Affairs and Northern Development, 1982) [*Outstanding Business*]). This document contemplated certain administrative changes like additional resources for the Office, and more clearly articulated the bases upon which claims could be accepted. However, objections persisted about the lack of an independent review of the validity of claims or the amount of compensation to be paid for claims.

[21] In response to this criticism, the federal government created the ICC, which was empowered as a commission of inquiry under the *Inquiries Act*, R.S.C. 1985, c. I-11, and mandated in July 1991 by Order in Council P.C. 1991-1329. A revised Order in Council established the ICC's jurisdiction and powers. Its jurisdiction was consistent with *Outstanding Business*, subject to any formal amendments or additions.

[22] The ICC's mandate was twofold: 1) hold a public inquiry to review the Minister's decision to reject a claim (or to accept a claim where there remained a dispute over how to establish compensation) upon the request of a First Nation, and 2) upon mutual agreement of a First Nation and the Department of Indian Affairs, provide mediation support at any stage of the claims process. The ICC provided non-binding recommendations regarding the federal government's outstanding lawful obligations. Two successive Ministers, in November 1991 and October 1993, affirmed they would accept the ICC's recommendations where they fell within the Specific Claims Policy, and would welcome its recommendations on how to proceed where the

ICC concluded the policy was implemented correctly but that the outcome was nonetheless unfair.

[23] In November 2003, *The Specific Claims Resolution Act*, S.C. 2003, c. 23, received Royal Assent. Meant to modify the specific claims process, this statute was never proclaimed into force by the federal government in light of the lack of support of First Nations for the legislative changes it contained. The legislation was criticized for insufficiently addressing the need for an independent adjudicator of specific claims and for placing an overly restrictive financial cap on claim settlements.

[24] In December 2006, the Standing Senate Committee on Aboriginal Peoples published a special study on the federal specific claims process that recommended, among other things, the establishment, in full partnership with First Nations, of an independent body with the mandate and power to resolve specific claims (Senate of Canada, Standing Senate Committee on Aboriginal Peoples, *Negotiation or Confrontation: It's Canada's Choice, Final Report of the Standing Senate Committee on Aboriginal Peoples' Special Study on the Federal Specific Claims Process* (2006 December) (Chair: The Honourable Gerry St. Germain, P.C.)).

[25] In June 2007, the Minister of Indian and Northern Affairs released *Justice at Last: Specific Claims Action Plan* (Canada, Indian Affairs and Northern Affairs Canada, *Specific Claims: Justice at Last*, No. QS-5393-000-EE-A1 (Ottawa: Department of Indian Affairs and Northern Affairs Canada, 2007) [*Justice at Last*]), a document setting out an action plan for the revision of the Specific Claims Policy. The action plan committed to the creation of an

independent tribunal to adjudicate specific claims. The Assembly of First Nations, jointly with the federal government, prepared a legislative proposal to embody the plan and discussed the process to implement it.

[26] Accompanying the draft bill, which was introduced into Parliament as Bill C-30 and culminated in the Act, was a political agreement between the federal government and the Assembly of First Nations [Political Agreement]. In this agreement, the parties acknowledged that a number of issues had arisen in their deliberations that were either outside the specific claims process or, by definition, were not addressed in the draft bill. They resolved to work together on specific claims issues that fell outside the scope of the legislation. The Political Agreement expressed the commitment of the parties to work together on a joint approach to address treaty issues not addressed in the draft bill or Specific Claims Policy, including claims for compensation in excess of $150 million, the monetary cap proposed in the draft bill.

[27] The *Specific Claims Tribunal Act* received royal assent in June 2008. Its preamble recognizes that resolving specific claims will promote reconciliation between First Nations and the Crown and that an independent tribunal is needed to adjudicate specific claims in accordance with law in a just and timely manner (the Act, Preamble). More specifically, the Tribunal's mandate is to "decide issues of validity and compensation relating to the specific claims of First Nations" (the Act, section 3). It awards "monetary compensation to First Nations for claims arising from the Crown's failure to honour its legal obligations to Indigenous peoples, even where delay or the passage of time would bar an action in the courts" (*Williams Lake Indian*

Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4 at para. 2, [2018] 1 S.C.R. 83 [footnote omitted]).

C. *Evolution of the grounds for specific claims*

[28] Several statements made over the course of the evolution of the Specific Claims Policy address the scope of the claims admissible under the Policy. These were raised by the Applicant in its arguments before the Tribunal and this Court as being relevant to the Tribunal's decision on whether to strike the Claim on the ground that it falls outside the scope of its authority. Accordingly, I highlight them here.

[29] In 1973, the federal government's Statement on Claims of Indian and Inuit People recognized two types of claims: 1) comprehensive claims based on aboriginal title; and 2) specific claims based on the non-fulfillment of an historic Treaty, mismanagement of reserve lands or other assets, and breaches of the Crown's legal obligations.

[30] In 1982, *Outstanding Business* defined specific claims as "claims made by Indians against the federal government which related to the administration of land and other Indian assets and to the fulfillment of Indian treaties." It provided that recognizable claims that disclose an outstanding lawful obligation (i.e., an obligation derived from the law on the federal government's part), could arise in four instances:

1. The non-fulfillment of a treaty or agreement between Indians and the Crown;

2. A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder;

3. A breach of an obligation arising out of government administration of Indian funds or other assets; and

4. An illegal disposition of Indian land.

Moreover, the government was prepared to acknowledge claims that related to a failure to provide for reserve lands taken or damaged by the federal government or any of its agencies or to fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government.

[31] In 2007, *Justice at Last* defined a specific claim as "a claim made by a First Nation against the federal government relating to the non-fulfillment of an historic treaty or the mismanagement of First Nation land or other assets" (*Justice at Last* at p. 3). The government recognized that a specific claim exists where a First Nation established that the Crown has a lawful obligation because it has:

1. Failed to uphold a treaty or other agreement between First Nations and the Government of Canada;

2. Breached the Indian Act or other statutory responsibility;

3. Mismanaged First Nation funds or other assets; and

4. Illegally sold or otherwise disposed of First Nation land.

[32] The *Specific Claims Policy and Process Guide* (Canada, Indian Affairs and Northern Affairs Canada, *Specific Claims Policy and Process Guide*, No. QS-5401-000-BB-A1 (Ottawa: Department of Indian Affairs and Northern Affairs Canada, 2000) [*2009 Policy*]), written after *Justice at Last* and the enactment of the Act, explains that:

> The fundamental principles of the Specific Claims Policy as articulated in [*Outstanding Business*] have not changed. These principles are: an outstanding lawful obligation must be confirmed, valid claims will be compensated in accordance with legal principles and any settlement reached must represent the final resolution of the grievance.

[33] Under the Act, the jurisdiction of the Tribunal to consider the validity of a claim is set out by section 14. As shown in the following section of these reasons, subsection 14(1) provides that a First Nation may file with the Tribunal a claim for compensation for losses arising from one or more of six listed grounds. Section 15 of the Act lists seven specific categories of claims that may not be filed with the Tribunal.

III. RELEVANT PROVISIONS

[34] For ease of reference, I reproduce the provisions that are relevant in this case, namely paragraphs 14(1)(*a*), (*c*) and 15(1)(*g*), subsection 15(2) and paragraph 17(*a*) of the Act.

Specific Claims	**Revendications particulières**
Grounds of a specific claim	**Revendications admissibles**

14 (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(*a*) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

…

(*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

…

Exceptions

15 (1) A First Nation may not file with the Tribunal a claim that

…

(*g*) is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights.

14 (1) Sous réserve des articles 15 et 16, la première nation peut saisir le Tribunal d'une revendication fondée sur l'un ou l'autre des faits ci-après en vue d'être indemnisée des pertes en résultant :

***a*)** l'inexécution d'une obligation légale de Sa Majesté liée à la fourniture d'une terre ou de tout autre élément d'actif en vertu d'un traité ou de tout autre accord conclu entre la première nation et Sa Majesté;

[…]

***c*)** la violation d'une obligation légale de Sa Majesté découlant de la fourniture ou de la non-fourniture de terres d'une réserve — notamment un engagement unilatéral donnant lieu à une obligation fiduciaire légale — ou de l'administration par Sa Majesté de terres d'une réserve, ou de l'administration par elle de l'argent des Indiens ou de tout autre élément d'actif de la première nation;

[…]

Réserve

15 (1) La première nation ne peut saisir le Tribunal d'une revendication si, selon le cas :

[…]

***g*)** elle est fondée sur des droits conférés par traité relativement à des activités susceptibles d'être exercées de façon continue et variable, notamment des droits de récolte.

Limitation	**Précision**
(2) Nothing in paragraph (1)(*g*) prevents a claim that is based on a treaty right to lands or to assets to be used for activities, such as ammunition to be used for hunting or plows to be used for cultivation, from being filed.	**(2)** L'alinéa (1)*g*) ne s'applique pas aux revendications fondées sur des droits conférés par traité soit sur des terres, soit sur des éléments d'actif destinés à des activités, tels les munitions, pour la chasse, et les charrues, pour l'agriculture.
…	[…]
Hearings and Decisions	**Audiences et décisions**
Application to strike	**Demande de radiation**
17 On application by a party to a specific claim, the Tribunal may, at any time, order that the claim be struck out in whole or in part, with or without leave to amend, on the ground that it	**17** Le Tribunal peut à tout moment, sur demande de toute partie, ordonner la radiation de tout ou partie de la revendication particulière avec ou sans autorisation de la modifier, pour l'un ou l'autre des motifs suivants :
(*a*) is, on its face, not admissible under sections 14 to 16;	***a*)** la revendication n'est manifestement pas admissible aux termes des articles 14 à 16;
…	[…]

IV. DECISION UNDER REVIEW

[35] On March 16, 2023, the Tribunal granted the Respondent's motion to strike, pursuant to paragraph 17(*a*) of the Act, on the ground that the Claim was, on its face, not admissible under sections 14 to 16 of the Act. Presuming the pleaded facts to be true and interpreting the Act broadly and liberally while recognizing the Tribunal's remedial purpose and process, the Tribunal concluded that its jurisdiction was prescribed by the Act without ambiguity and that the Claim did not fall within the scope of its legislated jurisdiction. It held that it was plain and

obvious, and beyond doubt, that the Claim could not succeed before the Tribunal: Decision at para. 1.

[36] At the outset, the Tribunal concluded that a full evidentiary record and fulsome legal argument beyond the specific issue raised by the motion to strike under paragraph 17(*a*) of the Act—whether the Claim, as pleaded, fell within the Tribunal's jurisdictional boundaries—was "neither required nor appropriate": Decision at para. 4.

[37] The Tribunal considered whether paragraphs 14(1)(*a*) and (*c*) of the Act could ground the Claim. It considered and rejected the Applicant's argument that the term "other assets" in both paragraphs was ambiguous and, when properly interpreted, included commercial harvesting rights, characterized by the Applicant as an asset of a *sui generis* nature analogous to the common law property concept of *profit à prendre*: Decision at paras. 12-13. In the Tribunal's view, there was no genuine ambiguity in the language of the relevant sections of the Act, when read as a whole: Decision at paras. 14-15. It explained that section 2 of the Act defines the term "asset" (*élément d'actif*) as tangible property (*bien matériel*), interpreted by the Tribunal in *Beardy's* as property that has a physical form or things that can be touched or perceived by the senses. Moreover, it observed that paragraph 15(1)(*g*) of the Act specifically excludes from the Tribunal's jurisdiction claims based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights, while subsection 15(2) expressly saves from this exclusion claims based on treaty rights to tangible assets used for activities, like ammunition to be used for hunting. The Tribunal's determination in *Beardy's* that treaty annuities were "assets"

was distinguishable, since the Act specifically excluded from the Tribunal's jurisdiction claims based on treaty harvesting rights, unlike claims based on treaty annuities.

[38] The Tribunal also rejected the Applicant's argument that, since the harvesting rights at issue had been taken in 1930, they were not treaty rights of an ongoing and variable nature. In the Tribunal's view, the nature of the treaty right described in paragraph 15(1)(*g*) of the Act dealt with the character of harvesting rights. The alleged loss of the treaty right to harvest which grounded the Claim fell squarely within the exclusion legislated by paragraph 15(1)(*g*) of the Act: Decision at para. 16.

[39] The Tribunal also determined that, on its own, subsection 20(2) of the Act—which allows the Tribunal, in awarding compensation for a claim, to consider "losses related to activities of an ongoing and variable nature, such as activities related to harvesting rights"—was not sufficient to establish the Tribunal's jurisdiction: Decision at para. 17.

[40] The Tribunal observed that the substance of the Claim had been pleaded in two actions filed before the Saskatchewan Court of King's Bench. It noted that the Respondent had filed its statement of defence in one of them, without pleading a limitation period or a jurisdictional defence, and that in light of the Respondent's stated commitment to reconciliation, it would be "disappointing and unexpected" for the Respondent to rely on a limitation defence in response to the other action: Decision at para. 2. Accordingly, it observed that while it was granting the Respondent's motion to strike the Claim, there remained an avenue available to the Applicant to have the merits of its claim independently and objectively assessed and adjudicated.

V. ISSUE AND STANDARD OF REVIEW

[41] The only issue in this application for judicial review is whether the Tribunal erred in granting the Respondent's motion to strike on the basis that it was plain and obvious, and beyond doubt, that the claim would fail since, on its face, it was not admissible under sections 14 to 16 of the Act.

[42] Reviewing courts are to presume that reasonableness is the applicable standard of review of the merits of an administrative decision unless this presumption is rebutted by a clear indication of legislative intent or by the rule of law: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 10, [2019] 4 S.C.R. 563 [*Vavilov*].

[43] The Act prescribes neither a legislated standard of review nor a statutory right of appeal. As such, the presumption of reasonableness review is not rebutted by a clear expression of legislative intent.

[44] The Tribunal interprets and applies provisions of its enabling statute when it decides whether it should order that a claim be struck out under paragraph 17(*a*) of the Act on the ground that the claim is, on its face, not admissible under sections 14 to 16 of the Act. These provisions govern its power to decide an application to strike and define the scope of its jurisdiction. In my view, the Tribunal's interpretation and application of such statutory provisions do not fall into one of the categories of questions that the rule of law requires to be reviewed on a standard of

correctness: *Vavilov* at para. 53; *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 at paras. 26–28, 471 D.L.R. (4th) 391.

[45] The Applicant claims that this Court should undertake correctness review because, in deciding whether it has the statutory authority to decide the Claim, the Tribunal is determining the limits of its jurisdiction. This argument cannot succeed. True questions of jurisdiction, defined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59, [2008] 1 S.C.R. 190 as arising "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter," are no longer recognized as a category of questions commanding correctness review: *Vavilov* at para. 67.

[46] Decision makers must properly justify their interpretation of their statutory grant of authority in order for it to be upheld as reasonable: *Vavilov* at para. 109. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. By using precise and narrow language and delineating the power in detail, the legislature may tightly constrain the decision maker's ability to interpret the provision. The question for the reviewing court is whether the decision maker has properly justified its interpretation of the statute in light of the surrounding context: *Vavilov* at para. 110.

[47] The Applicant argues that correctness review is also warranted because, as recognized by the Tribunal, the Claim raises important constitutional issues and significant treaty rights issues. While constitutional questions make up one of the recognized categories for correctness review, I

agree with the Tribunal that its role on the Respondent's application to strike was not to assess the merits of the Claim, but to interpret the provisions of its enabling statute to determine whether the Claim, as framed by the Applicant, may be filed with the Tribunal for determination on the merits: Decision at para. 4. As none of the five rule of law-based categories for correctness review apply to the questions considered by the Tribunal, this Court will review the Decision on the reasonableness standard.

[48] In conducting reasonableness review of the Decision, this Court must adopt a "reasons first" approach, by focusing on the decision the Tribunal actually made, including the justification offered for it: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 58-60, 485 D.L.R. (4th) 583 [*Mason*].

[49] The Applicant bears the burden to show that the Tribunal's decision is unreasonable by establishing that it suffers from sufficiently central or significant shortcomings or flaws: *Vavilov* at para. 100. One such fundamental flaw is a failure by the decision maker to support its decision by reasoning that is rational and logical. A decision is unreasonable if, read holistically, it fails to reveal a rational chain of analysis or is based on an irrational chain of analysis: *Vavilov* at para. 103; *Mason* at para. 65. Another fundamental flaw is the decision maker's failure to justify the decision in relation to the legal and factual constraints that bear on the decision: *Mason* at para. 66. These constraints include the wording of the relevant statutory provisions, the applicable precedents, the evidence, the submissions of the parties, and the impact of the decision on the affected persons.

[50] Since the Applicant challenges the reasonableness of the Tribunal's interpretation of the provisions of the Act, I briefly describe here what the Applicant must show in order to establish that the Tribunal's interpretation is unreasonable.

[51] Courts interpreting a statutory provision apply the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, [2002] 2 S.C.R. 559, both quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. An administrative decision maker need not "engage in a formalistic statutory interpretation exercise in every case," so long as "the merits of [the interpretation] are consistent with the text, context and purpose of the provision": *Vavilov* at paras. 119–20.

[52] For the Tribunal's interpretation of the Act to be reasonable, it need not "dwell on each and every signal of statutory intent": *Vavilov* at para. 122. Even if the Tribunal failed "entirely to consider a pertinent aspect" of the context or purpose, such an omission is not enough, in itself, to warrant judicial intervention: *Vavilov* at para. 122. The omission needs to be central enough that it is clear the Tribunal "may well … have arrived at a different result" if it had considered the omitted element, therefore rendering the omission "indefensible, and unreasonable in the circumstances": *Vavilov* at para. 122.

VI. PARTIES' ARGUMENTS

A. *The Applicant's arguments*

[53] The Applicant challenges the reasonableness of the Decision on three fronts.

[54] First, the Applicant argues that the Tribunal erred in its application of the legal test for a motion to strike and, in particular, that it erred in deciding to strike the Claim without the benefit of a full evidentiary record and fulsome legal arguments.

[55] Second, the Applicant submits that the Tribunal erred in its interpretation of the jurisdiction-conferring provisions of the Act. Specifically, it argues that:

1. The Tribunal erred in interpreting the definition of "other assets" in paragraphs 14(1)(*a*) and (*c*) of the Act and failed to understand the Applicant's argument that the *sui generis* treaty harvesting rights at issue in the Claim were analogous to a common law *profit à prendre* property right and gave rise to tangible property, encompassed within the concept of "assets" in the Act.

2. The Tribunal erred in concluding that the claim falls within the exclusion in paragraph 15(1)(*g*) of the Act.

3. The Tribunal erred in failing to consider the evolution of the Specific Claims Policy and the history of the Claim in its interpretation of the jurisdiction-conferring provisions of the Act.

4. The Tribunal failed to properly apply the principles of statutory interpretation emanating from *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193 [*Nowegijick*].

5. The Tribunal misunderstood the Applicant's submissions regarding subsection 20(2) of the Act, causing it to misinterpret section 14 of the Act.

[56] Third, and finally, the Applicant submits that the Tribunal erred in comparing the Claim with the actions previously filed in the Saskatchewan Court of King's Bench and, in doing so, demonstrated bias in favour of the Crown.

B. *The Respondents' arguments*

[57] The Respondent argues that the Tribunal properly construed and applied its power to strike the Claim under paragraph 17(*a*) of the Act.

[58] The Respondent emphasized at the hearing that a harvesting right cannot be tangible property, and therefore "assets" for the purposes of paragraphs 14(1)(*a*) and (*c*) of the Act, because it is a promise to allow hunting, fishing and trapping to take place, and not a promise to the harvest itself; there is no promise as to the quality or quantity of the harvest, and the right can thus only be described as intangible. Moreover, subsection 15(2) of the Act specifies that, in the context of harvesting rights, "ammunition to be used for hunting or plows to be used for cultivation" would be assets for purposes of section 14, indicating that the right to harvest or the harvest itself are not assets under the Act.

[59] The Respondent submits that paragraph 15(1)(*g*) of the Act plainly and obviously excludes harvesting rights from the jurisdiction of the Tribunal. The paragraph deems harvesting rights to be an activity of an ongoing and variable nature, and those types of activities are explicitly excluded.

[60] The Respondent argues that the *Nowegijick* principle does not apply since the Tribunal reasonably found there was no ambiguity to the jurisdiction-conferring provisions of the Act. Similarly, the Respondent submits that it was not necessary for the Tribunal to address the legislative evolution of the Specific Claims Policy since the text of the relevant provisions was clear. In any event, the Respondent maintains that the Policy's scope has not changed and was not narrowed, since harvesting rights did not fall within previous policies either.

VII. ANALYSIS

[61] Consistent with the reasons first approach to reasonableness review, I focus on the Tribunal's justification for 1) its interpretation and application of its powers on an application under section 17, and 2) its decision that the Claim does not belong to one of the categories of claims that may be filed under section 14 of the Act and instead belongs to one of the categories of claims specifically excluded from the Tribunal's jurisdiction by section 15. In doing so, I address the various challenges raised by the Applicant to these aspects of the Decision. Finally, I address the Applicant's arguments relating to the Tribunal's comments on the actions filed in the Saskatchewan Court of King's Bench.

A. *The Tribunal's role on a section 17 application to strike*

[62] The Tribunal began its decision by examining the burden imposed on the Crown to strike a claim under section 17 of the Act. It held that the Crown bore the onus to establish that it was plain and obvious, and beyond doubt that the Claim cannot succeed before the Tribunal: Decision at para. 3. In approaching this assessment, the Tribunal recognized that it should: 1) accept that the assertions made in the Claim are true; 2) interpret the Act broadly and liberally, recognizing the remedial purpose and process of the Tribunal; and 3) consider the fact that the Claim was novel in the context of a continuing evolving area of law: Decision at paras. 1, 3–4.

[63] In framing the legal standard governing an application to strike, the Tribunal relied on the test set out in leading Supreme Court of Canada precedents, including *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17, [2011] 3 S.C.R. 45 [*Imperial Tobacco*], to govern motions to strike pleadings for not disclosing a reasonable cause of action. I note that a decision that is consistent with the established understanding of a legal standard well known in law and in the jurisprudence will generally be reasonable: *Vavilov* at para. 111.

[64] According to the Tribunal, the Claim sought compensation for the loss of the Applicant's ability to exercise harvesting rights: Decision at para. 4–5. This loss occurred through 1) the abrogation, by the 1930 NRTA, of commercial hunting rights guaranteed by treaty and 2) the establishment of the Primrose Range, which denied the Applicant access to traditional lands and prevented it from practising thereon its harvesting rights guaranteed by treaty and by the trapping licenses conferred under the Saskatchewan *Fur Act*.

[65] The Tribunal's characterization of the Claim mirrors that set out by the Applicant. In its Memorandum of Fact and Law, the Applicant states that its "Treaty right to earn a livelihood through hunting, fishing, and trapping as promised by the Crown under Treaty 6 was unilaterally taken away by the 1930 NRTA and further restricted by the creation of the [Primrose Range] in 1954, which took not only the Applicant's harvesting rights but also its statutory trapping rights granted under provincial licenses": Memorandum of Fact and Law at para. 33 (see also paras. 41, 52, 53 and 62).

[66] The Tribunal decided that its role was not to adjudicate the merits of the Claim, but to decide whether the Claim, as framed, fell within the jurisdiction of the Tribunal as defined in sections 14 to 16 of the Act. For the purposes of this exercise, the Tribunal held, it was sufficient to accept as true the assertions made in the Claim; a full evidentiary record and fulsome legal argument beyond the question of jurisdiction were neither required nor appropriate.

[67] The Applicant argues that it was unreasonable for the Tribunal to decide there was no need for a full evidentiary record on a motion to strike under section 17 of the Act. I disagree. In *Imperial Tobacco*, relied on by the Tribunal, the Supreme Court observes that motions to strike proceed on the basis that the facts pleaded are true (*Imperial Tobacco* at para. 17). It also notes that striking out claims that have no reasonable prospect of success "promotes litigation efficiency, reducing time and cost" by allowing litigants to "focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless" and allowing decision makers to focus on claims that have a reasonable chance of success (*Imperial Tobacco* at para. 20) [emphasis added]. The Tribunal's approach under section

17 of the Act is consistent with the concern for litigation efficiency and timeliness that animates the power to strike claims. It is also aligned with the Act's emphasis on the resolution of claims in a "just and timely manner" (Act, Preamble) and its direction that, in deciding how to conduct a hearing, the Tribunal have regard to "the importance of achieving an expeditious resolution" (Act, subsection 26(2)).

[68] Accordingly, I am of the view that the Applicant has not established that the approach adopted by the Tribunal to decide the Crown's application under section 17 is fundamentally flawed, either because it relies on reasoning that is not internally coherent or because it is unjustified in light of the applicable legal and factual constraints.

B. *The Tribunal's authority to consider specific claims under sections 14 and 15 of the Act*

[69] The Tribunal held that its jurisdiction to consider the validity of a claim was "wholly determined" by section 14 of the Act, but that section 15 "guide[d]" the application of section 14 "with specific examples of when a First Nation may not file a claim with the Tribunal": Decision at para. 17. After reviewing the purpose of the Act and of the Tribunal (Decision at para. 5), the Tribunal concluded that the Claim was not admissible under section 14 of the Act and that it was specifically excluded from the Tribunal's jurisdiction by paragraph 15(1)(*g*) of the Act: Decision at para. 17.

(1) Purpose of the Act and the Tribunal

[70] The Tribunal noted that it was established as an independent tribunal to resolve historical specific claims between First Nations and the Crown as part of the process of reconciliation and that its process was remedial. It also observed that the purpose of the Act was to provide First Nations with access to justice in resolving specific claims in a cost-effective and timely manner. Since a narrow and technical interpretation of the Act would, in its view, defeat this purpose, the Tribunal decided that the Act should be broadly and liberally interpreted: Decision at para. 5.

(2) Admissibility of the Claim under section 14 of the Act

[71] The Tribunal observed that the Applicant argued that the Claim came within the Tribunal's authority under paragraphs 14(1)(*a*) and (*c*) of the Act: Decision at para. 6.

[72] Paragraph 14(1)(*a*) allows the filing of claims seeking compensation for losses ensuing from "a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown." The Tribunal held that this language clearly directed "an analysis of whether a claimant had pled a failure by the Crown to provide land or assets under a treaty": Decision at para. 7.

[73] The Tribunal then examined the provisions of Treaty 6 by which the signatory First Nations ceded to the Crown their rights in a large tract of land and by which the Crown agreed to set aside reserves for their use. Significantly, it emphasized the provision of Treaty 6 which

guaranteed to signatory First Nations harvesting rights in the tract surrendered, subject to the right of the Crown to take up lands:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.
>
> [Decision at para. 10; Emphasis in the original.]

[74] The Tribunal held that, as framed by the Applicant, the Claim did not allege, in the words of paragraph 14(1)(*a*), a failure to *provide* lands to the Applicant under Treaty 6. Rather, in the Tribunal's view, it challenged the Crown's right to *take up* land surrendered under Treaty 6 upon which the Applicant retained harvesting rights for the Primrose Range without consultation or compensation. The Claim also sought compensation for the abrogation of harvesting rights by the NRTA, without consultation: Decision at para. 11. Accordingly, the Tribunal concluded, the Claim was grounded in the harvesting rights provision of Treaty 6.

[75] The Tribunal's characterization of the Claim as grounded in the Crown's abrogation of treaty harvesting rights is amply supported by the Declaration of Claim (at para. 68, Issue 1, para. 105, para. 112) and by the Applicant's arguments in its Memorandum of Fact and Law (at paras. 33, 52, 53, 79 and 90).

[76] Having determined that the Claim did not allege a failure to fulfill a legal obligation of the Crown to provide lands, the Tribunal focused its inquiry under paragraph 14(1)(*a*) on whether the Claim could involve the Crown's failure to fulfil a legal obligation to provide "other assets" under a treaty or another agreement between the First Nation and the Crown.

[77] Paragraph 14(1)(*c*) of the Act allows the filing of claims for compensation for losses arising from "a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian monies or other assets of the First Nation" [emphasis added]. As the parties had agreed that the Claim did not involve the Crown's "provision or non-provision of reserve lands" or its administration of reserve lands, the Tribunal focused on whether the Claim could involve a breach of a legal obligation arising from the Crown's administration of "other assets" of the First Nation: Decision at para. 12.

[78] The Applicant submitted that the term "other assets" in paragraphs 14(1)(*a*) and (*c*) was ambiguous and properly interpreted to include harvesting rights and trapping licenses as well as its claim concerning the taking up of lands for the Primrose Range. In particular, it argued that its treaty harvesting rights created a *sui generis* interest in land, analogous to a *profit à prendre*—a right at common law to take tangible items from land owned by another—and gave rise to tangible property.

[79] The Applicant claims that the Tribunal failed to consider its argument that because the right to harvest gave rise to tangible property, it constituted an asset for purposes of paragraphs

14(1)(*a*) and (*c*) of the Act which gave the Tribunal authority to consider the Claim. I disagree. The Tribunal grasped the Applicant's argument, summarizing it as follows: "the Claimant submits that because tangible property is gathered during the exercise of the harvesting right and then converted to cash or other tangible property, the right itself is an asset, as defined in the [Act]": Decision at para. 13.

[80] The Tribunal dismissed the argument, finding that it was not supported by the Act. It grounded its conclusion in three provisions of the Act: 1) section 2, which defines "asset" as "tangible property"; 2) paragraph 15(1)(*g*), which excludes claims "based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights" from the categories of claims over which the Tribunal has authority, defined in section 14; and 3) subsection 15(2), which provides that paragraph 15(1)(*g*) does not prevent the filing of a claim "based on a treaty right to lands or to assets to be used for activities, such as ammunition to be used for hunting or plows to be used for cultivation": Decision at para. 14.

[81] The Tribunal observed that the term "asset", defined in section 2 of the Act as "tangible property", was interpreted by the Tribunal in *Beardy's* at para. 295 to mean property that has physical form and characteristics, or things that can be seen or touched or that are otherwise perceptible to the senses: Decision at para. 14.

[82] In *Beardy's*, the Crown unsuccessfully sought to strike a claim arising out of its non-payment of Treaty 6 payments to members of the claimant First Nations on the ground that treaty annuities were not "assets" for purposes of paragraph 14(1)(*a*) of the Act, depriving the Tribunal

of jurisdiction. The Tribunal observed that, in *Beardy's*, treaty annuities were recognized as assets for several reasons (Decision at para. 15). First, they had the necessary physical existence (*Beardy's* at para. 294). Second, they would have been understood to be assets by the signatories of the treaty (*Beardy's* at para. 289). Finally, treaty annuity-related claims were not one of the categories of claims expressly excluded from the Tribunal's jurisdiction under section 15 of the Act (*Beardy's* at para. 406).

[83] The Tribunal observed that paragraph 15(1)(*g*) of the Act expressly excludes claims based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights: Decision at para. 15. It noted that subsection 15(2) of the Act "*saves* a claim related to treaty harvesting rights from being excluded if it were also a claim to treaty… *assets*" [italics added]. This, in the Tribunal's view, showed that the Act "preserves the jurisdiction of the Tribunal to hear a claim based on treaty rights to those *tangible* assets required to exercise the treaty harvesting rights, like ammunition and plows" [italics added]: Decision at para. 15.

[84] The Tribunal's reasons show that it recognized, through its analysis of paragraph 15(1)(*g*) and subsection 15(2), that the Act distinguishes between a claim based on a treaty right to an asset, like ammunition, which is an item of tangible property used to exercise a treaty harvesting right, and a claim limited to the treaty harvesting right itself: the former involves the provision or administration of an asset and, consistent with paragraphs 14(1)(*a*) or (*c*), may be considered by the Tribunal; the latter does not.

[85] When its reasons are read holistically and contextually (*Mason* at para. 61), it is apparent that the Tribunal did not fail to consider the Applicant's arguments. Rather, it dismissed the Applicant's argument that its treaty right to harvest constituted an "asset" as defined in the Act and interpreted in *Beardy's*, and that its Claim therefore fell within the Tribunal's authority under paragraphs 14(1)(*a*) and (*c*) of the Act. In my view, the Tribunal's reasoning follows a rational chain of analysis and is supported both by the statutory language and the Tribunal's jurisprudence and suffers from no flaws or shortcomings sufficiently central or significant to render the Decision unreasonable.

(3) Exclusion of the Claim under paragraph 15(1)(*g*) of the Act

[86] Paragraph 15(1)(*g*) excludes from the Tribunal's jurisdiction claims that are "based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights". The Tribunal held that the Claim challenged Canada's right to take up surrendered land for the Primrose Range, upon which the Claimant retained harvesting rights, and sought further compensation for the abrogation of treaty harvesting rights by the NRTA: Decision at para. 11. It decided that because the Applicant's alleged loss of the treaty right to harvest grounds its claim for compensation, the Claim "falls squarely within the clearly legislated exclusionary language of paragraph 15(1)(g)": Decision at para. 16.

[87] The Applicant submits that the Tribunal erred in finding that the Claim relates to a treaty right of an ongoing and variable nature and that it is thus excluded from its authority by paragraph 15(1)(*g*) of the Act. In the Applicant's view, the Claim is not founded on a treaty right

of an ongoing and variable nature, but on a breach of fiduciary duty for the *de facto* taking of treaty rights without consent or compensation. In other words, the Applicant argues, the Claim relates to the taking of its Treaty harvesting right. Because the right was abrogated by the NRTA in 1930 and by the creation of the Primrose Range in 1954, the Claim relates not to a right of an ongoing or variable nature, but to a historical grievance – precisely the type of claim that the Tribunal was intended to adjudicate.

[88] The Tribunal dismissed this argument, holding that "[t]he nature of the treaty right described in the [Act], however, relates to the character of harvesting rights": Decision at para. 16 [emphasis added]. Thus, according to the Tribunal, paragraph 15(1)(*g*) of the Act excludes claims based on treaty rights of a certain nature or character—those that relate to "activities of an ongoing and variable nature." Harvesting rights are deemed by paragraph 15(1)(*g*) to be treaty rights that share this character.

[89] The Tribunal's decision that the Applicant's claim is based on harvesting rights and, as such, falls within the scope of paragraph 15(1)(*g*) is supported by the text of this statutory provision. Paragraph 15(1)(*g*) excludes from the Tribunal's jurisdiction a claim that "is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights" [emphasis added]. The term "such as" is commonly used to introduce an example of the concept that precedes it. "Harvesting rights" are therefore introduced by paragraph 15(1)(*g*) or defined as an example of a treaty right related to activities of an ongoing and variable nature. As noted by the Tribunal, the text of paragraph 15(1)(*g*) indicates that Parliament has decided that "harvesting

rights" are related to activities of an ongoing and variable nature, and that claims that relate to harvesting and to other treaty rights that share this character fall within the exclusion.

[90] The Tribunal's view that the nature of the treaty rights precluded by paragraph 15(1)(*g*) from serving as the basis for a claim under the Act relates to the character of harvesting rights is also supported by the French-language version of the Act. Paragraph 15(1)(*g*) excludes from the Tribunal's jurisdiction claims based on "des droits conférés par traité relativement à des activités susceptibles d'être exercées de façon continue et variable, notamment des droits de récolte." The term "susceptible d'être" in this context means "can be" or "capable of being" (*Collins Robert French-English English-French Dictionary*, 2nd ed, *sub verbo* "susceptible"). A reading of paragraph 15(1)(*g*) as designating treaty rights related to activities that *can be* or that *are capable of being* exercised in an ongoing and variable manner—whether they are or not—is entirely compatible with the interpretation advanced by the Tribunal in its reasons.

[91] Accordingly, the text of paragraph 15(1)(*g*) supports the Tribunal's conclusion that the Claim falls clearly within the legislated exclusionary language of paragraph 15(1)(*g*) because it is based on harvesting rights, expressly identified in paragraph 15(1)(*g*) as rights relating to activities of a certain character—those capable of being exercised in an ongoing and variable manner.

[92] In addition to focusing on the text of paragraph 15(1)(*g*) and the statutory context, the Tribunal specifically referred to one element of the legislative history leading to the adoption of the Act which, in its view, supported its interpretation that "read together with the SCTA as a

whole, the intention is that claims based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights, are not eligible to be filed with the Tribunal": Decision at para. 5. In 2008, when Bill C-30 was introduced to Parliament, the Honourable Chuck Strahl, then Minister of Indian Affairs and Northern Development, made a statement to the Standing Committee on Aboriginal Affairs and Northern Development in which he addressed the exclusion in paragraph 15(1)(*g*). For completeness, I reproduce in its entirety the relevant excerpt from this statement:

> I would like to spend some time discussing the ineligibility of claims based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights, to be filed with the tribunal. Let me be clear: these kinds of claims are not being accepted for negotiations under the specific claims policy. The fact that the bill precludes the filing of these grievances as specific claims is not a narrowing of the application of the policy; rather, it's a necessary clarification.
>
> The specific claims policy was designed to deal with historic grievances, with a view to settling outstanding debts and obligations in a final manner. The specific claims process is simply not the appropriate forum to deal with the broader issues of ongoing treaty rights, which are part and parcel of our ongoing relationship with first nations. …
>
> [House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 39-2, No. 12 (6 February 2008) at 1545 (Hon. Chuck Strahl); Emphasis added.]

[93] For its part, the Tribunal noted that Minister Strahl had stated in evidence "that '[t]he specific claims process is simply not the appropriate forum to deal with the broader issues of ongoing treaty rights', and that these issues would be dealt with in other initiatives" [emphasis in the original]: Decision at para. 5. The Applicant, however, argued that Minister Strahl's statement—particularly those portions highlighted in the excerpt above—supported its argument

that the purpose of the exclusion in paragraph 15(1)(*g*) of the Act was to strengthen the distinction between historical and ongoing grievances, rather than to exclude historical claims involving treaty harvesting rights.

[94] As I have previously noted, in reviewing the reasonableness of the Tribunal's interpretation, I am not to ask myself how I would have analysed the question. To be reasonable, the Decision must disclose that the Tribunal interpreted the Act in a manner consistent with the "modern principle" of statutory interpretation, by reading the language chosen by Parliament in light of the purpose of the provision and the entire relevant context. To determine the purpose of the Act and of specific provisions, it was open to the Tribunal to have regard to intrinsic evidence, including purpose clauses and, more generally, the text, context and scheme of the Act, and to extrinsic evidence, such as legislative history, including the explanations provided by the Minister to the Standing Committee on Aboriginal Affairs and Northern Development: *R. v. Sharma*, 2022 SCC 39 at paras. 88–89, 486 D.L.R. (4th) 579 [*Sharma*]. While such explanations can provide authoritative statements regarding Parliamentary intent, extrinsic evidence should be used with caution, since "statements of purpose in the legislative record may be rhetorical and imprecise" and may be poor indicators of "the purpose of Parliament, being that of its collective membership expressed in its legislative act": *Sharma* at para. 89.

[95] The Tribunal was clearly aware of the Minister's remarks to the Committee, having cited them in part. It was also clearly aware of the Applicant's claim that the purpose of paragraph 15(1)(*g*) of the Act was to exclude only those claims that related to harvesting rights that were

ongoing, in the sense that they were still being exercised, and that the provision aimed to distinguish "historic" from "ongoing" grievances: Decision at para. 16.

[96] In interpreting the words of a statute, courts and tribunals should place upon them "the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction": *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at 1042, 140 N.R. 327. While they must give an enactment such fair, large and liberal construction and interpretation as best ensures the attainment of its objects, this does not give them "license to ignore the words of the Act…": *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at 371, 102 D.L.R. (4th) 665. As recently observed by the Supreme Court of Canada, the text of a statute "remains the anchor of the interpretive exercise":

> The text specifies, among other things, the means chosen by the legislature to achieve its purposes. These means "may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation" (M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 Alta. L. Rev. 919, at p. 927; see also pp. 930-31). In other words, they may "tell an interpreter just how far a legislature wanted to go in achieving some more abstract goal" (p. 927).
>
> [*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 24.]

[97] As the Decision makes plain, the Tribunal was of the view that the language of the statutory provisions that defined its jurisdiction were clear and unambiguous: Decision at paras. 5, 7 and 14. Where the words used in the statute are precise and unequivocal, "their ordinary meaning will usually play a more significant role in the interpretive exercise": *Vavilov* at para. 120, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10, [2005] 2 S.C.R.

601. The Tribunal was of the view that in light of the text, context and scheme of the legislation, paragraph 15(1)(*g*) did not lend itself to the interpretation proposed by the Applicant and purportedly supported by the Minister's remarks. Even if the Applicant was correct that its harvesting rights were no longer ongoing, the Claim was still based on treaty rights of a certain character—those related to activities capable of being exercised in an ongoing and variable manner. The Applicant has not convinced me that the Tribunal's conclusion on this question was unreasonable.

(4) The Tribunal's alleged failure to consider the evolution of the Specific Claims Policy and how the Claim fit within it

[98] The Applicant argues that the Tribunal's interpretation of the jurisdiction-conferring provisions of the Act is unreasonable because, contrary to the approach taken by the Tribunal in its earlier decision in *Beardy's*, it does not take into account the evolution of the Specific Claims Process and thus ignores part of the context relevant to a proper interpretation. It also submits that the Tribunal should have considered the history of the Claim and how it is situated in the Specific Claims Policy.

[99] To establish that the Tribunal's failure to consider these elements of context is "indefensible and unreasonable", the Applicant must convince this Court that the Tribunal may well have arrived at a different decision if it had considered them: *Vavilov* at para. 122. I am not convinced that this is the case.

[100] There are key differences between the Claim and the treaty annuities claim in *Beardy's*. In light of these differences, the Tribunal's failure to include in its reasons a detailed analysis of the evolution of the Specific Claims Process, as was done in *Beardy's*, does not render the Decision unreasonable.

[101] In *Beardy's,* the Crown had argued that the Act should be interpreted to exclude claims based on the Crown's failure to pay treaty annuities. Its argument focused on the definition of "asset" as "tangible property" in section 2 of the Act and on the language of paragraph 14(1)(*a*) of the Act:

> 14. (1) Subject to section 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> > (a) a failure to fulfil a legal obligation of the Crown to provide land or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> [Emphasis added.]

[102] The Crown argued that annuities did not qualify as "tangible property" and were therefore not "assets" under paragraph 14(1)(*a*). Moreover, it claimed that any losses resulting from the non-payment of annuities were losses not of the First Nation ("its losses") under paragraph 14(1)(*a*) but of its individual members.

[103] Significantly, the Crown argued that annuity claims had never come within the grounds for claims contemplated in *Outstanding Business* (*Beardy's* at para. 333). Accordingly, it claimed that a finding that the Tribunal had jurisdiction to entertain annuity claims would

produce inconsistency between the Act and the grounds for a specific claim under the Specific Claims Policy. To respond to the Crown's argument, the Tribunal decided to launch into an overview of the evolution of the Specific Claim Policy (*Beardy's* at para. 332).

[104] In its overview, the Tribunal concluded that:

1. *Outstanding Business* specifically referred to annuities as a feature of "the Western treaties" (*Beardy's* at para. 334).

2. A claim alleging failure to pay annuities fell "plainly" within the grounds recognized in *Outstanding Business* for a specific claim: "… claims by Indian Bands which disclose an outstanding 'lawful obligation'…" in circumstances of "[t]he non-fulfillment of a treaty or agreement between Indians and the Crown" (*Beardy's* at paras. 336 and 386).

3. *Justice at Last* affirmed that treaty breaches could be claimed by First Nations based on failure to uphold the treaty. It gave "no hint of an intention to make specific claims policy more restrictive than formerly" but instead promised "to remedy the shortcomings of the claims process and create an independent adjudicator" (*Beardy's* at para. 352). In particular, there was no hint in *Justice at Last* that annuity claims were to be excluded (*Beardy's* at para. 343).

4. Counsel for the AFN, which had worked with the Government of Canada on a legislative proposal introduced to Parliament as Bill C-30 and

culminating in the Act, testified that the "apparently innocuous changes to the definition of grounds for claims" were not understood as precluding claims related to annuities (*Beardy's* at para. 352). The Tribunal held that the AFN and its legal counsel "could not have divined" the purpose of these changes (*Beardy's* at para. 392).

5. The exclusion of treaty annuity claims, which could plainly be brought under *Outstanding Business*, would be a "significant if not fundamental change" contrary to the assertion, in the *2009 Policy*, that "the fundamental principles of the Specific Claims Policy as articulated in [*Outstanding Business*] have not changed" (*Beardy's* at paras. 348 and 360–362).

[105] The Tribunal concluded that acceding to the Crown's argument that the definition of assets as "tangible property" and the reference to "its losses" in paragraph 14(1)(*a*) of the Act meant that the grounds for claims did not include annuity claims would represent a significant change that was not supported by the evolution of the Specific Claims Policy and the circumstances surrounding the adoption of the Act:

> *Justice at Last* gave First Nations the assurance of improvements to the specific claims process and access to an independent tribunal. It was not intended that claims provided for by *Outstanding Business* would no longer be provided for in the revised *2009 Policy*, and hence the [Act]. (*Beardy's* at para. 389).

[106] The Tribunal ultimately did not accept the Crown's views on the interpretation of the definition of "assets" and of paragraph 14(1)(*a*) of the Act. It held that annuities, an annual

payment of cash, could in some circumstances be "tangible property," and thus fell within the statutory definition of "asset" (*Beardy's* at paras. 299-300). Similarly, it decided that the treaty promise to provide annuities "sustained the collective by providing cash… to each member" as partial consideration for the cession of a collective interest in land (*Beardy's* at para. 316). Accordingly, the failure to pay the required money to an entitled individual was a loss to the collective and thus represented a loss to the First Nation for which compensation could be sought under section 14(1) of the Act.

[107] The Tribunal held that the evidence canvassed in its review of the evolution of the Specific Claims Policy established "the factual setting" of the Act, which was a relevant consideration in interpreting a word or phrase in a statute:

> On a plain reading, the policy in effect when the Claim was presented to the Minister in 2001, *Outstanding Business*, allowed for annuity claims grounded in non-fulfilment of the terms of a treaty. The *2009 Policy* does not exclude annuity claims but rather provides for them on essentially the same ground, namely the failure of the Crown to provide assets under a treaty. To say otherwise is contrary to the assertion in the *2009 Policy* that there has been no fundamental change.
>
> The [Act] is the product of a collaboration between the federal government and the AFN. It was enacted to provide recourse for First Nations when a claim is not accepted for negotiation by the Minister. This is the factual setting for its enactment. My interpretation of the term "asset," defined as "tangible property" and the application in the present matter of the phrase "its losses," ensures the achievement of the enactment's purpose. (*Beardy's* at paras 398-399).

[108] In *Beardy's*, the Crown claimed that the appropriate remedy for the claimant would be a representative action brought on behalf of individual members of the First Nation who were denied payment of annuities. The Tribunal noted that such a claim would be statute barred, and that the Act, by barring defences based on the passage of time, affirmed Parliament's intention

that "there be a forum for the just redress of treaty breaches where there is no access to the courts" (*Beardy's* at para. 405). It rejected the Crown's argument in the following terms:

> If, due to limitations, the failure of the Crown to make treaty payments cannot be a ground for a claim due to the definition of "asset" as "tangible property," the Claimant would likewise have no remedy in the courts. The [Act] lists, in section 15(1), the categories of potential claims that may not be brought before the Tribunal. To create another exclusion based on the definition of "asset" in sub-section 14(1)(a) in the factual setting of its enactment is, to use an analogy, like entering a birthday party through the front door with a present, then sneaking in the back door to take the present back.
>
> This was manifestly not Parliament's intention. (*Beardy's* at paras. 406-407)

[109] In both *Beardy's* and the case at bar, the Crown argued that the subject matter of the claim was not an "asset" as defined in the Act and that, as a result, the claim fell outside the categories of permissible claims set out in section 14 of the Act. However, key differences in the foundation of the Crown's argument in each of these two cases explain why a detailed treatment by the Tribunal of the evolution of the Specific Claims Policy was necessary in *Beardy's* but not in the case at bar.

[110] In *Beardy's*, the Crown effectively sought to "create" a new exclusion to the claims that could be considered by the Tribunal. It sought to convince the Tribunal that an exclusion of annuity claims could be *inferred* from apparently "innocuous changes" to the definition of grounds for claims whose purpose "could not have been divined". It argued that the Act should be interpreted in a manner such as to exclude claims relating to treaty annuities because such claims had never been covered by the Specific Claims Policy throughout its evolution. The Tribunal had to engage in a detailed review of this evolution to refute the Crown's argument.

[111] In the case at bar, the Crown's primary argument, accepted by the Tribunal, is fundamentally different. The Crown does not seek to "create" a new, implied, exclusion. The grounds described in section 14 of the Act, on which specific claims for compensation may be brought for consideration by the Tribunal, are expressly made "subject to" the exceptions set out in section 15 of the Act. As noted by the Tribunal, the Crown relies on a specific provision in section 15 that *expressly* excludes from the Tribunal's jurisdiction claims based on harvesting rights and other treaty rights related to activities of an ongoing and variable nature: Decision at para. 15. The Crown's argument and the Tribunal's decision are based on express language included in a statute that, as noted by the Tribunal in *Beardy's* and confirmed in the Preamble to the Act, "is the product of a collaboration between the federal government and the AFN."

[112] In the face of such a specific exclusion, I am far from convinced that the failure of the Tribunal to include in its reasons an analysis of the evolution of the Specific Claims Policy that mirrors the analysis carried out in *Beardy's* is an omission central enough that it is clear the Tribunal "may well … have arrived at a different result" if it had considered this evolution, therefore rendering its omission "indefensible, and unreasonable in the circumstances" (*Vavilov* at para. 122). It would have been open for the Tribunal to hold that the general statement found in the *2009 Policy* to the effect that the fundamental principles of the Specific Claims Policy articulated in *Outstanding Business* have not changed or the conclusion in *Beardy's* that *Justice at Last* does not evince an intention to make the Specific Claims Policy more restrictive than formerly must give way to paragraph 15(1)(*g*), a specific, express statutory provision whose intent is plainly to exclude a category of treaty-based claims.

[113] Similarly, the Tribunal's failure to reflect, in its interpretative exercise, the Claim's history, including the ICC's 1995 decision to recommend that its claim with respect to lost commercial harvesting rights be accepted for negotiation under the Specific Claims Policy, does not cause me to lose confidence in the interpretation reached by the Tribunal. Unlike the ICC in 1995, the Tribunal had before it—and was required to give meaning to—the specific provisions of the Act that defined which claims it could consider, including paragraph 15(1)(*g*). In doing so, the Tribunal focused on what it considered to be the most salient aspects of the Act's text, context and purpose. The Applicant has not convinced me that, had it considered the history of the Claim as requested by the Applicant, the Tribunal may well have arrived at a different result. Accordingly, its failure to do so does not render the Decision unreasonable or indefensible: *Vavilov* at para. 122.

(5) Genuine ambiguity and the *Nowegijick* principle

[114] The Applicant claims that, contrary to the Tribunal's view, the language of the Act, including the reference in paragraph 15(1)(*g*) to activities of an "ongoing and variable nature" is not clear and unambiguous. In its view, the Tribunal should have resolved any ambiguity or doubt in the words of the Act in a manner that favours the Applicant, as required by the interpretive principle set out in *Nowegijick*. The Applicant submits that the Tribunal erred in applying instead the "narrow and technical legal standard of 'genuine ambiguity'".

[115] This submission is without merit. The Tribunal, relying on the decision of the Saskatchewan Court of Appeal in *George Gordon First Nation v. Saskatchewan*, 2022 SKCA 41

at paras. 53-54, 2022 CarswellSask 136 [*George Gordon*], held that the *Nowegijick* principle did not apply to the interpretation of legislation absent genuine ambiguity: Decision at para. 7. Its conclusion finds support in the decisions of the Supreme Court in *R. v. Blais*, 2003 SCC 44 at paras. 37–38, [2003] 2 S.C.R. 236 cited in *George Gordon*, and in *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 at para. 68, 3 S.C.R. 746 [*Osoyoos*]. There, a majority of the Court described the *Nowegijick* principle as follows:

> …[I]f two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application that impairs the Indian interests as little as possible should be preferred, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment: see *Nowegijick*, *supra*; *Mitchell*, *supra*; *Semiahmoo Indian Band*, *supra*, per Isaac C.J., at p. 25; and *Sparrow*, *supra*, at p. 1119, per Dickson C.J.
>
> [Emphasis added.]

[116] The Tribunal's approach is also supported by the recent decision of this Court in *Little Black Bear First Nation v. Kawacatoose First Nation*, 2024 FCA 119 at para. 80, leave to appeal to SCC pending, Court File 41458, 2024 CarswellNat 5015, which upheld as reasonable the Tribunal's interpretation of an Order in Council creating a fishing reserve under Treaty 4, including its finding that, in the absence of genuine ambiguity, the *Nowegijick* principle had no application. After pointing to the passage from *Osoyoos* cited above, this Court noted that the Supreme Court of Canada had confirmed that courts need resort to external interpretive aids, like the principle of strict construction of penal laws or the presumption of conformity with the *Canadian Charter of Rights and Freedoms*, only where a provision gives rise to a genuine or real ambiguity. This will occur if "its words can reasonably be interpreted in more than one way after

due consideration of the context in which they appear and of the purpose of the provision" or, in other words, "if differing readings of the same provision cannot be decisively resolved" through the modern approach to statutory interpretation: *LaPresse inc. v. Quebec*, 2023 SCC 22 at para. 24, 485 D.L.R. (4th) 652. The Tribunal found no genuine ambiguity in the jurisdiction-conferring provisions of the Act. The Applicant has not established that this conclusion was unreasonable.

(6) The Tribunal's treatment of subsection 20(2)

[117] The Applicant submits that the Tribunal misstated its position on the role of subsection 20(2) of the Act. The Applicant states that it had not claimed that this provision was "sufficient to establish the Tribunal's jurisdiction," but had argued that "[s]ection 20(2) acknowledges that losses accruing on Treaty lands—such as those that would arise from harvesting rights on Treaty lands—and which bear some similarity with the common law *profit à prendre*, are compensable, and thus fall within the scope of a specific claim." The Applicant agrees with the Tribunal that section 14 sets out the grounds on which specific claims may be based, subject to the exceptions defined in section 15. It claims that the Tribunal's incorrect understanding of its position regarding subsection 20(2) "affected its analysis" and led it to "incorrectly interpreting" section 14 of the Act.

[118] The Applicant has not demonstrated how this alleged mischaracterization of its position on subsection 20(2) had any incidence on the Tribunal's interpretation of sections 14 and 15 of

the Act as described earlier in these reasons. Accordingly, I am not satisfied that it is sufficiently central or significant to render the Decision unreasonable: *Vavilov* at para. 100.

C. *The Tribunal's comments on the litigation before the Saskatchewan Court of King's Bench*

[119] The Tribunal stated at the outset of its reasons that actions essentially covering the substance of the Claim had been filed before the Saskatchewan Court of King's Bench. It noted that in one of these actions, the Crown had not pled a jurisdictional defence or limitation period and observed that it would be disappointing, given its stated commitment to reconciliation, for Canada to rely on a limitation defence in response to the second action.

[120] The Applicant argues that these actions are not identical to the Claim, that they are protective measures, that they are in abeyance until the Claim can be addressed on the merits by the Tribunal as provided in paragraph 15(3)(*c*) of the Act, that they are irrelevant to the question before the Tribunal and that the Tribunal erred in declining to exercise its jurisdiction because a litigation option in the courts was available to the Applicant.

[121] This argument is without merit. In its reasons, the Tribunal clearly based its decision that the Claim fell outside of its jurisdiction on its interpretation of paragraphs 14(1)(*a*), 14(1)(*c*) and 15(1)(*g*) of the Act. On a fair reading of the Tribunal's reasons, its comments on the King's Bench litigation had no bearing on this analysis. They are properly characterized as an *obiter* expression of the Tribunal's hope and expectation that the Crown will not plead defences in these actions that will preclude adjudication on the merits of the claims made therein.

[122] The Applicant also argued that these comments establish that the Tribunal is biased in favour of the Crown. An allegation of actual bias against a tribunal challenges the integrity of the tribunal and the member who participated in the impugned decision; it is a serious allegation that cannot be brought lightly: *Arthur v. Canada (Attorney General)*, 2001 FCA 223 at para. 8, 283 N.R. 346. In my view, the Tribunal's comments come nowhere close to satisfying the test for actual or apparent bias: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at 394, 68 DLR (3d) 716. This allegation should not have been made.

D. *Conclusion*

[123] The Claim challenges and seeks compensation for the Crown's taking of the Applicant's Treaty right to earn a livelihood through hunting, fishing and trapping. In its motion to strike, the Respondent argued that the Claim should be struck because it was, on its face, not admissible under sections 14 to 16 of the Act. The Applicant responded that the Claim was admissible as a claim for compensation for losses arising either from "a failure to fulfil a legal obligation of the Crown to provide… other assets under Treaty or another agreement between the First Nation and the Crown" under paragraph 14(1)(*a*) or "a breach of a legal obligation arising from the Crown's… administration of… other assets of the First Nation" under paragraph 14(1)(*c*) of the Act.

[124] The Tribunal's task was to interpret the jurisdiction-conferring provisions of the Act, including paragraphs 14(1)(*a*), 14(1)(*c*) and 15(1)(*g*), in a manner consistent with their text, context and purpose: *Vavilov* at para. 121. The Tribunal decided that the Claim challenged the

taking up of surrendered land upon which the Applicant exercised harvesting rights and the abrogation, through the NRTA, of the Applicant's harvesting rights. It held that, fairly characterized, the Claim was based on treaty harvesting rights.

[125] The Tribunal found that a harvesting right was not itself an asset because assets are defined in section 2 of the Act as "tangible property", previously interpreted by the Tribunal as something "that can be seen or touched" or that is "otherwise perceptible to the senses." It found that its view that harvesting rights themselves are not assets under paragraphs 14(1)(*a*) or (*c*) of the Act is consistent with an interpretation of paragraph 15(1)(*g*) of the Act that expressly excludes claims relating to harvesting rights from the Tribunal's jurisdiction, and is confirmed by subsection 15(2) of the Act, which "saves" from exclusion under paragraph 15(1)(*g*) those claims that *do* involve assets such as ammunition, plows and other tangible property used in harvesting and cultivation.

[126] While the Tribunal acknowledged the Act's purpose of empowering it to "resolve historical specific claims between First Nations and the Crown as part of the process of reconciliation" and the need to interpret its provisions broadly and liberally, it concluded that, in light of its analysis of the text and context of the Act's jurisdiction-conferring provisions, it was plain and obvious that it had no authority to adjudicate the Claim on its merits.

[127] The Tribunal's reasons reveal a rational chain of analysis, based on the text, context and scheme of the Act and on its prior decisions which led it to conclude that Parliament intended to exclude from its jurisdiction claims based on treaty harvesting rights. In light of this analysis, I

am not persuaded that, had the Tribunal incorporated into the Decision the detailed review of the evolution of the Specific Claims Policy and of the history of the Claim that the Applicant had requested, it may have arrived at a different result. More generally, the Applicant has not established that the Tribunal failed to consider a key element of the text, context or purpose of the Act and its jurisdiction-conferring provisions, which, had it been considered, would have brought the Tribunal to a different result: *Vavilov* at para. 122. As a result, I am of the opinion that the Decision is reasonable and that this application for judicial review should be dismissed.

VIII. COSTS

[128] The parties advised the Court at the hearing that they had not come to an agreement on costs and, at the Court's invitation, filed submissions on costs after the hearing.

[129] Since I would dismiss the application for judicial review, it follows that no costs should be awarded to the Applicant. The question remains, however, as to what, if any, costs should be awarded to the Respondent.

[130] The Respondent argues that costs for the successful party should be awarded in the range of $10,000 to $18,000. It acknowledges that the issues in this application were important, but argues they were nonetheless of an average or usual complexity.

[131] The Applicant argues that the Claim and this application for judicial review represent "a 'test case' regarding the Crown's unlawful conduct in expropriating Treaty commercial rights to

hunt, fish and trap without compensation" whose importance extends beyond the interests to the parties to the litigation. It claims that it has not engaged in vexatious, frivolous or abusive conduct and that the Crown has superior capacity to bear the costs of the proceeding. Accordingly, the Applicant submits that, according to the factors set out by the Federal Court in *Doherty v. Canada (Attorney General)*, 2021 FC 695 at para. 8, 2021 CarswellNat 3124 [*Doherty*], the Court should find that it is a public interest litigant and that no costs should be awarded against it.

[132] I do not agree with the Applicant that it is a public interest litigant. One of the indicia listed by the Federal Court in *Doherty* to identify public interest litigants is that "[t]he party requesting relief has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if they have an interest, it clearly does not justify the proceeding economically": *Doherty* at para. 8. That indicium is clearly not met in this case. As observed by the Supreme Court in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 76, [2003] 3 S.C.R. 263:

> It is difficult to regard the plaintiff who is seeking several million dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation.

[133] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 establishes the basic principle that costs are at the complete discretion of this Court as to issues of entitlement, amount and allocation and are, in that sense, "quintessentially discretionary": *Haynes v. Canada (Attorney General)*, 2023 FCA 244 at para. 13, [2023] F.C.J. No. 2289 (Q.L.), citing *Canada (Attorney*

General) v. Rapiscan Systems Inc., 2015 FCA 97 at para. 10, [2015] F.C.J. No. 511 (Q.L.), and *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 126, [2009] 2 S.C.R. 678.

[134] For the following reasons, I would exercise my discretion to depart from the general rule that the successful party is entitled to costs.

[135] The Applicant has been advancing its claim for compensation for the abrogation of its treaty harvesting rights, in one form or another, since 1975. In the half century since the Applicant first filed a claim with the federal government's Office of Native Claims, the federal government has declined to negotiate the Claim and the Applicant has been unable to secure a final adjudication of the merits of the Claim by an independent tribunal.

[136] In 2007, the Minister of Indian Affairs and Northern Development and the National Chief of the AFN concluded a Political Agreement on specific claims reform. It accompanied the draft bill that was jointly developed by the federal government and the AFN and introduced into Parliament as Bill C-30, culminating in the Act. In the Political Agreement, the parties agreed that it was "a legal and moral imperative… to address the Specific Land Claims in a just and timely manner." Indeed, the Preamble of the Act recognizes that "resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations." The parties also specifically contemplated that there would be claims excluded by the statutory claim limit of $150 million "or other provisions" of the Act, and expressed their commitment to work in partnership to address these matters and develop "approaches to claims that are outside the specific claims policy and the scope of the [Act]":

House of Commons, Standing Committee on Aboriginal Affirs and Norther Development, Evidence, *Evidence,* 39-2, No 12 (6 February 2008) at 15:45 (Chuck Strahl, introduction of Bill C-30).

[137] In light of the Applicant's longstanding claims and the fact that they are still awaiting resolution close to 18 years following the Political Agreement and the introduction to Parliament of Bill C-30, the Applicant cannot be faulted for filing the Claim and seeking access to a specialized tribunal designed to adjudicate specific claims in a just and timely manner. Nor can the Applicant be faulted for seeking judicial review of a decision by the Tribunal on the scope of its jurisdiction under the Act which would deny the Applicant access to this mechanism, particularly since, to the Court's knowledge, this was the first time the Tribunal was called on to interpret the scope of paragraph 15(1)(*g*) of the Act.

[138] For these reasons, I conclude that it would be fair and appropriate not to order costs against the Applicant in the circumstances of this case.

[139] I am aware that the Tribunal's decision to strike the Claim as falling outside its jurisdiction deprives the Applicant of recourse to an adjudication of the Claim before the Tribunal. The Applicant submits that it filed the Claim with the Tribunal after the Crown failed to act on its promise, made when it refused to file the Claim with the Minister, to seek other venues to address the issues raised therein. The Applicant could seek adjudication of the issues raised in the Claim by reviving the actions filed in the Saskatchewan Court of King's Bench in 1999 and 2007. In my view, a course of conduct by the Crown that would seek to deprive the

Applicant of access to the final adjudication of the issues raised by the Claim would be inconsistent with the solemn commitments expressed by the parties in the Political Agreement and with the goal of reconciliation between First Nations and the Crown that animates both that agreement and the Act.

[140] I would dismiss the application for judicial review, without costs.

"Gerald Heckman"
J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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