# Court of Queen's Bench of Alberta

**Citation: Kainaiwa/Blood Tribe v Alberta (Energy), 2017 ABQB 107**



**Date:** 20170214
**Docket:** 1501 07073
**Registry:** Calgary

Between:

**Kainaiwa/Blood Band, also known as the Blood Indian Band, a Band within the meaning of the *Indian Act*, RSC 1985, c. I-5, by its Chief and Council**

Applicant

- and -

**The Crown in Right of Alberta, Minister of Energy of Alberta and Attorney General for Alberta**

Respondent

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**Reasons for Decision of the Honourable Mr. Justice P.R. Jeffrey**

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## I. Introduction

[1] The Blood Indian Band seeks a *mandamus* order directing the provincial Crown to transfer to it certain subsurface land rights. Failing that the Band seeks judicial review, asking the Court to quash the provincial Minister of Energy's refusal to transfer to the Band those subsurface land rights, and to direct the Minister's reconsideration.

[2] The Band says the Minister was required to convey the subsurface rights to it by virtue of Treaty 7, the *Natural Resource Transfer Act* and the honour of the Crown, all of which it says are constitutional enactments and obligations which the Minister failed to correctly interpret and follow. The Band says that each of the enactments and obligations require Alberta transfer to the Band the subsurface rights.

[3] The Crown says she was under no such legal obligation, constitutional or otherwise, that the Minister's decision was discretionary, need only have been reasonable, and was reasonable.

[4] For the reasons that follow I deny *mandamus* but grant the judicial review application, quash the Minister's decision and remit the matter back to the Minister for reconsideration.

## II. Facts

### *A. Pre-application History*

[5] The Blood Indian Band (the "**Band**") signed Treaty Number 7 on September 22, 1877. Under the terms of Treaty 7 several reserves were set aside for the Blackfoot, Blood and Sarcee Bands along the Bow River near Blackfoot Crossing.

[6] The Band was dissatisfied with their Blackfoot Crossing Reserve. It agreed to surrender its interest in the Blackfoot Crossing Reserve in exchange for a new reserve. The Band selected new reserve land, which is the site of their current reserve (the "**Reserve**"), and then relocated there in 1880 and 1881.

[7] While surveying the Reserve in 1882, the federal government became aware that a non-Indian man, David Akers, was living at its eastern extremity, at the confluence of the St. Mary's and Old Man rivers.

[8] In 1883 the Amended Treaty 7 was finalized between the Band and the federal government.

[9] In error, the federal government sold several pieces of land contained within the Reserve to Akers. Once the mistake was realized the federal government asked Akers to relocate. He refused.

[10] According to the Indian Claims Commission's report on the negotiations with Akers, in light of Akers' refusal to relocate, "the only recourse for the Department of Indian Affairs was to obtain a surrender of the land from the Blood". Commissioner Hayter Reed was authorized to take the surrender. After requesting additional instructions regarding compensation, he was told "when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way".

[11] On September 2, 1889, the federal government obtained a surrender of the land from the Band (the "**Surrender**"). The surrendered land was located between the Oldman and St. Mary's River to the limit of section 3, township 8, range 22, west of the fourth meridian, with an area of approximately 444 acres (the "**Claim Land**"). The Band argues that the Surrender was invalid, while the Minister of Energy does not concede the point, saying that the federal government never admitted liability as to the Surrender's validity.

[12] In 1970 the Federal Department of Indian Affairs acquired 219 acres of the Claim Land from a third party private owner. The 219 acres were re-incorporated back into the Reserve. However, the remaining 225 acres of Claim Land continued to not be within the Reserve as originally agreed.

[13] In 1995 the Band submitted a Claim pursuant to Canada's "Specific Claim Policy". In that Claim the Band alleged that it did not receive compensation for the Surrender and that the

Surrender was invalid. Canada accepted the Band's claim for negotiation but never admitted any material facts that the Band alleged or any liability to it.

[14] As a result of the negotiations Canada and the Band entered into two settlements. The first settlement agreement, dated November 7, 1996, was executed by the Band and by Canada on March 12 and 27, 1997, respectively (the "**1st Akers Settlement**"). It was a full and final settlement of the Band's claim that Canada failed to pay compensation for the Surrender. Canada paid $2,346,000, inclusive of negotiation costs, to the Band.

[15] Article 5 of the 1st Akers Settlement required the Band to invest the settlement money "in a long term asset...for the future benefit of the Tribe". It gave the Band the option of purchasing up to 444 acres of land, which Canada would set apart as reserve land. However, before Canada was required to do so, the Band had to consult with the relevant interest holders in the purchased land and also the provincial government. Article 12(b) of the 1st Akers Settlement stated that "if the concerns of [the provincial] government...are not resolved, Canada cannot guarantee that the lands will ever be added to reserve, regardless of how reasonable the Tribe may be in dealings with the provincial...government."

[16] After the 1st Akers Settlement, the Band continued to press its claim that the Surrender was invalid. Canada and the Band entered into a second settlement agreement, dated September 24, 2003, and executed by the Band and Canada on December 1, 2003 and March 31, 2004, respectively (the "**2nd Akers Settlement**"). It was a full and final settlement of the Band's claim that the Surrender was invalid. Canada paid an additional $3,555,000.

[17] Under the terms of the 2nd Akers Settlement the Band surrendered absolutely all its interest in the Claim Land, within the meaning of ss 38 and 39 of the *Indian Act*, RSC 1985, c I-5. The Band gained the option of purchasing 225 acres within an area adjacent to the Band's Reserve, including the underlying subsurface rights, on a willing buyer/seller basis. Canada would then set aside the purchased land as an addition to the Reserve, subject to meeting the concerns of the provincial government (Article 4.2(b)).

[18] Under the 1st and 2nd Akers Settlements combined, the Band received $5,800,000 and the option of purchasing up to 669 acres that could be added to the Reserve.

[19] On November 4, 2008, May 5, 2009 and June 24, 2009 the Band purchased surface rights to 6 parcels of land, totaling 664.8 acres (the "**Purchased Lands**"). The subsurface rights remained vested in the Provincial Crown. Portions of the subsurface rights of the Purchased Lands were subject to coal leases, an ammonite lease and oil and gas leases.

### *B. Application Process*

[20] I divide the Minister of Energy's decision process into three periods: (1) an initial consideration period; (2) a formal consideration period before Minister Oberle's tenure and (3) the formal consideration period during Minister Oberle's tenure culminating in his decision. Over the course of the application process, seven different members of the Legislative Assembly held the office of Minister of Energy, the last of which was Minister Oberle, who communicated the Minister's denial of the Band's request.

#### *i. The Initial Period: October 31, 2008 until May 21, 2013*

[21] The initial consideration period spans from when the Band first contacted the Alberta government concerning the transfer of subsurface rights on October 31, 2008 until Chief Charles

Weasel Head officially requested a meeting with the Alberta Minister of Energy on May 21, 2013.

[22] The Band first contacted the Alberta government concerning the transfer of subsurface rights on October 31, 2008. At that time, the Band had just purchased 350 acres pursuant to the 1st Akers Settlement. Jacqueline Oka, on behalf of the Band, wrote to the Department of Energy to advise that the Band "would like to have the mineral rights transferred to the Blood" Band and to request direction "as to the process in transferring the minerals right [*sic*] to the Blood" Band.

[23] On November 5, 2008, J. Rand Smith, Branch Head of Aboriginal Relations, informed the Band that "Alberta is not willing to transfer Alberta Crown mineral rights to any party, except where required by law". He offered an opportunity to discuss the matter further.

[24] On June 23, 2010, Mr. Smith met with a representative of the Band to discuss acquiring the subsurface rights.

[25] In August 2010, several emails were exchanged between Ms. Oka and the Department of Energy. Mr. Smith stated that "I was advised that we are not willing to transfer the mineral rights to Canada [for the benefit of the Blood Tribe] while the well [on the Purchased Lands] is under production".

[26] A briefing note from August 31, 2010 stated that the "Deputy Minister [of Energy] has instructed the Aboriginal Relations Branch Head to advise the Blood Tribe that Alberta Energy is not willing to transfer the mineral rights...until the natural gas well is no longer producing". The briefing note outlined two options: (1) "require the Blood Tribe to clear the existing Alberta mineral leases and have Canada purchase the mineral rights from Alberta at fair market value on the Blood Tribe's behalf" or (2) "advise the Blood Tribe that Alberta Energy will not transfer the mineral rights until the natural gas well ceases production".

[27] In 2011 the Alberta Energy Deputy Minister, Peter Watson, repeated Alberta's position to the Band that it would not transfer the subsurface rights.

[28] On January 26, 2011, Mr. John Wilson, a representative from Indian and Northern Affairs Canada, contacted Mr. Smith to discuss potential options with respect to transferring the subsurface rights. Specifically, Mr. John Wilson wanted to discuss ways to resolve outstanding issues with respect to mineral leases existing on the Purchased Lands. Mr. Wilson proposed that the Band could purchase the subsurface rights once the leases expired.

[29] On March 2, 2012, various Band representatives, including Chief Weasel Head, met with the Assistant Deputy Minister of Aboriginal Relations, Mr. Stan Rutwind, to discuss the addition of the Purchase Lands to the reserve. Based on the meeting notes of Mr. Rutwind, the main issue with transferring the subsurface rights was the existence of a producing well on the Purchased Lands. Even if the producing energy company agreed to the transfer of subsurface rights, Alberta would still want compensation for the sub-surface rights and lost royalties. Following that meeting the Band planned to seek comfort letters from the various companies that held mineral leases in the Purchased Lands.

[30] After this meeting, on October 26, 2012, Mr. Rutwind sent a memorandum and briefing note to the Deputy Minister of Aboriginal Relations, Mr. Bill Werry. It recommended that the Minister of Aboriginal Relations "meet with the Minister of Energy to discuss the transfer or sale to Canada of the mines and minerals underlying the lands purchased by the Blood Tribe".

[31] On November 21, 2012, Mr. Rutwind sent a memorandum to the Assistant Deputy Minister of Energy, Mr. Martin Chamberlain. The attached briefing note recommended that the Minister of Aboriginal Relations meet "with the Minister of Energy to discuss Alberta's options [regarding the transfer of the subsurface rights] prior to any meeting" with Chief Weasel Head.

[32] Prior to the meeting, on or around November 27, 2012, the Minister of Energy received a briefing note that made three recommendations: (1) the Minister of Energy agrees to meet with the Minister of Aboriginal Relations "to discuss the minerals underlying the lands purchased by the Blood Tribe and fully consider any strategic considerations for exploring the sale or transfer of mineral rights"; (2) as an alternative to transferring Crown mineral rights, Canada's purchase of the minerals, at fair market value, for the benefit of the Band, should be explored, and (3) the Minister of Energy "should be aware of what the department's position has been on this issue and why; the department's interests, and implications to the department agreeing to a transfer or sale of Crown mineral rights".

[33] On May 21, 2013, Chief Weasel Head wrote to the Alberta Ministers of Aboriginal Relations and Energy. He requested to meet with them as soon as possible to explore the possibility of transferring the subsurface rights of the Purchased Lands to the Band's Reserve. He informed them that the Band had contacted the holders of the "subsurface instruments granted by Alberta in respect of the petroleum and natural gas, coal and ammonite rights" underneath the Purchased Lands. The interest holders were all amenable to participating in a transfer process of the subsurface rights, provided that the current interest holders' maintained substantially the same rights and benefits.

***ii. The period before Mr. Oberle's tenure as Minister of Energy: May 21, 2013 to September 15, 2014***

[34] After the request to meet from Chief Weasel Head, the Minister of Energy needed to be briefed. On June 14, 2013, Mr Chamberlain sent a briefing note to the Minister of Energy that outlined three options: (1) refuse to transfer the subsurface rights under the Purchased Lands; (2) agree to the transfer of subsurface rights at no cost, subject to resolution of all third party interests; (3) agree to transfer the subsurface rights at a value to be determined by Alberta Energy. It stated that "there is no concern with the minerals being transferred with the surface. There is minimal value to the known resource and given the terrain (coulees) it would be difficult to site a well on these lands. As long as Canada enters into a lease with the same terms and conditions as the provincial lease, our lessees should have no concern with this approach".

[35] As of September 5, 2013, the Band had engaged in "positive discussions [about transferring the subsurface rights] with... [Indian and Northern Affairs Canada] and Alberta Aboriginal Relations." However, the Band had only "very preliminary discussions with Alberta Energy with no indication as to the position they might take".

[36] Mr. Chamberlain prepared another briefing note on September 23, 2013. In it he stated that "transferring minerals at no cost when Alberta had no obligation to do so may set a precedent for lands transferred to settle a specific claim". Therefore, Mr. Chamberlain continued to recommend that the Minister should consider selling the subsurface rights for market value.

[37] On October 2, 2013, the Ministers of Energy and Aboriginal Relations met with the Band's representatives. Among other things the Band stated that it would be willing to purchase the subsurface rights, as opposed to have Alberta transfer the subsurface rights for free.

[38] On November 15, 2013, the Minister of Energy wrote to Band Counsellor Ms. Dorothy First Rider stating that "it is not our normal practice to sell subsurface Crown mineral rights". Nonetheless, the Minister stated that "we will consider the proposed transaction".

[39] There was then a prolonged debate between the Departments of Energy and Aboriginal Relations as to the proper course of action. The Minister of Aboriginal Relations, then Frank Oberle, advocated for the transfer of the subsurface rights to the Band.

[40] Based on a briefing note from the Assistant Deputy Minister of Energy dated January 24, 2014, the Minister of Energy had two options: (1) refuse to transfer the subsurface rights to the Band, which the briefing note acknowledged "could potentially complicate future development of some Crown subsurface rights", or (2) agree to a sale of the subsurface rights underlying the Purchased Lands at fair market value.

[41] The then Minister of Energy, Diana McQueen, reviewed the Band's request for the transfer of subsurface rights. She stated in an internal memorandum to Minister Oberle:

> I...have determined that reserve creation, in the absence of a constitutional obligation, is a matter of policy. If Alberta Energy adopted a policy of transferring Crown minerals where no legal obligation exists, there is nothing to preclude other First Nations from purchasing land and seeking similar concessions...I am concerned about making exceptions to this practice.
>
> Therefore, I am proposing that we refuse the subsurface transfer...

Minister McQueen then invited Minister Oberle to contact her if he wanted to discuss the matter further.

[42] In response, Minister Oberle sent her a memorandum on March 14, 2014. In his memorandum, Minister Oberle stated that he viewed the Band's situation as unique. Specifically, he pointed out six reasons for transferring the subsurface rights: (1) the Band was simply trying to implement the 1st and 2nd Akers Settlements; (2) the 1st and 2nd Akers Settlements allowed the Band to buy land and have it incorporated into their reserve; (3) the Band made every effort to purchase the land contiguous to their reserve, as per Alberta's concerns around non-contiguous additions to reserves; (4) the Band had negotiated with Alberta officials in good faith; (5) there was merit to allowing the Band to fully implement the 1st and 2nd Akers Settlements and (6) there was precedent for facilitating specific claim settlements between First Nations and Canada.

[43] After considering the additional information provided by Minister Oberle, Minister McQueen was still of the opinion that the subsurface rights should not be transferred to the Band. A draft letter to the Band's counsel was prepared for her signature. It appears that the letter was never sent.

### *iii. The Period during Minister Oberle's Tenure: September 15, 2014 until January 2, 2015*

[44] Minister Oberle became the Minister of Energy on September 15, 2014, appointed by the new Premier, Jim Prentice, who also served as the Minister of Aboriginal Relations.

[45] On October 22, 2014, the Band's counsel wrote to Premier Prentice and Minister Oberle. In addition to summarizing the Band's efforts to have Alberta transfer the subsurface rights, the Band's counsel also stated that it was their opinion that the Band had a "strong claim to the

subsurface rights pursuant to Section 10 of the *Natural Resources Transfer Act*". Finally, the Band's counsel requested to either have a favourable response concerning the subsurface rights from Alberta within 30 days, or alternatively, to meet with Premier Prentice and Minister Oberle.

[46] After receiving a briefing note from his Deputy Minister, Premier Prentice wrote to Minister Oberle on November 7, 2014. In his memorandum to Minister Oberle, Premier Prentice said "there is some merit in considering a sale of the minerals to Canada subject to any and all third party matters being addressed by Canada and the Blood Tribe". Premier Prentice also requested that Minister Oberle respond "on behalf of the Government of Alberta" to the Band's request to transfer the subsurface rights.

[47] On December 19, 2014, the Assistant Deputy Minister of Energy advised the Premier that the Minister of Energy would be sending the Band a letter informing it that the Government of Alberta would not be transferring the subsurface rights. The Assistant Deputy Minister reasoned that (1) there were existing subsurface rights in the Purchased Lands that were presently being leased, (2) Alberta does not sell subsurface rights except in exceptional cases, (3) Alberta did not have a legal obligation to transfer the subsurface rights in this case and (4) selling subsurface rights where no legal obligation exists may lead other First Nations to purchase land and seek similar treatment.

[48] Minister Oberle signed a letter sent to the Band's counsel on January 2, 2015, expressing the Government of Alberta's decision to refuse the Band's request:

> Dear Ms. O'Keeffe,
>
> Thank you for your letter of October 22, 2014 to the Honourable Jim Prentice, Premier of Alberta and Minister of Aboriginal Relations, and myself inquiring about the status of the Blood Tribe's request to transfer or sell Crown mineral rights underlying surface lands purchased with funds from the settlement of the Akers claim (the Land).
>
> After careful consideration, the Government of Alberta is not prepared to transfer or sell the underlying mineral rights to the Blood Tribe. The Government of Alberta has no objection to the addition of the Land to the Blood Reserve provided satisfactory arrangements are made with Alberta Energy's current and future agreement holders if they require access to the Land to win, work, and recover Alberta's minerals.
>
> I appreciate the time and effort you have taken on behalf of your client on this matter.
>
> Sincerely,
>
> ...
>
> Frank Oberle
>
> Minister

[49] On June 29, 2015, the Band commenced this application.

## III. Relevant Legislation

[50] The Minister's authority to approve a transfer of subsurface property derives from the *Mines and Minerals Act*, RSA 2000, c M-17 (the "**Act**"). Under s 9 of the Act, the Minister has the authority to dispose of mineral rights. Under s 11(2)(b), the Minister has the authority to transfer subsurface rights to the Crown in right of Canada:

> 11(1) No disposition may be made of an estate in a mineral owned by the Crown in right of Alberta unless the disposition is specifically authorized by this or another Act.
>
> (2) Subsection (1) does not preclude
>
> > (a) the Lieutenant Governor in Council from transferring the administration and control of minerals to the Crown in right of Canada, or
> >
> > (b) the Minister from executing and delivering a transfer under the Land Titles Act in favour of the Crown in right of Canada of an estate in minerals of which the Crown in right of Alberta is the registered owner.

[51] Under the *Natural Resource Transfer Agreement* (the "**NRTA**"),[1] all public lands in Alberta were transferred from the Crown in right of the Dominion of Canada to the Crown in right of Alberta. By s 1 of the NRTA, the transfer took place subject to any trust already in existence (emphasis added):

> 1 In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province and the interest of the Crown in the waters and water-powers within the Province under the *North-west Irrigation Act, 1898*, and the *Dominion Water Power Act*, and all sums due or payable for such lands, mines, minerals or royalties, or for interests or rights in or to the use of such waters or water-powers, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same...

[52] Section 10 of the NRTA caused Indian reserves to continue to be vested in the Federal Crown and imposed a duty on Alberta to transfer "unoccupied Crown lands" to Canada where Canada had an outstanding treaty obligation toward an Indian band:

> 10 All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of

[1] Being a Schedule to the *Constitution Act, 1930* (UK), 20 & 21 Geo V, c 26. The agreement is also ratified by federal and provincial legislation: the *Alberta Natural Resources Act*, SA 1930, c 21 and the *Alberta Natural Resource Act*, SC 1930, c 3. It is part of the Constitution of Canada.

> Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.



## IV. Issues

[53] The issues to be decided, therefore, are:

(a) Does *mandamus* lie against the Minister of Energy?

(b) If not, what is the applicable standard of review for a judicial review of the Minister's decision? and

(c) Did the Minister's decision fall short of that review standard?

[54] No suggestion has been made, and therefore there is no issue before the Court, that:

(a) the Minister's process was unfair;

(b) the Minister decided the request prior to December 29, 2014, (such that the Band is out of time to apply for judicial review); or

(c) the Minister's discretion under s. 11(2)(b) of the Act does not apply in this case (therefore, among other things, the transfer or sale, if pursued by Alberta, would be to the Government of Canada on behalf of the Band).

## V. Mandamus

[55] *Mandamus* compels a servant of the Crown to exercise a statutory duty it owes but has failed to exercise. As this Court stated in *Peter Lehmann Wines Ltd v Vintage West Wine Marketing Inc*, 2015 ABQB 481 at para 52:

> ...mandamus compels respect to the Crown by ordering that the Crown's commands be obeyed by the Crown's servants. "If a Crown servant refuses or neglects to obey the Crown, it is the function of the Courts to compel his obedience": *R v Workmen's Compensation Board*, [1942] 2 DLR 665 at 682 (BC CA).

[56] The Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA) at 766-767, aff'd [1994] 3 SCR 1100, set out the principal requirements which must be satisfied before *mandamus* will issue, including:

> 1. There must be a public legal duty to act…
>
> 2. The duty must be owed to the applicant…
>
> 3. There is a clear right to performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty…

> (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay…

[57] The Band says the Minister was required by law to approve the transfer, based on the Band's rights under Treaty 7, based on its rights under the NRTA, and based on the honour of the Crown. The Band says that each of these left the Minister no choice but to approve the transfer.

[58] Even though the Minister has discretion, the Band says that in this case that discretion is constrained to permit only one lawful decision (given Treaty 7, the NRTA and the honour of the Crown) which is to approve the transfer. The Court in *Apotex* at 767-768 also set out the requirements for *mandamus* when the public duty is discretionary:

> 4.Where the duty sought to be enforced is discretionary, the following rules apply:
>
> (*a*) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (*b*) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> (*c*) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>
> (*d*) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way;
>
> and
>
> (*e*) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

[59] For the reasons that follow, I conclude that each of Treaty 7, the NRTA and the honour of the Crown do not entitle the Band to the subsurface rights.

***A. Treaty 7 and the NRTA do not entitle the Band to the subsurface rights***

[60] The Band argues that Alberta is obliged to consent to the transfer of the subsurface rights by operation of the NRTA. Section 1 of the NRTA transferred all public land within Alberta from the Federal Crown to the Provincial Crown, "subject to any trusts existing in respect thereof". The Band argues that the transfer of land from the Federal Crown to Provincial Crown was subject to the existing First Nation treaty rights, including the right to reserve land under Treaty 7.

[61] The Band argues that the Treaty 7 rights include subsurface rights and therefore the Provincial Crown must fulfill any Crown obligation to the Band with respect to the Claim Lands. Specifically, the Band argues that in order to make the Band whole and to restore the Band to the position it was in prior to the 1889 Surrender, the Province must transfer the subsurface rights underlying the Purchased Lands to the Band.

[62] Further, the Band points to s 10 of the NRTA to argue that Alberta has a duty to assist Canada in fulfilling its treaty obligations.

[63] Treaties are constitutionally protected by s 35 of the *Constitution Act, 1982* (*Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53). Therefore, Treaty 7 does create certain constitutional obligations on Alberta, subject to any justified infringement under the *Sparrow* analysis (see *R v Sparrow*, [1990] 1 SCR 1075). The NRTA transferred land from the Federal Crown to the Provincial Crown subject to any existing trusts. The Band retained all interests in their reserve before and after the NRTA was enacted.

[64] However, the Band's argument overlooks the fact that the Purchased Lands never formed part of the Band's reserve; they were never subject to any interest created by Treaty 7. Only after entering into the 1st and 2nd Akers Settlement did the Band acquire an interest in the Purchased Lands. Prior to that and, more specifically, when the NRTA was enacted, the Band did not have any interest in or claim to the subsurface rights underlying the Purchased Lands. Alberta received those subsurface rights unencumbered by any obligation to the Band. The Band does not presently have any interest in the subsurface rights underlying the Purchased Lands. Accordingly neither Treaty 7 nor the NRTA oblige Alberta to transfer to the Band the subsurface rights.

### *B. The Honour of the Crown does not entitle the Band to the subsurface rights*

[65] The Band also says the honour of the Crown is breached by Alberta refusing to transfer the subsurface rights of the Purchased Lands to the Band.

[66] The assertion of Crown sovereignty, made in the Royal Proclamation of 1763, committed the Crown to "treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (*Mitchell v MNR*, 2001 SCC 33 at para 9). The Supreme Court of Canada said: "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17). The Crown must avoid sharp dealing and always act in good faith in respect of Aboriginal peoples. The honour of the Crown requires diligence, good faith and integrity in fulfilling her obligations to Aboriginal interests including in pursuing the honourable reconciliation of Crown and Aboriginal interests (*Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at paras 68, 73, 79).

[67] However, the honour of the Crown "is not a cause of action in itself, rather, it speaks to how obligations that attract it must be fulfilled" (*Manitoba Metis Federation Inc* at para 73). It creates obligations of manner, approach, and treatment, not of outcome (*Haida Nation* at para 63). In the absence of a legal obligation, the honour of the Crown cannot compel Alberta to transfer the subsurface rights to the Band. Therefore, the honour of the Crown does not entitle the Band to the subsurface rights or oblige Alberta to transfer them.

### *C. Effect of 2nd Settlement*

[68] Even if I am wrong in my analysis above, and Alberta was obliged to transfer the subsurface rights based on Treaty 7, the NRTA or the honour of the Crown, the 2nd Akers Settlement extinguished all such claims of the Band. Therefore, the 2nd Akers Settlement has the effect of completely barring *mandamus*, for the following reasons.

#### *i. Analysis of the 2nd Akers Settlement*

[69] In order to determine the effect of the 2nd Akers Settlement, the true intention of the Band with respect to the surrender in the 2nd Akers Settlement must be determined (*St Mary's Indian*

*Band v Cranbrook (City)*, [1997] 2 SCR 657 at para 17). The true intention of the Band can be determined through (1) the language of the 2nd Akers Settlement with respect to the surrender, (2) the language of the 2nd Akers Settlement with respect to subsurface rights and (3) the circumstances surrounding the agreement pointing towards the intention to make the Band whole.

### *a. Language of the 2nd Akers Settlement*

[70] In the 2nd Akers Settlement, the Band absolutely surrendered their interest in the Claim Lands. Article 4.1 of the 2nd Akers Settlement states:

> The Parties agree, pursuant to the provisions of subsection 38(1) and sections 39 and 40 of the Indian Act, and the Tribe hereby assents to the Surrender to Canada of all claim, right, title, interest, benefit, and possession, beneficial, equitable, or otherwise, which the Tribe, and its heirs, descendants, executors, successors and assigns past, present and future may have had or may now have in the Claim Lands.

[71] Section 38(1) of the *Indian Act* states that:

> A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

[72] Section 39(1) of the *Indian Act* outlines the requirements of an absolute surrender:

> An absolute surrender is void unless
>
> (a) it is made to Her Majesty;
>
> (b) it is assented to by a majority of the electors of the band
>
> > (i) at a general meeting of the band called by the council of the band,
> >
> > (ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender, or
> >
> > (iii) by a referendum as provided in the regulations; and
>
> (c) it is accepted by the Governor in Council.

[73] An absolute surrender extinguishes all a band's interest in the reserve land; thereafter the land ceases to have the characteristics of a reserve: *Musqueam Indian Band v Glass*, 2000 SCC 52 at paras 16, 49, 65; *Osoyoos Indian Band v Oliver (Town of)*, 1999 BCCA 297, overturned on other grounds 2001 SCC 85. The Court is *Osoyoos* said at para 33 (emphasis added):

> The effect of an absolute surrender is that all the interests of the Indians in the reserve land that is surrendered are completely wiped out. <u>The land is removed from the reserve and all interests of the Indians in the land, including interests which could be claimed as aboriginal title, are extinguished.</u> That is what was decided by a unanimous Supreme Court of Canada in *Smith v. The Queen*, 1983 CanLII 134 (SCC), [1983] 1 S.C.R. 554, particularly at 578, and given effect to in

> *St. Mary's Indian Band v. Cranbrook*, 1997 CanLII 364 (SCC), [1997] 2 S.C.R. 657.

[74] The language used by the Band and Canada in the 2nd Akers Settlement surrender clause was broad (emphasis added):

> "the Tribe hereby assents to the Surrender to Canada of all claim, right, title, interest, benefit, and possession, beneficial, equitable, or otherwise, which the Tribe, and its heirs, descendants, executors, successors and assigns past, present and future may have had or may now have in the Claim Lands".

Therefore, the Band absolutely surrendered all rights and interests attached to the Claim Lands, including any Treaty 7 rights.

[75] While the Band acknowledges that the 2nd Akers Settlement fulfilled Canada's treaty obligations, the Band argues that the Provincial Crown still has outstanding treaty obligations. Based on the Band's argument, these treaty obligations require Alberta to transfer the subsurface rights of the Purchased Lands to the Band.

[76] With respect, the Band's argument misunderstands the nature of absolute surrenders. Due to s 91(24) of the *Constitution Act*, 1867 and s 39(1)(c) of the *Indian Act*, the federal government has the exclusive power to obtain a surrender of Indian lands. Indian bands can only validly surrender reserve land to the Federal Crown. At such time, however, the absolute surrender extinguishes all rights and interests in the surrendered land as against the world – not just all rights and interests held by the Federal Crown. The Band has argued that certain Treaty 7 rights still remain outstanding. I can find none. The absolute surrender extinguished all Indian rights in the Claim Land, including treaty rights. The language of the 2nd Akers Settlement clearly states that all rights and interests in the Claim Land were extinguished. Any duty that Alberta had to transfer the subsurface rights based on Treaty 7 was extinguished. All Treaty 7 rights with respect to the Claim Lands are extinguished.

### *b. Subsurface rights in the 1st and 2nd Akers Settlement*

[77] The 1st Akers Settlement makes no mention of subsurface rights. Based on Article 5 of the 1st Akers Settlement, the $2.36 million paid to the Band was meant to be "a long-term asset…to be invested for the future benefit of the Tribe in a trust created by the Tribe." According to Articles 12 to 16 of the 1st Akers Settlement, the Band had permission, but was not required, to purchase up to 444 acres and have them set apart as reserve land. Further, Article 12(b) required "that consultation with the relevant provincial and municipal governments take place with respect to the proposed addition. If the concerns of these governments…are not resolved, Canada cannot guarantee that the lands will ever be added to reserve, regardless of how reasonable the Band may be in its dealings with the provincial or relevant municipal government". Under Article 29 the parties agreed that "this Settlement Agreement shall be the entire agreement and there is no representation, warranty, collateral agreement, undertaking or condition affecting this Settlement Agreement except as expressed in this Settlement Agreement".

[78] The 2nd Akers Settlement mentions subsurface rights in Article 4.2, which states (emphases added):

> The Parties agree that the New Lands purchased by the Tribe that may be set apart as reserve land shall be governed by the following principles:
>
> (a) The Tribe may use the Compensation received pursuant to Article 2.3 to purchase up to 225 acres of land including the corresponding subsurface title on a willing buyer/seller basis within an area adjacent to the Reserve for a period of thirty years commencing on the Effective Date;
>
> (b) At the request of the Tribe, the Minister will recommend to set aside in a timely manner a single selection of New Lands up to 225 acres to the Governor in Council, subject to the Additions to Reserve Policy as an addition to the Reserve, including the corresponding subsurface title, for the use and benefit of the Tribe, provided that the Tribe consult with the Province of Alberta and the relevant municipality, and take all reasonable steps to meet the concerns of both governments;
>
> (c) The New Lands will not be recommended for transfer to reserve status until both the surface land and the corresponding subsurface title has been acquired or otherwise addressed with the subsurface owner;

[79] There is no explicit obligation on the Provincial Crown to transfer subsurface rights to the Band. The express mention of subsurface rights next to the phrase "willing buyer/seller basis" indicates that Alberta (whom the parties contemplated as a possible owner of such rights) must be willing to sell those rights. Even if Canada happened to own those rights, it would be under no obligation to convey them, by sale or transfer.

[80] In *Bear v Saskatchewan*, 2016 SKQB 73 at paras 44, 45, the Saskatchewan Court of Queen's Bench held when interpreting a treaty land settlement agreement that "the "willing seller/willing buyer" phrase has to do with setting the price of the land chosen as opposed to impacting on the ability to say yes or no to... [the Indian Band's] request." While this interpretation is instructive, in *Bear* the phrase "willing seller/willing buyer" was used in direct relation to the purchase of Crown lands. The Settlement Agreement in *Bear* at para 27 stated:

> Canada, Saskatchewan and the Band agree that...transactions involving the sale by Canada or Saskatchewan of federal or provincial Crown Lands...shall be governed by the principle of "willing seller/willing buyer".

[81] In the present case, the phrase "willing buyer/willing seller" is used in relation to any land in general. Obviously the 2nd Akers Settlement does not impact a private party's ability to refuse to sell land to the Band. However, the clause containing the phrase "willing buyer/willing seller" does not distinguish between Crown land and privately held land. Further, in *Bear*, there was a clause in the settlement agreement that stated that "Canada and Saskatchewan agrees to give favourable consideration to offers from the Band to purchase federal or provincial Crown Land". No such clause exists in the present case. Alberta is not a party to either agreement. Therefore, in the present case the phrase "willing buyer/willing seller" does not have the same sense as it did in *Bear*.

[82] Also, based on Article 2.5(c), "the Compensation paid to the Tribe [was] to be a long-term asset to be invested for the benefit of the Tribe by the Trustees in accordance with the terms of the Trust Agreement." Accordingly, there was no obligation on the Band to use the funds they

received to purchase land. The 1st and 2nd Akers Settlements do not give rise to an explicit obligation to transfer the subsurface rights.

***c. The Circumstances Surrounding the Settlement Agreement***

[83] The Band argues that the intention of the 1st and 2nd Akers Settlement was to "make the Tribe whole in regard to the invalid surrender, and to restore to the Tribe the rights it would have enjoyed in the Land but for the invalid surrender". Therefore, the Band argues that Alberta has an implicit obligation to transfer the subsurface rights to the Band. This argument is based on the Provincial Crown's obligations pursuant to Treaty 7. As I have already concluded, all Treaty 7 rights with respect to the Claim Lands have been extinguished. However, the intention of the 1st and 2nd Akers Settlement could still have been to "make the Tribe whole in regard to the invalid surrender". In order to determine the intention of the parties, the circumstances surrounding the 1st and 2nd Settlement Agreements must be examined.

[84] Writing in the context of treaty interpretation, Justice Lamer, in *R v Sioui*, [1990] 1 SCR 1025 at 1060, stated that "the subsequent conduct which is most indicative of the parties' intent is undoubtedly that which most closely followed the conclusion of the document". This principle is equally applicable here. The true intent of the parties is best captured by their beliefs and by their conduct that followed most closely after ratification of the 1st and 2nd Akers Settlements.

[85] The circumstances surrounding both the 1st and 2nd Akers Settlements are laid out in detail in the Record of Proceeding. In Chief Weasel Head's Affidavit in support of the Band's application, he included the Indian Claims Commission's "Report on the Mediation of the Blood Tribe/Kainaiwa Akers Surrender Negotiations". This report was written by the Indian Claims Commission, which is a Commission whose mandate (in part) is to provide mediation services for claims between First Nations and the Government of Canada. The Report outlines the various steps that occurred in the 2003 surrender negotiations between the Band and the Government of Canada.

[86] The Report states that prior to entering into formal negotiations over the Claim Lands, the Band and Canada had two land appraisals, one loss-of-use study and one loss-of-revenue study completed on the Claim Lands. Based on this information, the parties entered into negotiations. The report explains:

> Complicated and intense negotiations followed, with several months of offers and counter offers, but by April 2001, the parties were still far apart, and it looked as though negotiations might break down completely. In January 2002, however, a new federal negotiator was appointed, and the parties were able to reach a tentative agreement in May 2003.

[87] After the Band ratified the 2nd Akers Settlement, the Band sent a letter to the Commission thanking them for playing "a key role in the success of the Akers 2 Negotiations".

[88] Based on the Indian Claims Commission's report, the 2nd Akers Settlement was a true negotiation. Neither side was compelled to accept the terms of the agreement and both sides compromised in order to reach a settlement. Based on the behaviour of both parties directly after the 2nd Akers Settlement, it appears that both parties accepted and were pleased with the results of the 2nd Akers Settlement.

[89] The Band argues that the intention of the 2nd Akers Settlement was to make the Band whole with respect to the Claim Land. In other words, the intention of the 2nd Akers Settlement was to require the Provincial Crown to transfer the subsurface rights of any land the Band purchased to the Band. However, if this was indeed the intention of the Band with respect to the 2nd Akers Settlement, then subsequent communications with the provincial government become difficult to explain.

[90] The first time the Band contacted the provincial government with respect to the subsurface rights of the Purchased Lands was on October 31, 2008. The Band had just purchased 350 acres under the 1st Akers Settlement provision. The Band's representative, Jacqueline Oka, wrote to the Department of Aboriginal Relations stating that "the Blood Tribe would like to have the minerals rights [*sic*] [of the Purchased Lands] transferred to the Blood Tribe. I would like some direction as to the process in transferring the minerals right [*sic*] to the Blood Tribe. Please provide direction and contact information for the process". The Alberta government responded, stating that "Alberta is not willing to transfer Alberta Crown mineral rights to any party, except where required by law". In response the Band did not assert that Alberta had a legal obligation to transfer the subsurface rights to the Band.

[91] Over the next several years, the Band and the Alberta government (Departments of Energy and Aboriginal Relations), discussed the possibility of transferring the subsurface rights. Throughout that time the Band did not assert that Alberta had a legal obligation to transfer the subsurface rights to it. In a letter to the Ministers of Energy and Aboriginal Relations dated May 21, 2013, Chief Weasel Head stated that "Alberta is likely not under any express legal obligation to facilitate the addition to reserve process by agreeing to transfer...the subsurface rights...to Canada for the benefit of the Tribe". While this statement is not determinative of the existence or not of any binding obligation upon Alberta, it is relevant to the circumstances surrounding the agreement and point towards the Band's understanding of the 2nd Akers Settlement at the affected time. Up until this time, the Band had not alleged that Alberta had a legal obligation to transfer the subsurface rights, despite having the opportunity to so allege. I find Alberta's view more consistent with the context and conduct following the creation of the Agreements; the Band has not demonstrated that its true intention was to receive from Alberta, by transfer or sale, the subsurface rights.

### *D. Conclusion on Mandamus*

[92] Therefore *mandamus* does not lie against the Minister. Alberta is not under any legal obligation to transfer the subsurface property rights to the Band. The office of the Minister of Energy, as the office bearing the power to transfer such rights (and the public duty to do so in some situations), does not owe a public duty to the Band to transfer the subsurface property rights. The statute bestows on the Minister the discretion to do so, but no more than that in this case. According to the test for *mandamus* in *Apotex*, *mandamus* cannot compel discretion in a particular way. As the Band is not legally entitled to have the Minister transfer the subsurface rights to it, *mandamus* is not available.

## VI. Standard of Review

[93] Since the Minister is not under a public duty to transfer or sell the subsurface rights owned by the Province, but nevertheless has discretion to do so, I must next consider whether his

discretionary decision to decline any transfer or sale withstands review. The Band argues that I am to review the Minister's refusal for correctness because the Minister's decision deals with constitutional questions, relying on *Smith v Alliance Pipelines Ltd*, 2011 SCC 7 and *Manitoba Association of Health Care Professionals v Nor-Man Regional Health Authority Inc*, 2011 SCC 59. In particular, the Band argues that the Minister failed to properly account for the Crown's constitutional obligations with respect to Treaty 7, the NRTA and the honour of the Crown.

[94] Alberta argues that I am to review the decision on the more deferential reasonableness standard, saying the existing jurisprudence, notably *Muskoday First Nation v Saskatchewan*, 2016 SKQB 73, has established that reasonableness is the standard of review of a Minister's decision of whether to transfer subsurface rights. Further, Alberta argues that even if the issue was not previously decided, a full standard of review analysis based on *New Brunswick v Dunsmuir*, 2008 SCC 9, yields the same result. Alberta argues that the decision to transfer or not transfer subsurface rights is fundamentally a question of discretion, which is only reviewable on a reasonableness standard.

[95] The applicable standard of review is determined in two steps, described by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[96] This approach was recently affirmed by the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22:

> Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). [...]

[97] The jurisprudence has not already settled this question. The parties could not locate any previous judicial review decision of a Ministerial decision under the Act.

[98] The "administrative body" exercising delegated statutory authority is the Minister of Energy. His authority derives from the Act. In exercising that authority he must interpret the Act, that is, his home statute. Reasonableness is therefore the presumptive review standard.

[99] This presumption may be rebutted, however, and if so the standard of review is correctness. From *Edmonton*, at para 24:

> The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized

> tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (*Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22).

[100] The Band says its request required the Minister to interpret Treaty 7 and the NRTA. It says these do not raise constitutional questions regarding the division of powers, but they are constitutional questions nonetheless that rebut the presumption of reasonableness, attracting the correctness standard.

[101] Section 35 of the *Constitution Act, 1982* "recognized and affirmed" existing treaty rights. These treaty rights are constitutionally protected, subject to justifiable infringements (See *R v Sparrow*, [1990] 1 SCR 1075). As rights stemming out of Treaty 7 are constitutionally protected, determining the scope of these rights is a matter of constitutional interpretation. The NRTA is a constitutional enactment and the honour of the Crown is engaged by s 35 of the *Constitution Act, 1982* (*Manitoba Metis Federation Inc* at para 69). Therefore, an issue of interpretation arising from the interplay between Treaty 7, the NRTA and the correct scope of application of the honour of the Crown, arguably, even though not a division of powers issue, is also a matter of constitutional interpretation. The Court said in this regard in *Dunsmuir*, at paragraph 58:

> [...] correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54 (CanLII); Mullan, Administrative Law, at p. 60).

[102] Decisions involving "*Charter* values" are generally reviewed on a standard of reasonableness: *Doré v Barreau du Québec*, 2012 SCC 12 at paras 54, 56; *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423 at para 80. The Supreme Court in *Doré* stated at para 54 that "[e]ven where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*" (emphasis in original). In this case, the questions engaging the constitution pertain more to the interpretation of a constitutional agreement and of a constitutional enactment, than to their impact for which the Minister of Energy might be better positioned to appreciate. Whether the NRTA, Treaty 7 or the honour of the Crown legally require Alberta to transfer the subsurface rights are extricable questions of law, involving constitutional terms. This case involves determining the scope of constitutional principles rather than applying them.

[103] Therefore, insofar as the Minister's decision entails extricable questions of constitutional interpretation, of an enactment (the NRTA) or an agreement (Treaty 7), or determining the scope of what is entailed by the honour of the Crown, the standard of review is correctness. In deciding here whether Alberta had a constitutional obligation to transfer the subsurface rights to the Band

as a consequence of Treaty 7, the NRTA or the honour of the Crown, the Minister had to be correct.

[104] However, if the Minister has no such legal obligation to authorize the transfer or sale of the requested property to the Band, he nevertheless has the authority to do so. His discretionary decision in that regard is subject to review on a reasonableness standard. Such a discretionary decision involves the Minister acting under his home statute, and the presumptive reasonableness standard is not rebutted. Further, by delegating such decisions to a senior cabinet member such as the Minister of Energy, the Legislative Assembly signalled its wish that such decisions be policy driven. The Legislative Assembly underscored its expectation that such decisions would be policy driven by the absence of any statutory guidelines or criteria for such decisions. The Act says only that these shall be the Minister of Energy's decisions. Finally, in delegating such decisions specifically to the Minister of Energy, the Legislative Assembly signalled its wish that the public interest in the province's ownership of energy resources should be factored in any such decisions. For such questions deference will usually apply automatically: *Dunsmuir* at para 53.



## VII. The Minister's Discretionary Decision

### *A. Was the Minister Correct Constitutionally?*

[105] The Band's request did require the Minister to correctly decide extricable constitutional questions; it required him to correctly interpret Treaty 7, the NRTA and the scope of the honour of the Crown. On those questions, for the reasons I provided above, the Minister of Energy was correct. In short, the Minister of Energy was not obliged constitutionally to grant either of the Band's requests, for transfer or sale, because the 2nd Akers Settlement extinguished all rights and interests the Band may have had after the 1889 Surrender of the Claim Lands. Further, none of Treaty 7, the NRTA and the honour of the Crown gives the Band any interest in the subsurface rights underlying the Purchased Lands.

### *B. Was the Minister's Decision Reasonable?*

[106] In a review for reasonableness of the Minister's discretion to nevertheless authorize the transfer, the Court cannot replace the administrative decision with its own. The question is not whether I agree with the Minister's exercise of discretion or might have concluded the matter differently. Reasonableness is a deferential standard of review. At paragraph 47 of *Dunsmuir*, the Supreme Court of Canada explained the nature of that deference as follows:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[107] There are not degrees of reasonableness. That is, under the reasonableness standard of review some types of decisions are not accorded more deference than other types of decisions by different decision makers. The deference accorded is the same for all decisions reviewed on that standard.

[108] Nevertheless, the review for reasonableness is necessarily contextual, with the result that for two different decisions, both of which are subject to a reasonableness standard of review, the range of acceptable outcomes may differ widely between them. In one decision that range can be broader or narrower than the range of acceptable outcomes for another type of decision by a different decision maker. One is not being given more deference than the other, but the authority delegated to it may be subject to less statutory restrictions or less mandatory considerations or the discretion to be exercised might be more influenced by policy, just as a few examples. So the effect may be an appearance of more deference being accorded even though the difference is merely that the range of acceptable and defensible outcomes is broader. That appearance may arise in this case.

[109] In this case, the power to decide has been delegated to a Minister of the Crown without any statutory limitations, guidance, criteria or considerations. The range of acceptable outcomes therefore is very broad. Further, the decision involves whether to relinquish rights of property ownership. A holder of property rights can rarely be forced to relinquish them against their will, for example by operation of law when the public interest is shown to override the private. The owner of property can choose for arbitrary reasons, even on a whim, to refuse all offers to sell or transfer their property, no matter how extravagantly rich those offers might be. He just cannot refuse on grounds that are prohibited discrimination. The Crown owns the property at issue here and has all the rights of ownership that a private owner would enjoy. Therefore, in this context of *almost* unfettered discretion, involving whether to relinquish property rights, *a priori* the range of acceptable outcomes is extremely broad, easily encompassing both approving and denying a request.

[110] Alberta says the Minister's decision was reasonable. In the absence of an obligation to transfer the lands, Alberta says the decision of the Minister to refuse to sell or transfer the lands falls within a range of reasonable outcomes. It says there is no basis here for questioning the decision or referring the matter back to the Minister for reconsideration.

[111] Alberta says the Court's review of whether the decision falls within a range of possible acceptable outcomes must be made in the context of the whole record. Alberta says the record shows that the Minister considered all the facts and arguments presented by the Band and all the arguments opposing it. By considering both sides of the argument, Alberta argues that the Minister's decision falls within a range of reasonable outcomes. In effect Alberta is saying that because the Minister accorded procedural fairness, therefore his decision was reasonable. That does not follow and warrants no further comment.

[112] However Alberta is correct in that a reviewing court should look to the record for determining the reasonableness of the outcome: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15. In *Agraira v Canada*, 2013 SCC 36 at para 53, the Court stated:

> ... the reviewing court must consider the tribunal's decision as a whole, in the context of the underlying record, to determine whether it was reasonable...

[113] That becomes critical in this case – to assess the reasonableness of the Minister's decision by looking at the whole record, since he stated no reasons for his decision. His decision merely states:

> After careful consideration, the Government of Alberta is not prepared to transfer or sell the underlying mineral rights to the Blood Tribe.

[114] While the Act does not require the Minister to provide his reason(s), their absence makes my task of gauging the reasonableness of his decision extraordinarily difficult. In *Edmonton* the Court said, at paras 36:

> When a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging.

In *Newfoundland and Labrador Nurses' Union* at paras 14, the Court said (emphasis added):

> I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result.... It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes."

Here there are no reasons that on review I can "read together with the outcome", organically or otherwise.

[115] In *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 38, the Supreme Court of Canada said:

> The concept of "reasonableness" relates primarily to the transparency and intelligibility of the reasons given for a decision. But it also encompasses a quality requirement that applies to those reasons and to the outcome of the decision-making process.

Here the reasons are not transparent and intelligible; they are missing from the decision.

[116] The requirement of intelligibility focuses on the need for the reasons given to be rational and supportive of the decision. In *Lehigh Inland Cement Ltd v BBF, Local D359*, 2008 ABCA 128 at para 9, the Court of Appeal stated (emphasis added):

> A reasonableness standard requires the reviewing judge to stay close to the reasons given by the tribunal, and look to see if any of those reasons adequately support the decision.... A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence to its conclusion. If any of the reasons are tenable in that they stand up to a somewhat probing examination, then the decision will not be unreasonable.

The Court of Appeal affirmed the applicability of this statement in *Boyd v JBS Foods Canada Inc*, 2015 ABCA 380 at para 67. The Minister provided no reasons to the Band that I can "stay close to" in assessing whether they adequately support the decision.

[117] Even though the honour of the Crown does not require that the Minister grant the Band's request, it does extend to the nature and manner of the Minister's communications with the Band. Communicating reasons to the Band is a sign of respect. Providing reasons displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation. Providing reasons is also important for a decision holding such significance to the Band as does this one. Of course there are also here the more common benefits from proper reasons, of revealing to the losing party whether they were properly understood, of the losing party learning why their thinking was not persuasive, and of enabling the losing party to consider whether to challenge the decision by legal process.

[118] *Prima facie*, the high standard of honourable dealing – of dealing in good faith and integrity that is to characterize the honour of the Crown – is not met by the Minister's uninformative one sentence decision. *Prima facie,* just because the Act does not limit the broad discretion of the Minister in such decisions, does not mean it is acceptable for the Minister to have no reasons for his decision or to communicate his decision to a First Nation without stating his reason(s). First Nations are deserving of more respect from the Crown in matters of such importance to them as this. The courtesy of explaining the decision was all the more warranted here where the Band perceived, rightly or wrongly, an injustice was done to them over a century ago, followed by its decades-long struggle for a remedy. Its historic claim obviously had some legitimacy given the magnitude of Canada's payment in settlement. Following settlement with Canada the Band embarked on what has become, no doubt to the Band's dismay, a further years-long struggle imploring the Alberta Crown to cooperate in realizing the Band's negotiated 'next-best-thing' solution (the 'next-best-thing' to getting their original land back). The Band dealt with the Minister in his previous portfolio; at that time and in that capacity he appeared to favour the Band's request. *Prima facie,* these factors all militate strongly in favour of the honour of the Crown obliging the Minister himself to explain his one sentence denial to the Band.

[119] I said the honour of the Crown "*prima facie*" requires reasons in these circumstances, but I do not find that the honour of the Crown *does* require reasons. As I indicated above, the Band has not challenged the decision for breach of procedural fairness. The effect of that is the Crown did not have opportunity to be heard on whether the honour of the Crown in this case entails the provision of reasons, emanating from the decision maker.[2] If the Crown had opportunity to address the issue, she may have placed much more or different information before me, and argument, to overcome the *prima facie* impression. She may have. Without hearing from the Crown on the point I make no finding adverse to Her, that Her honour required the Minister give his reason(s).

[120] The Court in *Edmonton* said, at para 38:

> However, when a tribunal's failure to provide any reasons does not breach procedural fairness, the reviewing court may consider the reasons "which could be offered" in support of the decision (*Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Defence: Judicial Review and Democracy", in M.

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[2] See, for example: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 126, a deportation decision of a Minister of the Crown affecting constitutional rights.

> Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286). In appropriate circumstances, this Court has, for example, drawn upon the reasons given by the same tribunal in other decisions (*Alberta Teachers'*, at para. 56) and the submissions of the tribunal in this Court (*McLean*, at para. 72).

[121] In this case the record offers reasons for the Minister's decision, in the form of his ADM's December 19, 2014 email to the Premier. Repeating from paragraph 47 above:

> ... (1) there were existing subsurface rights in the Purchased Lands that were presently being leased, (2) Alberta does not sell subsurface rights except in exceptional cases, (3) Alberta did not have a legal obligation to transfer the subsurface rights in this case and (4) selling subsurface rights where no legal obligation exists may lead other First Nations to purchase land and seek similar treatment.

[122] Regarding the first of those reasons, while it is true that some of the rights requested by the Band were already leased, that statement alone was misleading without also reporting that in fact each of those 3 lessees had consented to the Band acquiring the residual subsurface property rights and that the Band had no desire to interfere with the leases.

[123] Regarding the second of those reasons, from everything presented in this judicial review, this case is an exceptional case. There are no details provided for any similar requests that were denied. The only other case mentioned was the "Cold Lake case" in which the Minister *did* approve the transfer to a First Nation, apparently as a means of extricating Alberta from risk of unrelated liability.

[124] The third of those reasons is not relevant to the reasonableness of the Minister's discretionary decision. It was the Minister's response to the suggestion from the Band that Alberta *had to* convey the subsurface rights, which I conclude above was incorrect on the Band's part. But it cannot be one of the Minister's reasons for in his discretion declining the Band. It is not a reason for declining to simply say, in effect, 'because we don't have to'.

[125] Regarding the fourth of those reasons, the 'it would open the floodgates to lots of such requests' reason, interestingly Minister Oberle previously said when Minister of Aboriginal Relations that the Band's "specific claim makes this situation different than a First Nation simply purchasing land at will with a view to adding it to reserve". That is, the Minister previously considered the Band's situation did not risk a flood of such requests and was exceptional. Minister Oberle previously stated, making reference to the Cold Lake Specific Claim, that there was already existing precedent for transferring subsurface rights to First Nations. The Minister had previously stated that "there is merit in trying to find a workable solution to allow the Blood Tribe to move forward to fully implement their specific claim settlement". The Premier of the Province had also earlier intimated the Band's request merited consideration.

[126] These differences between Minister Oberle's earlier views and those ascribed to him as Minister of Energy, cast significant doubt on whether the decision was actually the Minister's. The seeming about face of Minister Oberle between his letter decision as Minister of Energy and his views when Minister of Aboriginal Relations leave the impression that Minister Oberle felt constrained from freely deciding this particular matter according to his own conscience and opinion (the test articulated in *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952 at 971). This impression is reinforced by an email sent from the Director of Land

Claims to the Deputy Minister of Aboriginal Relations, where the Director of Land Claims stated "I still think Minister Oberle would be amenable [to transferring the subsurface rights] if not guided down a different path by his department. In fact, he said as much in a memo he wrote back when he was our minister [of Aboriginal Relations]". While this email is merely someone's opinion, it aligns with the general impression given by the overall record: Minister Oberle may have been constrained from making this decision as he wished.

[127] Of course Minister Oberle may have been constrained from espousing his true views when he was Minister of Aboriginal Relations and it was only by becoming Minister of Energy that his true views found liberty of expression. Or perhaps, more likely, he simply changed his mind. The latter is certainly the starting point presumption, particularly when considering the decision of a Minister of the Crown. Absent persuasive evidence to the contrary I accept that to be what happened here. That is, absent evidence demonstrating on balance that the Minister was prevented from deciding in accordance with his own opinion and conscience, I infer that the Minister decided to say "no" to the Band and for the reasons attributed to him by the ADM. I infer that the Minister, upon assuming responsibility for the energy portfolio, was persuaded off his previous views that favoured the Band's request; he changed his mind. That is his prerogative. But his reasons for that final decision, read together with the outcome, must still show that the result falls within a range of possible outcomes. More correctly stated, the Band must show that the Minister's reasons, read together with the outcome, do not fall within a range of possible outcomes. At a minimum, though, those differences between what the Minister himself earlier wrote and what was later attributed to him in the ADM's email to the Premier, impair my ability to find the requisite transparency in the process of articulating the reasons and outcomes.

[128] Further, the deficiencies in those reasons (itemized in para's 122 to 125 above) materially undermine a finding of the requisite intelligibility of the decision and its reasons, of finding a sufficient rational connection between the reasons given and the outcome.

[129] Finally, it does not appear that the Minister's deliberations at any time considered the role the decision could play for the Band in the ongoing process of reconciliation between Aboriginal peoples and the Crown. This is despite the fact that, acknowledged internally by Alberta (see para 34 above), granting the request would have at most a nominal adverse impact on the interests of the Province. Opportunities to advance and promote this 'process of reconciliation' warrant attention and consideration with that in mind. It is constitutionally mandated by Section 35 of the *Constitution Act, 1982*: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24. At paragraph 42 of that decision the Court states:

> The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.

[130] Therefore, even though the Act contains no mandatory considerations by the Minister for such decisions, or limitations on the breadth of his discretion, the broader law does. This is one of the reasons I described the Minister's discretion in paragraph 109 above as "*almost* unfettered". In these circumstances the Constitution requires the Minister to consider whether, and if so how, his decision may advance or impair the process of reconciliation. His brief decision does not indicate he did. The reasons attributed to him do not indicate he did. Nothing in the entire record reveals the Minister considered the importance his decision might play in promoting the process of reconciliation with the Band. His considering that possibility might not

have changed the outcome, but it was a mandatory consideration given the circumstances presented.

[131] The failure to turn his mind to a mandatory consideration may alone have rendered his decision unreasonable, but I need not go that far. The combination of the diminished intelligibility and rationality of the decision and reasons and his failure to consider how his decision might affect the process of reconciliation, results in my finding his decision unreasonable.



## VIII. Conclusion

[132] The Minister of Energy was not legally required to transfer or sell the subsurface rights underlying the Purchased Lands to the Band. Nevertheless the Minister has the discretion to transfer or sell them. I find his decision not to do so unreasonable because of the deficiency in the intelligibility and rationality of his decision and reasons, exacerbated by his failure throughout to consider the opportunity for his decision to promote the process of reconciliation between the Crown and the Band, as the law requires.

[133] I therefore quash the decision and return the Band's request to the Minister for reconsideration.

**Heard** on the 3rd day of November, 2016.
**Dated** at the City of Calgary, Alberta this 10th day of February, 2017.

**P.R. Jeffrey**
**J.C.Q.B.A.**

**Appearances:**

Max Faille and Graham Ragan
for the Applicant

Doug Titosky
for the Respondent