Federal Court of Appeal  Cour d'appel fédérale

Date: 20160429

Docket: A-11-15

Citation: 2016 FCA 133

CORAM: **PELLETIER J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE ATTORNEY GENERAL OF SASKATCHEWAN

Appellant (Defendant)

and

CHIEF M. TODD PEIGAN ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE PASQUA FIRST NATION AND THE PASQUA FIRST NATION

Respondents (Plaintiffs)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

(Defendant)

Heard at Regina, Saskatchewan, on November 10, 2015.

Judgment delivered at Ottawa, Ontario, on April 29, 2016.

REASONS FOR JUDGMENT BY:	NEAR J.A.
	GLEASON J.A.
CONCURRING REASONS BY:	PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160429

Docket: A-11-15

Citation: 2016 FCA 133

CORAM: **PELLETIER J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE ATTORNEY GENERAL OF SASKATCHEWAN

Appellant (Defendant)

and

CHIEF M. TODD PEIGAN ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE PASQUA FIRST NATION AND THE PASQUA FIRST NATION

Respondents (Plaintiffs)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

(Defendant)

REASONS FOR JUDGMENT

NEAR AND GLEASON JJ.A.

[1] On September 15, 1874, at Fort Qu'Appelle, Saskatchewan, representatives of Queen Victoria and of various Cree and Saulteaux First Nations concluded Treaty Number 4. Among the promises made in Treaty Number 4 was the commitment by the Crown to provide the signatory First Nations with reserve land "of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families". This promise was not fulfilled, and there was a shortfall in the amount of reserve land provided to Treaty Number 4 First Nations, including the Pasqua First Nation [the PFN], whose members, as represented by Chief Todd Peigan, are the respondents in this appeal.

[2] In 1992, the Crown in right of Canada [Canada], the Crown in right of Saskatchewan [Saskatchewan] and a number of First Nation signatories to Treaty 4 (and to Treaties 6 and 10) concluded the *Saskatchewan Treaty Land Entitlement Framework Agreement among her Majesty the Queen in Right of Canada and the Minister of Indian Affairs and Northern Development and the Entitlement Bands and Her Majesty in Right of Saskatchewan* [the *Framework Agreement*].

[3] The *Framework Agreement* is a comprehensive agreement that creates a framework for the fulfillment of the Crown's outstanding obligations under Treaty 4 and the two other numbered treaties. It also provides for the subsequent conclusion of similar settlement agreements between Canada, Saskatchewan and First Nations with treaty land entitlement claims in Saskatchewan who did not sign the *Framework Agreement*. The PFN concluded such an

agreement with Canada and Saskatchewan on September 30, 2008 [the *PFN Settlement Agreement*].

[4] Both the *Framework Agreement* and the *PFN Settlement Agreement* [together, the *Agreements*] provide that disputes arising under them will be referred to the Federal Court for determination. Sections 20.20 of the *Framework Agreement* and 20.19 of the *PFN Settlement Agreement* state in relevant part that:

> … in the event the parties … are unable to agree on any matter, including a question of interpretation of any term, covenant, condition or provision of this Agreement, the determination of any such disagreement, and the enforcement thereof, shall be within the exclusive jurisdiction of the Federal Court of Canada.

[5] On June 17, 2014, the PFN commenced an action in the Federal Court, in which it named Canada and Saskatchewan as respondents, alleging that both Canada and Saskatchewan had violated their obligations under the *PFN Settlement Agreement* and that both had also failed to discharge their obligations to consult with the PFN regarding, in particular, the grant of a subsurface mineral lease in September 2010 for the Legacy Mining Project.

[6] Saskatchewan brought a motion to strike the PFN's action as against it, arguing that the Federal Court does not have jurisdiction over Saskatchewan or over the subject matter of the PFN's claim against Saskatchewan. On January 8, 2015, Justice Boswell of the Federal Court dismissed Saskatchewan's motion in a short "speaking order" in which he held that section 20.20 of the *Framework Agreement* was sufficient to provide the Federal Court jurisdiction over the PFN's claim against Saskatchewan, principally by virtue of the provisions of paragraph 17(3)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [the *FCA*]. This paragraph provides that the

Federal Court has exclusive original jurisdiction to hear and determine any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing would be determined by the Federal Court.

[7] Saskatchewan has appealed the Federal Court's order to this Court and argues that, notwithstanding the attornment clauses in sections 20.20 of the *Framework Agreement* and 20.19 of the *PFN Settlement Agreement*, the Federal Court has no jurisdiction over Saskatchewan or over the subject matter of the PFN's claim as against Saskatchewan.

[8] We disagree, and, for the reasons set out below, believe that the Federal Court possesses jurisdiction over the portions of the PFN's claim that allege a breach of Saskatchewan's obligations under the *PFN Settlement Agreement*. However, the portion of the claim, as currently pleaded, which alleges a violation by Saskatchewan of its duty to consult with the PFN with respect to the grant of the subsurface lease for the Legacy Mining Project fall outside the jurisdiction of the Federal Court. We would accordingly allow this appeal in part and, making the order that the Federal Court ought to have made, would strike the portions of the Statement of Claim that allege that Saskatchewan breached its duty to consult with the PFN with respect to this Project, providing the PFN with leave to amend this portion of the claim in accordance with these Reasons. Success being divided, we would propose that each party bear its own costs of this appeal and in the Federal Court.

I. Relevant Legislative Backdrop

[9] To place the issues in this appeal in context, it is helpful to begin by reviewing the legislative backdrop to the *Framework Agreement* and *PFN Settlement Agreement*.

[10] Under section 109 of the *British North America Act, 1867* (now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3), the four provinces that came together to form Canada in 1867 were afforded the right to administer Crown lands and rights to natural resources and minerals situated in the provinces. However, when Manitoba, Alberta and Saskatchewan joined Confederation (in 1870 in the case of Manitoba and in 1905 in the case of Alberta and Saskatchewan), the newly-created western provinces were not granted the right to administer Crown land, nor were they given control over natural resources in the provinces (see *Manitoba Act*, 1870, S.C. 1870, c. 3, s. 30; *Saskatchewan Act*, S.C. 1905, c. 42, s. 21; *Alberta Act*, S.C. 1905, c. 3, s. 21).

[11] In 1930, Canada and the three prairie provinces reached a series of agreements, called the *Natural Resources Transfer Agreements* [the *NRTAs*], which transferred to the prairie provinces control over natural resources and provided them the right to administer Crown lands in the province, subject to certain exceptions. One of these exceptions involves outstanding treaty obligations to indigenous peoples. The *NRTAs* provide that Manitoba, Alberta and Saskatchewan could be required to transfer unoccupied Crown lands to Canada to satisfy outstanding treaty obligations. Paragraph 10 of the *Saskatchewan NRTA* provides in this regard that Saskatchewan:

> … 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 fulfill 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.

Similar provisions are contained in the *NRTAs* applicable to Manitoba and Alberta.

[12] Parliament and the western provincial legislatures passed legislation to implement the *NRTAs*: *Manitoba Natural Resources Transfer Act*, S.M. 1930, c. 30; *Manitoba Natural Resources Act*, S.C. 1930, c. 29; *An Act to ratify a certain Agreement between the Government of the Dominion of Canada and the Government of the Province of Saskatchewan*, S.S. 1930, c. 87; *Saskatchewan Natural Resources Act*, S.C. 1930, c. 41; *Alberta Natural Resources Act*, S.A. 1930, c. 21; *Alberta Natural Resources Act*, S.C. 1930, c. 3. Thereafter, the British Parliament adopted the *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, to incorporate the *NRTAs* into the constitution. Section 1 of the *Constitution Act, 1930* provides as follows:

> The [*NRTAs*] are hereby confirmed and shall have the force of law notwithstanding anything in the *Constitution Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.
>
> Les [*CTRN*] sont par les présentes confirmées et auront force de loi nonobstant tout ce qui est contenu dans la Loi constitutionnelle de 1867, ou dans toute loi la modifiant, ou dans toute loi du Parlement du Canada ou dans tout arrêté du Conseil ou termes ou conditions d'Union faits ou approuvés sous l'empire d'aucune de ces lois.

II. The *Framework Agreement* and the *PFN Settlement Agreement*

[13] It was against the foregoing backdrop that the *Framework Agreement* and the *PFN Settlement Agreement* were negotiated.

[14] The *Framework Agreement* was signed in 1992 by the Prime Minister and the Minister of Indian Affairs and Northern Development, on behalf of Canada, by the Premier and the Minister responsible for the Indian and Métis Affairs Secretariat, for Saskatchewan, and by 23 Chiefs of various Indian Bands with unfulfilled treaty land entitlements in Saskatchewan. Their signatures were witnessed by the Chief of the Federation of Saskatchewan Indian Nations and the Treaty Commissioner of Saskatchewan.

[15] The *Framework Agreement* provides for the payment of monies [referred to as "Entitlement Monies"] by both Canada and Saskatchewan to trust funds to be set up on behalf of the signatory Bands (Article 3). The bulk of these funds are to be used to purchase land equivalent to the shortfall in reserve acreage owed to each Band under the treaties their forbearers signed with the Crown (ss. 4.01(a)(i), 4.01(b)). Excess funds may be used to purchase additional acreage or for other Band development purposes (s. 4.01(a)(ii)).

[16] The lands to be so purchased by the signatory Bands need not be contiguous to an existing reserve, and, indeed, the *Framework Agreement* specifically contemplates that purchased lands may be within an existing municipality (Article 9). Section 4.05(b) of the *Framework Agreement* contemplates that a Band desirous of purchasing Crown land advise

Saskatchewan (in the case of provincial Crown lands) or Canada (in the case of federal Crown lands) of the lands it wishes to purchase, and Saskatchewan or Canada must respond to such requests within 90 days.

[17] The *Framework Agreement* provides that sale of Crown lands following receipt of such a request is governed by the principle of "willing seller/willing buyer" (s. 4.05(a)). Under section 4.06 of the *Framework Agreement*, Saskatchewan and Canada are bound to give "favourable consideration" to offers from the signatory Bands to purchase Crown lands. Once they have agreed to the sale, subject to certain exceptions, Canada and Saskatchewan are prohibited from selling the lands to third parties or granting third parties an interest in the lands for a period of 18 months (ss. 4.05(c) and (d)).

[18] Several exceptions to the foregoing obligations are recognized in the *Framework Agreement*; these include the designation of the lands as critical wildlife habitats under the applicable provincial legislation, the fact that the land a Band wishes to purchase is occupied by a third party, who has not given its consent to the sale of the land, or the designation of lands as being subject to a "Public Purposes Plan", in which Saskatchewan sets out an intention to conserve or use Crown minerals located on or under the lands for the benefit of all or a substantial portion of the people of Saskatchewan (ss. 4.07, 4.08(a), 5.04(a)(iii)). Generally speaking, where an exception pertains, the lands need not be sold to one of the signatory Bands.

[19] The *Framework Agreement* contemplates that once a signatory Band purchases land and satisfactory arrangements have been made for dealing with third party interests in the land (in

accordance with the detailed provisions set out in the *Framework Agreement*), the purchased lands will be surrendered by the Band to Canada. The *Framework Agreement* further contemplates that, subject to the provisions of the agreement, Canada will then set apart the lands so surrendered as additional reserve lands for the benefit of the Band [defined as an "Entitlement Reserve" in the agreement]. Under section 11.09 of the *Framework Agreement*, Saskatchewan is required to transfer to Canada all interests Saskatchewan might have had in the land so surrendered to Canada to ensure that the land set aside as an Entitlement Reserve is free of provincial Crown rights or encumbrances.

[20] Before any Entitlement Monies can be paid to a signatory Band, section 10 of the *Framework Agreement* requires that the Band ratify the *Framework Agreement* through the conclusion of a "Band Specific Agreement" (ss. 10.01(a), 22.01(a)). Each Band Specific Agreement must outline, among other things, the signatory Band's shortfall acreage, the total amount of Entitlement Monies to be paid in trust to the Band pursuant to the *Framework Agreement* and any other provisions of specific concern having been the subject of negotiations between the Band and Canada. To take effect, a Band Specific Agreement must be ratified by Band Council Resolution and must subsequently be executed by Canada (ss. 10.01(a), 10.03).

[21] Section 10.02 of the *Framework Agreement* provides that other Bands may adhere to the agreement at a date subsequent to its conclusion by the original signatories, provided they have an outstanding treaty land entitlement under Treaties 4, 6, or 10 and provided they take the steps outlined in the *Framework Agreement*, which include the conclusion of a Band Specific Agreement in accordance with section 10.01(a).

[22] By virtue of the entitlements provided to the signatory Bands under the *Framework Agreement*, the Bands agreed in Article 15 to release Canada from all outstanding claims related to treaty land entitlement.

[23] In Article 16 of the *Framework Agreement*, Canada and the signatory Bands similarly released Saskatchewan from its obligations under section 10 of the *Saskatchewan NRTA*, contingent in part upon Saskatchewan's compliance with the terms of the *Framework Agreement*. The provisions of Article 16 of the *Framework Agreement* are relevant to the issue of the jurisdiction of the Federal Court over the PFN's claim and are therefore produced in their entirety. They provide:

> CANADA AND ENTITLEMENT BANDS - FINALITY OF SETTLEMENT RESPECTING SASKATCHEWAN
>
> 16.01 FINALITY - CANADA AND SASKATCHEWAN:
>
> (a) Canada, Saskatchewan and the Entitlement Bands agree that the financial and other contributions to be made by Saskatchewan pursuant to the Amended Cost Sharing Agreement and this Agreement are a means by which Saskatchewan shall fulfil its obligations under paragraph 10 of the ***Natural Resources Transfer Agreement*** with respect to the Treaty land entitlement of each Entitlement Band which signs a Band Specific Agreement.
>
> (b) Canada and Saskatchewan acknowledge that an agreement to be entered into between Canada and Saskatchewan (as set out in Schedule 4) provides for the release and discharge of the obligations of Saskatchewan under paragraph 10 of the ***Natural Resources Transfer Agreement*** and that Canada and Saskatchewan agree to recommend to the Parliament of Canada and the Legislative Assembly of Saskatchewan, respectively, enactment of statutes ratifying and confirming the agreement.
>
> 16.02 RELEASE BY CANADA AND ENTITLEMENT BANDS:
>
> (a) Canada and each of the Entitlement Bands hereby agree that, after ratification, execution and delivery of a Band Specific Agreement, as long as Saskatchewan is paying to Canada and the Treaty Land Entitlement (Saskatchewan) Fund the amounts required to be paid by Saskatchewan in respect of each of the said

> Entitlement Bands in accordance with this Agreement, and Saskatchewan has not failed, in any material way, to comply with its other obligations hereunder:
>
> > (i) the Superintendent General of Indian Affairs shall not request Saskatchewan to set aside any land pursuant to paragraph 10 of the ***Natural Resources Transfer Agreement*** to fulfil Canada's obligations under the Treaties in respect of that Entitlement Band; and
> >
> > (ii) the Entitlement Band shall not make any claim whatsoever that Saskatchewan has any obligation to provide land pursuant to paragraph 10 of the ***Natural Resources Transfer Agreement***.
>
> (b) Notwithstanding subparagraph (a), Canada and each of the Entitlement Bands further agrees to forever release and discharge Saskatchewan, Her heirs, servants, agents and successors from all claims, obligations, promises, undertakings or representations made by Saskatchewan to Canada relating to Saskatchewan's obligations to assist Canada in fulfilling the Treaty land entitlement of such Entitlement Band, or their predecessors in title, pursuant to paragraph 10 of the ***Natural Resources Transfer Agreement*** from and after the earlier of:
>
> > (i) the date upon which such Entitlement Band reaches its Shortfall Acres Acquisition Date; or
> >
> > (ii) the date upon which Saskatchewan has paid to Canada all amounts required to be paid by Saskatchewan pursuant to this Agreement in respect of such Entitlement Band.
>
> [Emphasis in original]

[24] In addition to the legislation mentioned in Article 16, the *Framework Agreement* also contemplates the passage of other legislation aimed at giving effect to certain provisions of the agreement. By virtue of section 20.19(a), Saskatchewan agreed to present legislation in its Legislative Assembly on a variety of matters, including the transfer of mineral rights to the Entitlement Bands and the relinquishment of any residual interest in land set apart by Canada as an Entitlement Reserve. Pursuant to section 20.19(b), Canada agreed to present legislation in Parliament pertaining to matters including varying common law riparian rights and the creation of a Special Purpose Account to administer the Treaty Land Entitlement Fund in which

Saskatchewan's payments under the *Framework Agreement* are to be collected [referred to as the "Treaty Land Entitlement (Saskatchewan) Fund"].

[25] The *Framework Agreement* provides that certain types of disputes arising under it are to be referred to arbitration (Article 19) and that all other disputes are to be referred to the Federal Court, under section 20.20, cited above. It is common ground between Saskatchewan and the PFN that the subject matter of the PFN's claim against both Saskatchewan and Canada is not referable to arbitration.

[26] Finally, of note, section 21.01 of the *Framework Agreement* provides that Canada, Saskatchewan and the signatory Bands "will, in good faith, employ their best efforts to fulfil the terms of [the *Framework Agreement*] according to its true spirit and intent and that they will negotiate in good faith any further [agreement(s)] that are required in order to do so".

[27] In material respects, the *PFN Settlement Agreement* is identical to the *Framework Agreement*, save that it was negotiated and signed by the PFN, Saskatchewan and Canada several years after the *Framework Agreement* was concluded. Due to its later conclusion, the *PFN Settlement Agreement* makes reference to the federal *Claim Settlements (Alberta and Saskatchewan) Implementation Act*, S.C. 2002, c. 3 and provides in section 20.24 that that Act applies to the *PFN Settlement Agreement* and its implementation.

III. The Legislation Passed to Give Effect to the *Framework* and *PFN Settlement Agreements*

[28] Both Saskatchewan and Canada passed legislation further to the *Agreements*.

A. *Federal Legislation*

(1) The *Saskatchewan Treaty Land Entitlement Act*, S.C. 1993, c. 11

[29] The *Saskatchewan Treaty Land Entitlement Act*, S.C. 1993, c. 11 makes provision for a bi-partite agreement between Canada and Saskatchewan to amend the *Saskatchewan NRTA* and also references the *Framework Agreement* and the subsequent Band Specific Agreements (like the *PFN Settlement Agreement*) that the *Framework Agreement* contemplates.

[30] In terms of the amendment of the *Saskatchewan NRTA*, the *Saskatchewan Treaty Land Entitlement Act* provides in section 3 that:

3 (1) The NRTA Amendment Agreement is hereby confirmed and shall take effect according to its terms.	3 (1) L'accord modifiant la CTRN est confirmé et prend effet conformément à sa teneur.
(2) If, either before or after the coming into force of this subsection,	(2) Est confirmé et prend effet conformément à sa teneur l'accord conclu — avant ou après l'entrée en vigueur du présent article — entre le gouvernement du Canada et celui de la Saskatchewan relativement à un accord conclu avec une bande indienne de cette province en règlement d'une revendication fondée sur des droits fonciers issus de traités, si les conditions suivantes sont remplies :
(a) an agreement is entered into with an Indian band of Saskatchewan in settlement of a treaty land entitlement claim on the same or substantially the same basis as the Framework Agreement, and	a) l'accord conclu avec la bande indienne est semblable ou identique à l'accord-cadre;
(b) in connection with the agreement referred to in paragraph (a), the	b) l'accord conclu par ces gouvernements est semblable ou

Government of Canada and the Government of Saskatchewan enter into an agreement in the same or substantially the same form as the NRTA Amendment Agreement,	identique à l'accord modifiant la CTRN.
the agreement between the Government of Canada and the Government of Saskatchewan referred to in paragraph (b) is hereby confirmed and shall take effect according to its terms.	

[31] The "NRTA Amendment Agreement" is defined in section 2 of the federal legislation as meaning "the agreement to vary the [NRTA] entered into between the Government of Canada and the Government of Saskatchewan and set out in Schedule I".

[32] Schedule I to the *Saskatchewan Treaty Land Entitlement Act* sets out the entire NRTA Amendment Agreement. In its introductory clauses, the NRTA Amendment Agreement recognizes the outstanding treaty land obligations owed to several Saskatchewan First Nations, notes Saskatchewan's obligations in respect of them as set out in paragraph 10 of the *Saskatchewan NRTA* and references the conclusion of the *Framework Agreement*, its provision for subsequent similar agreements and their provision for release of Saskatchewan from its obligations under paragraph 10 of the *Saskatchewan NRTA*. The release language is incorporated into sections 2 and 3 of the NRTA Amendment Agreement, which provide in relevant part as follows:

2. Canada hereby agrees that the Superintendent General of Indian Affairs shall not request Saskatchewan to set aside any land pursuant to paragraph 10 of the *Natural Resources Transfer Agreement* to fulfil Canada's	2 Le Canada convient que le surintendant général des Affaires indiennes ne demandera pas à la Saskatchewan de mettre des terres de côté aux termes du paragraphe 10 de la *Convention sur le transfert des*

obligations under the treaties in respect of any Entitlement Band..., that ratifies, executes and delivers a Band Specific Agreement (or in respect of the past, present and future members of such Indian Bands), as long as Saskatchewan is paying to Canada and the Treaty Land Entitlement (Saskatchewan) Fund the amounts required to be paid by Saskatchewan in respect of each of the said Entitlement Bands in accordance with the Framework Agreement and Saskatchewan has not failed, in any material way, to comply with its other obligations thereunder....

ressources naturelles pour remplir les obligations incombant au Canada en vertu des traités à l'égard […] des bandes ayant droit à des terres […], lorsqu'elles ratifient et signent un accord particulier (ou à l'égard des membres passés, actuels et futurs de ces bandes), pourvu que la Saskatchewan verse au Canada et au Fonds de règlement des droits fonciers issus des traités en Saskatchewan les montants à payer par celle-ci pour chacune de ces bandes, en vertu de l'accord-cadre, et pourvu que la Saskatchewan se conforme pour l'essentiel aux autres obligations que lui impose […] cet accord […].

3. Notwithstanding section 2 hereof, Canada further agrees that it will forever release and discharge Saskatchewan from all of its obligations pursuant to paragraph 10 of the *Natural Resources Transfer Agreement* in respect of each Entitlement Band...that has entered into a Band Specific Agreement;

3 Malgré l'article 2, le Canada convient en outre de libérer définitivement la Saskatchewan de toutes les obligations que lui impose le paragraphe 10 de la *Convention sur le transfert des ressources naturelles* à l'égard de chacune des bandes ayant droit à des terres […] lorsqu'elles concluent un accord particulier :

(a) in the case of any Entitlement Band, from and after the earlier of:

a) dans le cas de l'une ou l'autre des bandes ayant droit à des terres, à partir de la première des dates suivantes :

(i) the date upon which such Entitlement Band reaches its Shortfall Acres Acquisition Date; or

(i) la date à laquelle la superficie manquante de la bande sera acquise,

(ii) the date upon which Saskatchewan has paid all amounts required to be paid by Saskatchewan to Canada and the Treaty Land Entitlement (Saskatchewan) Fund pursuant to the Framework Agreement in respect of such Entitlement Band;...

(ii) la date à laquelle la Saskatchewan aura payé tous les montants qu'elle doit verser au Canada et au Fonds de règlement des droits fonciers issus des traités en Saskatchewan, en vertu de l'accord-cadre, pour la bande; […]

[33] It is common ground between the parties that Saskatchewan and Canada signed a Memorandum of Agreement in the same or substantially the same form as the NRTA Amendment Agreement further to the execution of the *PFN Settlement Agreement* to release Saskatchewan from its obligations under the *NRTA* in respect of the PFN. Such agreement falls within the purview of paragraph 3(2)(*b*) of the *Saskatchewan Treaty Land Entitlement Act*.

[34] Section 4 of the *Saskatchewan Treaty Land Entitlement Act* provides for the creation of the Treaty Land Entitlement (Saskatchewan) Fund, referred to in section 20.19(b)(iv) of the *Framework Agreement*, and for the transfer to the Fund of the monies payable by Saskatchewan and Canada under the *Framework Agreement* and subsequent settlement agreements, like the *PFN Settlement Agreement*.

[35] Section 7 of the *Saskatchewan Treaty Land Entitlement Act* specifically confirms the sections in the *Framework Agreement* which amend the common law as it applies to riparian rights. The Act states that the relevant sections of the *Framework Agreement* "are hereby confirmed". They are also incorporated into Schedule II of the legislation.

> (2) The *Claim Settlements (Alberta and Saskatchewan) Implementation Act*, S.C. 2002, c. 3

[36] The federal *Claim Settlements (Alberta and Saskatchewan) Implementation Act* applies to the *PFN Settlement Agreement* by virtue of paragraph 3(b) of the Act, which provides for its application to any settlement agreement that provides that it is subject to the Act. (As noted, the *PFN Settlement Agreement* contains such a provision in section 20.24.)

[37] The *Claim Settlements (Alberta and Saskatchewan) Implementation Act* details the process by which lands surrendered to Canada under the *Framework Agreement* or subsequent settlement agreements are to be set apart as reserves under the *Indian Act*, R.S.C. 1985, c. I-5. Of note, section 6 provides that an interest in lands identified by an Entitlement Band, but not yet set apart as a reserve, may be conditionally surrendered to the Crown for transfer to a third party. Subsection 6(5) further provides that such prospective surrenders are deemed to have been made under the *Indian Act*.

[38] Section 7 of the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* allows Canada to grant third parties conditional interests in the lands to be set apart as reserve lands. Pursuant to subsection 7(3) of the Act, such conditional interests are deemed to have been granted under the *Indian Act*.

B. *Saskatchewan Legislation*

[39] The *Saskatchewan Natural Resources Transfer Agreement (Treaty Land Entitlement) Act*, S.S. 1993, c. S-31.1 annexes the NRTA Amendment Agreement and provides in section 2 that this agreement "is to take effect according to its terms".

[40] The *Treaty Land Entitlement Implementation Act*, S.S. 1993, c. T-20.1 provides that Saskatchewan shall not retain any residual interest (pertaining to minerals, waterways or land forming the bed of a waterway) in lands set apart as reserve land pursuant to the *Framework Agreement* or any subsequent Band Specific Agreements, except where Saskatchewan specifically retains such an interest or where Canada expressly acknowledges such a reservation.

C. *Orders-in-Council*

[41] In addition to the foregoing legislation, Orders-in-Council were adopted by the Governor General in Council and by the Lieutenant Governor in Council to authorize the federal and Saskatchewan representatives to sign the *Framework Agreement* and the NRTA Amendment Agreement (P.C. 1992-1400, June 26, 1992, Weekly Listing of Federal Cabinet Orders in Council, Vol. 13, No. 19; Saskatchewan Order-in-Council O.C. 797/92, September 9, 1992), as well as the *PFN Settlement Agreement* and the Memorandum of Agreement concluded between Canada and Saskatchewan attached to the *PFN Settlement Agreement* (P.C. 2008-1665, September 13, 2008, Weekly Listing of Federal Cabinet Orders in Council, Vol. 29, No. 37; Saskatchewan Order-in-Council O.C. 406/2008, June 19, 2008).

IV. The Statement of Claim

[42] As noted, the PFN advances two distinct types of claims in its Statement of Claim: allegations that Canada and Saskatchewan have breached their obligations under or in connection with the *PFN Settlement Agreement* and allegations that Saskatchewan and Canada breached their constitutional and other obligations to consult with the PFN when Saskatchewan granted a subsurface mineral lease to a third party in connection with the Legacy Mining Project.

[43] The latter claim is detailed in paragraphs 41 to 56 of the Statement of Claim. In this section, the PFN pleads that the subsurface mineral lease in question was granted in September 2010 (which pre-dates any of the PFN's requests under the *PFN Settlement Agreement* to purchase provincial Crown lands). In this section of the Statement of Claim, the PFN further

pleads that before the mineral lease was granted, Saskatchewan and Canada ought to have consulted with the PFN, in accordance with their constitutional and other obligations. However, the PFN makes no allegation in this portion of the Statement of Claim that the alleged failure to consult violated the *PFN Settlement Agreement*.

[44] In the balance of the Statement of Claim, after setting out the background to the *Agreements*, the PFN asserts that Saskatchewan and Canada breached their obligations under or in connection with the *PFN Settlement Agreement*, principally by refusing on multiple occasions to make provincial Crown lands available for sale to the PFN. More specifically, the PFN pleads that it made several requests to Saskatchewan to set aside provincial Crown lands for its benefit under the *PFN Settlement Agreement* and that Saskatchewan refused the requests, claiming that the requested lands had been sold, were subject to pre-existing mineral leases or had been designated as wildlife habitat. The PFN asserts that, despite this, the lands in question ought to have been transferred to it under the *PFN Settlement Agreement*. It also asserts that by reason of these actions it was forced to purchase lands from third parties and was unfairly and in a discriminatory fashion required to bear sole responsibility for clearing the third party interests from the lands purchased.

[45] In its prayer for relief, the PFN claims several declarations, damages, interest and costs. In many instances, its claims in respect of the alleged breach of the *PFN Settlement Agreement* are interwoven with claims based on the alleged failure to consult in breach of fiduciary, common law or constitutional obligations that the PFN alleges are owed to it by Saskatchewan and Canada.

V. Jurisdiction of the Federal Court over the PFN's Claim

[46] Having set out the relevant background, we turn now to consider whether the Federal Court erred in deciding that it possesses jurisdiction to adjudicate the PFN's action against Saskatchewan. This is a pure question of law and thus the Federal Court's order is reviewable on the standard of correctness: *Canadian Forest Products Ltd. v. Canada (Attorney General)*, 2005 FCA 220 at para. 21, [2006] 1 F.C.R. 570; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8; *Trainor Surveys (1974) Ltd. v. New Brunswick*, [1990] 2 F.C. 168, 1990 CarswellNat 623 at para. 10 (T.D.).

[47] Assessment of whether the Federal Court was correct in assuming jurisdiction to adjudicate the PFN's action against Saskatchewan involves consideration of two inter-related issues: first, whether Saskatchewan can claim to be immune from suit before the Federal Court by virtue of Crown immunity and, second, whether the Federal Court has subject matter jurisdiction over the claims made against Saskatchewan in this action as the Federal Court must possess both jurisdiction over the parties and subject matter jurisdiction for a suit to proceed before it: *Alberta v. Toney*, 2013 FCA 217 at para. 10, 2013 CarswellNat 3339 [*Toney*]. The issues raised by Saskatchewan's motion are therefore more complex than the Federal Court appreciated in its brief speaking order.

A. *Crown Immunity*

[48] Turning, first, to the issue of Crown immunity, the starting point for the discussion is the recognition that, at common law, the Crown was immune from suit before any court: Peter Hogg,

Patrick Monahan &Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at 485.

[49] This common law rule has been abrogated by statute in Canada. Provincial legislation expressly provides that the Crown in right of each province may be sued before the courts of that province, and the *FCA* and the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [*CLPA*] expressly make the Crown in right of Canada amenable to suit before either the Federal Court or the superior court of the province where a cause of action arises, except where the Federal Court has exclusive jurisdiction over the claim (*CLPA*, s.21; *FCA*, s.17). However, none of these statutes makes the Crown in right of a province amenable to suit before the Federal Court (or, for that matter, before the courts of another province).

[50] As Saskatchewan correctly notes, several cases have held that, in light of this, the provincial Crown may not be sued in the Federal Court due, in part, to the principle of Crown immunity. More specifically, this Court and the Federal Court have held that subsections 17(1) and (2) of the *FCA*, which provide for suits against the Crown in the Federal Court, do not apply to the provincial Crown, because the "Crown" is defined in section 2 of the *FCA* as meaning Her Majesty in Right of Canada: *Vollant v. Canada*, 2009 FCA 185 at para. 5, 2009 CarswellNat 1900; *Shade v. The Queen*, 2001 FCT 1067 at paras. 15-21, 26, (*sub nom. Blood Band v. Canada*) 2001 CarswellNat 2232; *Greeley v. "Tami Joan" (The)*, 113 F.T.R. 66, 1996 CarswellNat 731 at para. 18 [*Greeley*]; *Khagee v. Canada*, [1992] 3 F.C. 576, 1992 CarswellNat 131 at paras. 12, 27-28 (T.D.); *Varnam v. Canada (Minister of National Health & Welfare)*, [1988] 2 F.C. 454, 1988 CarswellNat 180 at para. 14 (C.A.); *Joe v. Canada*, [1984] 1 C.N.L.R.

96, 1983 CarswellNat 486 at para. 4 (F.C.A.), aff'd [1986] 2 S.C.R. 145; *Lubicon Lake Band v. Canada*, [1981] 2 F.C. 317, 1980 CarswellNat 15 at para. 8 (T.D.); *Union Oil Co. v. Canada*, [1974] 2 F.C. 452, 1974 CarswellNat 107 at para. 17 (T.D.), aff'd [1976] 1 F.C. 74 (C.A.).

[51] In a similar fashion, section 19 of the *FCA* has been held to be insufficient to render the Crown in right of a province amenable to suit before the Federal Court at the instance of a third party, even in circumstances where Canada is a co-defendant and might advance a claim against the province: *Toney* at para. 24; *Fairford Band v. Canada (Attorney General)*, [1995] 3 F.C. 165, 96 F.T.R. 172 at para. 13. (Section 19 of the *FCA* allows for actions before the Federal Court between a province and Canada or between provinces when a province has passed legislation affording the Federal Court jurisdiction to adjudicate such claims.)

[52] Saskatchewan argues that the foregoing principles and authorities are equally applicable in the present case and that it therefore cannot be named by the PFN in its action before the Federal Court. We disagree as there is an important difference between this case and the cases relied on by Saskatchewan. In this case, unlike those cited by Saskatchewan, there are two agreements – the *Framework Agreement and PFN Settlement Agreement* – in which Saskatchewan agreed that claims to interpret and enforce the *Framework Agreement* and the *PFN Settlement Agreement* will be advanced in the Federal Court.

[53] More specifically, as already noted, Saskatchewan agreed in section 20.19 of the *PFN Settlement Agreement* that "any matter, including a question of interpretation of any term, covenant, condition or provision" of the *PFN Settlement Agreement* and all matters relating to

the enforcement of the agreement "shall be within the exclusive jurisdiction of the Federal Court of Canada". This provision must be interpreted as an agreement by Saskatchewan to attorn to the jurisdiction of the Federal Court.

[54] Issues similar to these were canvassed by the Supreme Court of Canada in *Bank of Montreal v. Attorney General (Quebec),* [1979] 1 S.C.R. 565, 1978 CanLII 173 [*Bank of Montreal v. Quebec*] where the Supreme Court held that the Crown is bound by the contracts it concludes and that the rights and prerogatives of the Crown cannot be invoked to limit or alter the terms of a contract that is binding on the Crown (see 573-575).

[55] In the *Bank of Montreal v. Quebec* case, the Province of Quebec opened a bank account at the Bank of Montreal and sought to claim from the Bank the amount of a cheque on which an endorsement had been forged that the forger caused to be debited from the Province's account. The Province learned of the existence of the forgery three and a half years before it gave the Bank notice of it. The Bank refused to reimburse the Province, relying on provisions in the *Bills of Exchange Act*, R.S.C. 1970, c. B-5, which provided for a one-year period during which notice of the forgery must be given to a bank for the victim of the forgery to be able to recover the loss from the bank. Quebec argued that it was immune from the relevant provisions of the *Bills of Exchange Act* as the federal legislation did not provide that it was applicable to the Crown in right of a province.

[56] The Supreme Court disagreed and found that the relevant provisions in the *Bills of Exchange Act* are implied into every contract between a bank and an account holder. The Court

determined that by opening a bank account Quebec was bound by the provisions of the *Bills of Exchange Act* and could not invoke the principle of Crown immunity to avoid application of the express and implied terms of its contract with the Bank of Montreal. In result, Quebec's action against the Bank was dismissed by reason of its non-compliance with the notice provisions in the *Bills of Exchange Act*.

[57] In a similar fashion, in this case, Saskatchewan is bound by section 20.19 of the *PFN Settlement Agreement*, which is a far clearer case of a contractual provision that operates to prevent Saskatchewan from invoking the principle of Crown immunity.

[58] The only way to interpret section 20.19 of the *PFN Settlement Agreement* is to find that it means what it unambiguously says, namely, that all claims for interpretation and enforcement of the *PFN Settlement Agreement* are to be brought before the Federal Court.

[59] Despite the clear wording of this provision, Saskatchewan argues that the section should be read as meaning that only claims to enforce the *PFN Settlement Agreement* against Canada are to be brought before the Federal Court and that it is only if Canada commences a third party claim and joins Saskatchewan that Saskatchewan could be brought before the Federal Court in accordance with section 19 of the *FCA*. Saskatchewan argues that the PFN, who were represented by counsel during the negotiation and subsequent signing of the *PFN Settlement Agreement*, must have known that Saskatchewan is not amenable to suit before the Federal Court and, therefore, that section 20.19 of the *PFN Settlement Agreement* is unenforceable against

Saskatchewan and that the PFN should have appreciated as much when they signed the agreement.

[60] This argument cannot stand for several reasons. In the first place, it does violence to the clear wording of section 20.19 of the *PFN Settlement Agreement*. As noted, the provision clearly states that all claims to interpret and enforce the *PFN Settlement Agreement* are to be brought in the Federal Court.

[61] In the second place, Saskatchewan's proposed interpretation leads to an absurdity. Due to the provisions of paragraph 17(3)(*b*) of the *FCA*, claims to interpret and enforce the *PFN Settlement Agreement* against Canada must be brought in the Federal Court as the PFN and the federal Crown have agreed in writing that they will be brought there, and paragraph 17(3)(*b*) of the *FCA* provides the Federal Court *exclusive* jurisdiction to adjudicate such claims against Canada, as Saskatchewan concedes. If Saskatchewan's interpretation were to be upheld, the absurd result would follow that the PFN and every First Nation signatory to a similar treaty land entitlement settlement agreement would need to commence two actions if it felt that the governments were not respecting their contractual commitments: one in the Federal Court against Canada and another in the provincial superior court against the province. Such a result cannot ever have been intended.

[62] Finally, the PFN argues that accepting Saskatchewan's interpretation would be contrary to the Honour of the Crown as it would allow Saskatchewan to avoid the clear terms of the agreement it signed with the PFN. In assessing this assertion, it is important to consider whether

the *Framework Agreement* and the *PFN Settlement Agreement* are the types of agreements that contain a "certain measure of solemnity" sufficient to engage the Honour of the Crown as contemplated by the majority of the Supreme Court of Canada in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 71, [2013] 1 S.C.R. 623 [*Manitoba Metis*]. The majority in that case set out four situations in which the Honour of the Crown has been applied:

> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest;
>
> (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest;
>
> (3) The honour of the Crown governs treaty-making and implementation, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; and
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.
>
> [*Manitoba Metis* at para. 73; citations omitted]

[63] In our view, it is clear that the first three scenarios set out in *Manitoba Metis* do not apply as the *Framework Agreement* and the *PFN Settlement Agreement* do not give the Crown discretionary control over a specific aboriginal interest, do not invoke constitutional principles such as a purposive interpretation of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, and do not result from a treaty-making exercise or the implementation of such an exercise. However, the last scenario set out in *Manitoba Metis* may apply. It is important to remind ourselves of the background to the *Framework Agreement* and the *PFN Settlement Agreement*:

- Certain treaties were entered into between the Crown and First Nations, (for example, Treaty 4);

- First Nations claim that there remain outstanding obligations under the treaties;

- the *NRTA*, which is clearly a constitutional document, provides that a province may be required to transfer unoccupied Crown land to Canada to satisfy outstanding obligations under the treaties; and

- the federal and provincial Crown entered into the *Framework Agreement* and the *PFN Settlement Agreement* in an effort to resolve these outstanding claims and provide a detailed path forward in order to do so.

[64] In these circumstances, a compelling argument may be made that the Crown must act in a way that "accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples" as set out in *Manitoba Metis* at paragraph 73. In our view, the Honour of the Crown is engaged in this matter to the extent that the clear and unambiguous text of the *Framework Agreement* and the *PFN Settlement Agreement* – which were negotiated in good faith with all parties fully represented by legal counsel – should be interpreted in a way that abides by and respects the terms of the *Agreements*. Saskatchewan should not be permitted to re-write or re-interpret the terms of the agreement set out in section 20.19 of the *PFN Settlement Agreement*.

[65] Thus, as Saskatchewan is bound by section 20.19 of the *PFN Settlement Agreement*, it is not immune from suit before the Federal Court in respect of a claim to which section 20.19 of the *PFN Settlement Agreement* applies.

B. *Subject Matter Jurisdiction*

[66] The foregoing determination, however, is not the end of the inquiry as the Federal Court must also possess subject matter jurisdiction over the PFN's claim against Saskatchewan in order for any part of the action to proceed against it in the Federal Court.

[67] In *ITO-International Terminal Operators Ltd. v. Miida Electronics*, [1986] 1 S.C.R. 752 at 766, 1986 CanLII 91 [*ITO*], the Supreme Court of Canada confirmed a three-part test for establishing that the Federal Court has jurisdiction over a particular matter:

1. there must be a statutory grant of jurisdiction to the Federal Court by the federal Parliament;
2. there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[68] The first part of this test requires the presence of a federal statute, conferring jurisdiction on the Federal Court over the subject matter of the litigation. In most instances, this jurisdiction is conferred by the *FCA*. The second and the third parts of the test are directed toward determining whether federal law plays a sufficiently important role in the case for it to fall within the jurisdiction of the Federal Court. This is required because the Federal Court has been established under section 101 of the *Constitution Act, 1867* to administer the laws of Canada and so can only act in respect of such law.

[69] In *Roberts v. Canada*, [1989] 1 S.C.R. 322, 1989 CanLII 122 [*Roberts*], the Supreme Court of Canada noted that the second and third prongs of the *ITO* test are often subsumed in the same inquiry. In that case, the Supreme Court found that the Federal Court possessed jurisdiction over disputes in relation to land on an Indian reserve by virtue of both the *Indian Act* (which enshrines a regime for such lands) and by virtue of the common law relating to aboriginal title, which the Supreme Court determined to be part of the federal common law and a sufficient underpinning in and of itself to satisfy the second and third prongs of the *ITO* test. Writing for the Court, Wilson J. stated on this point (at 340):

> I would conclude therefore that "laws of Canada" are exclusively required for the disposition of this appeal, namely the relevant provisions of the *Indian Act*, the act of the federal executive pursuant to the *Indian Act* in setting aside the reserve in issue for the use and occupancy of one or other of the two claimant Bands, and the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands. The remaining two elements of the test set out in *ITO*, *supra*, are accordingly satisfied.

[70] Similar reasoning applies in this case, and the second and third parts of the *ITO* test are satisfied because the portions of the PFN's action seeking to have the Federal Court interpret and enforce the *PFN Settlement Agreement* deal with a treaty land entitlement settlement, which contemplates the creation of additional reserve lands for the benefit of members of the PFN. Insofar as the PFN seeks to enforce rights to additional reserve lands, these portions of the action concern the federal common law and are also intimately connected with the *Indian Act*. Under the reasoning in *Roberts*, this satisfies the second and third parts of the *ITO* test.

[71] Moreover, there are additional federal statues involved in this case which serve to further nourish any grant of jurisdiction. In addition to the *Indian Act*, the *Saskatchewan Treaty Land Entitlement Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* are

also engaged in this case. This provides a further basis for concluding that the second and third prongs of the *ITO* test are satisfied in respect of the portions of the Statement of Claim that seek to have the Federal Court interpret and enforce the *PFN Settlement Agreement*. Indeed, the nexus to these statutes and the *Indian Act* is stronger than the nexus to federal law established in *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88, 2015 CarswellNat 4835, (leave to appeal to SCC granted, [2015] S.C.C.A. No. 223) where the constituent statute of the authority operating the Ambassador Bridge was found to be sufficient to ground jurisdiction over a claim to declare a municipal by-law invalid.

[72] We therefore conclude that the second and third parts of the *ITO* test are met in this case. Saskatchewan, indeed, does not strenuously dispute this, but instead concentrates its objection to the Federal Court's jurisdiction on the first step of the *ITO* test and argues that there is no statutory grant of jurisdiction to the Federal Court in this case.

[73] There are two possible statutory grants of jurisdiction to the Federal Court in the present matter which could be argued to meet the first step of the *ITO* test, namely, either paragraph 17(3)(*b*) of the *FCA* or the federal legislation passed to give effect to the *Framework Agreement* and *PFN Settlement Agreement* – the *Saskatchewan Treaty Land Entitlement Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*.

[74] We agree with Saskatchewan that the latter two pieces of legislation do not constitute a statutory grant of jurisdiction to the Federal Court sufficient to meet the first step of the *ITO* test as neither statute speaks to the issue.

[75] The only possible basis for finding a grant of jurisdiction to the Federal Court in these two statutes would be if they could be viewed as incorporating the attornment clauses in section 20.19 of the *PFN Settlement Agreement* or 20.20 of the *Framework Agreement*. However, as Pelletier J. (as he then was) held in *Thomas v. Peace Hills Trust Co.*, 2001 FCT 443, 204 F.T.R. 274 [*Peace Hills Trust*], the entirety of the *Framework Agreement* (and by extension the *PFN Settlement Agreement*) cannot be said to be incorporated into the statutes as neither statute contains any provision for incorporation of the entirety of the *Agreements*. Indeed, as noted in *Peace Hills Trust*, the fact that the *Saskatchewan Treaty Land Entitlement Act* specifically states that it incorporates the provisions in the *Framework Agreement* dealing with riparian rights leads to the conclusion that the rest of the agreement is not to be viewed as being incorporated into that Act. Thus, neither the *Saskatchewan Treaty Land Entitlement Act* nor the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* can be viewed as incorporating the attornment clause, which is the only provision in the *Agreements* that deals with the Federal Court's jurisdiction. We thus conclude that the *Saskatchewan Treaty Land Entitlement Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* do not satisfy the first step of the *ITO* test.

[76] Turning to the *FCA*, it is useful to reproduce subsection 17(3), which provides:

17. (3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:	17. (3) Elle a compétence exclusive, en première instance, pour les questions suivantes :
(a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court	a) le paiement d'une somme dont le montant est à déterminer, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la

of Canada; and	Cour fédérale;
(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.	b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

[77] There have been relatively few cases decided under paragraph 17(3)(*b*) of the *FCA*. It was discussed in *Peace Hills Trust*, but the comments made about the paragraph in that case are non-binding as the case involved a claim against a party who was not a signatory to the *Framework Agreement* nor to any other agreement that purported to confer jurisdiction on the Federal Court. In that case, Pelletier J. noted that "the effect of subsection 17(3) is not to expand the Federal Court's jurisdiction but to oust the jurisdiction of the provincial Superior Court" (at para. 28). With respect, we disagree as the legislative history of the provision makes it clear that subsection 17(3) of the *FCA is* attributive of jurisdiction.

[78] In this regard, prior to February 1, 1992, the Federal Court had *exclusive* jurisdiction over claims against the federal Crown; subsections 17(1) and 17(2) of the *FCA* then stated:

17. (1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all of those cases.	17. (1) La Section de première instance connaît, en première instance, de tous les cas de demande de réparation contre la Couronne et, sauf disposition contraire, cette compétence est exclusive.
(2) Without restricting the generality of subsection (1), the Trial Division has exclusive original jurisdiction, except where otherwise provided, in	(2) La Section de première instance a notamment compétence exclusive en première instance, sauf disposition contraire, dans les cas de demande

all cases in which	motivés par :
(a) the land, goods or money of any person is in the possession of the Crown;	a) la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui;
(b) the claim arises out of a contract entered into by or on behalf of the Crown; or	b) un contrat conclu par ou pour la Couronne;
(c) there is a claim against the Crown for injurious affection.	c) un trouble de jouissance dont la Couronne se rend coupable.
[Emphasis added]	[soulignements de la Cour]

[79] However, the *FCA* then contained identical provisions in paragraphs 17(3)(*a*) and (*b*). Indeed, what are now paragraphs 17(3) (*a*) and (*b*) of the *FCA* have provided the Federal Court with exclusive jurisdiction since the inception of the Court in 1970. The wording of subsections 17(1) and 17(2) was amended in 1990 to provide the Federal Court with jurisdiction *concurrent* to that of the provincial superior courts. However, the exclusive jurisdiction conferred by paragraph 17(3) (*a*) and (*b*) remained intact.

[80] For paragraphs 17(3)(*a*) and (*b*) of the *FCA* to have had meaning before February 1, 1992, they had to have meant that parties could confer jurisdiction on the Court in addition to the exclusive jurisdiction it already possessed to adjudicate claims against the federal Crown. There is no reason to interpret the paragraphs any differently now.

[81] We thus conclude that paragraph 17(3)(*b*) of the *FCA* does not operate only to oust the jurisdiction of the provincial superior courts in cases where there is concurrent jurisdiction but, rather, must also be interpreted as both conferring jurisdiction upon the Federal Court and

ousting provincial jurisdiction in situations where the federal Crown and the other parties to the action or application have agreed in writing that the issue will be brought before the Federal Court for determination.

[82] Paragraph 17(3)(*a*) of the *FCA*, which is the parallel provision to 17(3)(*b*), has been applied to set rents payable under leases involving Canada or a federal Crown agent where the parties have agreed in writing to refer the matter to the Federal Court for determination: *Turberfield v. Canada*, 2012 FCA 170, 2012 CarswellNat 2032; Certification order of January 23, 2013 rendered in *Schnurr et al. v. Canada* (unreported, docket T-2193-09); *Canada v. Crosson*, 169 F.T.R. 218, 1999 CanLII 8350 at paras. 15, 31-33; *Bosa v. Canada (Attorney General)*, 2013 FC 793 at para. 7, 230 A.C.W.S. (3d) 425; *Irving Refining Ltd. v. Canada (National Harbours Board)*, [1976] 2 F.C. 415, 1976 CarswellNat 34 at para. 5 (T.D). We see no reason why written agreements should not be similarly effective under paragraph 17(3)(*b*) of the *FCA* to place issues meeting the subject matter jurisdiction of the Federal Court before the Court for settlement.

[83] We therefore conclude that paragraph 17(3)(*b*) of the *FCA is* attributive of jurisdiction and meets the first step of the *ITO* test in that it affords jurisdiction to the Federal Court to hear and determine any matter of fact, law or mixed fact and law that the federal Crown and another party have agreed in writing would be referred to the Federal Court for determination, provided the subject matter of the agreement *also* meets the second two steps of the *ITO* test. Thus, to be effective in placing a matter before the Federal Court under paragraph 17(3)(*b*) of the *FCA*, an agreement must concern a law of Canada, within the meaning of section 101 of the *Constitution*

Act, 1867, and there must also be a body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

[84] As the last two steps of the *ITO* test are met in this case, it follows that the attornment clause is sufficient to ground jurisdiction in the Federal Court to interpret and enforce the *PFN Settlement Agreement*.

[85] Saskatchewan argues that paragraph 17(3)(*b*) of the *FCA* ought not be interpreted in this way as parties cannot confer jurisdiction on a court by agreement, relying principally on *Canadian National Railway v. Canada (Canadian Transport Commission)*, [1988] 2 F.C. 437, 1987 CarswellNat 226 (T.D.) [*CNR*] and *Greeley* in support of this proposition. While we agree with Saskatchewan that parties cannot confer jurisdiction on a court by agreement unless the court's constituent legislation provides otherwise, that is not what occurs when paragraph 17(3)(*b*) of the *FCA* is successfully invoked. Rather, where paragraph 17(3)(*b*) of the *FCA* applies, jurisdiction is grounded in the statutory provision and not purely conferred by agreement. Moreover, the *CNR* and *Greeley* cases are of no assistance to Saskatchewan as neither involved an agreement with the federal Crown in which the parties agreed to submit matters to the jurisdiction of the Federal Court. These cases are therefore readily distinguishable.

[86] Saskatchewan also relies on the recent decision of this Court in *Toney* in support of its objection to the Federal Court's jurisdiction. There, the majority read section 22 of the *FCA* narrowly and determined that the grant of jurisdiction in matters of navigation and shipping "between subject and subject as well as otherwise" did not extend to the Crown in right of a

province, due to the lack of specificity in the *FCA* to bind the Crown in right of a province in matters of navigation and shipping. The Court thus found that the principles of Crown immunity prevented section 22 from applying to the Crown in right of Alberta. In our view, this case is likewise of no assistance to Saskatchewan because the case did not concern paragraph 17(3)(*b*) of the *FCA* and Alberta had not signed an attornment agreement similar to Article 20.19 of the *PFN Settlement Agreement*. *Toney* is thus likewise readily distinguishable.

[87] After this case was taken under reserve, counsel for Saskatchewan wrote to the Court to make additional submissions based on the recent decision of the Saskatchewan Court of Appeal in *Saskatchewan v. Saskatchewan Government and General Employees Union*, 2016 SKCA 56 [*Saskatchewan v. SGEU*], which, he argued, stands for the proposition that negotiated agreements cannot dictate the interpretation of a statute. We believe that counsel ought not have made these additional submissions without permission of the Court, but, despite this, have decided to address the substance of counsel's submissions.

[88] We disagree that *Saskatchewan v. SGEU* stands for the proposition advanced as the case involved the assessment of the reasonableness of an arbitrator's decision that declined to give effect to the terms in a collective agreement that conflicted with statutory provisions. However, even if *Saskatchewan v. SGEU* could be viewed as standing for the proposition that negotiated agreements cannot dictate the interpretation of a statute, such proposition is irrelevant to the present case, which turns on the effect to be given to a negotiated attornment agreement in light of the correct interpretation of the *FCA*. For the reasons set out above, we believe that the combined effect of the attornment clause in the *PFN Settlement Agreement* and paragraph

17(3)(*b*) of the *FCA* is to provide the Federal Court with exclusive jurisdiction over the portions of the PFN's claim which ask the Court to interpret and enforce the *PFN Settlement Agreement*. We therefore conclude that the appellant's appeal fails with respect to the portions of the PFN's claim which ask the Court to interpret and enforce the *PFN Settlement Agreement*.

[89] However, the Federal Court does not possess jurisdiction over the portion of the claim as it is currently pleaded that is set out in paragraphs 41 to 56 of the Statement of Claim and that alleges a breach by Saskatchewan of its duty to consult prior to awarding mineral rights to third parties in connection with the Legacy Mining Project. This claim is distinct from the claims that relate to the *PFN Settlement Agreement*, and the attornment clause in section 20.19 of the *PFN Settlement Agreement* is inapplicable to it. There is accordingly no basis for Federal Court jurisdiction over this duty to consult claim advanced against Saskatchewan as the latter has not attorned to the jurisdiction of the Court in respect of it. Paragraph 17(3)(*b*) of the *FCA* is also inapplicable to this duty to consult claim, which, as currently pleaded, arises outside the *PFN Settlement Agreement*. There is thus no basis for the Federal Court's jurisdiction over this portion of the PFN's claim, and under the case law relied upon by Saskatchewan (referred to in paragraph 50, above), this portion of the claim must be struck as the allegation made in paragraphs 41 to 56 of the Statement of Claim are unrelated to the *PFN Settlement Agreement*.

VI. Conclusion and Proposed Disposition

[90] We would therefore strike paragraphs 41 to 56 of the Statement of Claim, with leave to amend them to clarify how the grant of mineral rights to third parties in connection with the Legacy Mining Project constitutes a breach of the *PFN Settlement Agreement*. We would also

strike paragraph 1, with leave to amend, as the claims in the prayer for relief that are within the Federal Court's jurisdiction are intertwined with those that are not. The easiest course is therefore to strike the paragraph and provide the PFN with the opportunity to amend the prayer for relief so it seeks the remedies flowing from the interpretation and enforcement of the *PFN Settlement Agreement* against Saskatchewan and Canada and seeks the balance of the remedies against only Canada.

[91] We realize that the potential bifurcation of the claim against Saskatchewan may not be the preferred manner for the PFN to advance its various claims, but believe this is what section 20.19 of the *PFN Settlement Agreement* requires. Moreover, the claims to interpret and enforce the *PFN Settlement Agreement* and for breach of an unrelated duty to consult are conceptually distinct and can therefore be litigated separately. If this is believed to be too cumbersome, it would be open to the parties, in accordance with section 20.11 of the *PFN Settlement Agreement*, to sign an amending agreement to confer jurisdiction over the entire dispute on the Court of Queen's Bench in Saskatchewan.

[92] Finally, we wish to comment on the practical issue raised by Saskatchewan relating to the fact that other claims similar to the PFN's have come before the Court of Queen's Bench in Saskatchewan, which we have concluded does not possess jurisdiction over them: see, for example *Chief Austin Bear v. Government of Saskatchewan*, 2010 SKQB 342, 2010 CarswellSask 617 [*Bear 2010*]; *Bear v. Saskatchewan*, 2012 SKQB 232, 2012 CarswellSask 398; *One Arrow First Nation v. Saskatchewan*, [2000] 1 C.N.L.R. 162, 1999 CanLII 12857 (SK Q.B.). It appears that the jurisdictional point was not argued in these cases so they provide no

precedent on the issue. Interestingly, however, the Saskatchewan Court of Queen's Bench in *Bear 2010* observed in passing that the attornment clause agreed upon in the *Muskoday Settlement Agreement*, which is identical to section 20.19 of the *PFN Settlement Agreement*, could be an impediment to the Muskoday First Nation's action before the Court of Queen's Bench if Canada remained as a party to the action.

[93] It may well be open to the parties in the cases that are proceeding before the Saskatchewan courts to treat the pleadings as an agreement to amend the attornment clause, necessitated by virtue of circumstances, and to be an agreement within the scope of section 21.01 of the *Framework Agreement* (or other like provision in a later settlement agreement, if applicable) that was required in good faith to fulfill the spirit and intent of the agreement. Were this possible, this other litigation could continue to proceed before the Saskatchewan courts. That, however, is not a matter for this Court to rule on and is rather a matter for the Saskatchewan courts to decide.

[94] Success in this matter being divided, we would propose that each party bear its own costs of this appeal and in the Federal Court.

"D. G. Near"

J.A.

"Mary J.L. Gleason"

J.A.

PELLETIER J.A. (Concurring Reasons)

[95] I agree with the disposition of this appeal proposed by my colleagues. However, I believe that there is a line of reasoning which supports my colleagues' conclusion as to the effect of paragraph 17(3)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [the *FCA*] but which is also capable of supporting Federal Court jurisdiction on a stand-alone basis if, for whatever reason, the argument as to paragraph 17(3)(*b*) should be found wanting.

[96] Like my colleagues, I agree that Saskatchewan's argument as to Crown immunity must fail. For the purposes of this discussion, Crown immunity deals with whether the Crown is bound by legislation of general application. But, in this case, the source of the Crown's obligation is contractual, not legislative. The Supreme Court has made it clear that Crown immunity has no application to the Crown's contractual obligations:

> The rules respecting the liability of the Crown therefore differ depending on whether the source of the obligation is contractual or legislative. The Crown is bound by a contractual obligation in the same manner as an individual, whereas as a general rule it is not bound by an obligation resulting from the law alone unless it is mentioned in it. This also means that subject possibly to a limited number of exceptions which would not apply here in any event, the rights and prerogatives of the Crown cannot be invoked to limit or alter the terms of a contract, which comprises not only what is expressly provided in it but also everything that normally results from it according to usage or the law.
>
> [*Bank of Montreal v. Attorney General (Quebec),* [1979] 1 S.C.R. 565 at 574, 1978 CanLII 173]

[97] As a result, Saskatchewan cannot claim Crown immunity in respect of its contractual obligation under the *PFN Settlement Agreement*. Of course, the fact that Saskatchewan is not immune from suit does not mean that the Federal Court therefore has jurisdiction over it.

[98] The contractual term which gives rise to the issue of jurisdiction is Article 20.19 of the *PFN Settlement Agreement*, reproduced below for ease of reference:

> Notwithstanding Article 19, save and except for those questions to which arbitration has been agreed to in section 19.02, in the event the parties concerned are unable to agree on any matter, including a question of interpretation of any term, covenant, condition or provision of this Agreement, the determination of any such disagreement and the enforcement thereof, shall be within the exclusive jurisdiction of the Federal Court of Canada.

Article 19 deals with arbitration and Article 19.02 identifies the matters which are to be resolved by arbitration.

[99] It may be useful to begin with a discussion of those matters which cannot be the subject of exclusive Federal Court jurisdiction pursuant to Article 20.19. It can be said with some confidence that allegations and claims for relief in the Statement of Claim which are unrelated to the interpretation or enforcement of the *PFN Settlement Agreement* are outside the scope of Article 20.19. Pasqua First Nation cannot rely on Article 20.19 to compel either Canada or Saskatchewan to litigate matters which do not arise out of the agreement in the Federal Court.

[100] The Statement of Claim is 68 paragraphs long and, while it pleads the terms of the *PFN Settlement Agreement*, it also contains some allegations which do not appear to arise out of the agreement. Saskatchewan says, at paragraph 20 of its memorandum of fact and law, that Pasqua First Nation seeks "declarations of constitutional rights and obligations that exist outside the Agreement's terms". Assuming Saskatchewan's characterization to be correct, any such claims or allegations would not be subject to Article 20.19. My colleagues point out that the pleadings

with respect to the Legacy Mining Project fall into this category. I agree with them and I agree with their proposed disposition of those pleadings.

[101] That said, the fact that specific allegations go beyond the scope of Article 20.19 does not mean that the whole claim is therefore tainted. This brings us back to the issue of whether the Federal Court has jurisdiction over this claim, which in turn, brings us back to Article 20.19.

[102] Saskatchewan's principal argument is that it is not bound by Article 20.19 because the Federal Court does not have jurisdiction over it in the absence of a specific statutory grant of such jurisdiction. In making this argument, Saskatchewan invokes the first branch of the three-part test for Federal Court jurisdiction set out in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 766, 1986 CanLII 91 [*ITO*]:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867.

[103] It is important to be clear about the defect in jurisdiction which is being alleged. My colleagues, relying on *Roberts v. Canada*, [1989] 1 S.C.R. 322, 1989 CanLII 122 [*Roberts*] have concluded that the second and third branches of the *ITO* test are satisfied. I agree with their analysis. Furthermore, it appears to me that *Roberts* is a full answer to Saskatchewan's plea that no law of Canada underlies Pasqua First Nation's claim:

> I would conclude therefore that "laws of Canada" are exclusively required for the disposition of this appeal, namely *the relevant provisions of the Indian Act*, the act

> of the federal executive pursuant to the *Indian Act* in setting aside the reserve in issue for the use and occupancy of one or other of the two claimant Bands, *and the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands*. The remaining two elements of the test set out in ITO, supra, are accordingly satisfied.
>
> [*Roberts* at 340; emphasis added]

[104] While the issue here is not the same as it was in *Roberts*, it rests upon the same laws of Canada.

[105] That leaves the first branch of the test to be satisfied.

[106] As between the Pasqua First Nation and Canada, the statutory grant of jurisdiction can be found in either sub-section 17(1) of the *FCA* since the action is one in which "relief is claimed against the Crown" or in paragraph 17(2)(*b*) as a claim arising "out of a contract entered into by or on behalf of the Crown".

[107] As a result, the Federal Court has jurisdiction over Canada and over the subject matter of the litigation, whether it be considered from the point of view of substantive law, the Crown's obligations to aboriginal peoples, or from the point of view of the enforcement of a contract made by the Crown. On the other hand, Saskatchewan argues that the Federal Court lacks subject matter jurisdiction over Saskatchewan Crown lands. This, I believe, misses the point. Saskatchewan received those lands subject to the reservation that they would be re-conveyed to the federal Crown if they were required to satisfy the federal Crown's treaty obligations, a condition to which Saskatchewan agreed. This agreement underpins Saskatchewan's obligations under the *PFN Settlement Agreement*, which obligations arise from and give effect to federal

common law and to the *Indian Act* relating to Indian lands, as well as to the *Saskatchewan Treaty Land Entitlement Act*, S.C. 1993, c. 11 and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*, S.C. 2002, c. 3. As a result, the Federal Court has subject matter jurisdiction, as regards Saskatchewan Crown lands, to the extent provided in the *PFN Settlement Agreement*.

[108] This leaves the issue of jurisdiction over the person which, once again, brings us back to Article 20.19. Saskatchewan refers to this provision as an attornment clause but for private international law purposes, I believe that it would be characterized as a choice of forum or forum selection clause. Notwithstanding the difference in characterization, a forum selection clause must necessarily imply that the parties will submit to, or attorn to, the jurisdiction of the agreed-upon forum, otherwise the clause would serve no useful purpose.

[109] Saskatchewan seeks to undo its attornment to the jurisdiction of the Federal Court by arguing that jurisdiction cannot be created by consent. It cites a number of cases in support of that proposition: *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para. 38, [2015] F.C.J. No. 4; *Merck Frosst Canada Inc. v. Canada*, [1997] 2 F.C. 561, [1997] F.C.J. No. 149 at para. 10; *Armeco Construction Ltd. v. Canada*, 94 F.T.R. 314, [1995] F.C.J. No. 473 (T.D.)(Q.L.), at paragraph 25, affd103 F.T.R. 240, [1995] F.C.J. No. 1561 (C.A.)(QL); *Canadian National Railway Co. v. Canada (Canadian Transport Commission)*, [1988] 2 F.C. 437 at 449, 1987 CarswellNat 226. To the extent that these cases stand for the proposition that (a) an agreement among counsel as to a point of law does not bind the Court, or (b) subject

matter jurisdiction cannot be created by consent, I have no quarrel with them. However, none of these cases stand for the proposition that jurisdiction over the person cannot arise by agreement.

[110] The Supreme Court has held that choice of forum clauses should be given effect, unless there is "strong cause" for not doing so: *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 [*Z.I. Pompey*]. While the issue in *Z.I. Pompey* was the test to be applied with respect to an application for a stay of a proceeding in the Federal Court on the basis that the parties had chosen another forum in their contract (in that case, a bill of lading), the Court's comments with respect to choice of forum or forum selection clauses are of general application:

> Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": Décary J.A. in *Jian Sheng*, supra, at para. 7. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at paras. 71-72. … In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. *It is essential that courts give full weight to the desirability of holding contracting parties to their agreements*. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise.
>
> [*Z.I. Pompey* at para. 20; emphasis added]

[111] Everything that the Supreme Court said about the need to give full effect to forum selection clauses applies equally to the implied agreement to attorn to the jurisdiction of the agreed-upon forum.

[112] In order to place the Supreme Court's decision in context, it is necessary to consider its earlier decision in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135 [*Morguard*], in which the Court modified the principles of private international law by articulating a principled basis for the enforcement of provincial superior court judgments from one province to another. The Court's reasoning rested on considerations as to the nature of Canada as a federal state and the need for order and fairness to ensure security of transactions:

> … see Hessel E. Yntema, "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721, at p. 741. As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.…
>
> … I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions.
>
> [*Morguard* at 1097, 1102]

[113] The principles of order and fairness were raised to the level of constitutional imperatives in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at para. 56, [1993] S.C.J. No. 125. I take this to mean that in the application of principles derived from private international law in the context of the Canadian federation, Courts should give "full faith and credit" to the judgments of courts of other Canadian jurisdictions.

[114] Within that context, the Federal Court occupies a special position among Canadian superior courts as a statutory court. But, as was pointed out in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, [1998] S.C.J. No. 31 at para. 34 [*Canadian Liberty Net*]:

> But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow,

> rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them.

[115] This admonition is relevant to the search for a statutory basis for the Federal Court's jurisdiction against Saskatchewan. It authorizes a "fair and liberal" reading of paragraph 17(3)(*b*) so that the Federal Court is enabled to assert the jurisdiction over Saskatchewan which the latter has contractually ceded. Failing that, it militates against a restrictive reading of the jurisprudence relating to Federal Court jurisdiction as, for example, in the case of choice of forum clauses or, for that matter, the *ITO* test itself.

[116] In this context, the Supreme Court's decision in *Z. I. Pompey* goes a long way towards resolving the issue in this matter. There, the Supreme Court held that the Federal Court ought to have granted a stay of proceedings pending in that court on the basis of a choice of forum clause in which the parties agreed to litigate their differences in the courts of Antwerp. While *Z.I. Pompey* was a maritime case where the Federal Court enjoys a robust jurisdiction by virtue of section 22 of the *FCA*, the principles articulated in that case are, as noted above, of general application: see, for example, *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9 at para. 9, [2012] 1 S.C.R. 359; *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at paras. 108-109, [2011] S.J. No. 708; *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. (3d) 241.

[117] The same considerations which prompted the Supreme Court in *Z.I. Pompey* to hold that the Federal Court should give effect to choice of forum clauses when those clauses favour foreign courts must surely apply when those clauses favour the Federal Court, providing that the Federal Court has jurisdiction over the subject matter of the dispute.

[118] It appears to me to be contrary to the principles of order and fairness, as well as to security of transactions, to hold that the Federal Court does not have jurisdiction over a party who has attorned to its jurisdiction unless one can find a specific statutory grant of the power to give effect to choice of forum clauses. My colleagues have shown that paragraph 17(3)(*b*) is that specific statutory grant. But even if it were to be found that paragraph 17(3)(*b*) does not have the effect that my colleagues attribute to it, I remain persuaded that once it is shown that the Federal Court enjoys a statutory grant of jurisdiction over the subject matter, the principles of order and fairness require that effect be given to Article 20.19 as a source of jurisdiction over the person, subject to any arguments as to the Federal Court being *forum non conveniens*.

[119] These considerations should dominate any consideration of choice of forum clauses as between provincial and federal governments and First Nations. Where there is a basis for Federal Court jurisdiction as between a First Nation and the federal Crown, it does not offend the established constitutional order to give effect to a province's voluntary undertaking to submit to the Federal Court's jurisdiction with respect to the interpretation and enforcement of an agreement to which all three have subscribed. On the contrary, giving effect to a province's attornment to the jurisdiction of the Federal Court, is, if nothing else, an honourable way of respecting the province's undertaking to the First Nation to submit to Federal Court jurisdiction,

allowing the latter to rely on the terms of such a tri-partite agreement, a form of security of transactions. Any overreaching by the Federal Court is constrained by the terms of the agreement and, if necessary, by the final review by the Supreme Court of Canada, which can determine if the Federal Court has overstepped its constitutional limitations: see *Canadian Liberty Net* at para. 40.

[120] I would conclude by pointing out that attornment or choice of forum clauses in treaty land entitlement cases are always subject to challenge on grounds of *forum non conveniens* if the claim advanced exceeds the contractual framework or the pleadings raise issues which cannot be adjudicated by the Federal Court. Given my finding that the Federal Court has jurisdiction, it may be that any pleadings which would otherwise have supported a plea of *forum non conveniens*, apart from the pleadings with respect to the Legacy Mining Project and the prayer for relief, must now be dealt with by a motion to strike them on the basis that they are outside the jurisdiction conferred by Article 20.19. I leave this to be dealt with when it arises.

[121] I conclude that the Federal Court can and should give effect to Saskatchewan's attornment to its jurisdiction with respect to the interpretation and enforcement of the *PFN Settlement Agreement*. I would therefore allow the appeal on the terms proposed by my colleagues.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-11-15
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE ATTORNEY GENERAL OF SASKATCHEWAN v. CHIEF M. TODD PEIGAN ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE PASQUA FIRST NATION AND THE PASQUA FIRST NATION AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 10, 2015
REASONS FOR JUDGMENT BY:	NEAR J.A. GLEASON J.A.
CONCURRING REASONS BY:	PELLETIER J.A.
DATED:	APRIL 29, 2016

APPEARANCES:

James Fyfe	FOR THE APPELLANT (DEFENDANT)
Cynthia Westaway Benjamin Hiemstra	FOR THE RESPONDENTS (PLAINTIFFS)
Karen Jones	FOR THE DEFENDANT HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

R. James Fyfe Regina, Saskatchewan	AGENT FOR THE APPELLANT (DEFENDANT)
Devlin Gailus Westaway Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENTS (PLAINTIFFS)
William F. Pentney Deputy Attorney General of Canada	FOR THE DEFENDANT