

CANADA / JUDGMENT

West Moberly First Nations v. British Columbia

2020 BCCA 138

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 138 West Moberly First Nations v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

West Moberly First Nations v. British Columbia,

2020 BCCA 138

Date: 20200519

Docket: CA44849

Between:

West Moberly First Nations, Halfway River First Nation,

Saulteau First Nations, Prophet River First Nation,

and Doig River First Nation

Respondents

(Plaintiffs and Defendants by Counterclaim)

And

Her Majesty the Queen in Right of British Columbia

Appellant

(Defendant)

And

The Attorney General of Canada, The Kaska Dena Council,

and the McLeod Lake Indian Band

Respondents

(Defendants)

And

Tahltan Central Government, Tsay Keh Dene First Nation,

Takla Lake First Nation and Nak'azdli First Nation

Intervenors

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated

September 25, 2017 (West Moberly First Nations v. British Columbia,

2017 BCSC 1700, Victoria Registry 05-3802).

Counsel for the Appellant:

P.E. Yearwood

J. Oliphant

Counsel for the Respondent,

Treaty 8 First Nations:

C. Devlin

A. Rana

Counsel for the Respondent,

Attorney General of Canada:

J. Hoffman

W. Watson

Counsel for the Respondent,

Kaska Dena Council:

S. Walsh

Counsel for the Respondent,

McLeod Lake Indian Band:

M.L. Pflueger

Counsel for the Intervenor,

Tahltan Central Government:

T.J. Howard

Counsel for the Intervenor,

Tsay Keh Dene First Nation:

R. Kyle

V. Mathers

Counsel for the Intervenor,

Takla Lake First Nation:

E. Murphy

M. Boulton

Counsel for the Intervenor,

Nak'azdli First Nation:

K. Williams

J. Huberman

Further Submissions received from

Department of Justice:

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West Moberly First Nation:

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May 19, 2020

Dissenting Reasons by:

The Honourable Madam Justice D. Smith

Written Reasons by:

The Honourable Chief Justice Bauman (page 95, para. 291)

Concurred in by:

The Honourable Mr. Justice Goepel

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Summary: The parties dispute the meaning of a provision of Treaty 8 describing a tract of land with a western boundary along the "central range of the Rocky Mountains". The trial judge concluded this clause referred to the Arctic-Pacific Divide, which is located within the Rocky Mountains up until the 54th parallel north, then diverges west. The appellant submits (i) declaratory relief was unavailable in the circumstances and (ii) the judge erred in his interpretation of the relevant provision.

Dissenting (per Justice Smith): No declaration was available in the circumstances of this case; in the alternative, the only declaration available was one stating the relevant provision refers to the watershed of the Rocky Mountains, which falls east of the Arctic-Pacific Divide north of 54°. Declarations must affect a legal right. In this case, the judge expressly declined to make any findings on the relationship between the relevant provision and the parties' rights under the treaty, and it is unclear from the text of the treaty alone that any rights are tied to the provision. Consequently, the declaration should not have been granted. Alternatively, if a declaration was available, the trial judge erred and a declaration should be issued that the entirety of the boundary falls within the Rocky Mountains. The judge failed to apply the principles of treaty interpretation and made palpable and overriding factual errors. In view of the mainly documentary record and the length of time that has already passed in attempting to resolve this dispute, it is appropriate for this Court to reassess the evidence and substitute its own declaration as requested by the parties. That reassessment shows the only possible interpretation of the provision is that the western boundary of the tract is the line of watershed in the Rocky Mountains.

Majority (per Chief Justice Bauman, Justice Goepel concurring): The declaration is upheld. The trial judge did not err in determining a declaration was available, or that the disputed provision was intended to refer to the Arctic-Pacific Divide. The requested declaration clarifies legal rights and obligations and the trial judge had discretion to issue it. The law of declaratory relief does not require the parties to litigate the effects of a declaration in order for said declaration to be available, nor would such a requirement be advisable. Further, the trial judge made no reversible error in his analysis of the relevant provision. He cited and applied the relevant law correctly and his inferences were supported by the extensive factual record. This Court should not interfere with the conclusions he reached from his vantage point at trial.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

I. OVERVIEW

- [1] Between 1871 and 1921, the Dominion of Canada ("Canada") entered into 11 "numbered treaties" with Indigenous groups throughout the country. This appeal concerns Treaty 8 (the "Treaty"), which was signed on June 21, 1899, at Lesser Slave Lake in the District of Athabasca. The District of Athabasca encompassed what is now northern Alberta and northwestern Saskatchewan.
- [2] The text of the Treaty as recorded by Canada includes a "metes and bounds" clause that describes a tract of land (the "tract"). The tract included areas that in 1899 were the District of Athabasca, a southern region of the Northwest Territories, and a northeastern region of British Columbia. The Treaty defined the western boundary of the tract in British Columbia as "the central range of the Rocky Mountains ... to the point where it intersects the 60th parallel of north latitude."
- [3] What the original signatories to the Treaty meant by the phrase "the central range of the Rocky Mountains" has been a vexing issue for over 100 years. In the underlying litigation, the plaintiffs (respondents on appeal) represent descendants of Indigenous groups who signed adhesion agreements with Canada or individuals who were added to the rolls of the Treaty. The plaintiffs applied for a declaration that the western boundary of the tract described in the Treaty referred to the height of land (the "Arctic-Pacific Divide" or "APD") along the continental divide between the Arctic and Pacific watersheds (the "wider boundary"), and named Canada and the Province of British Columbia (the "Province") as defendants. Canada assented to the plaintiffs' position. McLeod Lake Indian Band ("McLeod Lake"), added later as a defendant, also assented to the plaintiffs' position.
- [4] The Province took a contrary position. In a counterclaim, it applied for a declaration that the phrase "central range of the Rocky Mountains" referred to the line of watershed within the Rocky Mountains as those mountains were understood to be situated in 1899 (the "narrow boundary"). Kaska Dena Council ("Kaska Dena"), also later joined as a defendant, filed a counterclaim in which they applied for a declaration similar to that proposed by the Province.

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- [5] Approximately 48,000 square miles lie between the wider boundary and the narrow boundary (the "disputed territory").
- [6] Three First Nations that live within the disputed territory were granted intervenor status in the proceeding and made submissions in favour of the narrow boundary.
- [7] At the conclusion of the trial, the judge granted the declaration requested by the plaintiffs and ordered that "[t]he western boundary of Treaty No. 8 is declared to be the height of land along the continental divide between the Arctic and Pacific watersheds." The Province appeals the order. It is supported in its appeal by the Kaska Dena, four intervenor First Nations who live in the disputed territory, and McLeod Lake, which has reversed its position on appeal.
- [8] For the reasons below, in my view, the judge erred in law in granting the declaration. A declaration must confirm or deny a legal right. The declaration granted does not do so. Nor, in my view, can this Court remedy the judge's error by replacing his declaration with one that clarifies the parties' rights; the interaction of the metes and bounds provision with the rights guaranteed by the Treaty was not litigated below and therefore is not before this Court.
- [9] Accordingly, I would allow the appeal and quash the order.
- [10] In the alternative, if I am wrong and the declaration could have been granted, in my view, the judge erred in law by failing to apply the principles of treaty interpretation summarized at paras. 78-83 of *R. v. Marshall*, [1999] 3 S.C.R. 456. That error led him to overlook evidence that was relevant to the interpretive task before him.
- [11] I am also of the view the judge erred in fact by ignoring material evidence and by relying on irrelevant evidence and unreasonable inferences. Cumulatively, those errors led him to palpable and overriding error in finding that Canada's intention was to treat within the wider boundary. In my view, the only declaration available on the record and the judge's findings was that the common intention behind the words "central range of the Rocky Mountains" was to define the tract as ending at the narrow boundary.
- [12] If a declaration was available in the circumstances of this case, I would allow the appeal, set aside the declaration granted, and substitute an order for a declaration in favour of the narrow boundary.
- [13] In addressing these issues, I will first characterize the order under appeal, then review some of the relevant procedural history that has shaped this litigation, and thereafter explain why the granting of the declaration was, in my view, an error of law. I will then explain why, in the event that a declaration could have been granted, the judge erred in granting the declaration in favour of the wider boundary.
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- [14] Attached as Appendix A to these reasons is the full text of the Treaty. Attached as Appendices B-I are a set of maps referred to in these reasons. Most of the maps were entered as evidence at trial. The map in Appendix D was attached to Kaska Dena's pleadings and is included for illustrative purposes only.

II. BACKGROUND

- [15] Canada first considered making a treaty north of Treaties 6 and 7 in the early 1890s. In 1891, the Department of Indian Affairs proposed treating in the District of Athabasca and a section of the southern Northwest Territories. No area in British Columbia was included. Canada rejected this proposal because it was "unnecessary until settlement of the territory appeared imminent".
- [16] Prompted in part by the Klondike Gold Rush, Canada again considered forming a treaty north of Treaties 6 and 7 in 1898. By Order in Council ("OIC") 1703 of June 27, 1898, Canada authorized three Commissioners--David Laird, James McKenna, and James Ross (the "Treaty Commissioners")--to conclude a new treaty in that area and invested them with a broad discretion to set some of the terms. One of those terms was the fixing of the tract of land that would be ceded. This time, some of the land that Canada proposed to be included in the tract was in British Columbia.
- [17] Canada had a long-running dispute with the Province over the making of reserves and the surrender of Aboriginal title. The Province did not agree with granting provincial reserve land in the size proposed by Canada and it did not recognize Aboriginal title. This made it difficult for Canada to obtain the Province's agreement with terms of the proposed treaty. Eventually, this led to the Province allocating a block of land in the Peace River District to Canada as part of its constitutional obligation under The Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5, and Article 13 of the British Columbia Terms of Union Act (U.K.), 1871, reprinted in R.S.C. 1985, App. II, No. 10 [Terms of Union] in exchange for the building of the transnational railroad in the Province. This became known as the Peace River Block, where federal reserve lands could be allotted.
- [18] On December 6, 1898, by OIC 2749, Canada informed the Province of its intention to treat with respect to land in the Province. Attached to OIC 2749 was a map, a portion of which may be found at Appendix C (the "OIC 2749 map"). In June 1889, the Treaty Commissioners sent out notices to Indigenous groups advising them of dates and locations where the Commissioners would meet with them in the summer of 1899. None of the meeting places were west (or north) of Fort St. John.

- [19] The Treaty Commissioners met with the Cree at Lesser Slave Lake on June 20, 1899. The Treaty was finalized the following day. Subsequent meetings with Indigenous groups at a number of locations east of the Rocky Mountains involved one or more of the Treaty Commissioners taking adhesions to the Treaty. Upon their return, the Treaty Commissioners prepared a September 22, 1899 report on the Treaty with an attached map. That map has been lost to time. On February 20, 1900, the Treaty was ratified by OIC 363.
- [20] Canada ceased to take adhesions for some years thereafter during which period it did not treat with any Indigenous groups west or north of Fort St. John. In 1909, prompted in part by conflicts that were occurring in the area of Fort Nelson, which is some distance north of Fort St. John, Canada appointed Henry Conroy to travel to Fort Nelson and take additional adhesions from Indigenous groups in that area. They included Slave and Sekani peoples.
- [21] From Canada's perspective, an adhesion agreement was all that was necessary to obtain the surrender of Aboriginal title to the land held by the Indigenous signatories. Once an Indigenous group had adhered to the treaty, further members of the group could be added to the rolls of persons to whom treaty payments would be made. A number of Indigenous people were added to the rolls at Hudson's Hope (west of Fort St. John but east of the Rocky Mountains) in 1914. They were the antecedents of some of the plaintiffs in the underlying action.

III. ORDER UNDER APPEAL

- [22] The order under appeal was made on September 25, 2017, and provides:
1. The western boundary of Treaty No. 8 is declared to be the height of land along the continental divide between the Arctic and Pacific watersheds.
- [23] The order declares the location of the western boundary established in the metes and bounds clause. It does not interpret the rights and obligations of the parties to the Treaty and has no immediate effect on the substantive rights of the plaintiffs under the Treaty.
- [24] The trial judge was also the case management judge. On August 31, 2007, he made an interlocutory order in which he held that the final order would be in rem. I shall review this ruling below. Given its prospective nature, this aspect of the August 31, 2007 order is embedded in the final order. The declaration under appeal, therefore, is an order in rem.

IV. PROCEDURAL HISTORY

- [25] The procedural history of the underlying litigation is lengthy and complex. It is necessary to review some of those proceedings and pre-trial rulings in order to understand how they have shaped the manner in which the litigation has gone forward.

A. The Parties

- [26] In 2005, the West Moberly First Nations, Halfway River First Nation, Saulteau First Nations, Prophet River First Nation and Doig River First Nation commenced the underlying litigation. They are the respondents on appeal, and are referred to collectively as the "respondent First Nations" throughout these reasons. The Fort Nelson First Nation was one of the original plaintiffs but withdrew from the action on June 11, 2009.
- [27] The West Moberly First Nations and Halfway River First Nation are descendants of the Hudson Hope Beaver Band, which adhered to the Treaty in 1914 and divided into the West Moberly and Halfway River First Nations in 1976. The Prophet River First Nation and Fort Nelson First Nation are descendants of those who adhered to the Treaty at Fort Nelson in 1910. Prophet River First Nation separated from the Fort Nelson First Nation in 1974. The Saulteau First Nations entered into the treaty in 1913, when a reserve was set aside for them in the Peace River Block at the east end of Moberly Lake, almost due south of Hudson's Hope. The Doig River First Nation is the immediate successor of the Fort St. John Beaver Band that adhered to the Treaty in 1900. The Fort St. John Beaver Band divided into the Doig River First Nation and the Blueberry River First Nation in 1977.
- [28] The respondent First Nations subsequently amended their statement of claim to also plead a claim of proprietary estoppel by acquiescence against the Province. That claim was settled before trial.
- [29] The interest of the respondent First Nations in obtaining the declaration granted stems from their position that the Treaty gives them hunting, trapping and fishing rights (collectively, "harvesting rights") throughout the tract defined in the metes and bounds clause. However, whether the Treaty gives them such rights throughout the tract was not the subject matter of the litigation at trial. While Canada assented to the position of the respondent First Nations that the wider boundary was the location of the western boundary, it has remained silent on the issue of whether the harvesting rights of the respondent First Nations extend to the wider boundary except to say that it is "managing" the issue.
- [30] The Province filed a counterclaim requesting "a declaration that the location of the western boundary of the tract described in Treaty No. 8 is to be interpreted as the central range within the Rocky Mountains, that is, the line of the watershed of the Rocky Mountains where the water flows on one side to the east and on the other to the west".
- [31] The Kaska Dena inhabit territory that lies west of the Rocky Mountains in the disputed territory. The ancestors of the Kaska Dena did not adhere to the Treaty or sign the Treaty rolls. In 2006, the Kaska Dena was added as a defendant to the action. They too filed a counterclaim asking, inter alia, for a declaration that the western boundary of the tract of land described in Treaty No. 8 is located along the central range or main chain of the Rocky Mountains or, in the alternative, the declaration sought by the Province. The difference between the two positions is shown in Appendix D.

B. The Pre-Trial Rulings

- [32] The judge made a number of pre-trial rulings, most of which were not appealed. Of note are two rulings that impacted the final order: *Willson v. British Columbia (Attorney General)*, 2007 BCSC 1324 (Willson #5); and *Willson v. British Columbia*, 2012 BCSC 1256 (Willson #7). The former determined that the declaration, if granted, would be one of fact and in rem. The latter dismissed motions to strike the Notice of Claim that alleged the declaration related to a dispute that was merely hypothetical.
- [33] The issue of the nature of the declaration being requested was first raised in *Willson et al v. British Columbia*, 2007 BCSC 342 (Willson #3). The action had been commenced as a purported representative action by the Chiefs of the six original plaintiff bands on behalf of all "beneficiaries of Treaty 8". The plaintiffs proposed to change the representative nature of the proceeding so that the Chiefs would be acting only on behalf of their own First Nations. The judge requested submissions from the parties on the issue of whether he should make a declaration "fixing a boundary of a treaty area" that may "affect rights or interests of all those bound by the treaty" without granting "an opportunity for all those whose rights or interests might be affected to take part in the action", or whether he should instead make a declaration that would bind only the parties (at paras. 9, 11).
- [34] After receiving submissions, in *Willson #5* the judge considered how he could avoid re-litigation of the boundary issue by non-parties and their privies. He began by considering the nature of the declaration requested:
- [35] Assuming that this case will result in a declaration fixing the location of the western boundary of Treaty 8, it is not so clear to me that such a declaration will amount to a statement of legal principle that would stand unless or until reversed by a higher court. Rather, it would seem that the application of legal principles would, in this case, result in a finding of fact as to where the parties in 1899 intended or understood the western boundary of the area covered by Treaty 8 to be located. Such a finding would be binding on the parties to this action, of course, but would not prevent any of the other 33 signatories or adherents to Treaty 8 from arguing in fresh proceedings for a different interpretation of the western boundary on their own evidence and argument.
- [36] The judge then turned to a consideration of the principles of *res judicata*, *stare decisis* and the effect of granting the final order in rem rather than in personam.
- [37] First, the judge concluded that *res judicata* would bind only the parties and their privies. However, he found that the non-party signatories and adherents to the Treaty (an additional 33 bands) would be such privies. He also found it would be manifestly unfair to these parties to have a final declaration made without an opportunity to intervene. He proposed to give them notice following which the parties could decide if they wanted to apply to join the action. The judge was satisfied that, even if all the non-party Indigenous groups chose to participate in the action, the action would still be justiciable. However, if they chose not to join the action, in his view they would be bound by the declaration. Nonetheless, the judge

proceeded to consider the impact of stare decisis and of making an order in rem instead of in personam.

- [37] The fact that a privy has received notice of the original proceeding does not appear to be a factor in the Supreme Court of Canada's articulation of the test for issue estoppel in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at 254; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25; or *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 27. Without deciding that issue in the absence of submissions, it will suffice to observe that the judge's analysis on this point appears to depart from the noted jurisprudence.
- [38] Second, the judge concluded that stare decisis would not be effective to bind non-parties to the litigation. Stare decisis is a principle that requires courts to follow the legal principles set out in previous decisions relating to the same issue to ensure consistency. However, because the requested declaration was one of fact, not one of law, stare decisis was not applicable in this case.
- [39] Third, the judge determined that the declaration would "result in a decision in rem, good against all persons, whether or not parties to the action" (at para. 43). He did so over the objections of the respondent First Nations and Canada. They submitted that the action sought equitable relief and therefore had to be in personam. The judge rejected their submission. It is unclear from his reasons whether he did so because he found that granting the declaration would not be an exercise of equitable jurisdiction, or whether he found that an equitable declaration could be granted in rem.
- [40] In the August 31, 2007 interlocutory order from Willson #5, the judge directed the respondent First Nations to notify each of the non-party signatories and adherents that the declaration sought in the action, if granted, would be in rem and would be binding on them.
- [41] The judge also directed that notice need not be given "to any who hold or claim to hold other interests in the area between the disputed western boundaries" on the basis that this would make the action non-justiciable (at para. 66).
- [42] The order directed that the respondent First Nations give notice of the litigation to the signatories and adherents to Treaty 8. The order prescribed the terms of the notice, which included that each recipient "will be bound by the declarations sought in the Legal Proceeding, either as privies to the existing Plaintiffs or because the decision will be in rem". This order was not appealed.
- [43] Given the prospective nature of the term of the order in Willson #5, the final order declaring the western boundary of the tract as the wider boundary is in rem (notwithstanding the fact that it does not expressly indicate that to be the case).

- [44] In Willson #7, the Province and McLeod Lake applied separately to strike the claim. They argued that a declaration was not available because the pleadings did not disclose a real dispute, in the sense of an infringement of or threat to the plaintiffs' rights under the Treaty, and the declaration would not serve a useful purpose.
- [45] The judge rejected these submissions. He found there was a real dispute between the parties on the location of the western boundary. The judge cited *Solosky v. The Queen*, [1980] 1 S.C.R. 821, in which the Court imposed a two-stage test for granting declaratory relief: (1) the dispute must be real and substantial, such that it is not moot, academic, or may not arise; and (2) if the dispute is real, the court must determine whether granting the declaration requested would have any practical effect of resolving the issues in the case.
- [46] Applying the two-step test, the judge found that the dispute was real and substantial, stating:
- [49] a declaration as to the western boundary of Treaty 8 would have practical effect on the rights of all signatories and adherents to Treaty 8, as well as to the parties to this action. It would also determine the controversy that counsel for Canada says has now festered for one hundred years.
- [50] As well, the location of the boundary is a matter of importance to all of the citizens of British Columbia, including of course those who have signed or adhered to Treaty 8. Resolution of the dispute would be in the public interest.
- [47] The judge then turned to the question of whether the claim for declaratory relief should be struck. Quoting from *Horton Bay Holdings Ltd. v. Wilks*, 1991 CanLII 1156 (B.C.C.A.), he noted that the proper test on such an application is not "whether 'the Court would grant the declaration sought' [as t]he granting of a declaration is a discretionary matter which cannot properly be pronounced upon without first hearing evidence and conducting a trial". The judge reasoned (at para. 70):

in order to justify exercising discretion to deny a plaintiff a hearing, the court should require a fairly clear demonstration that there is no real or live issue underlying the claim for declaratory relief, or that no useful purpose would be served by granting the declaration sought, and that the burden of demonstrating this is on the party seeking to deprive a plaintiff of a hearing.

- [48] The judge summarized the history of declaratory relief jurisprudence. He distinguished *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, leave to appeal ref'd, [2000] S.C.C.A. No. 625; *Tr'ondëk Hwëch'in v. Canada*, 2004 YKCA 2; and *Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, on the basis that the declarations requested in those cases related to Aboriginal rights and were denied because there was no allegation those rights had been infringed or threatened. In comparison, the judge found "the rights conferred by Treaty 8 are quite beside the point raised by the plaintiffs in their action, an action that seeks a declaration as to where the treaty rights might be exercised, whatever those rights might be" (at para. 76). The judge stated that "the question of where the western boundary lies for Treaty 8 is real and not just theoretical, and the plaintiffs have

a real interest in the outcome of the action: their treaty rights may be exercised on land covered by the treaty, so it is important to know where that land lies" (at para. 77).

- [49] The judge concluded that "there is a real dispute among the parties as to the location of the western boundary of Treaty 8 that has been festering to one degree or another for over one hundred years and continues," and that "[t]he declaration sought here will have the practical effect of resolving that issue. There is nothing hypothetical about the dispute" (at para. 80), adding at para. 83:

the plaintiffs have a legal interest that stems from being parties to Treaty 8. I also conclude that there is a cognizable threat to that interest flowing from British Columbia's denial, as the "aspect of the Crown in whom the lands of British Columbia were vested," that a large area that the plaintiffs believe the treaty applies to is covered at all. It goes without saying that the plaintiffs and their members could have great difficulty exercising treaty rights in a location outside the treaty area, and at minimum, are faced with great uncertainty that could be cleared up if this action were to proceed to judgment.

- [50] In the result, the judge dismissed the applications.

C. The Appeal

- [51] After 61 days of hearing, the trial completed on November 25, 2016 and reasons for judgment were released on September 25, 2017. The judge granted a declaration for the wider boundary and dismissed the counterclaims. The judge held that "the 'said range' ['the central range of the Rocky Mountains'] in the metes and bounds description of Treaty 8 refers to the Arctic-Pacific Divide or watershed, and not to a range or lesser watershed within what we now call the Rocky Mountains" (at para. 151).
- [52] The Province appealed the order. The Kaska Dena on appeal adopts the position of the Province. McLeod Lake has changed its position on appeal and now adopts the position of the Province. The respondent First Nations submit the appeal should be dismissed as the judge's findings were factual and no palpable and overriding errors of fact have been demonstrated; Canada agrees with that position.
- [53] Four intervenors on appeal--Tsay Keh Dene First Nation ("Tsay Keh Dene"), Takla Lake First Nation ("Takla Lake"), Tahltan Central Government ("Tahltan"), and Nak'azdli First Nation ("Nak'azdli")--support the position of the Province, each for slightly different reasons. The first three were intervenors in the trial; the last was added on the appeal.
- [54] Before turning to the parties' submissions on appeal regarding the application of the principles of treaty interpretation to the facts of this case, I propose first to address the issue of whether the declaration should have been granted at all. This issue, in my view, is dispositive of the appeal.

V. DECLARATORY RELIEF

[55] By memorandum to the parties dated August 22, 2019, the Court asked counsel to provide written submissions on whether the declaration granted in this case complies with the test for declaratory relief set out in *Solosky and Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. In particular, it asked whether the declaration amounted to an opinion on a hypothetical issue.

A. Jurisdiction on Appeal

[56] As a preliminary matter, the respondent First Nations submit that this Court does not have jurisdiction to consider the availability of declaratory relief. They argue that Willson #7 conclusively resolved the question of whether the dispute between the parties was hypothetical and whether the declaration sought would have practical utility. If any party took issue with the judge's analysis, their remedy was to appeal the order arising from Willson #7. The effect of that order was that, at trial, the judge was no longer entitled to decline to grant a declaration on the grounds that the dispute was hypothetical or that the declaration would have no practical utility.

[57] In my view, the respondent First Nations misstate the effect of Willson #7. As explained above, that decision concerned applications by the Province and McLeod Lake to strike the statement of claim under Rule 9-5(1) of the Supreme Court Civil Rules and the court's inherent jurisdiction. The applicants argued that the statement of claim failed to identify any live dispute that would be resolved by the declaration. Consequently, they submitted, the claim for declaratory relief could not succeed and was an abuse of the court's process.

[58] The question the judge was called upon to answer was not whether declaratory relief should be granted, but whether he should exercise his discretion to refuse such relief without first hearing the claim. In *Cheslatta* at para. 5, Newbury J.A. explained the principles that govern such an application:

... an applicant under R. 19(24) [now R. 9-5(1)] must show it is "plain and obvious" the plaintiff cannot succeed. That phrase is awkward to apply where the question is not one of novelty or substantive law, but whether the Court should exercise its discretion ... and proceed with the determination of an issue that may be hypothetical or moot. However, there can be no doubt that the threshold for an application striking out a plaintiff's claim is very high. In considering such an application, of course, the court must proceed on the assumption that the facts alleged in the Statement of Claim are true.

[59] In this case, the judge declined to strike the claim, finding at para. 77 that the issue was real and not hypothetical. Importantly, however, that determination was made on the assumption that the facts pleaded by the plaintiff were true. Those facts included that the location of the western boundary "directly affects the question of where the respondent First Nations may exercise the rights guaranteed by Treaty No. 8" (at para. 5(15)).

[60] At trial, on the other hand, the judge was required to determine whether, on the basis of the facts actually proven, the respondent First Nations had established their claim for declaratory relief. As a result, his ultimate decision to grant a declaration remains reviewable.

B. The Law of Declaratory Relief

[61] Recent articulations of the test for declaratory relief generally cite some combination of the following five principles:

- a) the court has jurisdiction to hear the issue;
- b) the party raising the issue has a genuine interest in the resolution of the issue;
- c) the responding party has an interest in opposing the declaration sought;
- d) the dispute is real and not theoretical; and
- e) the declaration will be of practical utility.

See *Daniels v. Canada* (Indian Affairs and Northern Development), 2016 SCC 12 at para. 11; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at paras. 60-61; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para. 46; and *Ewert v. Canada*, 2018 SCC 30 at para. 81.

[62] The court's jurisdiction and the parties' relative interests in the matter are not at issue in this case. I will therefore limit my analysis to the real dispute and practical utility criteria. I will then address a further requirement that, in my view, emerges from the jurisprudence, namely that a declaration must confirm or deny a legal right or interest.

1. The Dispute Must Be Real and Not Hypothetical

[63] A declaration may be granted only where there is a dispute that is real and not hypothetical: *S.A.* at para. 60; *Daniels* at para. 11; *Cheslatta* at para. 13; *Operation Dismantle* at 457.

[64] A question is hypothetical where there is no dispute, where the dispute is over and has become academic, or where the dispute is based on hypothetical facts: *Solosky* at 832; *Zamir and Woolf*, *The Declaratory Judgment*, 3d ed. (London: Sweet & Maxwell Ltd., 2002) at 146.

[65] A dispute is real where the facts disclose an actual or threatened infringement of a legal right: *Operation Dismantle* at 457; *Kaska Dena* at para. 13. In the absence of a legal right in dispute, the court lacks jurisdiction to grant a declaratory judgment. As explained by Lazar Sarna in *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016) at 37-38:

While the court has an extremely wide jurisdiction, it will not entertain an action or a motion seeking relief where there is no dispute between the parties, or where the dispute does not reveal any difficulty with respect to the rights vested in one of the parties.

[Emphasis added.]

[66] In S.A. at para. 78, Rowe J. (dissenting) endorsed this limitation:

The availability of [declaratory] relief is premised on the actual or potential infringement of an applicant's rights (*Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236 (S.C.), at para. 32). A court has "no jurisdiction to issue a declaration where there exists no right in jeopardy nor in procedural provision for the relief sought" (L. Sarna, *The Law of Declaratory Judgments*, (4th ed. 2016), at p. 87). Absent a legal entitlement to anchor the declaration one cannot properly be granted.

[Emphasis added.]

Côté J., writing for the majority, did not comment on Justice Rowe's characterization of the law on this point. However, her reasons appear to accept the premise that declaratory relief is only where a legal entitlement is in dispute, and the declaration she ultimately granted was clearly framed as one of right: see paras. 24-26 and 60-61.

2. Declarations Must Have Practical Utility

[67] In *Daniels* at para. 11, Abella J. explained that a "declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties". Stated otherwise, it must "serve a legal purpose in terms of resolving a real difficulty, present or threatened": *Cheslatta* at para. 17.

[68] This can only mean that the "live controversy" settled by the declaration is the same as the real dispute between the parties. Thus, a declaration will have practical utility only where it will settle a dispute as to the parties' legal rights.

3. Declarations Must Confirm or Deny a Legal Right

[69] A necessary implication of the real dispute and practical utility criteria is that a declaration must define the legal rights at issue between the parties. A declaration that does not do so will have no practical utility in the sense described above and therefore should not be granted.

[70] This Court has previously commented that declarations are "limited to confirming or denying a legal right": *R. v. Armstrong*, 2012 BCCA 242 at para. 38, quoting Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Carswell, 2007) at 1 (emphasis added by Newbury J.A.). The Ontario Court of Appeal has also recognized this limitation on the declaratory jurisdiction, holding in *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at para. 30 [Rosen] that "[d]eclaratory relief must determine the rights of the parties" and, further, "courts do not have jurisdiction to simply declare facts, detached from the rights of the parties."

[71] British courts have framed the declaratory jurisdiction in similar terms. In *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 at 501, Lord Diplock stated:

that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it

[Emphasis added.]

- [72] Limiting the availability of declaratory relief to declarations of right accords with the fundamental purpose of the remedy: to clarify legal rights and obligations where they are in dispute: *Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.*, 2007 MBCA 85 at para. 62. It is also consistent with the plain language of R. 20-4(1) of the Supreme Court Civil Rules, which allows the court to make "binding declarations of right".
- [73] I find support for this approach in *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 [GVRD], where the appellant District requested a declaration that the respondent Province had "ignored" or "breached" a preambulatory provision of the Local Government Act, R.S.B.C. 1996, c. 323. The Court declined to grant such relief, explaining:
- [52] Given my conclusion that s. 3(c) does not create any obligation on the part of the Province or any right on the part of the GVRD, I do not see how declaratory relief of the kind now sought by the GVRD could affect a legal interest, determine any "right" or "entitlement" of the District, or even move this proceeding along. No legal purpose would be served by such a declaration. As noted by L. Sarna in *The Law of Declaratory Judgments* (3rd ed., 2007), before a declaration will be granted with respect to an issue of statutory interpretation, the provision in question must "substantively and actively refer to rights. The court will refuse to adjudicate on preambles..." (At 137; my emphasis.) I conclude that it is plain and obvious the District could not succeed in obtaining even the limited declaration it now seeks.

As I read GVRD, the crux of the Court's decision was the fact that the declaration sought did not confirm or deny any legal right. As a result, it could not serve any legal purpose.

- [74] I am aware that in *Horton Bay*, this Court allowed a claim for a declaration of fact to proceed in the face of a motion to strike. However, it appears to have done so without considering whether it had the jurisdiction to grant a declaration that did not confirm or deny a legal right. For that reason, I do not consider the decision to be dispositive of the issue.

C. Submissions

- [75] The respondent First Nations argue that the declaration meets all of the criteria for declaratory relief. In their submission, there is a live controversy over the location of the western boundary. That controversy, in turn, has created a cognizable threat to their legal rights:

BC has taken the formal position that the boundary lies to the east, which directly affects where the Plaintiffs may legally exercise their existing Treaty rights and where the duty to consult will be triggered. The threat to the exercise of the Plaintiffs' Treaty rights in the disputed territory is therefore cognizable.

[Further Submissions of the Respondent First Nations at para. 41.]

[76] In their view, the declaration granted will neutralize this threat by clarifying the parties' rights and obligations:

As a result of the declaration, Treaty 8 members may step outside and know with certainty where they can exercise their Treaty rights.

Without a court resolution respecting the boundary of the Treaty, the geographic extent of the respective rights and responsibilities of the parties will continue to be in dispute.

[Further Submissions of the Respondent First Nations at para. 47.]

[77] The Province, McLeod Lake, and the intervenors, on the other hand, argue that the declaration will not have the effect suggested by the respondent First Nations. In their view, the declaration affects the parties' legal rights only if the Treaty is interpreted as granting substantive rights that are limited by the boundary defined in the metes and bounds clause. The judge accepted that the declaration did so in Willson #7, stating at para. 77:

[T]he question of where the western boundary lies for Treaty 8 is real and not just theoretical, and the plaintiffs have a real interest in the outcome of the action: their treaty rights may be exercised on land covered by the treaty, so it is important to know where that land lies.

[Emphasis added.]

Consequently, the judge concluded that the declaration would confirm "where the treaty rights might be exercised, whatever those rights might be" (at para. 76).

[78] However, the parties opposing the declaration note that the judge's findings in Willson #7 were made in the context of an application to strike, where all facts in the impugned pleading are taken to be true. At trial, the judge made no findings as to whether that initial assessment was borne out by the evidence. In fact, he expressly declined to consider how the declaration would affect the parties' rights and obligations:

[12] This case is decidedly not about aboriginal rights, title, or interests that existed before the treaty. It is not about what aboriginal signatories or adherents surrendered or gave up by entering treaty. It is not about what obligations the Crown assumed when it entered the treaty, nor does it have an impact on or purport to interpret treaty provisions other than those setting out the treaty boundary.

[Emphasis added.]

In the absence of any findings as to the geographic scope of the substantive rights in the Treaty, they submit, the declaration has no legal effect and does not resolve the issue identified by the respondent First Nations. As a result, the judge erred in granting it.

- [79] In response to these submissions, the respondent First Nations argue that the judge's conclusion in Willson #7 was correct and that he was not required to revisit the issue at trial. In their view, it is uncontroversial that the metes and bounds clause defines the area in which they may exercise their treaty rights. They note that in *R. v. Badger*, [1996] 1 S.C.R. 771, the Court stated:
- [40] Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.

The respondent First Nations submit that this finding is dispositive of the issue:

It is settled law as to where harvesting rights under Treaty No. 8 may be exercised. [T]he trial judge was entitled (as were the Plaintiffs) to rely on that existing law and was not required to determine afresh whether such was the case at trial.

[Further Reply Submissions of the Respondent First Nations at para. 13.]

- [80] Canada adopts a somewhat equivocal position. On the one hand, it argues that "the impact of the judge's declaration on the geographic scope and extent of the right to hunt, fish and trap guaranteed by the Treaty remains an open question that is not appropriate to decide in this case" (Canada's Factum in Response to the Intervenor at para. 42). On the other, it says that the dispute "regarding the western boundary's location casts significant doubt as to the outer limits of the land upon which Treaty 8 rights could be exercised. It is this doubt that the plaintiffs seek to remove through this proceeding" (Canada's Factum at para. 25).

D. Standard of Review

- [81] Questions of law are subject to a correctness standard of review; questions of mixed fact and law are subject to the deferential standard of review of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8 and 10.
- [82] Declarations that do not meet the criteria outlined above are not available at law. In my view, the question of whether a declaration was available in this case is a question of law, reviewable on the standard of correctness.

E. Analysis

- [83] I accept that there is a real dispute in this case. The respondent First Nations assert that the Treaty allows them to exercise certain rights in the disputed territory. The Province denies that they may do so. That denial is sufficient to create a threat to the respondent First Nations' rights.
- [84] If the declaration settled the dispute over the respondent First Nations' ability to practice Treaty rights in the disputed territory, it would unquestionably have practical utility. However, the declaration granted does not do so. Although it establishes the location of the western boundary of the tract, it does not determine the legal effect of that boundary. In that sense, it is more akin to a finding of fact than a declaration of right. Indeed, the judge described the declaration as "a finding of fact" in Willson #5 at para. 33.
- [85] The respondent First Nations suggest in their submissions that the declaration will clarify the geographical area in which they may exercise their Treaty rights and over which the duty to consult will be triggered. In that sense, the declaration might be seen as confirmatory of their rights.
- [86] However, there has been no judicial finding as to the relationship between the tract boundary and the substantive rights under the Treaty. The judge expressly limited his consideration to the meaning of the words "central range of the Rocky Mountains", and not their effect on the parties' rights.
- [87] Further, it is not at all clear from the record before us that the substantive rights under the Treaty were intended to be exercised on all of the land encompassed by the metes and bounds clause.
- [88] The metes and bounds clause describes the limits of a "tract of country":

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance the mouth of Lockart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

[89] Throughout the Treaty, the area defined in the metes and bounds clause is referred to variously as a "tract", "district", and "territory". As identified above, I shall refer to it as the tract.

[90] The Treaty refers to the tract without qualification three times. First, in the recitals, the Treaty refers to the tract in defining which Indigenous groups participated in the treaty process:

ARTICLES OF A TREATY made and concluded by [the Commissioners] and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the Limits hereinafter defined and described

WHEREAS, the Indians inhabiting the territory hereinafter defined have been convened to meet a Commission to deliberate upon certain matters of interest of Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

[Emphasis added.]

These provisions do not appear to be connected to any rights under the Treaty.

[91] Second, the Treaty refers to the tract to define the area wherein the Indigenous signatories agree to cede and surrender "all their rights, titles and privileges". However, the import of this provision is nullified by the statement immediately following: "AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada" (the "extinguishment clause"). The effect of the extinguishment clause is that the territory ceded and surrendered may not be limited to the metes and bounds clause. I would note, however, that whether this text is capable of extinguishing Aboriginal title to the surrendered lands throughout Canada has been questioned by at least one court, which held

that the equivalent language in Treaty 11 was "so vague as to be virtually meaningless": see *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCA 105 at para. 16.

- [92] There are two other Treaty provisions that refer to the metes and bounds clause; both are qualified by the terms "surrendered" and "ceded":

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [the "harvesting rights clause"]

THEY PROMISE AND ENGAGE that they will in all respects, obey and abide by the law; that they will maintain the peace between each other, and between themselves and other tribes of Indians, and between themselves and other of Her Majesty's subjects and that they will not molest the person or property of any inhabitant of such ceded territory, or of any other district or country, or interfere with or trouble any person passing through the said tract or any part, thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded. [the "keep the peace clause"]

[Emphasis added.]

- [93] There are at least two possible interpretations of these clauses. The first is that the phrases "tract surrendered" and "ceded territory" mean the same as the "tract" in the metes and bounds clause. In that case, the declaration requested would affect the parties' legal rights. The second is that the phrases "tract surrendered" and "ceded territory" mean that part of the tract defined in the metes and bounds clause that is ultimately surrendered or ceded by an Indigenous group who is party to the Treaty. In that case, the declaration requested would only affect the parties' legal rights if an Indigenous signatory or adherent also held rights and/or title within the disputed territory.

- [94] Contrary to the respondent First Nations' submissions, the *Badger* case did not hold that the signatories' and adherents' rights are exercisable throughout the entirety of the tract. The passage they cite as having that effect merely recites the language of the harvesting rights clause. As explained above, the meaning of that clause is not self-evident.

- [95] Because the relationship between the tract and the substantive rights under the Treaty is unclear, I cannot accept the respondent First Nations' position that the declaration would, in itself, allow Treaty members to "step outside and know with certainty where they can exercise their Treaty rights". For it to have that effect, a judicial determination that the rights are exercisable throughout the entire tract would be required. Absent such a determination, the declaration does not have any practical utility.

- [96] I accept that if a court subsequently determines that rights under the Treaty are tied to the tract boundary, the declaration would have practical utility. If it does not, the time and resources spent in reaching that determination are wasted. In my view, the jurisprudence does not permit the court to grant a declaration of fact on the speculation that the fact declared may later prove useful in determining the scope of a right.
- [97] Rosen provides some insight into this issue albeit in a different context. There, a trucking company brought an application for a declaration confirming its insurer's obligations to indemnify and defend in relation to certain goods stolen from its lot. The customer whose goods were stolen had not made a claim against the trucking company for the theft. The insurer took the position that the loss was not covered by the policy because: (1) the trucking company had misrepresented the nature of the goods it was transporting; and (2) the goods were in the possession of a subcontractor at the time of the theft.
- [98] The application judge declined to grant a declaration confirming the scope of the insurer's obligations. Instead, he declared that: (1) the trucking company did not make material misrepresentations on its application for insurance; and (2) the theft of the goods had occurred while they were in the custody of the trucking company.
- [99] While these declarations may have had the potential to resolve the dispute concerning the parties' rights and obligations under the insurance policy, the Court of Appeal found they had no practical utility as the customer who had suffered the loss had not yet made a claim and therefore the nature and extent of his claim remained unknown (at paras. 25-26). Further, the Court held that it had no jurisdiction to make the declarations requested, stating that "[w]hile determining the rights of the parties may entail findings of fact, courts do not have jurisdiction to simply declare facts, detached from the rights of the parties" (at para. 30).
- [100] In the present case, it is clear that the declaration granted, standing alone, does not have the capacity to resolve the meaning and scope of the parties' rights under the Treaty. The fact that the declaration might have that effect if coupled with a subsequent judicial determination is, in my respectful view, simply not enough.
- [101] This case provides an example of why declarations of fact are not available. The goal of the treaty interpretation process is to determine the common intention of the parties to the Treaty. In making that determination, the honour of the Crown must be presumed. I shall discuss the application of the presumption in this case further below. However, for the purpose of this analysis it may be summarized as follows. If the substantive rights under the Treaty are exercisable by its Indigenous signatories within the entirety of the tract defined in the metes and bounds clause, then the Treaty would impact the rights and title of the Indigenous groups in that area. In that scenario, Canada would have been obligated to notify, consult, and seek the consent of the Indigenous groups that inhabited that territory. Yet the Treaty Commissioners, as agents of Canada, did not follow those processes in the disputed territory to ensure that Canada had met its duty to the potentially impacted

Indigenous groups in that area. In those circumstances, only the narrow boundary would be consistent with the honour of the Crown. If, on the other hand, the substantive rights under the Treaty are exercisable by its Indigenous signatories only within the territory that they surrendered, both the narrow or wider boundary might be consistent with the honour of the Crown.

[102] Marshall mandates that the Court consider the honour of the Crown when interpreting a treaty. However, absent an understanding of what rights the tract defined, this principle could not properly be applied and the declaration should not have been granted.

[103] My conclusion that the declaration should not have been granted is also supported by considerations of judicial economy. It is clear that, regardless of the boundary established by the declaration, one side or the other intend to take the position that the metes and bounds clause does not conclusively define the area over which the respondent First Nations may exercise their Treaty rights. Indeed, during the hearing, the Court was advised that this issue would be addressed in "stage two" of the litigation. In other words, the effect of the declaration was simply an invitation to further litigation.

VI. TREATY INTERPRETATION

[104] If I am wrong in finding that the declaration granted in this case could not be made in law, I turn to my alternate analysis. In my view, the judge erred in law and in fact in interpreting the phrase "the central range of the Rocky Mountains" to mean the wider boundary.

A. The Principles of Treaty Interpretation

[105] In Marshall at para. 78, McLachlin J. (as she then was, writing in dissent) summarized the legal principles that govern treaty interpretation as follows:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.

7. A technical or contractual interpretation of treaty wording should be avoided.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.

[Citations omitted.]

[106] McLachlin J. then indicated that courts should apply these principles in a two-step process. The first step involves a preliminary assessment of the facial meaning of the treaty language at issue. She explained: "the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences" (Marshall at para. 82). The second step expands to consideration of extrinsic evidence as to the meaning of the words at issue in their historical and cultural context, with particular attention to the relevant principles as set out in para. 78. The purpose is to determine a meaning that comes closest to reflecting the parties' common intention and that best reconciles the parties' interests at the time the treaty was signed (at paras. 80-81).

B. Adhesion Agreements

- [107] As described above, Canada concluded a single treaty with the original signatories at Lesser Slave Lake and thereafter added Indigenous groups through formal adhesion agreements. The adhesion agreements typically adopted the terms of the original treaty.
- [108] This process raises questions about how adhesion agreements affect the interpretation of a treaty, if at all. The adhesion agreements are separate from the Treaty itself and were each entered into in their own unique historical, geographical, and cultural contexts. In those circumstances, can the common intention of the original signatories to the Treaty be assumed to be the same for signatories to the later adhesion agreements? If not, how should the court reconcile the adhering parties' intentions with those of the original signatories?
- [109] Resolving those issues may have had an impact on the result of this case. The original Indigenous signatories lived on the Prairies around Lesser Slave Lake, while the later adherents lived in an area of the Province close to the Rocky Mountains. Their interests in treating with Canada may have been different. Their understanding of the relevant geography may have been different. The manner in which Canada's representatives explained the Treaty to them may have been different. These possibilities raise the question of whether it is correct to characterize Treaty 8 as a single agreement that binds all

signatories and adherents to the same terms, rather than a series of bilateral agreements between Canada and different Indigenous groups.

- [110] At trial, Kaska Dena argued briefly in its opening submissions that the judge should focus on the original signatories' intentions, and not those of the later adherents. The judge did not address this issue in his reasons for judgment.
- [111] On appeal, Tahltan repeats that argument, citing Marshall at paras. 26-29 in support. The respondent First Nations oppose such an approach, arguing that the open-ended nature of the treaty-making process adopted in this case mandates that the Court consider the intention of both the original signatories and later adherents. They suggest that the contrary view was rejected by this Court in Halfway River First Nation v. British Columbia (Ministry of Forests), 1999 BCCA 470 at paras. 111-114.
- [112] As I understand the submissions, the parties agree that the intention of the original signatories must be considered. The sole point of disagreement is whether the intentions of the later adherents also form part of the analysis. In my view, neither Marshall nor Halfway River is dispositive of this issue.
- [113] Halfway River concerned Treaty 8. The petitioners, Halfway River First Nation (a respondent on this appeal), were the descendants of a Beaver band that adhered to the Treaty in Fort St. John in 1900. They sought to prevent the issuance of a logging permit on the basis that it would interfere with their hunting rights under the Treaty. The Crown argued that evidence relating to the original signing of the Treaty in 1899 in Slave Lake was not admissible, because "there is no evidence that what was said by the government negotiators at Lesser Slave Lake, and elsewhere in 1899, was also said at Fort St. John in 1900, when the Beaver people signed" (at para. 110). Finch J.A. (as he then was) rejected this argument:
- [112] In my respectful view, the position of the Crown on this issue is not tenable. The adhesion signed by the representatives of the Beaver people at Fort St. John in 1900 contains this:
- The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.
- [Emphasis added by Finch J.A.]
- [113] The terms of the Treaty signed by the Indians at Lesser Slave Lake had been explained to them orally, as indicated in the Commissioner's report in 1899, and it is therefore, in my view, a reasonable inference from the terms of the Beavers' adhesion in 1900 that the terms of the Treaty were explained to them in similar, if not identical, terms.

- [114] Moreover, it would not be consistent with the honour and integrity of the Crown to accept that the Treaty was interpreted and explained to the Indians at Lesser Slave Lake in one way, but interpreted and explained to the Beaver at Fort St. John in another less favourable and more limited way. To accept the proposition put forward by the Ministry would be to acknowledge that the same Treaty language is to be given different meanings in respect of different signatories. Only the clearest evidence could persuade me to such a conclusion, and such evidence is not present in this case.
- [114] In my view, the issue in Halfway River was slightly different than the one here. There, the question was whether the intentions of the original signatory nations informed the substance of the Treaty to which Halfway River adhered. The Court found that they did. Here, the question is whether the intentions of parties that adhered to the Treaty after it had been concluded can be read back into the interpretation of the Treaty as a whole. That issue was not before the Court in Halfway River.
- [115] Marshall concerned a Treaty of Peace and Friendship, which the Crown entered into with a Mi'kmaq community on March 10, 1760. The appellant alleged that a trade clause in the treaty contained harvesting rights that protected his right to fish. In his analysis of the treaty, Binnie J. noted that the genesis of the trade clause was in the Crown's negotiation of an earlier treaty with the Maliseet and Passamaquoddy First Nations. As a result, he looked at those negotiations in interpreting the extent of the Mi'kmaq right.
- [116] As I understand it, the Mi'kmaq did not technically adhere to the Maliseet and Passamaquoddy treaty; rather, they entered into a standalone treaty on substantially the same terms as the Maliseet and Passamaquoddy. As a result, the negotiation of the earlier treaty helped inform the interpretation of the later one. Again, this does not appear to have any direct relevance to the question of whether the intention of adhering parties can inform the terms of the underlying agreement.
- [117] Marshall states that "[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed" (at para. 78(3), emphasis added). In the absence of more complete submissions on the issue, I am of the view that we must assume (without deciding) that the proper focus of the common intention analysis in this case is the intention of the original signatories to the Treaty on June 21, 1899.

C. Submissions

- [118] The Province submits the judge erred in law by failing to apply the two-step approach and principles of treaty interpretation from Marshall. It notes three specific deficiencies in the judge's analysis:
- a) The judge failed to consider the facial meaning of the Treaty text before turning to extrinsic evidence of intention. In the Province's view, the phrase "the central range of the Rocky Mountains" can only reasonably refer to a boundary that lies within the Rocky Mountains. If

the drafters intended that the boundary follow the APD, they would have specifically named that geographical feature. By focusing on map representations of the boundary at the outset of the analysis, the judge's analysis ignored these aspects of the text. The result was an interpretation that exceeded what was reasonably possible on the language.

- b) The judge failed to consider how the Indigenous signatories would have understood the phrase "the central range of the Rocky Mountains". It points to the testimony of Dr. Brownlie, a historian, as confirming that they would not have understood the boundary to be outside of the Rocky Mountains.
 - c) The judge failed to consider the honour of the Crown as it relates to the disputed territory. The Province submits that the honour of the Crown could only be preserved by finding that the Treaty Commissioners' failure to notify, consult with and seek the consent of any Indigenous groups that inhabited the disputed territory demonstrated an intention not to treat in the disputed territory. To find otherwise would have been dishonourable conduct by Canada in that: (i) it would have been dishonourable for Canada to enter into a Treaty that purported to extinguish Aboriginal title and grant harvesting rights in areas inhabited by non-signatories; and (ii) it would have been dishonourable for Canada to promise reserve lands to Indigenous groups that inhabited the disputed territory when it was not in a position to set aside such reserves.
- [119] The Province also maintains that the judge fell into palpable and overriding error in (i) his interpretation of a document titled "Our Indian Treaties", produced by Treaty Commissioner David Laird in 1905; and (ii) in certain conclusions he reached in respect of a map known as the "Macrae map".
- [120] If the appeal is allowed, the Province asks this Court to substitute the declaration granted with a declaration in favour of the narrow boundary. McLeod Lake and Kaska Dena adopt the Province's submissions.
- [121] The intervenors all support the Province's position. They argue that the judge failed to adequately consider the perspectives of Indigenous signatories, but also non-signatory inhabitants of the wider boundary. They assert that only the narrow boundary would be consistent with the honour of the Crown. Finally, they contend that the judge ought to have considered the impact a declaration in favour of the wider boundary will have on their nations, including potential interference with their Aboriginal rights and title and their bargaining power in treaty negotiations.
- [122] The respondent First Nations submit that the judge appreciated the principles of treaty interpretation even if he did not expressly refer to them. In particular, they argue:
- a) The judge correctly determined that the phrase "central range of the Rocky Mountains" was ambiguous and resorted to extrinsic evidence to clarify that ambiguity. This approach was both appropriate in the circumstances and consistent with the Marshall principles.

- b) The judge considered the intention of both the Crown and the Indigenous signatories and ascertained the interpretation of the metes and bounds clause that best reconciled their interests. The judge properly considered post-treaty conduct to confirm that interpretation.
- c) The judge was not required to interpret (i) the entire text of the Treaty; or (ii) the geographic scope of the Treaty with reference to the traditional territories held by signatory nations.
- d) The interpretive principle of the honour of the Crown requires that the Court give effect to the promises actually made to Indigenous treaty partners, notwithstanding any deficiencies in the written Treaty text. That principle is not engaged here, as the federal Crown and respondent First Nations agree on the location of the tract boundary. In any event, the assertion that wider boundary violates the honour of the Crown is (i) predicated on the unproven assumption that the boundary extinguishes the Aboriginal rights and title of non-signatory nations within the disputed tract; and (ii) fails to appreciate that the Treaty was envisioned as an ongoing process, whereby Indigenous peoples with interests in the tract described in the metes and bounds clause would be invited to adhere to the Treaty.

[123] Canada makes similar submissions, including that:

- a) The approach to treaty interpretation advocated by the Province and certain intervenors would begin and end with the literal meaning of the treaty text. This is contrary to the principles of treaty interpretation set out in *Marshall*, which require examination of the historical context. The judge's reliance on extrinsic evidence in his interpretation of the metes and bounds clause was entirely appropriate and consistent with the approach identified in *Marshall*.
- b) The judge's interpretation of the Treaty took into account the Indigenous signatories' perspective, despite the limited evidence on that issue. It was open to the judge to conclude that the APD was the boundary that best reconciled the parties' interests. In any event, the principles of treaty interpretation relating to common intention have less relevance where, as here, the parties to the treaty agree on the meaning of a provision.
- c) Fixing the boundary at the APD is consistent with the honour of the Crown. Any suggestion to the contrary overlooks (i) the on-going nature of the treaty process, and (ii) the fact that Canada's efforts to treat west of the Rocky Mountains were stymied by the Province's refusal to provide land for reserves. Any effect the Treaty may have on the legal rights of non-signatories within the disputed tract is not relevant to the analysis.

[124] Both the respondent First Nations and Canada say that the Province's submissions are in fact a thinly disguised attempt to have this Court substitute its own findings of fact for those of the judge in the absence of palpable and overriding errors of fact.

D. Standard of Review

- [125] The parties to this appeal disagree on the standard of review that applies to questions of treaty interpretation. The Province and its allies contend that the judge failed to properly apply the Marshall principles to the facts as he found them, which constitutes an error of law. As a result, they submit the standard of review is one of correctness. Canada and the respondent First Nations maintain that the alleged errors involve questions of fact and mixed fact and law, which attract the deferential standard of palpable and overriding error.
- [126] The Supreme Court of Canada has held that matters of contract interpretation generally raise questions of mixed fact and law. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, Rothstein J. explained:
- [49] ... Questions of law "are questions about what the correct legal test is" (Southam, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties -- a fact-specific goal -- through the application of legal principles of interpretation." ...
- [50] ... Contract interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
- [127] Notwithstanding this general rule, he continued, contract interpretation will sometimes involve an "extricable question of law", reviewable on the standard of correctness:
- [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (Housen at paras. 31 and 34 - 35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (King at para. 21).
- [128] Some courts have described treaty interpretation as raising questions of law: *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109 at para. 148; *Halfway River* at para. 85; *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2019 ABCA 14 at para. 39. All but the last decision were pre-Sattva.
- [129] Similarly, some decisions relating to Aboriginal rights have held that while deference is owed to the judge's findings of historical fact, no deference is owed to the "legal inferences or conclusions" drawn from those facts: *Caron v. Alberta*, 2015 SCC 56 at para. 61; and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 82. In *Marshall* at para. 18, Binnie J. referred to that distinction in the context of treaty interpretation.
- [130] In my view, the principles outlined in *Sattva* provide guidance in the approach to be taken to the standard of review with respect to treaty interpretation. Contract and treaty interpretation involve analogous (though not identical) considerations. Like contract interpretation, treaty interpretation involves the application of legal principles of

interpretation to the text of the written treaty, considered in light of the factual matrix. For historical treaties, that matrix includes the historical and cultural context of the time. Thus, the standard of review that applies to treaty interpretation is overriding and palpable error unless the error alleged involves an extricable question of law.

E. Overview of Errors

[131] I have concluded that in interpreting the metes and bounds clause, the judge erred in law by failing to properly apply the Marshall principles. In particular, the judge:

- a) failed to consider the facial meaning of the metes and bounds clause within the context of the Treaty as a whole before turning to extrinsic evidence of intent;
- b) failed to consider the Indigenous signatories' intentions, understandings, and interests in interpreting the metes and bounds clause; and
- c) failed to consider how the original signatory parties would have understood the meaning of the words of the Treaty, as they related to the geographical and geological features of the region, in interpreting the metes and bounds clause.

[132] These errors in my view tainted the judge's ultimate conclusion as to the location of the western boundary.

[133] I have also concluded that the judge erred in fact in finding that the Treaty Commissioners, as agents of Canada, intended the western boundary to follow the APD when they wrote "the central range of the Rocky Mountains". That error was predicated on a number of errors in the judge's fact-finding process, including relying on irrelevant evidence, drawing inferences not supported by the evidence, and failing to consider relevant evidence.

[134] The corollary issue is whether one or more of these errors of fact amounted to overriding error. Each of the noted errors of fact were, in my view, palpable and cumulatively overriding. The collective effect was a palpable and overriding error in the assessment of the Treaty Commissioners' intention for which appellate intervention is required.

F. Remedy

[135] Where an appellate court identifies reviewable errors, it may proceed in one of two ways. First, it can remit the matter back to the trial court for a new hearing. Second, if it is feasible and in the interests of justice, it can conduct a fresh assessment of the evidence: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 33. In determining whether it is feasible to proceed with a reassessment, relevant factors include whether witness credibility is in issue and whether the factual record underlying the controversial findings is sufficiently clear: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 174; *Swiss Reinsurance Company v. Camarin Limited*, 2015 BCCA 466 at para. 70. Considerations in relation to the interests of justice may include the length and cost of the litigation to that point: *Hollis* at para. 33; *Baker Petrolite Corp. v. Canwell Enviro-Industries*

Ltd., 2002 FCA 158 at para. 82.

[136] In the circumstances of this case, I am of the view that it is both feasible and in the interests of justice for this Court to make its own findings of fact. In arriving at that conclusion, I have considered the following factors:

- a) the bulk of the evidence was documentary in nature;
- b) the disposition of the case did not turn on credibility;
- c) the evidentiary record underlying the controversial findings is sufficiently clear;
- d) this litigation has been ongoing for 14 years; and
- e) all of the parties requested that, if this Court decided to allow the appeal, it substitute the judge's declaration with its own rather than remitting the matter back to the trial court. After 14 years of litigation over the location of the western boundary of the tract, in my view that was a reasonable request.

[137] I turn then to the errors of law that, in my view, mandate such a reconsideration.

G. Errors of Law

1. Failure to Interpret the Treaty as a Whole

[138] As set out in *Marshall*, the first step of treaty interpretation is to consider the facial meaning of the text. Doing so requires that the court consider how a particular clause relates to the whole of the treaty text. This legal principle was confirmed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 29, where Binnie J. held: "the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples."

[139] The Court's comments in *Mikisew* are consistent with the fundamental principle of contractual interpretation that a contract must be construed as a whole. While a treaty should not be interpreted "as if it were an everyday commercial contract", it is appropriate to draw on principles of contractual interpretation when they are consistent with the honour of the Crown: *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at para. 37; *Badger* at para. 43. In *Sattva*, the Court held that failing to construe a contract as a whole is an error of law (at paras. 63-64).

[140] In this case, the judge interpreted the phrase "the central range of the Rocky Mountains" in isolation from the Treaty as a whole, including the remainder of the metes and bounds clause. In doing so, he failed to consider whether other parts of the metes and bounds clause, or other provisions of the Treaty, might elucidate the parties' intentions and understanding of the western boundary of the tract. In my view, this was an extricable error of law that impacted the judge's ultimate interpretation.

[141] Several provisions of the Treaty provide context for the metes and bounds clause. I reproduce the relevant provisions below, including the metes and bounds clause:

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent of Indian Affairs in the year 1898, been convened to meet a Commission representing

AND WHEREAS, the said Indians have been notified and informed by her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent therefore of Her Indian subjects inhabiting the tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and her Majesty's other subjects, and that her Indian people may know and be assured of what allowances they are to count upon and receive from her Majesty's bounty and benevolence.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:

Commencing at the source of the main branch of the Red Deer River in Alberta, hence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockart's River, thence southeasterly in a straight line to and including Black Lake, southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement. [the "metes and bounds clause"]

AND ALSO the said Indian rights, title and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or any other portion of the Dominion of Canada. [the "extinguishment clause"]

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described [the "harvesting rights clause"]

THEY PROMISE AND ENGAGE that they will in all respects, obey and abide by the law; that they will maintain the peace between each other, and between themselves and other tribes of Indians, and between themselves and other of Her Majesty's subjects and that they will not molest the person or property of any inhabitant of such ceded territory, or of any other district or country, or interfere with or trouble any person passing through the said tract or any part thereof and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded. [the "keep the peace clause"]

[Emphasis added.]

[142] In my view, the words of the aforementioned provisions, standing alone, do not reflect an intention to treat within the disputed territory.

[143] First, the metes and bounds clause describes the western boundary of the tract as "the central range of the Rocky Mountains" and the eastern boundary of the tract as "the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six". The judge referred to the metes and bounds clause in para. 14 of his reasons but did not consider whether the difference in the descriptions of the eastern and the western boundaries of the tract held any significance. He therefore drew no inferences from that distinction but went immediately to a consideration of the extrinsic evidence of Canada's historical maps.

[144] In contrast, the judge found significance in a distinction between Minister Sifton's November 30, 1898 report to Cabinet, in which Sifton in the first part of his report referred to the "Mountains" in the context of describing the "Indians to the west of the Mountains" (emphasis added) and to the "Indians on either side of the Mountains" (emphasis added), from his later reference to the "height of land" in OIC 2749. The judge interpreted Sifton's distinction between "Mountains" and "height of land" at para. 159 as deliberate and intentional:

[159] A later portion of OIC 2749 reads:

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

I conclude that the use of the word "mountains" in the early portions of OIC 2749 can be contrasted with the phrase "height of land" in the portion above, and that this use was deliberate and meant to reaffirm that the intent was to seek treaty with aboriginal peoples occupying territory up the Arctic-Pacific divide.

[Emphasis added.]

- [145] Adopting the rationale he applied in interpreting OIC 2749, I would infer that the Treaty Commissioners deliberately used different descriptions for the two boundaries with the intention of providing a different meaning for the western boundary of the tract from the "height of land" description used to describe the eastern boundary of the tract. The Treaty Commissioners knew the meaning of the phrase "height of land"; they had no reason not to use the phrase "height of land" if they had intended the western boundary of the tract to be the APD and surely would have done so if they had wanted it to be the APD. To conclude otherwise would render the words "the central range of the Rocky Mountains" meaningless.
- [146] Second, none of the Indigenous groups named in the Treaty inhabited lands in the disputed territory. The Treaty referred to the Cree, Beaver, and Chipewyan, all of whom inhabited the District of Athabasca, but did not identify any Sekani or other Indigenous groups west of the Rocky Mountains. This omission was significant given the judge's finding that Canada's intention was as reflected in the pre-Treaty OIC 2749, wherein Minister Sifton wrote that the Sekani, who, for the most part, lived west of the Rocky Mountains, should be treated in the same manner as the Beaver, who lived east of the Rocky Mountains. In my view, that finding in regard to Canada's intention was factually wrong, which I shall discuss below. If the Treaty Commissioners did intend to treat with the Sekani, one would have expected they would have specifically named them as they did with the Cree, Beaver, and Chipewyan. Conversely, the fact that the only Indigenous groups expressly named in the Treaty inhabited land east of the Rocky Mountains supports the inference that the Treaty Commissioners did not intend to treat in the disputed territory.
- [147] The Treaty was ratified by OIC 363 on February 20, 1900. The OIC describes the Treaty as being made with "the Cree, Beaver, Chipewyan and other Indians inhabiting the territory--as fully defined in the treaty--lying within and adjacent to the Provisional District of Athabasca". This suggests that the Treaty Commissioners only intended to treat with those Indigenous groups expressly identified in the Treaty or that inhabited territory "within and adjacent to" the District of Athabasca. While imprecise, these words suggest that the geographical limit of the tract was intended to be in relatively close proximity to the District of Athabasca.
- [148] In my view, the judge's failure to consider these features of the Treaty text before turning to the extrinsic historical and cultural evidence of the time was an extricable error of law.
2. Failure to Consider Indigenous Signatories' Interests and Intentions
- [149] As explained above, the goal of treaty interpretation is to determine the parties' common intention: Marshall at para. 78(3). In searching for that intention, the Court must consider the signatories' respective understanding and intentions, being sensitive to the unique cultural and linguistic differences between the parties: Marshall at paras. 78(3) and (5). Where multiple interpretations of the parties' common intention is possible, the court must select the one which "best reconciles the interests of both parties at the time the treaty was signed": Marshall at para. 78(3).

[150] In the circumstances of this case, these principles obliged the judge to consider, inter alia: (i) what the Indigenous signatories would have understood the words "central range of the Rocky Mountains" to mean; (ii) what the Indigenous signatories' interests were in treating with Canada; and (iii) which interpretation of the boundary would best reconcile those interests with Canada's.

[151] The judge averted to Marshall briefly in his reasons:

[7] A goal of treaty interpretation is to search for the understanding and common intention of both parties to a treaty: *R. v. Marshall*, [1990] 3 S.C.R. 456 at para. 78. In a case such as this, where documents run into the thousands of pages, a court must guard against being overwhelmed by the evidence of that intention from only one side of the bargain.

However, his reasons do not reflect an application of these principles. While his analysis purports to consider the evidence pertaining to Canada's intention and interests at length, it touches only briefly on the evidence pertaining to the Indigenous signatories' intention and interests in taking treaty, and what inferences might be drawn from that evidence, in order to determine their intentions and understanding of the western boundary of the tract.

[152] As explained above, Marshall mandates an inquiry into the intentions and interests of the original signatories to Treaty 8. The original Indigenous signatories were the Cree Chief and Headmen present at Lesser Slave Lake on June 21, 1899.

[153] The parties produced little evidence concerning the original Indigenous signatories' interests in entering into the Treaty. What evidence did exist was derived from the contemporaneous report of Charles Mair, who was present at the negotiation of the Treaty. The judge accurately summarized that evidence at para. 66 of his reasons:

[66] I infer from Mr. Mair's account that the aboriginal people depended heavily on the explanation of the treaty terms put forward by the commissioners, particularly Mr. Laird on June 20, 1899, and that they depended heavily on Mr. Laird's reading of the treaty terms to the assemblage on June 21, 1899. From Mr. Mair's report of what was said by the aboriginal participants, it seems clear that the aboriginal signatories wanted to continue to make their own living, to avoid conflict with white people coming into their territory, and to increase their learning or knowledge through education. It is also fair to say that Mr. Mair does not report any discussion at Lesser Slave Lake concerning the western geographic extent of the treaty.

[Emphasis added.]

There was no evidence regarding the Cree signatories' likely understanding of the phrase "central range of the Rocky Mountains" before the judge. The respondent First Nations did not call any oral history evidence as to what the original Indigenous signatories might have understood the phrase at issue to mean or what their subjective understanding of the location and extent of the Rocky Mountains and the APD was at that time. Their interests clearly were different from those of the Cree signatories. Dr. Brownlie testified on cross-examination that the Indigenous

signatories would not have understood those words to refer to a location outside of the Rocky Mountains. No weight appears to have been given to this concession.

[154] Faced with this evidentiary lacuna, it was incumbent on the judge to consider which boundary best reconciled the interests of the original Indigenous signatories' with the interests of Canada. This was not done. Instead, the judge seems to have focused entirely on Canada's understanding of the phrase "central range of the Rocky Mountains". The judge made no further reference to the interests of the Cree signatories to the Treaty or consider what inferences might have been drawn from the limited evidence adduced of their interests. In other words, he erred in the precise manner he cautioned himself against, becoming "overwhelmed by the evidence of that intention from only one side of the bargain".

[155] In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 688 at para. 44, Gascon J. found that failure to apply a required element of a legal test constitutes an extricable error of law. As Iacobucci J. explained in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39:

if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

In my view, the trial judge's failure to incorporate the interests of the original Indigenous signatories' into an analysis of the common intention of the parties was an error of law within the meaning of *Teal Cedar* and *Southam*.

[156] The circumstantial evidence available on the record was limited. However, it does not support an inference that the Cree at Lesser Slave Lake would have intended for the western boundary of the tract to follow the APD. Significantly, they were from the Prairies in the District of Athabasca. Their interests in becoming parties to the Treaty, as found by the judge, were to preserve their way of life and to educate their children. There was no evidence that, at the time of the Treaty, they had any cultural connection to Indigenous groups who inhabited lands west of the Rocky Mountains. There was no evidence they had any knowledge of the territory west of the Rocky Mountains. There was no evidence they had any understanding, intention or indeed interest in hunting, trapping, and fishing beyond their territories on the Prairies. Indeed, the western boundary of the tract did not appear to be a relevant consideration to their purpose in becoming a party to the Treaty. I will return to these factors in addressing which boundary better reconciles the parties' interests below.

3. Failure to Consider the Signatories' Understanding of the Geographical and Geological References in the Treaty

- [157] Marshall requires the court to give the words of a treaty the meaning "they would naturally have held for the parties at the time" and that it avoid a "technical or contractual interpretation" (at para. 78, emphasis added).
- [158] In his discussion of Canada's intention, the judge correctly noted that while today we know that the Rocky Mountains end short of the 60th parallel north, "[w]hat is important to the resolution of the issue presented in this case is the state of geographical understanding in the late nineteenth century, as it may have influenced those who drafted the metes and bounds description of the western boundary of Treaty 8" (at para. 16). Notwithstanding that caution, however, he based his conclusion that Canada intended the meaning of "the central range of the Rocky Mountains" to be the wider boundary on expert evidence of today's geographical and geological knowledge of this area, including that: (i) the longitudinal extent of the Rocky Mountains ends south of the 60th parallel north; (ii) there is no continuous single line of watershed but a series of lines of watershed within the Rocky Mountains; and (iii) there is no single range but a subset of mountains within the Rocky Mountains that are defined by where the primary lines of watershed travel through those mountains. He explained:
- [149] For the central range in the Rocky Mountains to be the treaty boundary, it would have to extend to 60°N, although perhaps not as part of a series of three or more ranges but as one. Yet the evidence seems quite clear that there is not one such range.
- [150] If on the other hand "central range" was meant to refer to the watershed or divide due west of the source of the Red Deer River, then it was meant to refer to the continental divide. From 54° 30'N, the continental divide carries on as the Arctic-Pacific watershed and continues, ultimately crossing the parallel at 60°N.
- [151] I conclude that the "said range" in the metes and bounds description of Treaty 8 refers to the Arctic-Pacific divide or watershed, and not to a range or lesser watershed within what we now call the Rocky Mountains.
- [152] Brian Menounos was an expert witness qualified to opine on aspects of physical geography including surface processes and landforms, the origin, movement and collection of water in mountain regions, the physical geography of mountain environments and quaternary geology. Robert Gowan was a witness for British Columbia. He described his job as being to provide maps and analysis of digital geographic data to the "natural resource sector" in the province.
- [153] Dr. Menounos, Dr. Desloges and Mr. Gowan have stated that the Rocky Mountains end south of 60° N (January 27, 2016, at 82, ll. 27 - 38). Dr. Menounos states in his expert report that the Rocky Mountains end abruptly south of the Liard River and that they have a clear northern boundary south of the Liard River (Menounos report, ex. 43 at 12, 36). Dr. Desloges gives two latitudes for the northernmost point of the Rocky Mountains" approximately 59° 38' N and 59° 37.45' N (Desloges report, ex. 73 at 24, 26). Mr. Gowan struggled to find a connection between the northern end of the Rocky Mountains and the

60° N parallel (January 27, 2016, at 82, l. 39-83, l. 46; January 28, 2016, 72, ll. 31-39).

[154] It follows that Mr. White's [1912] map, as representing his graphic interpretation of the metes and bounds description in Treaty 8, was wrong.

[Emphasis added.]

[159] In this case, the application of the Marshall principles obliged the judge to give the phrase "the central range of the Rocky Mountains" a meaning that would naturally have been held by each of the parties and not a technical interpretation. That would include each sides' subjective understanding of whether: (i) the Rocky Mountains extended to the 60th parallel north; (ii) there was a continuous single line of watershed (or a series of watershed lines) within the Rocky Mountains; and (iii) there was one (or more) "central range" of the Rocky Mountains.

[160] The judge made no findings about the original signatories' understanding of these geographical features. Absent such a finding, today's understanding of the extent of the Rocky Mountains was irrelevant to the interpretation of the tract boundary. In fact, several contemporaneous maps of the day show the Rocky Mountains extending north to the 60th parallel. This would suggest that the original signatories may well have not been aware that the Rocky Mountains terminated south of that point.

4. The Honour of the Crown

[161] Marshall obliges the court to consider the honour of the Crown when interpreting a treaty. At para. 78(4), McLachlin J. held: "In searching for the common intention of the parties, the integrity and honour of the Crown is presumed."

[162] Some background is necessary to understand the nature of this obligation. The Royal Proclamation of 1763, reprinted in R.S.C. 1985, App. II, No. 1, imposed a duty on Canada to engage in a transparent process when seeking to make agreements with Indigenous peoples involving their land. The Crown's duty in that regard was reaffirmed by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44:

[69] The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[163] The honour of the Crown permeates all aspects of its dealings with Indigenous peoples: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 16. In particular, it "infuses the processes of treaty making and treaty interpretation": *Haida Nation* at para. 19.

[164] In relation to treaty interpretation, the honour of the Crown obliges the Court to interpret rights "in a manner which gives meaning and substance to the promises made by the Crown": Marshall at para. 52, per Binnie J. for the majority.

[165] The honour of the Crown also imposes obligations of notification, disclosure, and consultation on the Crown, which are triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title, and contemplates conduct that might adversely affect it" (Mikisew at para. 33, emphasis added, citing Haida Nation at para. 35). At para. 34, the Court in Mikisew added:

The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. Haida Nation and Taku River set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in the response to the notice" (Haida Nation, at para. 43).

[166] The Province and certain intervenors submit that only the narrow boundary is consistent with the integrity and honour of the Crown. They say that if the Treaty Commissioners had intended by the Treaty to extinguish Aboriginal rights and title throughout the tract, they had a duty to consult all Indigenous groups within the tract. Similarly, if the Treaty Commissioners had intended to confer rights on treating Indigenous groups throughout the tract, they were obliged to consult potentially affected Indigenous groups in that area. The fact that they did not consult any Indigenous group in the disputed territory gives rise to the inference that the Treaty Commissioners did not intend to include that territory within the tract.

[167] The Treaty provides that "the said Indians have been notified and informed by Her Majesty's said Commission" of Canada's intended conduct within the tract. The honour of the Crown, however, is not about the parameters of a boundary. As the Treaty states, it is the function of a transparent process that notifies and informs Indigenous groups that may potentially be affected by the Crown's intended conduct.

[168] Aspects of this submission, however, presume that the extinguishment and harvesting rights clauses are tied to the tract boundary, when that issue was expressly not determined by the judge. It may be that, properly construed, the extinguishment and harvesting rights clauses are only effective in relation to the territory occupied by a signatory Indigenous group. In other words, when an Indigenous group entered into the Treaty, Aboriginal title to the territory it occupied was extinguished. In exchange, the Crown would guarantee that group the right to hunt, trap, and fish within the territory it surrendered. If that were the case, the Treaty would have no effect on the rights and title of non-signatory groups that occupied territory within the disputed tract. On the other hand, if the harvesting rights were found to exist throughout the tract for the benefit of any treating Indigenous group, then the effect on non-signatories' rights and title could be very significant, which would be

inconsistent with the honour of the Crown. Absent a determination as to the scope of the parties' substantive rights within the tract, the issue raised with respect to the honour of the Crown cannot be determined.

[169] That said, to the extent the Treaty Commissioners were aware of their obligations flowing from the Royal Proclamation, the steps they took (or failed to take) in furtherance of that duty, are relevant to the question of where and with whom they intended to treat. I will return to this issue in addressing evidence concerning the Treaty Commissioners' intention below.

H. Errors of Fact

[170] As noted above, the standard of palpable and overriding error applies to findings of fact: Housen at para. 10. The "palpable" standard is met where a trial judge's findings of fact are "clearly wrong", "unreasonable", or "unsupported by the evidence": H.L. v. Canada (Attorney General), 2005 SCC 25 [H.L.] at paras. 55-56. The "overriding" standard is met where the impugned finding is likely to have affected the result: H.L. at para. 56.

[171] Errors of fact may include drawing inferences that are not reasonably supported by the evidence (H.L. at paras. 71-74) and ignoring relevant evidence (Schwartz v. Canada, [1996] 1 S.C.R. 254 at para. 35; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114 at 121).

[172] In my view, such errors are present here. In inferring that Canada intended the tract boundary to follow the APD, the judge relied on irrelevant evidence, drew inferences that were not reasonably supported by the evidence, and ignored relevant evidence. In my view, these errors were palpable.

[173] It has been challenging to apply the "overriding" standard in this case. The judge's reasons largely contain a recitation of evidence with few findings or inferences of fact and no clear explanation of how the evidence relates to his ultimate conclusion. Consequently, it is not always obvious whether a particular error would affect the result.

[174] That said, I am satisfied that absent these errors, the only conclusion available to the trial judge was that the parties intended the tract boundary to follow a line of watershed within the Rocky Mountains, and not the APD. In other words, the flaws in his analysis led him to draw a conclusion as to the parties' intentions that was clearly wrong.

1. Background

[175] In order to address the errors of fact that I have identified, some review of the historical background to the Treaty is necessary.

a) Canada's Decision to Pursue a Treaty

- [176] The Constitution Act, 1867 gave the federal government jurisdiction over "Indians, and Lands reserved for the Indians" pursuant to s. 91(24), and provincial jurisdiction authority over the "Management and Sale of the Public Lands belonging to the Province" pursuant to s. 92(5), respectively.
- [177] In 1871, the Colony of British Columbia joined Confederation. Article 13 of the British Columbia Terms of Union governed the relationship between the Province and Canada with respect to Indians and Indian reserves. It provided that Canada would assume responsibility for the creation of reserves according to a policy "as liberal" as British Columbia's, and the Province would agree to convey land to Canada for that purpose.
- [178] Canada's approach to treaty-making was founded upon the Royal Proclamation of 1763, which reserved the land beyond the boundaries of the organized British colonies "for the use of the Indians". Settlers could only gain an interest in those lands if the Indigenous inhabitants first surrendered or ceded their title to the Crown. In contrast, the Province did not recognize the existence of Aboriginal title and therefore did not consider that such title had to be extinguished.
- [179] These divergent approaches led to conflict over the allotment of reserve land, with Canada seeking much larger reserves than the Province was willing to accept.
- [180] In 1876, the Province and Canada attempted to manage the allotment of reserves for Indigenous groups through the creation of a three-member commission, known as the Joint Indian Reserve Commission. This process quickly became dysfunctional and by 1878 it was suspended. It was replaced by a federal Indian Commissioner who had the authority to recommend the number, extent and locality of the reserves, subject to the approval of the Provincial Chief Commissioner of Lands and Works who had a veto over any proposal. The latter process resulted in over 1,000 reserves of varying sizes being approved and McLeod Lake being allotted a 290-acre reserve immediately west of the Rocky Mountains in 1892. The provincial process continued up to the hearings of the McKenna-McBride Commission in 1912, which I shall discuss below. In 2000, McLeod Lake was added to the Treaty under a contemporary adhesion agreement that was made subject to the future determination of the western boundary of the tract.
- [181] Treaties 6 and 7 were concluded in 1876 and 1877, respectively. Treaty 6 covered the central area of the District of Athabasca. The western boundary of the tract in Treaty 6 was defined as the "easterly range of the Rocky Mountains". Treaty 7 covered the southern part of the District of Athabasca in what we now know as southern Alberta. The western boundary of the tract in Treaty 7 was described as "the central range of the Rocky Mountains, or the boundary of the Province of British Columbia". The boundary of the tract in this area, which is located in the southern Rocky Mountains, is coincident with the APD. The APD does not diverge from Rocky Mountains until 54° 30' N, where it then travels in a northwesterly direction.

- [182] The western boundaries of Treaties 6 and 7 left a small strip of land between the eastern and central range of the Rocky Mountains, described by Laird in a 1910 memorandum as a "tongue of unceded land".
- [183] Laird was a Commissioner for Treaty 7. One of his objectives in fixing the western boundary of Treaty 8 was to connect it with the "tongue of unceded land" left by Treaty 7. The words "central range" were not in widespread use at the time. However, it was common ground that the term "central range" identified a line of watershed. The terms may have also been used to remedy the defect created by Treaties 6 and 7.
- [184] In 1883, the Province agreed to convey 3.5 million acres of land to Canada as partial payment for Canada's contribution to the costs of building the transcontinental railway, with the exact location of that land to be determined at a later date. The area from which the land was to be selected was later described as "between the boundary of British Columbia and the Rocky Mountains" and was accompanied by a map. Eventually, a rectangular block of land in the Peace River District, approximately 75 by 72 miles surrounding Fort St. John, was surveyed and determined to be a suitable size for the accommodation of the reserve lands and severalty allotments offered under the Treaty (the "Peace River Block"); see Appendix E. The Province finally agreed to the selection of the land in 1907 and in June 1907 transferred the Peace River Block to Canada. Canada transferred the Peace River Block back to the Province in 1930. Until then, all federal reserves under the Treaty were allocated within the Peace River Block, including the Fort St. John, Halfway River, West Moberly, and Saulneau reserves.
- [185] The location of the eastern boundary of the Province was another long-running dispute. An imperial statute passed in 1858 defined the Province's boundary as "the 'main chain' of the Rocky Mountains", while statutes passed in 1863 and 1866 provided that the boundary was "by the Rocky Mountains". In 1884, Lieutenant-Colonel D.R. Cameron was appointed to resolve the issue. Cameron found that where a mountain range is used as a boundary, the boundary must follow their line of watershed, as that is the only "ascertainable and practical line" characteristic of mountain ranges. Further, he explained that "[t]he words 'by the main chain of the Rocky Mountains' occurring in the Act of 1858, has special reference to a water-shed line, for it is this line which determines the main-chain". Thus, the Province's boundary followed "the line of water-shed of the Rocky Mountains".
- [186] By 1891, Canada was looking to make a treaty north of Treaty 6. Amédée Forget was the Indian Commissioner for the North-West Territories (as it was known at the time). He cautioned Cabinet about including northeastern British Columbia in the targeted area. The Province had joined Confederation in 1871. Canada knew from its experience with Treaty 3 in Ontario and the Privy Council's decision of *St. Catherine's Milling and Lumber Company v. The Queen*, [1880] U.K.P.C. 70, that it would need the consent of the Province to allocate reserve or severalty lands under a treaty. In *St. Catherine's Milling*, the Privy Council held that s. 109 of the Constitution Act, 1867 gave the Province the beneficial use of the land once it had been "disencumbered of Indian title". The effect of the decision was that the federal

Crown could not unilaterally create Indian reserves on provincial lands without the consent of the Province, and that a province benefitting by a surrender of "Indian title" should bear the burdens incidental to that surrender. Consequently, the Survey Branch of the Department of Indian Affairs (the "DIA") proposed a metes and bounds description for the new treaty that did not include any area of northeastern British Columbia. The targeted area was depicted in an attached map that included a pink-shaded area of the District of Athabasca and the southern portion of the District of Mackenzie in the North-West Territories (the "1891 DIA map"); see an excerpt of that map at Appendix B. Notably, the 1881 DIA map depicted the Rocky Mountains as extending north of the 60th parallel north, well into Yukon.

[187] Thereafter, discussions about the new treaty were suspended until January 1898, when Forget recommended a treaty that would be limited to the District of Athabasca and "Northwestern British Columbia". He attached a hand-drawn map with two areas marked as "A" and "B" respectively. Area "A" was the District of Athabasca. Area "B" was depicted as situated under the "North-West Territory" and drawn in a vague and undefined manner (the "1898 Forget map"). The Forget map is reproduced at para. 45 of the judge's reasons and can be found in Appendix F. Notably, the 1898 Forget map did not propose that the tract extend into the Northwest Territories. Forget opined in his January 12, 1898 report that "[w]ith regard to the attitude of the Indians of the Lower Peace and Nelson Rivers and the Nahanni and Sicanie tribes I can only conclude that the same necessity for the extinguishment of the native title exists there as at Lesser Slave Lake and vicinity", adding:

Beyond these points however I do not consider that the Government would be justified in undertaking the negotiation of treaties which would involve very heavy outlay for comparatively inadequate returns in-so-far as the value of territory to be ceded, or the right of the Indian owners, are concerned.

[188] The immediate catalyst for revisiting the proposed treaty was the Klondike gold rush, which began in 1897 with the influx of prospective miners headed to Yukon in search of gold. One of the routes they travelled was from Edmonton to Pelly River, which took them through parts of northeastern British Columbia and the Rocky Mountains. The "Edmonton Death Route", as it was described in some accounts, was arduous and dangerous. Many did not survive; others returned sick and starving. In August 1897, L.W. Herchmer, Commissioner of the North West Mounted Police, instructed Inspector J.D. Moodie to travel from Edmonton to Pelly River, following a route that took him over the Rocky Mountains and through disputed territory. The journey was expected to take four or five months, but ultimately lasted 14. In his report, Moodie described a difficult and dangerous journey. He concluded that the route he travelled "would never be used in the face of the quick and easy one via Skagway and the White Pass". Superintendent Steele, who commanded the North West Mounted Police in the Yukon Territory, described the expedition as an "incomprehensible" journey that "sane men" would not attempt. It clearly did not provide Canada with a passable route to Yukon. By July 1898, the gold rush was beginning to ebb

and by September 1898, the North West Mounted Police were reporting that it was over.

- [189] Before the Privy Council received Inspector Moodie's report, Minister Sifton provided Cabinet with two reports. In his June 18, 1898 report, he recommended the appointment of Commissioners to negotiate a treaty with "Indians occupying the proposed line of route from Edmonton to Pelly River". That recommendation was approved by the Privy Council and formed the basis of OIC 1703. In his November 30, 1898 report, he recommended that the new treaty extend to the APD and that no demand be made upon the Province for any money payment in connection with the proposed treaty. That recommendation was approved by the Privy Council and formed the basis for OIC 2749.
- [190] By 1898, conflicts between the white settlers and Indigenous peoples, and Canada's desire to access marketable resources from the lands held by the Indigenous groups, made it increasingly urgent to secure the extinguishment of Aboriginal title from those lands. Canada was also alive to the cost it would have to incur for the payment of annuities to the treating Indigenous groups. The judge noted this at paras. 31 and 158:
- [31] Canada was alert to the cost of treating with its aboriginal people, and would defer taking on financial obligations until it saw an immediate need for territory inhabited by aboriginal people, whether for settlement or economic exploitation.
- [158] OIC 2749 recognizes the main purpose of the proposed treaty - to obtain peace with aboriginal peoples occupying the territory being invaded by whites seeking a route to the Klondike, or seeking gold or other resources in Athabasca District and northern British Columbia, or deciding to settle in this territory for their own reasons - would not be significantly achieved if the treaty stopped at the British Columbia boundary.
- [191] In 1910, Canada ceased taking adhesions to the Treaty. Dr. Brownlie attributed this to the Province's refusal to create reserves of the size required under the Treaty. Professor Jones similarly found that in 1907, faced with provincial intransigence, the Indian Commissioner instructed the Indian agents in British Columbia "not to encourage applications on the part of any of the Indians for additional reserves except in cases where the same may be absolutely necessary as a means of enabling the applicants to provide themselves with the necessities of life".
- b) OIC 1703
- [192] OIC 1703, issued June 27, 1898, authorized the appointment of three commissioners to negotiate a treaty north of the area ceded by Treaty 6, with "the Indians occupying the proposed line of route from Edmonton to Pelly River" in "the District of Athabasca and adjacent land as the Commissioners may deem expedient to include in the treaty". It identified the "Indians" as "the Beaver Indians of the Peace and Nelson Rivers" and "the Sicamies [Sekani] and Nihamies [Nahanni] Indians", who "were inclined to be troublesome" and "liable to give trouble should isolated parties of miners or traders interfere with what they consider their vested rights."

- [193] The numbers of the Sekani were small. The term "Sekani" is widely accepted as meaning "people on the rocks or on the mountains". It refers to a small nomadic group of Athapaskan-speaking peoples who inhabited lands west of the Rocky Mountains, in the Rocky Mountain Trench north of the APD. G.W. Dawson, in his 1880 report, described the Sekani as occupying territory primarily west of the Rocky Mountains to Hudson's Hope, on the Peace River in the foothills of the mountains. There was also a small group of Sekani that occupied land east of the Rocky Mountains around the Fort Nelson area.
- [194] The specific meaning of the term "Nihamie", "Nahanni", or "Nahani" is less clear. Dr. Brownlie explained that the term was sometimes used by Indigenous groups to refer to "relatively remote or distrusted Indian groups" that were considered 'evil, untrustworthy, or hostile', and at other times to identify specific neighbouring groups. Some Indigenous groups, including the Tahltan at Telegraph Creek and the Pelly River Kaska at Ross River, referred to themselves as Nahani. Traders, ethnologists, and other "outsiders" sometimes applied the term to Indigenous groups that would not have described themselves as such.
- [195] While OIC 1703 referred to the need for Canada to take steps to make a treaty with the Indigenous groups along the Edmonton to Pelly route, as alluded to above, the actual text of the Treaty does not mention the Sekani or indeed any Indigenous groups west of the Rocky Mountains.
- [196] Canada also recognized in OIC 1703 that it had limited knowledge of the disputed territory. In 1897, George Dawson, the Director of Geological Survey of Canada wrote in the Physical Geography and Geology of Canada that "no existing map yet properly represents even the principle physical outlines [of the northern Cordillera] and the impressions gained by the traveler or explorer may well be one of confusion". Most of Canada's historical maps misrepresented the location and extent of the Rocky Mountains and the APD based on our knowledge of these landmarks today. Those maps included the Dominion of Canada 1887 base map, Forget's 1898 hand-drawn "A/B" map, and the OIC 2749 map, which I shall discuss further below. James White's 1912 "Indian Treaties" map also continued to depict the Rocky Mountains as extending to 60° N and the APD lying immediately west of the Rocky Mountains (the "White map") at Appendix G.
- [197] In the face of this limited knowledge of the geography of the targeted area, it is not surprising that OIC 1703 gave the Treaty Commissioners a broad discretion over the fixing of the western boundary of the tract to be ceded:

The Minister [Sifton] further states that the Department of Indian Affairs, however, possesses so limited a knowledge of the conditions on the country, and of the nature and extent of the claims likely to be put forward by its Indian inhabitants, that he, the Minister considers that the Commissioners should be given discretionary power both as to the annuities to be paid and the reservations of land to be set apart for the Indians, with the understanding that no greater obligations will, on the whole, be assumed in either respects than were incurred in assuring the cessation of the territory covered by the treaties, which were made with the Indians of the other

portions of the North West.

The Minister also considers that, as to the territory to be ceded, the Commissioners will likewise have to be given discretionary power, for its extent will depend upon the conditions which are found to exist as a consequence of the inroads of white population; but he is of opinion that the territory to be treated for may in a general way be restricted to the Provisional District of Athabasca, and such of the country adjacent thereto as the Commissioners may deem it expedient to include within the treaty.

[Emphasis added.]

[198] The grant of discretion given the Treaty Commissioners was considerably broader than that provided for in Treaty 6. The OIC authorizing the Commissioners of Treaty 6 declared more precise bounds on the territory to be included: it was the territory "occupied by the Cree, Plain Assiniboines and other Tribes [and] extends Westward from the Western boundaries of Treaties No. 4 and 5 and should extend if possible not less than fifty miles north of the North Branch of the Saskatchewan, embracing West and South all the Territory claimed by the bands treated with". The Treaty 6 Commissioners were also given a map that indicated "the territory which it would be desirable to include in the surrender to be effected".

[199] In a Hansard debate on June 22, 1899, Sifton was asked about the territory the Treaty Commissioners had to travel over. He responded:

The desire is that they shall go as far as Great Slave Lake, but it is impossible to form a positive opinion as to what ground they can cover. Their instructions are to go as far as possible and to accomplish as much as possible. Everything will depend on the facility they have in dealing with the Indians.

[House of Commons Debates, 8th Parl., 4th Sess., Vol. XLIX (22 June 1899) at 5695-5696]

[200] The Treaty Commissioners were willing to exercise the discretion they were given. For example, on December 5, 1898, McKenna wrote to Laird (after Sifton had submitted his report but before it was ratified by the Privy Council):

The northern and eastern portions of the tract have not been definitely settled, and it is still a matter for consideration whether it would not be advisable to considerably extend, at any rate towards the north, the territory to be surrendered.

[201] On January 7, 1899, Laird responded that OIC 1703 "very properly gives the Commissioners discretionary power in regard to the extent of the territory to be ceded".

[202] The Commissioners also considered using their discretion to enter into multiple treaties but settled on making one treaty with adhesions. They also exercised their discretion to extend the boundary of the tract north to Fort Resolution, which as will be seen below, was not contemplated by OIC 2749 but was encouraged by Sifton.

c) OIC 2749

- [203] On December 6, 1898, by OIC 2749, the Privy Council adopted Sifton's November 30, 1898 report to Cabinet in which he recommended that Canada negotiate with "Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia [who] were allied to the Indians of Athabasca".
- [204] OIC 2749 recognized that the Beaver of Fort St. John and Hudson's Hope (now West Moberly First Nations), who lived on the east side of the Rocky Mountains, were connected with and related to the Beaver in the District of Athabasca.
- [205] The area targeted by Canada for the treaty was shown in pink on a map attached to OIC 2749 (reproduced in part in Appendix C). The pink-shaded area was divided into two sections, marked "A" and "B". For the first time, northeastern British Columbia was included in "A" to the handwritten "height of land"; the District of Athabasca was in "B". The southern portion of "A" included the "tongue of uncaded land" between the height of land within the Rocky Mountains and the western boundaries of Treaties 6 and 7. However, the pink-shaded area of the map incorrectly depicted the location of the APD as closely parallel to the western edge of the Rocky Mountains, and the Rocky Mountains as extending to 60° N. Consequently, the map did not target most of the disputed territory.
- [206] As alluded to above, the uncertain state of knowledge of the geography of northeastern British Columbia was evident in Canada's historical maps of that day. Opinion evidence from the expert witnesses confirmed this fact. For example, Dr. Galois reported that the Rocky Mountains were "portrayed in different locations and with different extents" with a "configuration [that] was both uncertain and variable" based on limited information at the time. Dr. Galois also noted that, at the time, the practice was to rely on base maps that had not incorporated the latest findings, adding that the Canadian government only began a more systematic approach to map usage and updating after James White took over in the early 1900s.
- [207] In his report, Sifton explained his recommendation, which I reproduce for ease of reference:

In this connection the undersigned begs to draw attention to the fact that that part of the territory marked "A" on the plan attached is within the boundaries of the Province of British Columbia, and that in the past no treaties such as have been made with the Indians of the North West have been made with any of the Indians whose habitat is West of the Mountains. An arrangement was come to in 1876 under which the British Columbia Government agreed to the setting aside by a Commission, subject to the approval of that Government, of land which might be considered necessary for Indian reserves in different parts of the Province, and later on the agreement was varied so as to provide that the setting apart should be made by a Commissioner appointed by the Dominion Government whose allotment would be subject to the approval of the Commissioner of Lands and Works of the Province.

As the Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains. But there can be no doubt that had the division line between the Indians been artificial instead of natural such difference in treatment would have been fraught with grave danger and have been the fruitful source of much trouble to both the Dominion and the Provincial Governments.

It will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

- [208] The first paragraph of this report expresses Sifton's belief that the proposed tract to the height of land (as depicted in the OIC 2749 map) could be achieved under the existing provincial process in place since 1876 for the allotment of reserve lands, albeit the size allotment was significantly smaller than those proposed by Canada.
- [209] Sifton's second paragraph states that "[t]he Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains." He is clearly referring to those Sekani who live west of the Rocky Mountains. However, Canada's only experience in western Canada at the time was negotiating Treaties 6 and 7 in the Districts of Athabasca and Alberta respectively. On their western boundaries, those Districts bordered along the southern Rocky Mountains. It was in that context that Canada understood that Indigenous groups east of the Rocky Mountains in British Columbia, where there was no treaty, and those along the western boundaries of Treaties 6 and 7, could be treated differently as long as the boundary between them was "natural".
- [210] The third paragraph of the report suggests that a similar approach be taken for the proposed treaty in northeastern British Columbia, where the Beaver living east of the Rocky Mountains, who were connected to but separated from the Beaver in the District of Athabasca, would expect the same treatment from Canada. The reference to the height of land was as depicted in the OIC 2749 map, closely parallel to the Rocky Mountains, and therefore an "ascertainable" natural boundary. It did not include most of the disputed territory.
- [211] The judge made the following findings with respect to OIC 2749:
- [156] OIC 2749 refers twice to the map showing the proposed treaty extending to the Arctic-Pacific divide. After reciting background information, some of which is reflected from OIC 1703, OIC 2749 points out that no treaties had been made to that time with aboriginal peoples living west of the mountains. I take that reference to be to the Rocky Mountains.

[157] OIC 2749 goes on to state that up to then, there had been no difficulties arising out of differences in treatment of Indians living on either side of the mountains because they were "quite distinct," and then states the obvious: that in the northern reaches of the proposed treaty area, the British Columbia boundary, as the 120° W meridian, can be considered quite artificial, in the sense that the aboriginal inhabitants would have no reason to be aware of it or its significance in their daily lives.

[158] OIC 2749 recognizes that the main purpose of the proposed treaty - to obtain peace with aboriginal peoples occupying the territory being invaded by whites seeking a route to the Klondike, or seeking gold or other resources in Athabasca District and northern British Columbia, or deciding to settle in this territory for their own reasons - would not be significantly achieved if the treaty stopped at the British Columbia boundary.

[159] A later portion of OIC 2749 reads:

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

I conclude that the use of the word "mountains" in the early portions of OIC 2749 can be contrasted with the phrase "height of land" in the portion above, and that this use was deliberate and meant to reaffirm that the intent was to seek treaty with aboriginal peoples occupying territory up to the Arctic-Pacific divide.

[Emphasis added.]

[212] In finding the wider boundary was intended by Canada, the judge relied on the proposed boundary as set out in OIC 2749 and its attached map, over the text of the Treaty as written by the Treaty Commissioners:

[117] The treaty commissioners had discretion as to the territory to be ceded, but that does not mean that the commissioners in fact reduced the area in the western region of the treaty from the area proposed in the map accompanying OIC 2749.

[Emphasis added.]

[213] As this statement reflects, the judge considered that OIC 2749 reflected a starting presumption: absent evidence that the Treaty Commissioners exercised their discretion to alter the Treaty boundaries, the boundaries drawn on the map attached to OIC 2749 would govern.

[214] In sum, OIC 2749 provided some evidence of an intention by Canada, at that point in time, for the treaty boundary to be: (i) "natural" in terms of both its physical and cultural geography; (ii) readily ascertainable based on past practices; and (iii) along the APD as depicted in the OIC 2749 map.

d) The Treaty Process

[215] After Sifton's November 30, 1898 report that became OIC 2749, and McKenna's letter to Laird, the Privy Council received Inspector Moodie's report on his expedition to find an Edmonton to Pelly River route. As described above, the route he travelled did not present a viable route to the Yukon. Ms. Jones, an expert witness at trial, explained that by the time the Treaty Commissioners entered into the Treaty, the "necessity for acquiring 'the line of route from Edmonton to Pelly River' had faded away."

[216] The Treaty Commissioners set out to meet with the Indigenous groups between June 8, 1899 and August 23, 1899. All of the designated locations were east of the Rocky Mountains: 11 were in the District of Athabasca and one was at Fort St. John, British Columbia. Fort Nelson and Fort Resolution were not on the list of designated locations although both fall within the narrow boundary. They were late in arriving at Fort St. John by which time the Indigenous peoples had left because their supplies had run out. The following year Commissioner James Macrae was instructed to attend at Fort St. John and Fort Resolution, and in 1909, Henry Conroy was commissioned to attend at Fort Nelson.

[217] Eighteen months before the 1899 scheduled meetings, 1,200 printed notices were circulated through the North West Mounted Police, agents of the Hudson's Bay Company, missionaries with the Anglican and Catholic Churches, traders and anyone else who may have travelled in these areas. There was no evidence of whether the 1,200 printed notices were ever delivered to the targeted groups, but Indigenous groups did attend at many of the locations listed in the public notices and adhered to the Treaty.

[218] After the Treaty was signed at Lesser Slave Lake, the Treaty Commissioners split up to take adhesions from Indigenous groups in other locations. Collectively, they obtained adhesions in the following locations:

- a) Peace River Landing on July 1, 1899, from people identified only as Indians;
- b) Dunvegan on July 6, 1899, from people identified as Beaver Indians;
- c) Vermilion on July 8, 1899, from people identified as Beaver, Crees, and other Indians;
- d) Fort Chipewyan on July 13, 1899, from people identified as Chipewyan Indians of Athabasca River, Birch River, Peace River, Slave River, and Gull River and Cree Indians of Gull River and Deep Lake;
- e) Smith's Landing on July 17, 1899, from people identified as Chipewyan Indians of Slave River;

- f) Fond du Lac (Lake Athabasca) on July 25 and 27, 1899, from people identified as Chipewyan Indians;
- g) Fort McMurray on August 4, 1899, from people identified as Chipewyan and Cree Indians; and
- h) Wapiscow Lake on August 14, 1899 from people identified as the Indians of Wapiscow.

[219] There was no evidence of public notices having been printed or circulated for dates and locations west of the Rocky Mountains, and no evidence that any Indigenous groups attended any meetings with any Treaty Commissioners west of the Rocky Mountains. The judge drew no inference from this lack of evidence.

[220] The Province also was notified formally, but did not respond.

[221] There was limited evidence about the negotiation surrounding the Treaty at the time it was signed. Most of the evidence came from the contemporaneous report of Charles Mair, secretary to the Scrip Commission that travelled with the Treaty Commissioners, who was present at the negotiation and signing of the Treaty at Lesser Slave Lake on June 20 and 21, 1899.

[222] In sum, the purpose of the Treaty, as found by the judge (at paras. 66 and 158), was (i) to secure peace between the Indigenous peoples and the settlers who had moved into their communities as a result of the Klondike gold rush and its swift decline; (ii) to assure the Indigenous peoples that their lifestyle, which included hunting, trapping and fishing rights within their territories, would be preserved; and (iii) to educate Indigenous children. These objectives were to be achieved by the surrender of Aboriginal title to lands held by the Indigenous peoples who treated with Canada.

e) The Macrae Report and Macrae Map

[223] On March 2, 1900, James Macrae was appointed Commissioner to complete the treaty process that began the previous year. His instructions were limited to securing adhesions from Indigenous groups at Fort St. John, where they intended to treat the previous year but arrived too late, and at Fort Resolution in the North-West Territories, where there were marketable reserves of petroleum and minerals that could be accessed after Aboriginal title had been ceded. Commissioner Macrae received no instructions to travel to the disputed territory.

[224] In the summer of 1900, Macrae secured adhesion agreements with the eight Indigenous groups: the Beaver at Fort St. John, the Sturgeon Lake Band, the Slaves of Upper and Lower Hay River, the Dogribs, the Chipewyans, and the Yellowknives of Great Slave Lake, in the North-West Territories. Shortly after meeting with the Beaver at Fort St. John, Macrae wrote in a letter to Comptroller White: "The interests of people inhabiting this side of the natural dividing line are closely allied to those of the N.W.T. and are hardly, if at all connected with British Columbia". The judge made no findings or inferences from this evidence.

[225] In his December 11, 1900 report to Cabinet, Macrae confirmed the adhesions he had secured at Fort St. John and Fort Resolution; he also appended a map. His report was ratified by the Privy Council on January 3, 1901 by OIC 2793; no map was appended to the OIC.

[226] In his report, Macrae also indicated that Aboriginal title within the tract was "almost entirely extinguished":

There yet remains a number of persons leading an Indian life in the country north of Lesser Slave Lake who have not accepted treaty as Indians, or scrip as halfbreeds, but this is not so much through indisposition to do so as [because] they live at points distant from those visited and are not pressed by want. The Indians of all parts of the territory who have not yet been paid annuity probably number about 500 - exclusive of those in the extreme northwestern portion - but as most, if not all of this number belong to bands that have already joined in the treaty, the Indian title to the tract it covers may be fairly regarded as almost entirely extinguished.

[Emphasis added.]

[227] The map attached to Macrae's report has been lost in time. However, a map that was subsequently produced and became known as the "Macrae map" played a significant role in the dispute that followed over the western boundary of the tract. It is reproduced at para. 85 of the judge's reasons and may be found at Appendix H. The actual source of the "Macrae map", however, remains unknown.

[228] The Macrae map provides a more accurate depiction of the location of the APD, albeit the map still misrepresents the Rocky Mountains as extending to the 60° N latitude. Its depiction of the APD coincides with the updated 1900 Dominion of Canada base map, which provided a more accurate representation of the geographic area. In general terms, the Macrae map outlines the land taken into treaty as encompassing the wider boundary.

[229] The judge found that the Macrae map was the map that Macrae intended to attach to his December 11, 1900 report to Cabinet (at para. 83) and was likely the same, or similar to, the missing map in the possession of the Treaty Commissioners (at para. 84). In my view, this was a factual impossibility, as I shall discuss below.

[230] The judge further observed (at para. 112) that "both the map attached to OIC 2749 and the Macrae map show the western boundary of Treaty 8 meeting the 60° N parallel." He repeats this observation (at para. 115) stating that "[t]he map attached to OIC 2749, sent by way of notice to British Columbia not long before Treaty 8 was negotiated and first signed, and the Macrae map, generated following the 1900 adhesions to Treaty 8, both show the western boundary of the treaty following the Arctic-Pacific divide (allowing for a small deviation in the OIC 2749 map at the very northern limit)." These statements appear to imply that the OIC 2749 map and the Macrae map are similar if not the same, when they actually depict the location of the APD quite differently: the Dominion of Canada base map for OIC 2749 was corrected only to 1887 while the Dominion of Canada base map for the Macrae Map

was updated to 1900. The former depicted the APD as immediately parallel to the Rocky Mountains and not extending to the wider boundary; the latter depicted the APD as closer to its actual location and the wider boundary.

f) Post-Treaty Events

[231] For the sake of completeness, I briefly refer to some post-Treaty events and conduct, most of which have limited relevance to the issue of the common intention of the parties to the Treaty in 1899 unless they involve the Treaty parties or conduct that is probative to the intention of a Treaty party. Laird, Macrae and McKenna, all of whom were Treaty Commissioners, made post-Treaty statements that have some probative value to the issue of their respective intentions when they signed the Treaty or its adhesions the following year.

[232] After the Treaty was concluded in 1899, Laird wrote to several individuals about the Treaty boundary. On May 3, 1904, Laird wrote to Sifton recommending that he reject applications of Indigenous groups from Portage La Loche and Isle a la Crosse (in northwestern Saskatchewan) for admission to the Treaty, as the scope of the Treaty Commissioners' authority was effectively limited to the region of Lesser Slave Lake, Peace River from Fort St. John to Great Slave Lake, and the Athabasca River. In 1905, Laird was the president of the Historical and Scientific Society of Manitoba and delivered a paper titled "Our Indian Treaties" in which he provided an overview of the numbered treaties. The judge recounted that in the paper Laird stated:

[88] Treaty No. 8 was made and concluded at the several dates mentioned therein in 1899, the first being at Lesser Slave Lake on the 21st of June, between Commissioners D. Laird, James A.J. McKenna, now Assistant Indian Commissioner and Hon. James H. Ross, and the Cree, Beaver, Chipewyan and other Indians inhabiting the country watered by the Athabasca and Peace Rivers, in the District of Athabasca, also that portion of British Columbia east of the Rocky Mountains, and of the McKenzie District south of Great Slave Lake.

[Emphasis added by the judge.]

[233] The judge found that the highlighted passage referred to the Indigenous peoples who had entered the treaty and not the extent of the treaty area. I will discuss this further below, but, in my view, this finding was factually incorrect.

[234] In 1909, Father Coccola, a missionary at Fort St. James, attempted to intervene with the Department of Indian Affairs to secure reserve lands between the Ingenika and Findlay Rivers on behalf of the Indigenous people in the Fort McLeod and Fort Grahame areas (east of the Rocky Mountains) who were on the verge of starvation. His request was declined on the basis that the geographic area contemplated for the reserves was outside of Canada's control and would require the consent of the Province in order to comply with the Treaty.

[235] In 1909, Canada authorized Inspector Henry Conroy, who was a clerk with the Treaty Commissioners in 1899, to take further adhesions to the Treaty at Fort Nelson because of conflict between settlers and Indigenous groups in that area. In 1911 and 1912, Commissioner Conroy secured adhesion agreements with more Sekani and Slaves from the area. In 1913, a further small group of Sekani from the area were added to the rolls.

[236] In 1909, Macrae wrote a memorandum to the Deputy Secretary-General in which he questioned the accuracy of the Macrae map. The memorandum bears reproduction in full:

The undersigned begs to refer to a report made by him under date of December 11th, 1900 on adhesions taken to Indian Treaty No. 8, which report was submitted accompanied by documents.

Document No. 6 was a "map showing the distribution of Indians in a territory covered by Treaty No. 8 and the extent of that territory".

It is now noticed that the south western boundary of the territory intended to be indicated on that map has come to be regarded to a greater or less extent as authoritative, and there seems cause to believe that it possibly should not be so regarded because in laying down such south western boundary a certain water-shed or height of land seems to have been followed which may not coincide with the descriptions of the words contained in the Treaty. These words "Commencing at the source of the main branch of the Red Deer river in Alberta thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point to where it intersects the 60 parallel of north latitude".

The undersigned being of record as responsible for that map now begs to direct your attention thereto as if it contained an erroneous delineation it may be very necessary to correct it.

There seems to be strongly held differences of opinion not only as to what is the "Central Range of the Rocky Mountains" but even as to what mountain range or ranges constituted the Rocky Mountains referred to in the Treaty. If, as some hold, the "Rocky Mountains" were all the mountains lying between the eastern mountain slope and the Pacific Ocean the "central range" lies far to the westward or southwestward of the treaty limit as delineated on the aforementioned map. Whilst on the other hand if the "Rocky Mountains" are only the easterly range which terminates on the north at the mouth of the McKenzie river the limit probably lies further to the eastward or northeastward than delineated.

Although a height of land is a natural and convenient territorial definition such a definition was not used in the treaty and whether the particular height of land selected to be followed in delineating the southwestern boundary of Treaty No. 8 on the aforementioned map coincides truly or approximately with the "central range of the Rocky Mountains" or not appears to be very much open to question.

Without expressing any opinion on that subject the undersigned points out that it is one of great importance inasmuch as it must naturally govern any treaty made with Indians, principally in British Columbia, who have not yet been treated with, or their adhesions to existing treaties, and must come into question in respect to claims of British Columbia Indians for recognition of native title, and right to have such title extinguished.

- [237] In his memorandum, Macrae anticipates much of the controversy underlying the present litigation, and suggests that the map that is attributed to him may require correction if it is erroneous. The judge notes the record does not indicate what might have prompted Macrae's memorandum (at para. 91), but rejects the inference that Macrae was directly asked about the map, finding "it more likely that Mr. Macrae was aware of recent questions within the Department of Indian Affairs as to the potential to bring aboriginal people around Fort Grahame and Fort McLeod into treaty, and he was aware of the uncertainty surrounding the creation of reserves so far from the Peace River Block" (at para. 99).
- [238] In 1912, Canada appointed McKenna as a Commissioner to investigate the condition of Indian Affairs in British Columbia. McKenna wrote to Premier McBride noting that the Treaty had extinguished "Indian title" with "Indians of that part of British Columbia lying east of the mountains were so dealt with under [the Treaty] in 1899." The purpose of what became known as the McKenna-McBride Commission was "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia." That included the matter of reserve allotments promised under the Treaty outside the Peace River Block.
- [239] The McKenna-McBride Commission held hearings from 1914 to 1916. In its Interim Report No. 91, the Commission stated that "the territory covered by [the] Treaty extended into that part of the Province of British Columbia which lies between the Rocky Mountains and the 60th Parallel of North Latitude and 120th degree of Longitude." It recommended that, in the area of the Province covered by the Treaty, east of the Rocky Mountains, reserves be created under the terms outlined in the Treaty. No reference was made to the creation of reserves under the terms of the Treaty west of the Rocky Mountains.
- [240] Interim Report No. 91 was included in the McKenna-McBride Commission's final report, which was adopted by Canada under OIC 371. OIC 371 stated:

as the treaty made in the year 1899 between the Crown and certain Indians of North Western Canada, and known as Treaty No 8, extends into that portion of the Province of British Columbia which lies between the Rocky Mountains and the 60th parallel of north latitude and the 120th degree of longitude and therefore comes within the scope of the Commission's duties

[241] In 1920, the Ditchburn-Clark Commission was established and tasked with making a full and final settlement and allotment of Indian reserve lands in the Province. Commissioner Ditchburn, Canada's representative on the Commission, as with Macrae before him, noted the discrepancy between the boundary description in the Treaty text and the Macrae map and found that it demonstrated that the Macrae map was incorrect:

I have before me a copy of Treaty No. 8 and from the map accompanying this document I note that the western boundary of the Treaty is shown to be the Height of Land, whereas the described boundary in the Treaty itself is given as the Rocky Mountains, which are many miles east of the Height of Land. It is quite evident, therefore, that this map is in error as Dr. McKenna, who was one of the Treaty Commissioners and also a member of the Royal Commission, would not have had the small reserves set aside [near Fort McLeod and Fort Grahame] were these Indians properly included in Treaty 8.

[242] In response, Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs (formerly the Chief Accountant of Indian Affairs), stated that "I would say that the Treaty itself places the boundary at the central range of the Rocky Mountains, that is in effect, the height of land". He included in his response a copy of OIC 2749 with its attached map, which depicted the height of land as almost contiguous with the Rocky Mountains.

[243] In 1921, Canada entered into Treaty No. 11, wherein its southwest corner was fixed at the northwestern corner of the Treaty where the Arctic-Pacific divide meets with the 60th parallel north as depicted in the Macrae map previously published by the Department of Indian Affairs.

[244] In 1986, Canada established a "Treaty Renovation Project" in which Frank Oberle, P.C. M.P. was appointed Commissioner by the Minister of Indian Affairs to prepare a discussion paper on a number of matters including the "residual uncertainty about the actual boundary of Treaty 8". He described that uncertainty as stemming "from the lack of precision in describing the western demarcation line", and noted that "[t]he boundary description in the Treaty itself is different than what is actually shown in the Commissioner's map as the territory ceded." The Commissioner's map was the Macrae map. He added:

Both the written Treaty and the accompanying map in turn are at odds with an Order-in-Council and map which purports to provide the legal sanction for negotiating the treaty. As matters now stand, it is debateable whether several hundred square miles of land and a number of Indian bands are affected by Treaty 8. To the extent that it may be necessary to resolve this anomaly in the future, a more precise definition of the western boundary would have to be attempted in the light of more contemporary considerations than those which existed in 1899 and 1900.

[245] In 2000, McLeod Lake was added to the Treaty under a contemporary adhesion agreement. The agreement provided that "Canada asserts that the Aboriginal title and rights to land of Indians inhabiting the Treaty No. 8 area were extinguished when Treaty No. 8 was approved by the Governor in Council on February 20, 1900" (in the Preamble at para. 4). It

also provided that nothing in the agreement constituted an admission by British Columbia as to the location of the western boundary of the area defined and described in Treaty 8 (in Article 15).

2. Analysis

[246] In my view, the judge's conclusion that the Treaty Commissioners intended the western boundary of the tract to follow the APD reflects both errors of law, as discussed above, and errors of fact. The errors of fact include (1) relying on irrelevant evidence; (2) relying on unreasonable inferences; and (3) ignoring relevant evidence.

a) Reliance on Irrelevant Evidence

[247] As explained above, Marshall mandates a two-step approach to treaty interpretation. At the first stage, the court must consider the meaning of the treaty text on its face, noting any patent ambiguities and misunderstandings that may have arisen between the parties due to linguistic and cultural differences. At the second, the focus expands to include the historical and cultural context in which the treaty was signed. The goal is to determine which interpretation of the clause at issue comes closest to reflecting the parties' common intention.

[248] For the purposes of the intention analysis, the relevant parties were the Cree at Lesser Slave Lake, on the one hand, and the Treaty Commissioners, as agents of Canada, on the other. The subjective intent of the Treaty Commissioners is important for two reasons. First, OIC 1703 invested the Treaty Commissioners with almost complete discretion in fixing the boundary and therefore it was their intention that had to be considered in determining Canada's intention. Second, the Treaty Commissioners were the ones who met with the Indigenous signatories and adherents, and explained the terms of the Treaty to them. Thus, it was their representations to the Indigenous groups they treated with that could be expected to have influenced what the Indigenous groups understood they were agreeing to in return for surrendering their Aboriginal title to the land.

[249] The judge, however, relied on extrinsic evidence that was not probative of the original signatories' subjective intentions. In particular, he did so in his analysis of (i) the phrase "central range"; (ii) the map attached to OIC 2749; (iii) the salience of the APD as a cultural boundary; and (iv) evidence about the location of the APD relative to the Rocky Mountains.

i. Interpretation of the Phrase "Central Range"

[250] Part of the judge's analysis focused on the phrase "central range". He developed his reasoning in several paragraphs. He began at paras. 125 and 126 by discussing the emergent use of the term "central range" in Treaties 6 and 7. Treaty 6 described its western boundary as "the easterly range of the Rocky Mountains". Treaty 7 described its western boundary as "the central range of the Rocky Mountains", which it equated with "the boundary of the Province of British Columbia". However, the boundary of the Province in Treaty 7 was in an area of the southern Rocky Mountains that are coincident with the APD.

The judge then suggested (at para. 125) that "if there were an easterly range of the Rocky Mountains in that area, there must also be a westerly range". He inferred (at para. 146) that "[f]or there to be a 'central' range, there must be more than one range, and, for one of several to be 'central', it is logical that the number of ranges be an odd number".

[251] The judge found at para. 151 that the term "central range" as applied to boundaries meant a single line of watershed. This was common ground between the parties. In the context of the metes and bounds provision, he reasoned, that line of watershed would need to extend to the 60th parallel north (at para. 149). He noted, however, that today we know that there is no single line of watershed within the Rocky Mountains that meets that description. Therefore, he concluded, the "said range" in the metes and bounds clause must refer to the APD and not a lesser line of watershed within the Rocky Mountains.

[252] While from today's perspective, it is clear that no single line of watershed within the Rocky Mountains meets the description contained in the metes and bounds clause, the question the judge had to decide was whether the Treaty parties believed that such a line existed. The judge made no findings of fact in that regard. As a result, the evidence he relied on was irrelevant.

[253] Further, in rejecting the notion that a "central range" or "one range" could be a series of watershed lines within the Rocky Mountains, the judge relied on R.G. McConnell's published 1896 Report of an Exploration of the Finlay and Omineca Rivers:

[137] In 1896, the Geological Survey of Canada published Report of an Exploration of the Finlay and Omenica Rivers by R.G. McConnell (ex. 282, doc. 0493 at 29). In narrating observations from his 1893 field-work, Mr. McConnell used the phrase "central part of the Rocky Mountain ranges." A marginal printed note next to that point in Mr. McConnell's text states "Rocks in central ranges." Mr. McConnell's own text, narrated from the area around Fort Grahame, reads:

Westward, range after range of nameless mountains, running nearly parallel to the valley of the Finlay, extended to the horizon, while eastward the view was soon obstructed by the higher peaks of the central ranges of the Rockies.

Reference to "central ranges" in the plural suggests there was, at least in Mr. McConnell's mind, more than one central range of the Rocky Mountains when viewed from the Finlay River in the vicinity of Fort Grahame.

[Emphasis added.]

I note that the judge misstated this evidence in part; the marginal text in fact refers to "Rocks in central range" (emphasis added). More importantly, however, there is no evidence that the Treaty Commissioners had McConnell's 1896 report with them when they drafted the Treaty. As a result, it is unclear how McConnell's text was relevant to the analysis.

ii. The OIC 2749 Map

- [254] OIC 2749 recognized that the Beaver of Fort St. John and Hudson's Hope (now West Moberly First Nations), who lived on the east side of the Rocky Mountains, were connected with and related to the Beaver in the District of Athabasca. However, in concluding that Canada intended to treat within the wider boundary, the judge relied on the OIC 2749 map. Today's understanding of the location of the APD and its depiction on the OIC map illustrate much of the difference between the wider and narrow boundaries, respectively.
- [255] OIC 2749 was not an instruction to the Treaty Commissioners but rather an effort to notify the Province of the targeted area that was required for the new treaty within the Province. The Treaty Commissioners' authority came from OIC 1703, not OIC 2749. OIC 1703 gave the Treaty Commissioners significant discretion, which they understood and acted upon. While the Commissioners could have used their discretion to fix the boundary along the height of land as shown in the OIC 2749 map, there was no evidence they chose to do so. As a result, the judge's focus on the map was misplaced.

iii. The APD Was the Salient Boundary

- [256] Sifton's view that the boundary should follow "natural" borders between Indigenous groups led the judge to ask whether the Rocky Mountains or the APD was the more salient cultural boundary between the Sekani and the Beaver.
- [257] Expert witnesses explained that a barrier is more salient if it divides populations who do not have a common history or language or did not intermarry or trade. The Sekani lived in the disputed territory, with the Gitksan and the Carrier (Nak'azdli) to their west; the Beaver lived east of the Rocky Mountains in British Columbia and the District of Athabasca. The judge found there were linguistic and cultural bonds between the Sekani and the Beaver in the Province. While the Beaver, Sekani, and Carrier languages all have a common root in the Athabaskan language family, Sekani is more similar to Beaver than to Carrier (at para. 171). In addition, the two groups occasionally intermarried throughout the 19th and 20th centuries (at para. 172).
- [258] Based on testimony from leaders of First Nations situated on either side of the Rocky Mountains and expert evidence, the judge found that the APD was the more salient cultural boundary:
- [169] I do not accept that in 1899 there existed either a notional or a real boundary between the Beaver and Sekani as represented by the Rocky Mountains. Instead, I find that the territorial limits of the Beaver to the east and Sekani to the west were fluid, or flexible, with individuals and family groups travelling back and forth across the mountains at will, to hunt and trade.

- [170] I find that the Sekani were (in the words of Commissioner Herchmer) "inclined to be turbulent," and that they were, and were known to be, sufficiently in occupation of the land west of the Rocky Mountains to object to European incursion; and at the same time they were, and were known to be, in sufficiently frequent contact with the Beaver living east of the Rocky Mountains that the Sekani would soon learn if the Beaver entered into treaty and on what terms.
- [259] It is unclear, however, why any cultural boundary between the Beaver to the east and the Sekani to the west was relevant to the issue of the common intention of the treating signatories. While there was evidence to support the judge's finding that the APD was the more salient cultural boundary between the Sekani and Beaver on either side of the Rocky Mountains, there was no evidence that this was known by Canada or the Treaty Commissioners at the time, or was relevant to the interests of the Cree signatories.
- [260] The question to have been asked in regard to the issue of whether Canada intended to treat in the disputed territory, was whether the bonds between the Sekani and the Beaver within the Province, warranted preservation over the bonds between the Indigenous signatories and those allied Indigenous groups further east (e.g., at Portage La Loche) who were excluded from the Treaty. In his November 30, 1898 report that became OIC 2749, Sifton's objective seems to have been to keep together a whole Indigenous group (e.g., the Beaver at Hudson Hope and Fort St. John with the Beaver in the District of Athabasca) while expressing no concern about dividing allied Indigenous groups (e.g., the Sekani and the Beaver and other adherents to the Treaty).
- [261] In sum, a cultural boundary was a basis for extending the Treaty into northeastern British Columbia where there was a cultural bond between the Beaver of Fort St. John and Hudson's Hope and the Beaver of Athabasca. However, the evidence does not support a finding that the Treaty Commissioners intended to extend a cultural boundary to different Indigenous groups west of the Rocky Mountains.

iv. The Location of the APD and the Rocky Mountains

- [262] The judge relied on several maps of the period that did not depict the location of the APD and the Rocky Mountains with any degree of accuracy. At para. 136, he stated that "by 1880 it was understood that the Arctic-Pacific divide was west of the junction of the Parsnip and Finlay Rivers, and west of where the Peace River cuts through the Rocky Mountains." In making that finding, he relied on a map prepared by the Geological Survey of Canada in 1880 to illustrate G.M. Dawson's report of his 1879-80 expedition (the "1880 Survey Map") (Appendix I). Mr. Dawson had forwarded that map to Treaty Commissioner McKenna on April 12, 1899 in response to a request McKenna sent to the Geological Survey of Canada. Dr. Brownlie thought that the Treaty Commissioners may have had G.M. Dawson's 1879-1880 report and the 1880 Survey Map with them, along with instruction on how to transport it for use in the field. The judge described this map at paras. 135 of his reasons:

- [135] The Geological Survey of Canada published a "Map of Part of British Columbia and the North West Territory from the Pacific Ocean to Fort Edmonton" to illustrate the report of George M. Dawson of 1879-80 (ex. 116). On the second of its three sheets this map shows the Peace River with a notation "High Rugged Mountains" to the south, "High wooded Mountains" to the north, and "Mountains 4000 feet high on both sides of the River" just to the north side of the Peace River. The map shows the junction of the Parsnip River and the Finlay River, then shows the Parsnip River in fair detail south to McLeod Lake. From McLeod Lake the map again shows good detail of the course of the Crooked River, through Kerry's Lake and beyond to Summit Lake. Between Summit Lake and the Fraser River, also labeled and shown in good detail on this map, is a notation "Giscome Portage." West and north of that the label "Pacific-Arctic Watershed 2820' s." appears, next to a notation "wide gently undulating Sandy terrace flats." The map shows a label "THE ROCKY MOUNTAINS" some distance east of McLeod Lake, with the label starting a bit above the south end of the lake and continuing south-southeast on the map. The Finlay River is not represented in nearly the level of detail devoted to the Parsnip and Peace Rivers, and there are notations "Unexplored Region" in more than one area west of the Parsnip River, indicating an absence of detailed information about part of the region, at least in settler understanding.
- [263] However, the 1880 Survey Map does not depict the full length of the APD; the only indication of its position is a small notation in the position noted by the judge at para. 135 of his reasons. Dr. Brownlie agreed that the map "could not have enlightened the treaty commissioners concerning the location of the Arctic-Pacific divide" or "the location of the Rocky Mountains".
- [264] The judge also made no finding about whether the actual divergence between the Rocky Mountains and the APD was known by the Treaty Commissioners. Nor does the record support an inference that the extent of the divergence between these features was widely known.
- [265] Other maps likely in the possession of the Treaty Commissioners show the APD as closely parallel to the Rocky Mountains. The record included evidence that McKenna, in preparation for the journey, requested maps from a number of sources. In April 1898, McKenna was the private secretary to Sifton. He had requested a map in preparation for OIC 1703. None of the expert witnesses were able to identify this map and the judge drew no inference as to the map that McKenna likely received. An unmarked copy of the 1887 base map is not included in the record but it can be seen in the OIC 2749 map with its markings over the 1887 base map. The 1887 base map incorrectly depicted the location of the APD as closely parallel to the Rocky Mountains from the point where it diverges from the Rocky Mountains north to the 60th parallel.
- [266] OIC 2749, which relied on the 1887 Base Map, repeated that error. There was also no evidence the Treaty Commissioners had the OIC 2749 map with them or relied on it.

[267] As explained above, the judge relied heavily on OIC 2749 as indicative of Canada's intention but does not consider the erroneous depiction of the tract on the OIC 2749 map, which did not include most of the disputed territory.

b) Reliance on Unreasonable Inferences

[268] As well as relying on irrelevant evidence, in my view the judge made unreasonable inferences about certain aspects of the evidence for which there was no evidentiary foundation. These included inferences about the map Macrae intended to attach to his December 11, 1900 report to Minister Sifton; whether the Treaty Commissioners had the Macrae map in their possession; and the proper interpretation of Laird's 1905 publication, *Our Indian Treaties*.

i. Macrae Intended to Attach the Macrae Map to his December 11, 1900 Report to Sifton

[269] Macrae attached six documents to his report: four records of adhesions, a table showing the number of Indians admitted to Treaty in 1900, and a "Map showing the distribution of Indians in the territory covered by Treaty No. 8 and the extent of that territory". The judge stated at para. 81 that, on the margin next to this statement, someone had hand-written "[t]his last has been sent to the printer" under which there appears to be a name. The judge concluded at para. 82 that the map referred to by Macrae in his December 11, 1900 report to Minister Sifton was the one that has become known as the "Macrae map". This finding was based on an inference the judge drew from a letter Macrae sent to an acquaintance in March 1901, wherein he referred to a map that showed the "habitat of various Indian tribes" that was to be published in the "blue book of the Department of Indian Affairs" and specifically noted the "Iroquois around Jasper House" (at para. 83). This book included the "Macrae map", which featured labelled Indigenous groups in various locations, including the "Iroquois" near Jasper House.

[270] Dr. Taylor was the only expert witness who, on cross-examination, said the Macrae map was likely the one that accompanied Macrae's report. There was a large volume of direct evidence that strongly suggested otherwise but does not appear to have been considered by the judge. In particular, there was a November 14, 1900 memorandum from Macrae to the Deputy Minister of the Department of the Interior, which indicated Macrae did not have the updated 1900 Dominion of Canada base map that would eventually be used for the "Macrae map". In the memorandum, Macrae identified a number of geographical errors in the map he had for his expedition, which he discovered from his personal observations. They included:

1. Bat River a tributary of Loon River at the West is named Rat River.
2. The course of Pine River North is very incorrectly shown. The Creek which enters Pine River North [indecipherable] Ft. St. John is unnamed.

3. The River called Pine River up stream from Ft. St. John is indicated as entering Peace River at the wrong place.
4. Moberly River is also shown wrongly.
5. Portage La Loche, a very well known spot, and one that will constantly be referred to now that Treaty relations have been entered into with the Indians and scrip being given to the half-breeds in the North is not shown by name.
6. In these matters I speak from observation: from [hearsay] I may state that the distance between Hay River and Carcajou Point on the Peace River which is shown to be 80 miles, is I am informed only 2 ½ days with loaded pack horses, i.e. from 40 to 45 miles.

[271] The errors he identified are not consistent with the 1900 Base Map upon which the "Macrae map" was drawn and which outlined the APD more accurately than the OIC 2749 map. Macrae discussed the errors with the Deputy Minister who said they were "well-founded".

[272] In my view, this evidence is not capable of supporting the finding that the "Macrae map" was the map attached to Macrae's December 11, 1900 report to Sifton. The "Macrae map" did not contain the geographical errors identified by Macrae to the Deputy Minister in the map he had with him on his expedition. That map was drawn on the updated 1900 Dominion of Canada Base Map, which Macrae clearly did not have. Furthermore, the Macrae report with its now missing attached map was only published in the Annual Report of the Department of Indian Affairs for the year ending June 30, 1900, in the Sessional Papers of 1901. Indeed, this would explain why nine years later Macrae raised doubt about the accuracy of the depiction of the western boundary of the tract in the Macrae map.

ii. The Treaty Commissioners Had the Macrae Map or a Very

Similar One

[273] The judge also found at para. 84 that the Macrae map "was likely the same or at least very similar to the missing map referred to by the treaty commissioners in their report of September 22, 1899". This finding was factually impossible as Treaty Commissioners in 1899 could not have had in their possession a 1900 Dominion of Canada base map, or one similar to it, with a western boundary as depicted in the Macrae map.

iii. Laird in Our Indian Treaties Was Referring to the Indigenous Peoples Not the Extent of the Treaty Area

[274] For ease of reference I repeat the excerpt at issue from Laird's 1905 publication Our Indian Treaties concerning the Treaty:

Treaty No. 8 was made and concluded at the several dates mentioned therein in 1899, the first being at Lesser Slave Lake on the 21st of June, between Commissioners D. Laird, James A.J. McKenna, now Assistant Indian Commissioner, and Hon. James H. Ross, and the Cree, Beaver, Chipewyan and other Indians inhabiting the country watered by the Athabasca and Peace Rivers, in the District of Athabasca, also that portion of British Columbia east of the Rocky Mountains, and of the McKenzie District south of Great Slave Lake.

[Emphasis added.]

[275] The judge found at para. 88 that Laird was speaking of Indigenous peoples who entered into the Treaty and not the extent of the Treaty area. I cannot agree. This explanation fails to account for the fact that in 1899, Canada had not treated with Indigenous groups east of the Rocky Mountains in British Columbia or with those in the District of Mackenzie. Similarly, the Indigenous groups at Fort Nelson had not yet entered the Treaty. Therefore, if Laird had been writing about the Indigenous peoples who had entered the Treaty, he would have had to exclude the territory north of the Peace River in British Columbia. The only plausible meaning of this paragraph is that Laird was speaking of the extent of the Treaty area.

c) Failure to Consider Relevant Evidence

[276] The judge also failed to consider relevant evidence of the Treaty Commissioners' intentions arising from the text of the Treaty and the Treaty Commissioners' actions.

i. The Text of the Treaty

[277] On its face, the phrase "the central range of the Rocky Mountains" refers to a boundary within the Rocky Mountains. Even in 1899, the APD was understood to be a separate line of watershed from the Rocky Mountains. That was clear from the OIC 2749 map, which depicted the APD as west of, but closely parallel to, the Rocky Mountains, and extending north of the 60th parallel north into Yukon. Finding that the Treaty Commissioners intended the boundary to be the APD would read the words "Rocky Mountains" out of the phrase "the central range of the Rocky Mountains", contrary to Marshall at para. 78(8). To give meaning to the words "Rocky Mountains" as referring to mountains, and "central range" as referring to a line of watershed, inevitably leads to the conclusion that the phrase "central range of the Rocky Mountains" means a line of watershed in the Rocky Mountains.

[278] Second, in their report of September 22, 1899, the Treaty Commissioners referred to the "Indians west of the mountains" who resemble the Beaver. In that context, the "mountains" were the Rocky Mountains and the "Indians" were likely the Sekani who lived west of the Rocky Mountains. The Treaty Commissioners appear to recognize the Rocky Mountains as the natural border between the Beaver and the Sekani. The judge found that "the central range of the Rocky Mountains" referred to a line of watershed that divided the Beaver in the east from the Sekani in the west but then applied today's understanding of where the APD was located to determine the line of watershed. In doing so, he failed to consider that the Rocky Mountains, and not the APD, separated the Beaver and the Sekani.

[279] Third, the judge did not consider the absence of any reference to the Sekani in the Treaty as being more consistent with an intention of the Treaty Commissioners to only treat with Indigenous groups east of the Rocky Mountains. An intention to treat within the narrow boundary is also consistent with Mair's comments upon completing the 1899 meetings:

There were, of course, many Indians who did not or could not turn up at the various treaty points that year, viz., the Beavers of St. John, the Crees of Sturgeon Lake, the Slaves of Hay River, who should have come to Vermilion, and the Dog-Ribs, Yellow-Knives, Slaves, and Chipewyans, who should have been treated with at Fort Resolution, on Great Slave Lake.

In this passage, Mair was describing the Indigenous groups with whom they expected to treat in 1899. He does not mention the Sekani or any Indigenous groups west of the Rocky Mountains in a list that appears to be exhaustive.

[280] In sum, the material evidence in my view, overwhelmingly supports the inference that the "central range" refers to the subset of mountains within the Rocky Mountains that are defined by where the primary lines of watershed travel through the mountains. On this definition, the "central range" would be continuous even with the interruptions to the watershed lines by the Peace and Liard Rivers. This definition is also consistent with the description of there being a "main chain" or "central range" of the Rocky Mountains north of where the Rocky Mountains diverge from the APD. This evidence also supports the inference that the Treaty Commissioners intended the "central range" to equate with the "main chain" of the Rocky Mountains as referred to in the statutes cited in Cameron's decision on the eastern boundary of the Province, and in the 1880 Dawson report.

ii. The Treaty Commissioners' Actions

[281] The most compelling evidence, in my view, of Canada's intention to treat only east of the Rocky Mountains was that the Treaty Commissioners acted in a manner consistent with that understanding:

- a) there was no notification, discussion or consultation with any Indigenous groups in the disputed territory;
- b) there was no effort to secure adhesions from Indigenous groups in the disputed territory;
- c) all of the federal reserves allotted were within the Peace River Block east of the Rocky Mountains; and
- d) in the aftermath of Macrae's report, there was no action taken by Canada to secure adhesions from Fort McLeod or Fort Grahame, where there were reports of conflict and of starvation.

- [282] The Treaty Commissioners were aware that they could not secure the surrender of Aboriginal title through the Treaty without making proper notification, disclosure and consultation. With respect to Indigenous groups within the narrow boundary (with the exception of Fort Nelson, which adhered to the Treaty some years later), it followed the appropriate processes of notification and consultation.
- [283] In these circumstances, the Treaty Commissioners would have understood that a similar process would have had to be followed in the disputed area if they intended to treat with Indigenous groups in that area.
- [284] The judge drew no inference from the lack of evidence of Canada adopting or even considering a similar process in the disputed territory to the one they had adopted in treating with Indigenous groups east of the Rocky Mountains. In my view, the absence of that evidence, which Canada understood was required in order to secure the surrender of Aboriginal title and maintain the honour of the Crown, inexorably leads to the conclusion that Canada only intended to treat with Indigenous groups within the narrow boundary.

I. Summary of Findings

- [285] The errors of law and fact identified above tainted the judge's interpretation of the metes and bounds clause. As a result, I have found it necessary to reassess some of the evidence and apply the Marshall principles to that reassessment for determining the western boundary of the tract.
- [286] On its face, the Treaty clearly refers to a line of watershed located within the Rocky Mountains. The only Indigenous groups specifically named in the Treaty reside to the east of the Rocky Mountains. In particular, the Sekani are not named in the Treaty.
- [287] In my view, the only inference reasonably available on the evidence is that Canada intended the western boundary to fall within the Rocky Mountains. In particular, I base this conclusion on the following:
- a) Canada understood that consent of the Indigenous groups who occupied the land it sought to secure for the Treaty was needed to extinguish Aboriginal title to that land. It also understood that it had a duty to notify, consult with and obtain the consent of those Indigenous groups it treated with before Aboriginal title to their land could be surrendered.
 - b) Pre-Treaty, Minister Sifton proposed that the western boundary of the tract should extend to the APD as it was described and depicted in OIC 2749 and the attached map. The OIC 2749 map effectively depicted the APD parallel with and immediately adjacent to the Rocky Mountains.

- c) The Treaty Commissioners were empowered by OIC 1703 to make a treaty north of Treaty 6 and were given the discretion to determine the western boundary of the tract. Time, resources, and conditions on the ground did not permit them to take adhesions west of the Rocky Mountains and north at Fort Nelson east of the Rocky Mountains at that time.
 - d) When drafting the Treaty, the Treaty Commissioners used language consistent with Treaty 7.
 - e) At the time of writing, the Treaty Commissioners likely believed that the Rocky Mountains reached the 60th parallel, that the Rocky Mountains were only the easternmost mountains of the range, and that the APD and the Rocky Mountains were not far apart.
 - f) The Treaty Commissioners were unable to complete the treaty process at Fort Resolution and Fort St. John. The following year, Cabinet sent Commissioner Macrae to take adhesions at those communities and to give annuities throughout the rest of the tract. When Macrae had completed his mission, Canada was of the view that title had been extinguished everywhere in the tract.
 - g) The Treaty Commissioners and Commissioner Macrae were given no instructions to, and made no effort to, secure adhesions from the Indigenous groups living in the disputed territory. Canada did not engage in any process of notification and consultation with Indigenous groups in the disputed territory and understood that such a transparent process was necessary in order to honourably obtain the surrender of Aboriginal title from Indigenous groups impacted by their conduct. Following Macrae's report that Aboriginal title was extinguished everywhere other than at Fort Nelson, Canada took no further action in the immediate future thereafter to secure adhesions from Indigenous groups in the disputed territory.
- [288] The original Indigenous signatories were Cree from the District of Athabasca. Their interest in becoming parties to the Treaty was to preserve their way of life as they enjoyed it within their territory. That territory was situated on land east of the Rocky Mountains.
- [289] I am of the view that an application of the Marshall principles on this evidentiary record could only support a declaration in favour of the narrow boundary. Only the narrow boundary would reconcile the interests of the original signatories to the Treaty.

VII. DISPOSITION

- [290] In the result, I would allow the appeal and quash the declaration. If I am wrong in my assessment of the propriety of the declaration, I would allow the appeal, set aside the declaration granted, and substitute it with a declaration that the phrase "the central range of the Rocky Mountains" in the metes and bounds clause of Treaty 8 means "the line of watershed in the Rocky Mountains where the water flows on one side to the east and on the other to the west".

"The Honourable Madam Justice D. Smith"

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. OVERVIEW

- [291] I have had the privilege of reading my colleague Justice Smith's reasons for judgment in draft form.
- [292] I respectfully do not agree with her principal disposition of the appeal on the ground the court below erred in granting declaratory relief. In my colleague's view, declaratory relief was not available here because it is unclear on the material before us what legal rights the declaration will affect, and so it has no practical utility.
- [293] I say that there most certainly is practical utility to resolving the dispute between the parties as to the location of the western boundary of Treaty 8. The controversy is "live", indeed it has been festering for over 100 years. The jurisprudence prescribes no legal requirement to understand the scope of rights affected by a declaration in order for it to be available, and indeed such a requirement would not be necessary or advisable.
- [294] Nor can I agree with the alternative disposition that the trial judge erred in fact and law in determining the western boundary of Treaty 8 falls at the APD.
- [295] This case is one of competing inferences. A twenty-first century court has no ability to question those individuals who were party to the Treaty's signing in 1899. The trial judge instead had to examine what records remain from before and after the Treaty was signed to determine what the parties intended the metes and bounds clause to mean.
- [296] What my colleague calls errors of law and fact in my view amount to contentions that the judge should have drawn alternative inferences from the record. That he drew the inferences he found most compelling is not an error, but rather an appropriate exercise of his fact-finding role. His conclusions are owed deference by this Court.
- [297] In reaching her alternative conclusion, I respectfully say my colleague has stepped into the shoes of the trial judge and retried the case, going beyond the bounds of appropriate appellate review as discussed in many cases but especially crystallized by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. This case involved 61 days of trial over two years, with a detailed record including over 1500 pages of reports from 11 different experts. While there were of course alternative conclusions to be drawn, in my view the trial judge's conclusion is amply supported by the historical record developed before him, and the inferences drawn from the facts he found are reasonable. To find otherwise is simply to adopt alternative inferences on the same record.
- [298] I will proceed with a discussion of the jurisdiction enjoyed by courts to consider declaratory relief. I will then discuss the alleged errors of law. Finally, I will identify the critical pieces of evidence relied upon by the trial judge--the pillars supporting his conclusion--and explain how his conclusions are well-grounded in the trial record.

II. DECLARATORY RELIEF

[299] My colleague has determined that the trial judge erred in granting declaratory relief. I respectfully disagree.

[300] In explaining my disagreement, I will first set out my view of the law of declaratory relief, then explain that in my view, the trial judge had discretion to grant a declaration here.

A. Jurisdiction on Appeal

[301] As a preliminary matter, I will address the respondent First Nations' argument that this Court is precluded from considering whether declaratory relief was appropriate. In their submission, this is because the trial judge made a final determination in *Willson v. British Columbia*, 2012 BCSC 1256 [Willson #7], that declaratory relief is available, which was not challenged and is not properly under appeal.

[302] My colleague concludes that the judge did not make a final order and this Court has the ability to review his granting of declaratory relief as part of the decision he made at trial (Reasons of Justice Smith at paras. 56-60). I agree.

[303] The trial judge in *Willson* #7 was ruling on whether to dismiss the claim without a trial, in part based on an argument that he should find declaratory relief unavailable in the circumstances of the case. Allowing the claim to proceed to trial was not a final determination on the declaratory relief issue, but rather a finding that declaratory relief could be available based on the pleadings as they stood at that point.

[304] Thus, I agree that the judge's final decision to grant declaratory relief was made in the context of his trial reasons and is reviewable by this Court on the appeal of his trial decision.

B. The Law of Declaratory Relief

[305] My colleague and I agree on the criteria the Supreme Court of Canada has set out as relevant to declaratory relief.

[306] However, I disagree with the view that this test necessarily implies a declaration is unavailable where it defines only a limited part of the parties' legal relationship.

[307] In my view, the well-established test leaves ample room for declarations to be issued where the precise content of all rights affected is unknown.

1. Four Threshold Criteria and One Guiding Criterion in Exercising Discretion

[308] The granting of declaratory relief is at the court's discretion where four criteria are met. As the majority stated in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60:

Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (*Ewert v. Canada*, 2018 SCC 30, at para. 81; see also *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46).

[Emphasis added.]

As was held in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11, this list of factors represents a restatement of the Court's earlier view of declaratory relief, as expressed in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, and *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441.

[309] When these four criteria are present, a declaration "may be appropriate". In other words, these four conditions are generally necessary but not in themselves sufficient for declaratory relief to be inevitably awarded.

[310] Where these factors are met, a court looks at the practical value of the declaration in assessing if it should exercise its discretion to grant such a remedy:

A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.

Daniels at para. 11; see also *S.A.* at para. 61.

[311] This Court has also phrased the question as "whether a 'useful purpose' would be served by granting the order": *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 71; see also *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 at para. 52 [GVRD].

[312] An assessment of the practical utility of a declaration necessarily looks at the effect of the requested remedy on the parties' rights. Declarations must be connected to legal rights, rather than, for example, facts "detached" from those rights or "law generally": 1472292 *Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at para. 30; *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 at 501. Detached facts and general pronouncements of law have little utility.

2. A Declaration Can Clarify Legal Rights without Defining Their Every Aspect

[313] For a declaration to have practical utility, thus, it must "define" some aspect of the parties' rights: *Reasons of Justice Smith* at para. 69.

- [314] The question for the court is "whether the declaration is capable of having any practical effect in resolving the issues in the case": Solosky at 833 (emphasis added). In other words, declarations will only be certain to lack practical utility where it is clear the declaration sought will have no effect.
- [315] GVRD provides an example of the principle that declarations with no effect are not available. There, this Court declined to issue a declaration because it found that the provision on which the district was seeking a declaration did not create "any obligation" on the part of the Province or right on behalf of the district: GVRD at para. 52 (emphasis added).
- [316] To borrow my colleague's language at para. 73, the "crux" of the GVRD decision was that the declaration sought definitively would not have any impact on legal rights. This is quite distinct from a conclusion that the decision had an indeterminate impact on legal rights.
- [317] Similarly, in Daniels, the Supreme Court of Canada declined to grant two of the three declarations requested by the appellants: (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians, and (3) that Métis and non-status Indians have the right to consultation and negotiation. The Court determined that, having found Métis and non-status Indians fell under s. 91(24), these declarations would simply "restat[e] settled law": at paras. 53, 56. In other words, they lacked any practical utility.
- [318] In contrast, the case law makes clear that declarations are available where rights are connected to the declaration, but the exact way they will be affected is uncertain.
- [319] In Daniels, the Court upheld a declaration that non-status Indians and Métis are "Indians" within the meaning of s. 91(24) and are within the jurisdiction of the federal government. It did so without making any pronouncements on what being included in s. 91(24) would mean for the rights of those within these broad categories. The federal government had no corresponding "duty to legislate" as a result of the decision, but non-status Indians and Métis could at least know "where to turn for policy redress" in the future: Daniels at para. 15.
- [320] In other words, the declaration affected legal rights in that it gave clarity to the text of a provision of the Constitution, but did not come with any clarity as to what s. 91(24) may or may not set out in terms of the relationship between non-status Indians and Métis and the federal government. As one academic stated:

Virtually anything the federal government chooses to do today in response to the circumstances of non-status Indians or Métis it could have done before and apart from Daniels. But more importantly, Canada, as a matter of law, need do nothing differently today, after judicial confirmation of its legislative authority over all Indigenous peoples, than it did before the Supreme Court granted the first declaration.

Kerry Wilkins, "Is that All There Is: The Dubious Dividends of Daniels" (2019) Alta. L. Rev. 123 at 139.

[321] In S.A., a majority of the Supreme Court of Canada again determined a requested declaration would have practical utility despite its effect on the appellant's entitlement to housing--the major right at issue--being uncertain.

[322] That case concerned whether Henson trusts were "assets" within the meaning of S.A.'s application for rental assistance from the Metro Vancouver Housing Corp. ("MVHC"). The issue of a court's ability to grant declaratory relief was raised because MVHC argued that, regardless of whether a declaration was issued in that case, the appellant would not have any legal entitlement to receive rental assistance or to seek judicial review of the decision to deny assistance: S.A. at para. 25.

[323] A majority of the Court agreed that no entitlement to receive the assistance would stem from a declaration. It found the declaration would affect whether S.A. was entitled to have her application for assistance considered, however, and could regardless be issued: S.A. at para. 26.

[324] Thus, determining that the declaration sought may or may not affect the applicant's housing was enough to establish that the Court could grant it. This despite the fact that it was possible S.A.'s consequent application would not succeed, and she would nonetheless be refused rental housing at MVHC's discretion--meaning the declaration could have no effect on her ultimate entitlement to housing.

[325] My colleague at paras. 97-99 references Rosen at paras. 25-26 as an example of a case where a declaration was found to lack practical utility because its effects were uncertain.

[326] However, the Ontario Court of Appeal's comments on practical utility there occurred in the context of finding no "real dispute" existed between the parties. Rosen, the trucking company, had by application sought declarations to the effect that the respondent insurer was obligated to indemnify for certain stolen cargo. However, as the client to whom the goods belonged had not actually commenced a claim against Rosen there was as yet no claim for the insurer to indemnify. The insurer did not file a responding record, and instead moved to strike the application as no claim had been commenced, with leave to amend if the motion was refused.

[327] The application judge concluded he could not declare an obligation to indemnify due to the lack of an underlying claim, but granted declarations on two disputed factual issues: first, that the trucking company "did not make a material misrepresentation on its application for insurance with respect to its transportation of consumer electronic goods; and second, that the theft occurred while the cargo was in Rosen's custody" (at para. 16). The only evidence before him was an affidavit from the trucking company, upon which cross-examination had occurred. He did not deal with the motion to strike in his reasons, or give the insurer the opportunity to amend its response or file evidence.

- [328] The Ontario Court of Appeal determined the declarations should not have been granted, in part because of their lack of practical utility. In doing so, Justice Feldman cited the test from Solosky at 833, noting that the declaration must be capable of having "any practical effect" (at para. 24). With no legal dispute in existence, the requested declarations in Rosen were not capable of having any effect whatsoever.
- [329] As I read Rosen, this was the basis for overturning the declarations--not a finding that the declarations had "potential to resolve the dispute" but their effects were too uncertain, as my colleague states at para. 99 of her reasons. With a clear absence of any underlying conflict, no value could come from such relief. In my view, Rosen is thus distinguishable from the instant case. As I will discuss below, my colleague does not challenge the reality of the dispute here, and in my view it is apparent the declaration will clarify the parties' positions.
- [330] The above cases, and in particular the binding Supreme Court of Canada authorities, demonstrate that if there is a possible effect on rights stemming from a declaration of law, there is discretion to grant declaratory relief. In other words, the dispute only needs to give rise to a "cognizable threat to a legal interest" and cannot have "merely speculative" effects on future rights, as Dickson J. stated in Operation Dismantle.
- [331] In other words, while the declaration must "define" or clarify the rights of the parties to some extent, there is no obligation to comprehensively map out all changes to rights stemming from a declaration. By nature, many aspects of the parties' relationship in any legal proceeding are not before the courts. It is a matter of both practicality and logic that courts do not have to understand what a requested declaration would mean for any and every associated right in order to have recourse to this remedy.

C. Analysis: The Trial Judge Had Discretion to Issue a Declaration

- [332] Applying this legal framework to the trial judge's decision shows that, in the circumstances, a declaration was available.
1. All Threshold Criteria Were Met
- [333] The dispute over the meaning of the metes and bounds clause in Treaty 8 is real. The difference of opinion over the boundary's location has, as the trial judge described, been "festering to one degree or another for over one hundred years": Willson #7 at para. 80.
- [334] My colleague and I agree on the reality of the dispute, but I do take issue with a characterization of the impugned remedy as a "declaration of fact": Reasons of Justice Smith at para. 96. In my view, the dispute is unquestionably legal in nature, as is a declaration resolving it.
- [335] The rights of Indigenous signatories to Treaty 8 are guaranteed not only by the Treaty itself, but also by s. 35(1) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Treaties are solemn, sacred promises, and the interpretation of any part

of such an agreement requires, as this one did, understanding and interpretation of applicable legal principles: *Mikisew Cree First Nation v. Canada* (Governor General in Council), 2018 SCC 40 [Mikisew (2018)] at para. 28. A treaty between an Aboriginal nation and the Crown "is not a contract, and is not subject to the rules of contract law": Peter Hogg, *Constitutional Law of Canada*, 5th ed., (Toronto: Carswell, 2019) at 28.6(c).

[336] A declaration interpreting a treaty is highly distinguishable from, for example, a declaration of fact in a contract dispute, such as *Rosen*. A declaration as to the meaning of a clause of a treaty is by its nature a pronouncement with legal force and is not "detached from the rights of the parties": *Rosen* at para. 30. Justice Feldman also said this in *Rosen*:

[31] Where the issue between an insured and the insurer is not the interpretation and application of the policy to a specific set of facts, but rather, what were the facts that occurred, then it is not a proper case for declaratory relief. The application judge erred by making findings of fact under the guise of a declaration of right.

[Emphasis added.]

[337] In this case, however, the judge was assuredly interpreting and applying the metes and bounds description to, and in the context of, an extensive set of historical facts. That is a legal declaration. How could it be otherwise when he was asked to determine the geographic extent of a treaty entered into between Canada and certain First Nations--to interpret the meaning of a critical phrase in a legal relationship that is constitutionally protected?

[338] The dispute is not hypothetical. There is a factual matrix available to determine the boundary's location. To the extent the court was required to make inferences in the absence of facts--such as the missing 1899 map--here, this is the result of the passage of time, not because certain facts have not yet come to pass. These difficulties in resolving the dispute will only worsen as time goes on.

[339] Having established the threshold criteria were met, it remains only to explain why the judge did not make any error in principle or law in determining there was practical utility to the declaration here.

2. The Declaration Clarifies Legal Rights and Has Practical Utility

[340] My colleague is firm in concluding the law of declaratory relief would only allow a court to interpret the metes and bounds clause in tandem with a rights-giving provision of the Treaty (at para. 95):

Because the relationship between the tract and the substantive rights under the Treaty is unclear, I cannot accept the respondent First Nations' position that the declaration would, in itself, allow Treaty members to "step outside and know with certainty where they can exercise their Treaty rights". For it to have that effect, a judicial determination that the rights are exercisable throughout the entire tract would be required. Absent such a determination, the declaration does not have any practical utility.

[Emphasis added.]

[341] However, this position ignores the jurisprudence stating that if a declaration has possible effects--"is capable of having any practical effect"--it can be granted: Solosky at 833.

[342] My colleague's essential conclusion is that the Treaty text in itself does not allow this Court to know "with certainty" where substantive rights apply, despite the declaration. Yet it makes perfect sense that we do not know this. Neither this appeal court nor the court below have been asked to decide the scope of harvesting rights and whether they are connected to the tract; neither court has had the benefit of interpretative evidence specific to the rights-giving clauses of the Treaty. Quite simply, this Court, as did the trial court, does not have the information before it to conclude what the effects of the declaration will be.

[343] However, the law of declaratory relief tells us relief can nonetheless be available in circumstances where the declaration's effects are not before the court. Simply put, there is no obligation in the law of declaratory relief to litigate the range of a declaration's effects. The question is simply whether the declaration will have practical utility.

[344] The trial judge determined the declaration would have practical utility. He did so quite aware of the fact that the metes and bounds clause would not necessarily determine substantive rights. He recognized this in his trial reasons at para. 12 as well as in Willson #7 where he stated:

[76] In this case, on the other hand, the rights conferred by Treaty 8 are quite beside the point raised by the plaintiffs in their action, an action that seeks a declaration as to where the treaty rights might be exercised, whatever those rights might be.

[77] To return to the jurisdictional language from Russian Commercial and Industrial Bank, supra, in this case, the question of where the western boundary lies for Treaty 8 is real and not just theoretical, and the plaintiffs have a real interest in the outcome of the action: their treaty rights may be exercised on land covered by the treaty, so it is important to know where that land lies.

[Emphasis added.]

[345] I see no basis to interfere with the judge's determination. Certainty as to the meaning of this one clause of the Treaty would assist Indigenous, federal, and provincial governments in clarifying their rights and obligations towards each other in future litigation.

- [346] Regardless of the right or obligation being interpreted, if there is a possibility it could be affected by the location of the western boundary, the parties will be assisted by knowing that boundary. The meaning of the metes and bounds clause, as my colleague identifies, has implications for the rights of all of the parties--for the respondent First Nations' rights to harvest, certainly, but also for Canada and the Province's entitlement to claim title to and use of land, and the intervenor First Nations' entitlement to have their own s. 35(1) rights protected and be dealt with honourably by Canada.
- [347] The Treaty 8 First Nations who assert rights within the tract may find the declaration clarifies their ability to protect those rights through the existing Treaty, rather than as s. 35 rights stemming from historic use and occupation. The boundary may have significance to the relationship between the intervenor First Nations and the Crown, as this Court acknowledged in *West Moberly First Nations v. McLeod Lake Indian Band*, 2014 BCCA 283. McLeod Lake in that appeal contested the trial judge's decision to allow First Nations in the tract who were not Treaty 8 adherents to intervene in the proceedings. In upholding the decision to grant intervenor status, Justice Neilson stated:
- [27] There is no question that, if the Treaty 8 First Nations succeed in establishing the westernmost treaty boundary, the landscape for negotiating settlements of the respondents' claims, quite literally, shifts significantly. There will be a fundamental change in the territory available for settlement discussions. The action introduces the prospect of extinction or surrender of rights by virtue of the operation of Treaty 8 in the respondents' traditional territories. New players with a competing regime of similar claims will emerge in settlement discussions, bringing issues of overlapping and conflicting claims that will clearly interfere with and complicate the extensive negotiations in which the respondents have engaged to date. These new claims will in turn impose extended duties of consultation and accommodation on the Province and Canada: *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 57-58; *Cook* at paras. 186-192.
- [28] While the end result of the negotiations is unknown, the inevitable result will be delay and a greater investment of time and resources by all parties. These are not just theoretical or speculative scenarios as McLeod Lake alleges. Mr. Justice Johnston properly found a victory for the plaintiffs will have a practical effect on the respondents' legal rights and impose new and prejudicial legal obligations on them.
- [348] The complexity of the web of rights affected by the Treaty demonstrates the impossibility of requiring a court to know the impact of a declaration on associated rights in order to grant relief. It supports the view that "tangible practical utility" can come from a declaration that provides "certainty and accountability" regarding an aspect of a complex relationship: *Daniels* at para. 15.
- [349] Just as was the case in *Daniels*, the declaration issued here may not directly clarify the scope of the rights to which the parties are entitled. The parties are left to determine what responsibilities flow from the metes and bounds clause, just as the Aboriginal parties in

Daniels were left to determine what their inclusion in s. 91(24) actually meant. Just as there was practical utility to removing Métis and non-status Indians from "a jurisdictional wasteland with significant and obvious disadvantaging consequences" (at para. 14), so is there utility to removing Treaty 8 First Nations from a state of uncertainty as to the meaning of the metes and bounds clause--uncertainty that again has obvious disadvantaging consequences for future attempts to enforce their rights. I note one last parallel to Daniels: this case too results from the inability of provincial and federal governments to agree on the meaning of a phrase that affects Aboriginal rights.

[350] In my view, there was clear practical utility entitling the judge to grant a declaration here.

3. An All-or-Nothing Approach to Declaratory Relief is Unnecessarily Restrictive

[351] Furthermore, with respect, I believe my colleague's approach is in direct conflict with what she identifies as "the fundamental purpose of the remedy: to clarify legal rights and obligations where they are in dispute": Reasons of Justice Smith at para. 72, citing Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al., 2007 MBCA 85 at para. 62. This fundamental purpose further supports my view that declaratory relief was and should be available on the facts of this case.

[352] The proposal that associated rights must be litigated in tandem with a declaration such as this represents an all-or-nothing approach to accessing declaratory relief. This is not only inconsistent with the jurisprudence, but fits poorly with the larger public policy context of this case.

[353] Aboriginal rights and title litigation frequently involves immense expense and time. The original writ of summons in this matter was filed in August of 2005. The parties have undergone a decade and a half of protracted litigation to settle this supposedly limited issue. One can only imagine how much more complicated the proceedings could have become if the parties were required to bring forward even more evidence to explain what exactly was meant by the agreement reached 121 years ago.

[354] The proposed approach also ignores the long-standing recognition in Canadian law that disputes between settler and Indigenous peoples are often best resolved through political negotiation or settlement, as opposed to court orders: see e.g., Mark D. Walter, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?" in John Borrows and Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 187 at 202-203; Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights" (1992) 21:2 Man. L.J. 498.

[355] Giving parties to Aboriginal rights and title litigation the autonomy to litigate discrete issues serves the interests of judicial economy, contrary to my colleague's suggestion at para. 103. Clarity as to what this one written phrase in the Treaty entails represents an opportunity for subsequent disputes to be resolved outside the litigation process. It opens the door to a less acrimonious relationship between the parties, rather than mandating larger-scale litigation.

[356] The requested declaration meets the jurisprudential threshold of clarifying disputed rights and obligations. It was open to the trial judge to grant it.

D. Conclusion on Declaratory Relief

[357] In my view, the judge had discretion to issue a declaration with significant practical utility to the parties here. His decision on this point should not be disturbed.

III. TREATY INTERPRETATION

[358] If her conclusion with respect to the law of declarations is incorrect, my colleague would alternatively overturn the trial judge's decision, and issue a declaration that the Treaty boundary falls east of the APD.

[359] Given the deference owed to a judge of first instance and considering the trial judge's reasons in their full context, I do not agree there is a basis to interfere with the impugned declaration.

A. The Trial Judge's Application of the Law

[360] My colleague identifies three distinct errors of law at para. 131 of her reasons. Drawing on the seminal authority on treaty interpretation of *R. v. Marshall*, [1999] 3 S.C.R. 456, they are that the trial judge:

- a) failed to consider the facial meaning of the metes and bounds clause within the context of the Treaty as a whole before turning to extrinsic evidence of intent;
- b) failed to consider the Indigenous signatories' intentions, understandings, and interests in interpreting the metes and bounds clause; and
- c) failed to consider how the original signatory parties would have understood the meaning of the words of the Treaty, as they related to the geographical and geological features of the region, in interpreting the metes and bounds clause.

[361] While I disagree with my colleague's assessment of the law governing the first alleged error, for the second and third in my view there is little question the trial judge was aware of the established principles governing treaty interpretation and his obligation to apply them. He cited *Marshall* at the outset of his reasons, where then-Justice McLachlin summarized the principles guiding treaty interpretation, and he reproduced the principle that "a goal of treaty interpretation is to search for the understanding and common intention of both

parties to a treaty": at para. 7, citing Marshall at para. 78. Further, in his reasons he examines the wording of the provision at issue and considers its meaning in its complex historical and cultural backdrop, as required by Marshall.

[362] In determining if the trial judge erred on the second and third grounds, the question thus becomes whether some erroneous finding he made is traceable to an error of law. As I will explain, I conclude this was not the case.

1. Standard of Review

[363] It is common ground that no deference is owed to judicial conclusions stemming from legal error. A correctness standard of review applies to a finding of the trial judge that "can be traced to an error in his or her characterization of the legal standard": Housen at para. 33. Similarly, no deference is owed to the legal conclusions a trial judge makes by applying the law to a historical record: Caron v. Alberta, 2015 SCC 56 at para. 61.

[364] However, a traceable legal error must, of course, be identifiable to merit appellate interference on this correctness standard. My colleague and I disagree over whether such traceable errors indeed were made.

2. Alleged Errors of Law

a) Treaty as a Whole

[365] My colleague suggests the trial judge committed an extricable error of law in failing "to consider the facial meaning of the metes and bounds clause within the context of the Treaty as a whole before turning to extrinsic evidence of intent": Reasons of Justice Smith at para. 131.

[366] While my colleague references a need to consider the disputed provision in the context of the Treaty "before turning to extrinsic evidence of intent" (at para. 138 [emphasis added]), I do not take her as suggesting evidence outside of the Treaty's text is only relevant at some second stage of interpretation.

[367] Such an idea was forcefully rejected in Marshall. In discussing the relevance of a treaty's text, McLachlin J. directed the reviewing court to examine the facial meaning of "the words of the treaty clause at issue" to develop a "framework for the historical context inquiry": at para. 82 (emphasis added). However, beyond this necessary use of the text, a historical treaty's wording is not necessarily more important than other evidence before the court. The majority's resolution of one of the major issues in the case was to conclude "extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty": at para. 11 (emphasis added). McLachlin J. expanded at para. 81:

It is true that in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, this Court alluded with approval to the strict contract rule that extrinsic evidence is not admissible to construe a contract in the absence of ambiguity. However, subsequent decisions have made it clear that extrinsic evidence of the

historic and cultural context of a treaty may be received absent ambiguity: Sundown, *supra*, at para. 25; Badger, *supra*, at para. 52. As Cory J. wrote in Badger, *supra*, at para. 52, courts interpreting treaties "must take into account the context in which the treaties were negotiated, concluded and committed to writing".

[Emphasis added.]

- [368] No ambiguity in the written text of a historical treaty is required to make evidence extrinsic to the text relevant because such an approach would ignore the reality of how these documents were drafted. The written text of historical treaties "recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement": *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 52. The text, therefore, cannot be assumed to better reflect the parties' intentions than evidence "by conduct or otherwise as to how the parties understood the terms of the treaty": Marshall at para. 11, citing *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal *ref'd* [1981] 2 S.C.R. xi at 236.
- [369] Historical treaties stand in contrast to modern treaties, "whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not understand" and whose text is therefore more valuable as an interpretive aid: *Quebec (Attorney General) v. Moses*, 2010 SCC 17 at para. 7 (contrasting the James Bay and Northern Québec Agreement with Treaty 8); see also *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at paras. 36-37. To add to my colleague's statement of the law at para. 139 of her reasons, the appropriateness of drawing on principles of contractual interpretation differs significantly between the historical and modern contexts. Broadly speaking, such principles are significantly more relevant to the latter.
- [370] I thus take the suggestion to be that the trial judge erred by failing to consider the Treaty "in the context of its underlying purpose": Reasons of Justice Smith at para. 138, citing *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [Mikisew (2005)] at para. 138. This principle certainly applies to historical treaties. However, my colleague fails to explain how the trial judge's reasons demonstrate such a disregard for the Treaty's underlying purpose, which he addressed and considered: see e.g., at paras. 158-159.
- [371] Even if the trial judge did not take into account all other provisions of the Treaty in determining the meaning of the metes and bounds clause, this would not ground legal error; no traceable error in principle has been identified. If made out, such a failure to consider evidence could provide grounds for appellate reconsideration where the omission "gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion": *Housen* at para. 39, citing *Van der Perre v. Edwards*, 2001 SCC 60 at para. 15.
- [372] But no such failure is demonstrated here.

[373] I cannot accept the suggestion the trial judge forgot, ignored, or misconceived evidence in the form of the other clauses of the Treaty. The Treaty is the document at the very heart of the litigation that the judge managed and tried over the course of eleven years, in innumerable case management sessions, in pre-trial applications, and in at least nine sets of reasons disposing of those applications. It is evident from his reasons that the trial judge was familiar with its entire text, and considered the metes and bounds clause in the context of the Treaty as a whole as well as in relation to other relevant evidence.

[374] I reproduce the metes and bounds clause in its entirety for ease of reference:

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:--

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, an along the said boundary easterly, northerly and southwesterly, to the place of commencement.

[Emphasis added.]

[375] My colleague's first point is that the judge did not resolve the distinction between the eastern and western boundaries of the Treaty. In particular, the western boundary is described as the "central range of the Rocky Mountains" while the eastern boundary is described as "along the height of land between the Athabasca and Churchill Rivers".

[376] My colleague then goes on to draw her own inferences at para. 145:

Adopting the rationale he applied in interpreting OIC 2749, I would infer that the Treaty Commissioners deliberately used different descriptions for the two boundaries with the intention of providing a different meaning for the western boundary of the tract from the "height of land" description used to describe the eastern boundary of the tract. The Treaty Commissioners knew the meaning of the phrase "height of land"; they had no reason not to use the phrase "height of land" if they had intended the western boundary of the tract to be the APD and surely would have

done so if they had wanted it to be the APD. To conclude otherwise would render the words "the central range of the Rocky Mountains" meaningless.

[Emphasis added.]

[377] Yet this criticism overlooks the fact that the trial judge dealt thoroughly in his reasons with the critical phrase "central range of the Rocky Mountains". His analysis consumes at least paras. 115-151 of his reasons. His ultimate conclusion is found at para. 151:

I conclude that the "said range" in the metes and bounds description of Treaty 8 refers to the Arctic-Pacific divide or watershed, and not to a range or lesser watershed within what we now call the Rocky Mountains. In doing so, I accept Dr. Galois' opinion that the phrase "central range" as applied to boundaries means a line of watershed. Due west of the source of the Red Deer River, the line of watershed is the Hudson Bay-Pacific divide which, as part of the continental divide, is the highest order of watershed. North of that point, water west of the divide continues to flow to the Pacific Ocean while water to the east begins to flow to the Arctic Ocean rather than to Hudson Bay. This occurs well south of what Dr. Taylor has called "the split" at approximately 54° 30' N (ex. 110 at 18).

[378] At para. 121 of his reasons, the trial judge places some emphasis on the fact that David Laird was a Commissioner for both Treaties 7 and 8.

[379] This is an important point because the trial judge also refers at para. 101 to a memorandum written by Mr. Laird dated 11 January 1910, sent to the Deputy Minister of Indian Affairs by Mr. Laird who was by then the Indian Commissioner. It is in direct response to J.A. Macrae's earlier questioning of the accuracy of the so-called Macrae map--where Macrae wondered (he did not conclude) if the map showing the wider boundary (including the disputed territory) accurately reflected the metes and bounds clause of Treaty 8.

[380] Laird's 1910 memorandum is significant. It is the only unambiguous statement as to the intent of the Treaty Commissioners that can be found in the voluminous record. Dr. R.J. Brownlie, a professor in the Department of History at the University of Manitoba, was one of the principal expert witnesses who gave evidence at the request of Canada in these proceedings. Dr. Brownlie called the Laird memorandum and three other memoranda in a 1909-10 exchange "[o]ne of the best sources of insight into the thinking of key officials" involved with Treaty 8 (Amended main report of Dr. Brownlie, AB1, 2362-2527 at 2390 [Brownlie Report]).

[381] The Laird memorandum is reproduced in full in Appendix J and I will return to it later, but here I extract Laird's discussion of the phrase "the central range of the Rocky Mountains":

The northwesterly boundary of Treaty No. 7 is given as the central range of the Rocky Mountains, or the boundary of British Columbia; and, while it is true that the western boundary of Treaty No. 6 is set down as the "easterly range of the Mountains," yet this error was rectified in defining the boundaries of Treaty No. 8, which take in the strip of land between the western boundary of Treaty No. 6 and the eastern boundary of British Columbia, as it was seen that it might cause

disputes if there was a tongue of unceded land between Treaty 6 and the height of land which forms the eastern boundary of British Columbia from the international boundary northwesterly until it crosses the 120th degree of west longitude, which is thence the eastern boundary of that Province to the 60th parallel of north latitude.

[Emphasis added.]

- [382] Laird talks of "a tongue of unceded land between Treaty 6 and the height of land which forms the eastern boundary of British Columbia". The "tongue of unceded land" is shown on the map attached as Appendix K. This map shows the boundaries of Treaties 6, 7, and 8 and the so-called "tongue" created by taking the westerly boundary of Treaty 6 to the "easterly range of the Mountains" and the northwesterly boundary of Treaty 7 to (in the words of Treaty 7) "the central range of the Rocky Mountains". Treaty 8 uses the phrase "central range of the Rocky Mountains" so as to be consistent with the language in Treaty 7 and to thereby include the "unceded" tongue within the scope of Treaty 8. The evidence before the trial judge and referred to by him supports this very rational inference.
- [383] My colleague fairly notes that the Treaty Commissioners used the phrase "height of land between the Athabasca and Churchill Rivers" in the latter part of the metes and bounds clause. The irresistible question arises: why the use of the phrase "central range of the Rocky Mountains" rather than "height of land" (meaning the international divide and the APD)? Yet the need for consistency in describing the boundary between Treaty 7 and Treaty 8 to "catch" the tongue of unceded land in Treaty 8 rationally explains this. Indeed, Dr. Brownlie's evidence fully supports this conclusion.
- [384] The trial judge's conclusion that the term "central range" in Treaty 8 was logically connected to the same term in Treaty 7 demonstrates a reasoned consideration of the evidence before him. It refutes the alternative inference that the difference between the eastern and western boundary descriptions should have led him to a different conclusion, explaining the difference in language.
- [385] My colleague's second point similarly asserts the trial judge failed to consider relevant evidence in the form of another provision of the Treaty, which named Indigenous groups only within the District of Athabasca. Again, properly viewed, there is no basis on which to say a failure to consider this would be an error of law, and further, there is evidence the judge did consider this aspect of the Treaty. Similarly, I disagree the judge ignored the evidence of OIC 363, which described the tract's inhabitants as "within and adjacent to" the district. I will say more about this evidence in my discussion of the pillars of the judge's reasoning below. However, my conclusion remains that the record permitted the trial judge to reject the inferences proposed by my colleague and draw other ones, and there is no basis for a belief the trial judge must have forgotten, ignored or misconceived these provisions.

[386] Fundamentally, I cannot accept that the trial judge in 61 days of trial over two years, preceded by many years of case management and interlocutory applications, approached the interpretation of the metes and bounds clause, and in particular the phrase "central range of the Rocky Mountains", without considering the wording of the Treaty along with the rest of the record before him.

b) Failure to Consider the Interests and Intentions of Indigenous Signatories

[387] My colleague contends that the trial judge erred in law in applying the Marshall principle that the goal of treaty interpretation is to determine the parties' common intention, with an eye to their unique cultural and linguistic differences: *Reasons of Justice Smith* at para. 151; *Marshall* at paras. 78(3), (5).

[388] As she summarizes at para. 150 of her reasons:

In the circumstances of this case, these principles obliged the judge to consider, *inter alia*: (i) what the Indigenous signatories would have understood the words "central range of the Rocky Mountains" to mean; (ii) what the Indigenous signatories' interests were in treating with Canada; and (iii) which interpretation of the boundary would best reconcile those interests with Canada's.

[389] However, this conclusion is belied by the trial judge's express self-instruction at the outset of his reasons:

[7] A goal of treaty interpretation is to search for the understanding and common intention of both parties to a treaty: *R. v. Marshall*, [1990] 3 S.C.R. 456 at para. 78. In a case such as this, where documents run into the thousands of pages, a court must guard against being overwhelmed by the evidence of that intention from only one side of the bargain.

[390] Further, as the trial judge noted at para. 8, this case was unusual as the Indigenous peoples who adhered to Treaty 8 and appeared as plaintiffs agreed with the position of Canada that the wider boundary was the correct interpretation of Treaty 8:

This case is unusual within the body of decisions on treaty interpretation: here, federal Crown (a signatory to the treaty), a defendant, agrees with the aboriginal adherents who are the plaintiffs in this trial as to the location of the western boundary of Treaty 8. Therefore the contracting parties, as both "sides" of the bargain, at least as represented here, agree on the treaty's interpretation.

[391] Indeed, the only party to the Treaty who at trial disagreed that the metes and bounds clause referred to APD was the Crown in its provincial aspect.

[392] And the trial judge on 31 August 2007 directed that notice of the action be given to all signatories and adherents to Treaty 8 and, as stated at para. 11 of his reasons:

None has appeared to take issue with the position shared by the plaintiffs, Canada and the McLeod Lake Indian Band as to the location of the disputed boundary.

- [393] It is the case, of course, that on appeal McLeod Lake has changed its position and now sides with the Province in supporting the narrow boundary interpretation. But there is no suggestion that this tactical position is prompted by a new appreciation of the intentions and understandings of the original signatories to Treaty 8.
- [394] While Marshall indeed directs that one must search for the common intention that best reconciles the interests of both parties at the time the treaty was signed (at para. 78(3)) and "the words of the treaty must be given the sense which they would naturally have held for the parties at the time" (at para. 78(6)), a trial judge's task is complicated by the absence of viva voce evidence in a case like this of any one of the original signatories. Here, the trial judge also did not have the benefit of oral history addressing the Indigenous understanding of the term "central range".
- [395] My colleague suggests that, faced with this paucity of evidence, "it was incumbent upon the trial judge to consider which boundary better reconciled the interests of the parties in arriving at his conclusion on common intention": Reasons of Justice Smith at para. 154. In my view, this is exactly what he did.
- [396] The best of the minimal evidence around Indigenous intention led at trial, as stated by the judge, was the contemporaneous account of the original signing of Treaty 8 at Lesser Slave Lake in June of 1899 given by a settler witness thereto, Charles Mair. The judge noted at para. 64 that Mair's account *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899* (Toronto: William Briggs, 1908), was relied on by the Supreme Court of Canada in interpreting Treaty 8 in *Mikisew* (2005) at paras. 25, 27.
- [397] The trial judge said this in respect of Mair's account (at para. 66):

I infer from Mr. Mair's account that the aboriginal people depended heavily on the explanation of the treaty terms put forward by the commissioners, particularly Mr. Laird on June 20, 1899, and that they depended heavily on Mr. Laird's reading of the treaty terms to the assemblage on June 21, 1899. From Mr. Mair's report of what was said by the aboriginal participants, it seems clear that the aboriginal signatories wanted to continue to make their own living, to avoid conflict with white people coming into their territory, and to increase their learning or knowledge through education. It is also fair to say that Mr. Mair does not report any discussion at Lesser Slave Lake concerning the western geographic extent of the treaty.

[Emphasis added.]

- [398] In this light I cannot agree that the trial judge, within the confines of the record before him, did not consider the intention of the Indigenous signatories to Treaty 8. The fact is that the evidence he had of "intention" was quite simple and straightforward. It was "to continue to make their own living, to avoid conflict with white people coming into their territory, and to increase their learning or knowledge through education."

[399] I should note that in this discussion of Indigenous intent, I am accepting the premise that the intent of the original 1899 signatories should guide the court in this review: Reasons of Justice Smith at paras. 107-117. I also do not mean to suggest there was no further complexity to the interests of Indigenous parties to the Treaty, but rather that the trial judge could only consider that evidence that was before him.

[400] It is hardly surprising that the original Indigenous signatories centered in Alberta (Athabasca) would have had little interest in the western boundary of Treaty 8 far to the west in British Columbia. Again, there is apparently no evidence available on this point. It was the evidence of Dr. Brownlie that (Brownlie Report at 2465):

The record shows that First Nations had fairly exact ideas about where their own territory or boundaries and those of their neighbours were located. That record does not, however reveal anything about the Aboriginal understanding of the boundaries of Treaty 8.

[401] Dr. Brownlie also said that, "[h]aving been assured that their hunting, trapping, and fishing were to be protected, and thus gained the impression that the treaty's effect would be to guarantee the continuation of their livelihoods and ways of life, the treaty signatories probably did not think much about boundaries" (Brownlie Report at 2620). In cross-examination, Dr. Brownlie agreed that while there was confusion within the dominion government over the location of the APD, including as to how far it extended within the Rocky Mountains, the original signatories would not have known about this internal-to-government dispute (T. at 274, ll. 27-37). I cannot agree with my colleague's suggestion at para. 153 that this unsurprising evidence should have affected the judge's analysis.

[402] The view of the Indigenous parties to the Treaty is highly relevant to the scope of its protection of their livelihoods and rights. But for this provision of the Treaty--the interpretation of which is not necessarily determinative of Treaty rights, where the Indigenous parties to the Treaty agreed with Canada's position, and where the intention behind the clause came apparently solely from Canada--the absence of Indigenous intention cannot prevent the dispute over it from being settled.

[403] The trial judge did not fail to consider the intention of Indigenous parties to the Treaty. He considered it, and determined it was not relevant to the interpretive request these same parties had made of the court.

[404] Given the provision setting a boundary to the Treaty was irrelevant to the original Indigenous signatories, the trial judge did not err in focusing his analysis on evidence of Crown intention.

c) Reliance on Modern Day Geography

- [405] My colleague concludes the trial judge erred in law by referring to the fact--made out in modern geographic evidence but unknown in 1899--that the Rocky Mountains stop short of the 60th parallel. This, she concludes, demonstrates a misunderstanding of the legal principle that treaties must be interpreted in their historical context and not given a "technical or contractual interpretation": Reasons of Justice Smith at para. 157, citing Marshall at para. 78.
- [406] I do not agree the trial judge failed to interpret the provision in its historical context. Read with the rest of his reasons, his reference to modern geographic evidence is consistent with the Marshall principles.
- [407] It is true the trial judge made reference to the fact that the Rocky Mountains (proper) in current understanding do not extend to the 60th parallel of north latitude. This does support his ultimate conclusion that the APD, which extends to the 60th parallel, is the western boundary. And it is apparently the case that late 19th-century maps variously depicted the Rocky Mountains as indeed extending to the 60th parallel of north latitude.
- [408] However, this was only one piece of evidence alluded to by the trial judge in in determining that "central range", in the context of the time and the Treaty, referred to the continental watershed. He also determined the term was used to describe the continental watershed in numerous other documents from the time period, that such a watershed was a predictable and unambiguous way to define a boundary, and that it was known at the time that the watershed split west from the Rocky Mountains prior to the 60th parallel. All of this evidence supported his ultimate conclusion that Canada intended the boundary to fall along the APD.
- [409] As I have said, the trial judge's approach to this issue of construction encompassed many paragraphs in his reasons and it bears emphasizing that the trial judge, in referring at para. 16 to the fact that the Rocky Mountains effectively come to an end some kilometres short of the northern boundary of British Columbia at 60 degrees of north latitude, also said this:

That is the current state of geographical knowledge. What is important to the resolution of the issue presented in this case is the state of geographical understanding in the late nineteenth century, as it may have influenced those who drafted the metes and bounds description of the western boundary of Treaty 8.

- [410] This express recognition by the trial judge of this Marshall principle of treaty interpretation, at the very outset of his reasons, must be taken to have ultimately guided his findings in the case.

3. The Honour of the Crown

- [411] My colleague does not raise the honour of the Crown as grounding a separate error of law.

- [412] As I understand her reasons, she concludes that it should have changed the trial judge's analysis of whether the Treaty Commissioners intended to treat west of the Rocky Mountains, as "the steps they took (or failed to take) in furtherance of that duty [to fulfill the honour of the Crown], are relevant to the question of where and with whom they intended to treat": Reasons of Justice Smith at para. 169.
- [413] As I understand the thrust of this concern, addressed at paras. 161-169 of my colleague's reasons and also advanced by a number of the intervenors, it is this: Treaty 8 could affect the rights of Indigenous peoples within the disputed territory without their adhesion to the Treaty, without notice to them and without consultation. The principle that "[i]n searching for the common intention of the parties, the integrity and honour of the Crown is presumed" (Marshall at para. 78(4)) supports an interpretation of the boundary of Treaty 8 that is consistent with an honourable exercise of the Crown's powers; this supports the interpretation favouring the narrow boundary.
- [414] I cannot agree with my colleague that the interpretive principle of the honour of the Crown is "relevant" to finding the historical facts of what intention Canada had, and what steps the Treaty Commissioners took, in entering into treaty in 1899.
- [415] The honour of the Crown in treaty interpretation "assume[s] that the Crown intends to fulfil its promises": Badger at para. 41. It "requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples: Marshall at para. 44; Mikisew (2018) at para. 28.
- [416] The honour of the Crown is not applied to rewrite history. It should not be used to retroactively alter the promises the Crown actually made to Indigenous peoples to make these promises more honourable. To apply the honour of the Crown to assume the Crown did not give certain assurances to Treaty 8 First Nations because said assurances could be detrimental to the intervenor First Nations would, indeed, be dishonourable; it would allow the Crown to shirk responsibilities it took on towards Treaty 8 nations, as well as the consequences of potentially breaching its duties to non-Treaty 8 nations. Significantly, such an application of this principle would ignore the historical reality that the Crown in fact has not always dealt honourably with Indigenous peoples.
- [417] In addition, I note that even with the narrower boundary, this concern would arise. The territory within that boundary included the land of numerous Indigenous peoples who were not represented at Lesser Slave Lake in 1899. All further Indigenous parties to the Treaty joined by adhesion, after the Treaty had already been formed; this is true even of the areas to which the Treaty Commissioners travelled during the summer of 1899 (Reasons of the Trial Judge at para. 68).

[418] But the most direct answer to any concern the judge failed to consider the honour of the Crown is that such consideration would be premature. Because of the way in which the litigation has been staged, we do not know if the honour of the Crown will be compromised by an interpretation of Treaty 8 favouring the wider boundary.

[419] This is because the question of what rights within the wider boundary flow under the Treaty to adherents is not before the court. The trial judge made this very clear at the beginning of his reasons (at para. 12):

This case is decidedly not about aboriginal rights, title, or interests that existed before the treaty. It is not about what aboriginal signatories or adherents surrendered or gave up by entering treaty. It is not about what obligations the Crown assumed when it entered the treaty, nor does it have an impact on or purport to interpret treaty provisions other than those setting out the treaty boundary.

[420] My colleague acknowledges at para. 168 that a declaration as to the meaning of the metes and bounds clause of Treaty 8, in the absence of a determination of rights, does not allow one to determine if the honour of the Crown has been maintained.

[421] The honour of the Crown in this regard must await any future proceedings seeking to define the extent of each adherent's rights under the Treaty. For example, Treaty 8 gives adherents certain rights in these terms:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[422] The question begged is whether this purports to grant a particular adhering nation harvesting rights throughout the entire area covered by Treaty 8. It raises the spectre of the Cree of Vermilion asserting rights over the Sekani's traditional lands in British Columbia.

[423] On the contrary, in future proceedings the Treaty may be interpreted as only affirming a particular adhering nation's rights that its members traditionally enjoyed within their traditional lands, their "usual vocations" throughout "the tract hereinbefore described" that is the tract that that nation surrendered. The former interpretation may not accord with the honour of the Crown, the latter may; it is undecided in this case.

[424] In other words, on the facts of this specific case that did not determine the scope of treaty or non-treaty rights, the interpretive principle of the honour of the Crown was not relevant. There was no question of honour to be determined. It is uncontroversial that the Crown has an obligation, constitutionally enshrined, to protect Aboriginal rights both treaty and non-treaty, and to act honourably in doing so. Whether it has done so can only be understood when assessing the scope of those rights, and promises the Crown has made

with respect to those rights.

[425] The argument was made before us that the Supreme Court of Canada's decision in *Badger* determines the question of what rights accrue under the Treaty. I do not read it as doing so. Although I do acknowledge that the issue came up in the Court's decision in *Mikisew* (2005), where Justice Binnie said this in disposing of an argument advanced by Alberta (at para. 47):

The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the *Mikisew* may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the *Mikisew* hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report ...

[Emphasis added.]

[426] I do not take this as a definitive resolution of the issue of the extent of one adhering nation's rights in respect of the whole of the tracts of land surrendered under Treaty 8.

[427] In short, I do not accept that the trial judge's decision ignores the interpretive principle of the honour of the Crown.

B. Factual Basis for the Trial Judge's Analysis

[428] My colleague has listed nine errors in the trial judge's inferential reasoning that in her view, undermine his conclusion that the "Treaty Commissioners, as agents of Canada, intended the western boundary to follow the APD when they wrote 'the central range of the Rocky Mountains'": Reasons of Justice Smith at para. 133.

[429] In my view, the trial judge did not err in any of these ways. He drew inferences that were supported by the extensive record before him and the availability of different inferences does not constitute error, let alone palpable and overriding error.

1. Standard of Review

[430] It is helpful to reiterate that both findings of fact and inferences drawn from those facts by a trial judge are entitled to a substantial degree of deference. Absent palpable and overriding error, the appellate court should not interfere with such inferences and findings by the trial judge: *Housen* at paras. 10, 20.

[431] Other jurists have soundly emphasized how high the palpable and overriding standard is. As Morissette J.A. stated in *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77 [translation]:

[A] palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions.

[432] Or as described in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46 [translation]:

"Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[433] In distinguishing between errors that are palpable and overriding and those that are not, I find the Supreme Court of Canada's statements on appellate review in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, particularly appropriate for the case at hand:

[89] The general principle of appellate non-interference applies with particular force in this appeal. The trial was lengthy and very complex. There were 318 days of testimony. There were a large number of witnesses, lay and expert. The volume of evidence is enormous. ...

[90] It is not open to the appellants to challenge the trial judge's findings of fact merely because they disagree with them. I fear that a significant number of the appellants' objections fall into this category. Those objections are too numerous to list in their entirety. The bulk of these objections, at best, relate to alleged instances of misapprehension or oversight of material evidence by the trial judge. However, the respondents have established that, in most situations, there was some contradictory evidence that supported the trial judge's conclusion. The question, ultimately, was one of weight, and the appellants have failed to demonstrate that the trial judge erred in this respect.

[Emphasis in original.]

[434] The error that led the court to overturn the trial judge's findings in *Delgamuukw*--giving *adaawk* and *kungax*, forms of respective Gitksan and Wet'suwet'en oral history that reflect their laws, what the Court described as "no independent weight at all"--was clearly palpable and overriding: at para. 96. This error involved foundational pieces of evidence being categorically excluded from the trial judge's reasoning.

[435] These errors stand in clear contrast to the second category of error: "alleged instances of misapprehension or oversight of material evidence" where there is "in most situations, some contradictory evidence that supported the trial judge's conclusion". As I will discuss, in my view the errors of fact alleged here fall in the second category, and do not merit appellate interference.

[436] Further, this passage supports the intuitive conclusion that "appellate non-interference applies with particular force" in "lengthy and very complex" trials. Where the record is particularly voluminous, as it was here, its sheer size makes it particularly likely that more contradictions will arise in the evidence than can be expressly addressed by a trial judge in their reasons. The existence of inferences alternative to those drawn by the trial judge is not an error, but an inevitability.

2. Pillars of the Trial Judgment

[437] The alleged errors in reasoning, if made out, must go to the core of the trial judge's finding with respect to the boundary. In my view, what my colleague calls errors are in fact alternative inferences, and do not override conclusions well-supported by the evidence.

[438] The trial judge considered three main categories of evidence: evidence of where Canada intended to place the boundary before entering into the Treaty; evidence of where Canada thought the boundary was after the Treaty was signed; and evidence of how those drafting the Treaty language may have understood the phrase "central range of the Rocky Mountains". As I will discuss, in my view the evidence the judge relied on is relevant, the inferences he drew are sound, and the evidence inevitably left unaddressed in a proceeding of this scale does not undermine his conclusions.

[439] I will address the pillars of the trial judge's reasoning in each of these categories, which sturdily support his conclusion that the western boundary falls at the APD. I will be cryptic in my "titles" for each of the pillars, but will expand upon them at length below:

A. Pre-Treaty: Evidence Showing Canada Planned for the Western Boundary to be the APD, the Indigenous Signatories were Indifferent

(i) Forget's Recommendations

(ii) OIC 1703

(iii) OIC 2749 and Bray's 100,000 Square Miles

(iv) Mair's Account

B. Post-Treaty: Evidence Showing Canada Understood the Treaty Went to the APD

(v) Macrae's Map and OIC 2793

(vi) Macrae's 1909 Recanting? Laird's 1910 Riposte

(vii) Treaty 11

C. Historical Context: Evidence Showing the Central Range of the Rocky Mountains Could Have Meant the APD in at the Time

(viii) Central Range of the Rocky Mountains

(ix) The Beaver and Sekani: Fluidity of Movement

[440] Under each pillar I will quote extensively from the reasons of the trial judge. This may be tedious but it is necessary if one is to impugn his findings of fact.

[441] My colleague and I have taken fundamentally different approaches to this case. The different structures of our reasons necessarily create difficulty for the reader. For that reason, I summarize here where in my headings I will respond to the alleged errors, which span paras. 246-84 of her reasons:

- o Interpretation of the Phrase "Central Range" of the Rocky Mountains [(viii) Central Range of the Rocky Mountains];

- o The OIC 2749 Map [(iii) OIC 2749 and Bray's 100,000 Square Miles];

- o The APD Was the Salient Boundary [(ix) The Beaver and Sekani: Fluidity of Movement];

- o The Location of the APD and Rocky Mountains [(iii) OIC 2749 and Bray's 100,000 Square Miles];

- o Macrae Intended to Attach the Macrae Map to his December 11, 1900 Report to Sifton [(v) Macrae's Map and OIC 2793];

- o The Treaty Commissioners Had the Macrae Map or a Very Similar One [(v) Macrae's Map and OIC 2793];

- o Laird in Our Indian Treaties was Referring to the Indigenous Peoples Not the Extent of the Treaty Area [(viii) Central Range of the Rocky Mountains];

- o The Text of the Treaty [(c) Historical Context; III.A.2.(i) Treaty as a Whole]; and

- o The Treaty Commissioners' Actions [(ii) OIC 1703, 27 June 1988].

- a) Pre-Treaty: Evidence Showing Canada Planned for the Western Boundary to be the APD, the Indigenous Signatories Were Indifferent

[442] The trial judge considered evidence that Canada intended, in considering whether to propose Treaty 8, to draft a treaty area up to the APD.

[443] There are four pieces of evidence that strongly support the conclusion this was Canada's intention. First, a January 1898 report by Amédée Forget, then-Indian Commissioner of the Northwest Territories, recommended Canada treat with Indigenous people and included a map with a western boundary marked as the "height of land", west of the Rocky Mountains. Second, OIC 1703 notified many Indigenous groups of Canada's intention to treat, and no evidence suggests these notices did not go west of the Rocky Mountains. Third, OIC 2749, adopted December 1898, provided B.C. with notice of where Canada intended to treat, and included a map with a western boundary marked as the "height of land", west of the Rocky Mountains. Fourth, Mair's account of the signing of the treaty emphasizes what the trial judge found as the objective of the Indigenous signatories to the Treaty: protecting their way of life, and being disturbed as little as possible by settlers in their territory.

(i) Forget's Recommendations

[444] In 1897 and 1898, Amédée Forget was the Indian Commissioner of the Northwest Territories. He was one of the original Treaty Commissioners until he was appointed Lieutenant-Governor of the Northwest Territories. The trial judge deals with his recommendations to Clifford Sifton, Minister of the Interior, with respect to the territory to be included in proposed Treaty 8 at paras. 42-49 of his reasons.

[445] Forget's recommendations are important because they give an indication of what, at least initially, was Canada's intention as to the extent of the area within which it was proposing to treat. And that intention as found by the trial judge (and not gainsaid by my colleague) extended the western boundary of Treaty 8 to include the disputed territory.

[446] The trial judge (at para. 43) first quotes Forget in his recommendation of 12 January 1898, where Forget underlined the need to include in the Treaty "the Indians of the Lower Peace and Nelson Rivers and the Nahanni and Sicanie tribes".

[447] The "Sicanie" are the Sekani and they traditionally occupied lands west of the Rocky Mountains within the so-called disputed territory: Brownlie Report at 2417.

[448] While Forget's use of the term "Nahanni" is, as my colleague states at para. 194, "less clear", there was evidence that the term could have referred to nations west of the Rocky Mountains. As Dr. Brownlie's report stated (Brownlie Report at 2415, 2425-26):

The terms 'Sicamie' and 'Nahamie' [used in the letter Forget based his memorandum on] can be assumed to be versions of the now somewhat standardized terms 'Sekani' and 'Nahani,' which circulated at the time in many variants and spellings. ...

Outsiders such as traders and ethnologists came to adopt "Nahani" as a term for some Indigenous groups that would not have applied it to themselves, although there have been a few cases in which an Indigenous group used the term as a self-designation in response to its use by outsiders. ...

By the mid-1890s, the term 'Na-anees' was used to describe two 'semi-nomadic' bands north of Connolly Lake, totalling 149 people. These groups cannot be identified with certainty, but were probably either Sekani or Kaska.

[449] Many of these Indigenous groups have traditional lands well west of the Rocky Mountains in and beyond the disputed territory. As Dr. Brownlie stated (Brownlie Report at 2425):

Specifically, the Tahltan at Telegraph Creek and the Pelly River Kaska at Ross River are both known to have accepted this term for themselves at times. Gillespie states, "It has been variously used to refer to or include the Kaska, Mountain, Taku (the Athapaskan-speaking ancestors of the eastern Inland Tlingit), Slavey, Tsetsaut, Tagish, Tahltan, and Tutchone" Documented groups to whom it has been applied include people who lived along the Gravel (Keele) River; those living along the Pelly River, including local groups later known as Kaska and Tutchone; Sekani people used the term nah'a.neh for the people of Caribou Hide, British Columbia, who spent their

summers at Bear Lake (a group often designated as Sekani), and Carrier used a similar term for the same people, except that the Sekani name referred to both the Tahltan and the Upper Liard Kaska, while the Carrier applied it only to the Tahltan.

Further, I see a reference to the "Nah'ane in the north" on a map showing "the western Dené tribes" exhibited at trial (Morice, Map of Part of British Columbia (1892), AB1 at 635).

[450] Forget included a map with his recommended treaty area marked "A" and "B". The trial judge concluded (at para. 45):

Mr. Forget's map shows the northern limit of Treaty 6. His map suggests an eastern limit of the proposed treaty area (which he has marked "A") that would follow the Athabasca River to Athabasca Lake, then the Slave River north to just short of 60° N. Mr. Forget has marked with a "B" an area of northeastern British Columbia that is bordered on the east by 120° W and on the north by British Columbia's northern boundary along 60° N - but he placed no markings on his map to suggest a western boundary of the proposed treaty. His map does show, squarely in the area where he has placed his "B," what appear to be the main tributaries of the Peace River, and north of that the Liard and Dease Rivers, these details suggesting at least a consideration of a treaty area west of the Rocky Mountains.

[451] In my view, the "Forget" pillar, and the implication that it supports an original intention on the part of Canada to place the boundary to the west of the Rocky Mountains, remains intact.

(ii) OIC 1703, 27 June 1898

[452] Forget's report assisted Minister Sifton in making his report to the Privy Council recommending negotiation of Treaty 8. The trial judge deals with this at paras. 47-55 of his reasons.

[453] This report was adopted by the Privy Council as OIC 1703. This OIC contained the clause emphasized by my colleague (and the trial judge) that gave the Treaty Commissioners discretion as to the territory to be covered by the Treaty. OIC 1703 in turn allowed Minister Sifton to send out printed notices to Indigenous inhabitants of the proposed Treaty area inviting them to treat.

[454] The trial judge found as a fact that although the notices listed 12 locations for meetings (none of which were in the disputed territory west of the Rocky Mountains), we do not know which areas the notices in fact reached. One cannot assume then that Indigenous groups within the disputed territory were not notified of the proposed Treaty, thereby supporting the view that it was not intended to include them.

[455] My colleague at paras. 281-284 states the trial judge erred in failing to turn his mind to relevant evidence that shows Canada did not intend to treat to the APD.

- [456] I reiterate my caution, in addressing this point, that trial judges are not required to address every piece of evidence before them, especially in a trial as complex as this one. However, I also disagree that the trial judge erred in this way.
- [457] My colleague asserts that, as Canada did not notify or discuss a treaty with Indigenous groups in the disputed territory, it cannot have intended the metes and bounds clause to include their territory. This argument must fail for two reasons. First, there was evidence that Canada sent out notices of a proposed treaty, without evidence of where those notices went; this was ambiguous evidence that they may have notified groups in the disputed territory. Second, the extent to which Canada may have decided not to notify groups in the territory of an intention to treat in 1899 does not foreclose the possibility that they intended to treat with these groups later.
- [458] Additionally, my colleague argues at para. 281 that the fact reserves were allotted solely in the Peace River Block, and that no effort was made to secure adhesions from Fort McLeod or Fort Grahame, suggest the Treaty Commissioners had no intention to treat with those groups in 1899. However, this assertion ignores the fact that post-Treaty formation decisions pertaining to reserves and where to take adhesions could be explained by numerous pieces of evidence on the record, such as the "long-running dispute" between Canada and the Province over the creation of reserves (referred to in the Reasons of Justice Smith at para. 17). These aspects of Canada's post-Treaty conduct do not necessarily give rise to an inference that Canada intended to treat to the narrow boundary.
- [459] I see no palpable errors in the trial judge's handling of the OIC 1703 evidence, and no basis on which to set aside his conclusions. In my view, the OIC 1703 pillar remains intact.
- (iii) OIC 2749 and Bray's 100,000 Square Miles
- [460] Following OIC 1703, Minister Sifton prepared a further memorandum to the Privy Council. It was adopted on 6 December 1898 as OIC 2749. The trial judge deals with this important document at paras. 56-61 of his reasons.
- [461] OIC 2749 noted that OIC 1703 had authorized the negotiation of a Treaty "with the Indians occupying territory to the North of that already ceded and shown in pink on the attached map" (Reasons of the Trial Judge at para. 56). OIC 2749 also contemplated that it be transmitted, with the attached map, to the Lieutenant Governor of British Columbia "for the information of his Government" (Reasons of the Trial Judge at para. 56).
- [462] The trial judge reproduced the map attached to OIC 2749. It clearly delineates the "Height of Land" as the western boundary of the area shown in pink, and clearly identifies that height of land as the "Pacific-Arctic Watershed". It also depicts the Rocky Mountains to the east of, but much closer to, the APD than we know today is the case.
- [463] That OIC 2749 evidenced an intention to include the disputed territory within the boundaries of the proposed Treaty is made clear by its terms.

[464] The OIC recited the desirability of making a Treaty with the "Beaver Indians of the Peace and Nelson Rivers, and the Sicanies and Nahannis" who were "inclined to be turbulent and were liable to give trouble".

[465] I take this clearly to be a reference to the Sekani and the so-called Nahani.

[466] The trial judge at para. 60 reproduced this portion of OIC 2749:

The Minister, in this connection, draws attention to the fact that part of the territory marked "A" on the plans attached is within the boundaries of the Province of British Columbia, and that in the past no treaties such as have been made with Indians of the North West have been made with any of the Indians whose habitat is west of the Mountains. An arrangement was come to in 1876 under which the British Columbia Government agreed to the setting aside by a Commission subject to the approval of that Government, of land which might be considered necessary for Indian reserves in different parts of the Province, and later on the agreement was varied so as to provide that the setting apart should be made by a Commissioner appointed by the Dominion Government whose allotment would be subject to the approval of the Commissioner of Lands and Works of the Province.

As the Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains. But there can be no doubt that had the division line between the Indians been artificial instead of natural, such difference in treatment would have been fraught with grave danger and have been the fruitful source of much trouble to both the Dominion and the Provincial Governments.

It will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

[467] Again, this is a clear indication that it was intended in Treaty 8 to treat with Indigenous peoples "lying between the height of land [the APD] and the eastern boundary of British Columbia". And it further alludes to the problem facing Canada with treating in British Columbia: reaching agreement with the province on the lands to be set aside for "Indian reserves".

[468] This difficulty, which continued into the 1900s, will serve to explain why Canada did not actually pursue adhesions (at least, not significantly) within the disputed territory in British Columbia after the turn of the century.

[469] From its wording, OIC 2749 proposed a Treaty 8 area that stretched west to the APD, as the trial judge found (at para. 115). The map accompanying the OIC confirmed this. The instructions to the Treaty Commissioners as of 6 December 1898 told them to treat within the disputed territory, subject of course to an exercise of their discretion (see OIC 1703) to amend the area. The question of whether they did so is discussed below.

[470] My colleague makes much of the closeness of the APD and the Rocky Mountains on the OIC 2749 map (Reasons of Justice Smith at paras. 205, 254, 262). She asserts that the lines' proximity means the OIC 2749 map does not actually show the tract as extending to the APD:

The pink-shaded "A/B" area indicated Canada's targeted area for the treaty. For the first time, northeastern British Columbia was included in "A" to the handwritten "height of land"; the District of Athabasca was in "B". The southern portion of "A" included the "tongue of land" between the height of land within the Rocky Mountains and the western boundaries of Treaties 6 and 7. However, the pink-shaded area of the map incorrectly depicted the location of the APD as closely parallel to the western edge of the Rocky Mountains, and the Rocky Mountains as extending to 60° N. Consequently, the map did not target most of the disputed territory.

[Emphasis added.]

[471] This point is repeated several times. At para. 210:

The reference to the height of land [in Minister Sifton's report] was as depicted in the OIC 2749 map, closely parallel to the Rocky Mountains, and therefore an "ascertainable" natural boundary. It did not include most of the disputed territory.

[Emphasis added.]

She also states at para. 254 that "[t]oday's understanding of the location of the APD and its depiction on the OIC map illustrate much of the difference between the wider and narrow boundaries, respectively", and at para. 267 that "the judge relied heavily on OIC 2749 as indicative of Canada's intention but does not consider the erroneous depiction of the tract on the OIC 2749 map, which did not include most of the disputed territory".

[472] To the extent my colleague suggests the OIC 2749 map cannot provide the basis for an inference Canada intended to treat to the APD because it did not include "most of the disputed territory", this position is simply wrong, and significantly overstates the difference between the map and current understandings of the geography of the disputed tract. There was evidence for the trial judge to infer that OIC 2749 was largely accurate in the amount of disputed territory it included; that the distance between the Rocky Mountains and APD was not accurate does not change this.

[473] The trial judge at para. 48 noted that Samuel Bray, a surveyor with the Lands and Timber Branch, estimated the approximate area of the territory proposed to be ceded under the Treaty. Within British Columbia this totalled 100,000 square miles. Area A on the OIC 2749

map is shown as containing 100,000 square miles. The trial judge also referred at para. 58 to the expert evidence of Dr. Desloges, who measured, using current mapping techniques, the area shown inside British Columbia on the OIC 2749 map. Dr. Desloges estimated it at 103,000 square miles.

- [474] That the map attached to OIC 2749 includes the vast majority of the disputed area was put beyond doubt by Dr. Desloges's evidence at trial. Figure 6.5 in his report superimposes that portion of the OIC 2749 map area covering the tract on that area of B.C. east of the actual APD. Save for a section of B.C. in the northwest corner of the province, the OIC 2749 map is roughly concordant with modern-day understanding of the portion of B.C. east of the APD. I have attached Figure 6.5 as Appendix L.
- [475] Thus, the OIC 2749 map--which includes within the proposed Treaty boundaries something in the order of 100,000 square miles of British Columbia extending to the APD located as we know it today--included the vast bulk of the disputed territory. While the APD line on the OIC 2749 map differs slightly from the APD as it is known today, its essential characteristics are correct: it shows the correct area of land, and it shows the APD west of the Rocky Mountains.
- [476] The map attached to OIC 2749 may be wrong, but if it is, it is not in its location of the APD showing it further to the east and close to the Rocky Mountains. If anything, it is wrong in depicting the Rocky Mountains too far west and closer to the APD.
- [477] My colleague at paras. 264-266 further asserts that the record does not support an inference that the divergence between the Rocky Mountains and the APD was known by the Treaty Commissioners, and that there was "no evidence the Treaty Commissioners had the OIC 2749 map with them or relied on it". However, as Dr. Brownlie concluded, "[i]t seems safe to assume [the Treaty Commissioners] consulted the map that accompanied [OIC] 2749, since this map was used to illustrate the order in council that authorized Treaty 8, and was also the map sent to the BC government": Brownlie Report at 2400. As I have already addressed, the OIC 2749 map may show the APD as closely parallel to the Rocky Mountains, but the major issue of the size of the disputed tract is settled: it is approximately 100,000 square miles. This is a basis to find OIC 2749 was proposing a treaty both up to the APD and including the disputed tract.
- [478] My colleague at para. 265 also maintains the trial judge committed a palpable and overriding error by relying on OIC 2749 as evidence of Canada's intention to treat to the wider boundary, as the Commissioners could have exercised their discretion to vary the boundary. I do not agree the judge erred in this way. There is evidence the Commissioners chose to refer to the wider boundary in this provision of the Treaty--as I will discuss in the next section, multiple pieces of evidence following the Treaty suggest they believed this is where the boundary was set. Further, there is no evidence the Commissioners chose to change the boundary from what had already been set out in OIC 1703 and OIC 2749. It was open to the trial judge to infer no such change in boundary occurred. Indeed, there is

evidence, discussed in part below, that they did not make such an alteration.

[479] Read together with the terms of the order, the OIC 2749 map provides ample support for the finding that Canada intended a boundary at the APD.

[480] At this point the OIC 2749 pillar bears a significant load in the trial judge's analysis. It remains intact.

(iv) Mair's Account

[481] I have already discussed Mair's account of the signing of the original Treaty 8 at Lesser Slave Lake in 1899 and I noted his evidence accepted by the trial judge at para. 66 as to the aspirations of the original Indigenous signatories; they wanted to carry on their way of life, avoid conflict with settlers, and access education should they desire.

[482] Further evidence of the intentions of the Indigenous signatories has been accepted in the jurisprudence on Treaty 8. In *R. v. Horseman*, [1990] 1 S.C.R. 901, the court accepted that Canada's promise that hunting, fishing and trapping rights would be protected "was the sine qua non for obtaining the Indians' agreement to enter into Treaty No. 8" (at 911). Further, the court noted (at 909):

Mr. Daniel's study of these negotiations reveals that the Indians were especially concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. He points out that the Commissioners repeatedly sought to assure the Indians that they would continue to be free to pursue these activities as they always had. In the course of treaty negotiations at Lesser Slave Lake in June 1899 (negotiations that set the pattern for subsequent agreements with other Indian groups near Fort St. John, Fort Chipewyan, Fond du Lac, Fort Resolution and Wabasca), Commissioner Laird told the assembled Indians that "Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are." (See: Daniel, *op. cit.*, at p. 76). Similarly, Mr. Fumoleau has observed that "[o]nly when the Treaty Commissioners promised them that they would be free to hunt and trap and fish for a living, and that their rights would be protected against the abuses of white hunters and trappers, did the Indians at each trading post of the Treaty 8 area consent to sign the treaty" (Fumoleau, *op. cit.*, at p. 65).

[483] As I indicated above, this supports the trial judge's conclusion (at para. 66 of his reasons) that the original Indigenous signatories had little concern with the western geographic extent of the Treaty.

[484] The Mair pillar remains intact.

b) Post-Treaty: Evidence Showing Canada Understood the Treaty Went to the APD

[485] The trial judge considered evidence as to whether Canada or its agents in drafting the Treaty, the Commissioners, thought they had drawn the boundary to the APD.

[486] Three key pillars of evidence support the premise that this was Canada's retrospective understanding. First, there was evidence that Macrae understood the treaty boundary as west of the Rocky Mountains, in accordance with the map the trial judge found reflected his understanding. Second--and this may be the most important piece of evidence that was before the trial judge--Commissioner Laird, in a memorandum dated 1910, unequivocally stated that the boundary of the treaty went to the APD. Third, Treaty 11, whose western boundary begins at the northwestern point of Treaty 8, commences at the APD.

i. Macrae's Map and OIC 2793

[487] In reporting on the adhesions to Treaty 8 agreed to in 1900, the trial judge found Macrae attached a map that showed the boundary of Treaty 8 as the "height of land", west of the Rocky Mountains. This is significant evidence of where both he as a representative of Canada and Canada itself understood the boundary to be.

[488] Discussion of this point can be found at paras. 77-87 of the trial judge's reasons. Macrae took instructions to take adhesions to Treaty 8 "with the Indians of Fort St. John in the Upper Peace River and the various bands on Great Slave Lake that trade at Fort Resolution" (at para. 78 of the trial judge's reasons). Macrae did not take adhesions from Indigenous peoples west of the Rocky Mountains.

[489] It is the map attached to Macrae's report to Minister Sifton dated 11 December 1900 (which in turn formed part of OIC 2793) that is of importance. It is a "Map showing the distribution of Indians in the territory covered by Treaty No. 8 and the extent of that territory": Reasons of the Trial Judge at para. 81, citing ex. 282 at 9.

[490] The trial judge made a finding of fact that the Macrae map "is the map published later (in 1901) as the final document in exhibit 215, titled 'Treaty No. 8 (made June 21, 1899) and adhesions, reports, etc.'": at para. 82. The map is reproduced by the trial judge at para. 85 of his reasons. The trial judge commented at para. 86:

The expansion of the treaty area in the northeast can be seen by comparing this map to the one attached to OIC 2749. While the respective western boundaries might look like they differ between the two maps, both versions appear to follow the "Height of Land" in the northwest portion and both show the treaty boundary to the west of the label "Rocky Mountains."

[491] The trial judge made this additional important finding of fact at para. 84:

I find that this map was likely the same or at least very similar to the missing map referred to by the treaty commissioners in their report of September 22, 1899, found in exhibit 282, document 1250 at 1.

- [492] As an actual copy of the map was lost to time, identifying it was an important factual inquiry for the trial judge. Further, it was a critical finding of fact to conclude the Treaty Commissioners and Macrae were all acting on the understanding that the western boundary of Treaty 8 extended to the APD.
- [493] My colleague has questioned both conclusions: first, that the map published in 1901 reflected Macrae's understanding of the Treaty boundary (at paras. 269-272); and second, that this map was similar to that used by the 1899 Treaty Commissioners (Reasons of Justice Smith at para. 273).
- [494] On the first point, my colleague draws an inference that Macrae could not have drawn his 11 December 1900 map on a base map dated 1900. In her examination of the evidence, this was impossible, because Macrae indicated in a 14 November 1900 memorandum that he did not have a copy of the 1900 base map when traveling to take adhesions to the Treaty: Reasons of Justice Smith at paras. 270, 272. Thus, she concludes the trial judge erred in finding the Macrae map--published with his report in the 1901 Sessional Papers--was the one Macrae intended to attach to his report.
- [495] I disagree the trial judge erred in this way. In my view, there was ample evidence on the record to allow him to draw the conclusion he did: this was the map Macrae included in his report.
- [496] While Macrae's 14 November 1900 memorandum explains he took a different map into "the North" with him in the summer, there is nothing to suggest the map he took with him was the one he attached to his report. He could easily, and logically, have obtained a different map following his journey, while he was preparing his report. The trial judge's conclusion that the map published in 1901--the map before the court--reflected Macrae's understanding of the Treaty area was appropriately buttressed by other pieces of evidence: at paras. 82-83. The inferences he drew are entitled to deference.
- [497] The province's witness, Dr. Taylor, even admitted in cross-examination that the map could be that of Macrae's, as stated by the trial judge at para. 83. This whole debate surrounding the Macrae map involves a search for a "needle in the haystack" rather than a "beam in the eye".
- [498] Second, my colleague stresses the point that the Macrae map could not have been the map attached to the Treaty Commissioners' report of 22 September 1899 because the base map for the Macrae map is dated "1900". But this overlooks the trial judge's actual finding at para. 84:

I find that this map was likely the same or at least very similar to the missing map referred to by the treaty commissioners in their report of September 22, 1899, found in exhibit 282, document 1250 at 1.

[499] The Macrae map "was likely the same or least very similar to. "--the judge did not say that the Macrae map was the actual map attached to the noted report of the Treaty Commissioners.

[500] In my view, confining appellate review to its appropriate scope, the Macrae map pillar remains intact.

ii. Macrae's 1909 Recanting (?); Laird's 1910 Riposte

[501] Some attention was paid to two pieces of evidence showing how Commissioners Macrae and Laird viewed the Treaty boundary years after it was signed. In my view, both pieces of evidence are consistent with--and indeed support--the conclusion that they understood the boundary to be at the APD.

[502] The trial judge, beginning at para. 89 of his reasons, deals with a briefing paper from Macrae dated 30 December 1909 wherein Macrae calls into question the accuracy of the so-called Macrae map in light of the actual words of the metes and bounds description in the Treaty. The judge reproduces this portion of the memorandum:

The undersigned begs to refer to a report made by him under date of December 11, 1900 on Adhesions taken to Indian Treaty No. 8, which report was submitted accompanied by documents.

Document No. 6 was a "map showing the distribution of Indians in a territory covered by Treaty No. 8 and the extent of that territory."

It is now noticed that the south western boundary of the territory intended to be indicated on that map has come to be regarded to a greater or less extent as authoritative, and there seems cause to believe that it possibly should not be so regarded because in laying down such south western boundary a certain water-shed or height of land seems to have been followed which may not coincide with the descriptions [sic] of the words contained in the Treaty.

...

The undersigned being of record as responsible for that map now begs to direct your attention thereto as if it contained an erroneous delineation it may be very necessary to correct it.

[503] I interject to note that the trial judge found at para. 89 that Macrae was referring here to the Macrae map, sent with his December 1900 report, showing the western boundary of Treaty 8 extending to the APD. If that was not the map attached to his report of 1900, Macrae would have clearly said so.

[504] It is noted that Macrae does not offer a definitive opinion to the effect that the Macrae map is inaccurate in delineating the Treaty's western boundary. Instead, he is merely commenting on "strongly held differences of opinion" over the map: Reasons of the Trial Judge at para. 90.

[505] In January 1910, as I have discussed, Commissioner Laird responded to Macrae's ruminations. I have already reproduced the portion of Laird's memorandum (Appendix J) discussing the northerly boundary of Treaty 8. Laird continued:

If, therefore, the height of land between British Columbia and Alberta is held to be "the central range of the Rocky Mountains," then, I take it, these words in Treaty No. 8 mean the same height of land continued northwesterly to the 60th parallel of north latitude.

[506] Laird thus rejects any doubt as to the westerly boundary of Treaty 8 as following the APD--"the same height of land"--"continued northwesterly to the 60th parallel of north latitude".

[507] It is Laird's firm view that Macrae's concerns do not "present any great difficulty". Further, Laird's view is that "the printed map of the territory embraced in the Treaty, which accompanies the pamphlet report of the same, appears to me to be approximately correct". Thus, any doubt that by "the same height of land" he meant the APD, and not some unknown range of the Rocky Mountains, is dispelled.

[508] Laird was one of three original Treaty Commissioners in 1899. This surely puts to rest any doubt that the Macrae map was likely the same or at least very similar to the mining map referred to by the Treaty Commissioners of 22 September 1899.

[509] Laird as well provides a rationale for the wider boundary: the need to treat with the Indigenous peoples west of the Rocky Mountains (the need to treat with the "Sicannies and Nihannies who were inclined to be troublesome"). Laird said:

The Beaver Indians of Fort St. John have given their adhesion to the Treaty; the Sicannies and other Indians of Nelson River are proposed to be asked by Mr. Inspector Conroy to give their adhesion to the Treaty next summer. It will also probably be necessary before long to get the adhesion of the Indians in the vicinity of Fort Graham, as I understand that the Dominion Government by the aid of R.N.W.M. Police have recently opened a trail from Fort St. John on the Peace river to Fort Graham [sic] on the Finlay River, a tributary of the Peace.

[510] Fort Grahame on the Finlay River is west of the Rocky Mountains in the heart of the disputed territory.

[511] Dr. Brownlie points out that two others involved in the Treaty 8 process, then-Chief Accountant at Indian Affairs (and later Deputy Superintendent) Duncan Scott and Departmental Surveyor J.K. McLean, substantially agreed with Laird's position in memoranda they wrote in response to Macrae (Brownlie Report at 2489-92; see also the trial judge's discussion coming to this same conclusion at paras. 82-84).

[512] Finally, Laird provides a reason for why Canada did not seek further adhesions from Indigenous peoples west of the Rocky Mountains: the difficulty in creating reserves in British Columbia. Laird said:

The main difficulty in connection with Treaty No. 8 respecting British Columbia is not its boundary in that Province, which is scarcely doubtful, but in regard to the provision in the Treaty which says: "And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada," etc.

[513] This surely answers the vexing question: if Treaty 8 extended to the APD west of the Rocky Mountains, why didn't Canada seek further adhesions from the Indigenous peoples there? And a similar answer obtains to the question posed: why didn't the Treaty refer specifically to the Indigenous peoples west of the Rocky Mountains? The answer surely is because they were not present at Lesser Slave Lake in June 1899 and would not have been top of mind for the Commissioners who literally drafted the Treaty overnight for presentation to the Indigenous peoples congregated there the next day.

[514] In my view, the Macrae/Laird pillar remains intact.

iii. Treaty 11

[515] The trial judge highlighted crucial evidence pertaining to Treaty 11, which strongly supports the conclusion that Canada understood, following Treaty 8, that its boundary went to the APD.

[516] Treaty 11 was signed by Canada in 1921. Its southwestern corner was fixed to the northwestern corner of Treaty 8; this was mapped as the intersection of the 60th parallel and the APD. As the trial judge summarized:

[110] There has been no argument or evidence before me that Treaty 11's metes and bounds language is in dispute. Therefore I presume that the Treaty 11 map follows its own metes and bounds language at the detail above: "Commencing at the northwesterly corner of the territory ceded under the provisions of Treaty Number 8 ..."

[111] The Treaty 11 map published by the Department of Indian Affairs and dated 1921 shows the southwestern corner of Treaty 11, where it meets the 60° N parallel, as being just west of 130° W (ex. 262). The Treaty 11 map published by King's Printer in 1926 shows the same (ex. 195 at 9).

[112] I note that this point is also where both the map attached to OIC 2749 and the Macrae map show the western boundary of Treaty 8 meeting the 60° N parallel (ex. 195).

[517] Treaty 11 is compelling evidence that Canada understood Treaty 8's boundary as falling along the APD.

c) Historical Context: Evidence Showing the Central Range of the Rocky Mountains Could Have Meant the APD at the Time

[518] The final category of evidence before the trial judge was that which did not directly speak to intention, but provided historical context for the interpretation of the disputed clause.

[519] Two main pieces of evidence act as pillars to this context. First, evidence that the phrase "central range" could have, at the time, referred to the continental height of land, rather than the highest range within the Rocky Mountains. Second, evidence that there was fluid movement between the Beaver (generally living east of the Rocky Mountains) and the Sekani (generally living west of the Rocky Mountains).

[520] I reiterate my general disagreement, set out in a discussion of the first alleged error of law, with my colleague's suggestion at paras. 277-280 that it was a palpable and overriding error in reasoning to not address every inference to be drawn from the text of the Treaty. In my view, this represents an inappropriate application of contractual principles to treaty interpretation and is inconsistent with the jurisprudence.

i. Central Range of the Rocky Mountains

[521] I have discussed the trial judge's treatment of the interpretation issues associated with this phrase in assessing whether he erroneously relied on modern-day geography in coming to his conclusions. As I have stated, in my view, he did not err.

[522] The trial judge's findings with respect to the meaning of "central range" in the late 19th century provide supportive historical context to his earlier finding that Canada intended to treat to the APD, and the Indigenous signatories to the Treaty were indifferent.

[523] The trial judge concluded:

[150] If on the other hand "central range" was meant to refer to the watershed or divide due west of the source of the Red Deer River, then it was meant to refer to the continental divide. From 54° 30' N, the continental divide carries on as the Arctic-Pacific watershed and continues, ultimately crossing the parallel at 60° N.

[151] I conclude that the "said range" in the metes and bounds description of Treaty 8 refers to the Arctic-Pacific divide or watershed, and not to a range or lesser watershed within what we now call the Rocky Mountains. In doing so, I accept Dr. Galois' opinion that the phrase "central range" as applied to boundaries means a line of watershed. Due west of the source of the Red Deer River, the line of watershed is the Hudson Bay-Pacific divide which, as part of the continental divide, is the highest order of watershed. North of that point, water west of the divide continues to flow to the Pacific Ocean while water to the east begins to flow to the Arctic Ocean rather than to Hudson Bay. This occurs well south of what Dr. Taylor has called "the split" at approximately 54° 30' N (ex. 110 at 18).

[524] Once again, this is a finding of fact and it is most certainly entitled to deference.

[525] My colleague deals with this issue at paras. 250-253 of her reasons and reaches factual conclusions at odds with those of the trial judge. However, this is once again beyond the scope of appropriate appellate review. There were substantial aspects of the record supporting the trial judge's decision, such as the report of Dr. Galois that he mentions. As an appellate judge, I am bound not to second-guess the trial judge where "there was some evidence upon which he or she could have relied to reach that conclusion": Housen at para. 1. The fact that I might draw different inferences from that evidence is beside the mark absent palpable error.

[526] Another example where palpable and overriding error is alleged is helpful in illuminating my point. The trial judge had to deal with a somewhat ambivalent document penned by Laird in 1905 titled *Our Indian Treaties*, where Laird wrote:

Treaty No. 8 was made and concluded at the several dates mentioned therein in 1899, the first being at Lesser Slave Lake on the 21st of June, between Commissioners D. Laird, James A.J. McKenna, now Assistant Indian Commissioner, and Hon. James H. Ross, and the Cree, Beaver, Chipewyan and other Indians inhabiting the country watered by the Athabasca and Peace Rivers, in the District of Athabasca, also that portion of British Columbia east of the Rocky Mountains, and of the McKenzie District south of Great Slave Lake.

[Emphasis added by the trial judge.]

[527] The trial judge concluded at para. 88 that Mr. Laird was referring above to the Aboriginal peoples who had entered into the Treaty, and not purporting to give the extent of the Treaty area.

[528] My colleague says "this finding was factually incorrect" (at para. 233), in part because Canada had not treated with Indigenous groups east of the Rocky Mountains in British Columbia. But Macrae did so at Fort St. John the next summer: *Reasons of the Trial Judge* at para. 79. This could well explain Laird's conflation of the signings. One thing is certain: there was no ambiguity in Laird's memorandum of January 1910 as to the extent of the area covered by Treaty 8.

[529] Further buttressing Laird's view is at least one view expressed by Treaty Commissioner McKenna (who was then part of the McKenna-McBride Commission in 1912) that the "Tribe" at "McLeod's Lake" "is included in Treaty No. 8" (*Appeal Book 4* at 163). Dr. Brownlie also said that "it appears" that McKenna also believed that the people of Fort Grahame were within the Treaty area: *Brownlie Report* at 2404.

[530] McLeod Lake and Fort Grahame of course are well within the disputed tract.

[531] In my view this important pillar to the trial judge's conclusion as to the western boundary of Treaty 8 remains intact.

ii. The Beaver and Sekani: Fluidity of Movement

[532] The trial judge's treatment of this issue harkens back to two aspects of OIC 2749: first, the trial judge's statement at para. 158 that the main purpose of the proposed Treaty was to obtain peace with the Indigenous peoples occupying the territory being invaded by gold seekers travelling to the Klondike; and second, that this could not be achieved if the Treaty stopped at the British Columbia boundary. The trial judge at para. 159 quoted a portion of OIC 2749:

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

[533] In OIC 2749, the phrase "allied to the Indians of Athabasca" then required the trial judge to consider whether the Sekani and the Beaver could be so characterized. The judge's analysis in this regard is found at paras. 158-172 of his judgment. He relies on expert evidence and that of Indigenous witnesses to conclude at para. 169:

I do not accept that in 1899 there existed either a notional or a real boundary between the Beaver and Sekani as represented by the Rocky Mountains. Instead, I find that the territorial limits of the Beaver to the east and Sekani to the west were fluid, or flexible, with individuals and family groups travelling back and forth across the mountains at will, to hunt and trade.

[534] The finding that there was not "a notional or a real boundary" between the Sekani west of the Rocky Mountains and the Beaver further east may not go to showing Canada's intention in OIC 2749. However, at the least, the fluidity of movement finding supported the trial judge's conclusion in assisting him to "choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed": Marshall at para. 78(3). The fluidity evidence could help further Canada's interests, as expressed in OIC 2749, in setting a boundary that would not be "artificial" for Indigenous groups of the time.

[535] My colleague does not appear to question the judge's finding that there were linguistic and cultural bonds between the Sekani and the Beaver: Reasons of Justice Smith at paras. 258-259. That being so, it was for the trial judge, not this Court on appeal, to draw the inferences from that fact as to the intentions of Canada and the Treaty Commissioners.

[536] In my view this pillar remains firmly intact.

C. Conclusion on Interpretation of the Treaty

[537] This case comes down to the question: given that Canada intended initially to place the western boundary at the APD; recognizing that Canada gave the Treaty Commissioners discretion to amend the boundaries of that area to treat; did the Treaty Commissioners exercise that discretion and reduce the area of British Columbia to be covered by the proposed Treaty?

[538] There is no clear evidence saying they did. Further, where the Commissioners amended the area covered, as they did with respect to the northern boundary of Treaty 8, it was done so expressly.

[539] I have referred to the evidence of Dr. Brownlie, who concluded that Canada intended to include in Treaty 8 the territory lying between the Rocky Mountains and the Arctic-Pacific Divide (Brownlie Report at 2536):

There are four key items that show this intention. First, the map sent to the British Columbia government in advance of the treaty (which was presumably also provided to the treaty commissioners) showed the Arctic-Pacific divide as the western boundary. Second, the order in council authorizing the treaty specifically mentioned the Sekani, a Dene people who lived primarily on the western side of the Rocky Mountains, within the Rocky Mountain Trench that runs for thousands of kilometers between the Rockies and more westerly mountain ranges. Third, post-treaty descriptions of the areas embraced within the treaty territory always included the Peace River drainage system or watershed, whose headwaters lie within the Rocky Mountain Trench. Fourth, Dominion officials stated repeatedly in the post-treaty period that they expected some of the Sekani to adhere to Treaty 8 at some future date. In particular, officials wrote repeatedly that they expected the Sekani who traded at Fort Grahame to enter Treaty 8, and they sometimes recorded the same expectation for the Sekani who traded at McLeod Lake. Both these places lay within the Rocky Mountain Trench, west of the Rocky Mountains and east of the Arctic-Pacific divide.

[540] On the other hand, the province led the evidence of Dr. Robert Irwin, a professor of history at MacEwan University in Edmonton. He opined that the western boundary of Treaty 8 is the Rocky Mountains. Dr. Brownlie summarized Irwin's thesis (Brownlie Report at 2511):

His evidence is roughly the following: the commissioners had discretionary authority with respect to the boundaries; Macrae's map is not the only one, and James White's map of 1912 in the Handbook of Indians of Canada shows the Rocky Mountains as the western boundary; the treaty commissioners had every opportunity to reach an adequate understanding of the region's physical geography; and the federal government never attempted to include any groups west of the Rocky Mountains in the treaty.

[541] Essentially, these were the competing theories before the trial judge. Clearly, the trial judge largely accepted the conclusions of Dr. Brownlie and rejected those of Dr. Irwin. This is the quintessential role of a trial judge--to weigh and accept some of the evidence, in this case that of an expert, and reject that of other experts.

[542] My colleague would adopt a similar role and reach a different conclusion--a competing conclusion--on the evidence before the trial judge. It is not for this Court to do so.

[543] In my view, no reversible error of law or fact is demonstrated in the trial judge's analysis.

IV. DISPOSITION

[544] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Goepel"

APPENDICES

Appendix A: Text of Treaty 8

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest of Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive

from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, she will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given once for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, HAVE HEREUNTO SET THEIR HANDS at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Appendix B: The 1891 DIA Map

Appendix C: The OIC 2749 Map

Appendix D: Map Showing the Federal, Provincial, and Kaska Dena Council Interpretations of the Tract Boundary

Appendix E: Map Showing the Peace River Block

Appendix F: The 1898 Forget Map

Appendix G: The White Map

Appendix H: The Macrae Map

Appendix I: The 1880 Survey Map

Appendix J: Laird Memorandum

Appendix K: Map - West Moberly

Appendix L: Desloges Report

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