

Date Corrigendum Filed: 2023 08 14

Date: 2023 08 11

Docket: S-1-CV-2021-000 144

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
BETWEEN:**

COLVILLE LAKE RENEWABLE RESOURCES COUNCIL; BEDHZI AHDA’’
FIRST NATION and AYONI KEH LAND CORPORATION

Applicants

-and-

GOVERNMENT OF THE NORTHWEST TERRITORIES, AS REPRESENTED
BY MINISTER OF ENVIRONMENT AND NATURAL RESOURCES

Respondents

-and-

SAHTU RENEWABLE RESOURCES BOARD and INUVIALUIT GAME
COUNCIL

Interveners

MEMORANDUM OF JUDGMENT

Corrected judgment: A corrigendum was issued on August 14, 2023 the corrections have been made to the text and the corrigendum is appended to this judgment.

INTRODUCTION

[1] The Applicants seek judicial review of a decision of the Minister of Environment and Natural Resources (the “Minister”) relating to his decision with respect to permissible harvest activities of the Bluenose West Caribou Herd (the “Herd”) under the *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (the “Treaty”). The Roles and Responsibilities of the Applicants and Respondents are recognized under the *Wildlife Act*, SNWT 2013, c 30 and the Treaty as bearing responsibility for effective conservation and management of the Herd.

BACKGROUND

[2] The Applicant, Colville Lake Renewable Resources Council (“CLRRC”), is a Renewable Resources Council (“RRC”) established by the Treaty, recognized under the definition of a “local harvesting committee” under s. 1(1) of the *Wildlife Act*, and empowered under the Treaty in a co-management role to encourage local involvement in research, harvesting studies, conservation, and community wildlife management.

[3] The Applicant, Bedhzi Ahda First Nation, is a Dene First Nations band in the community of Colville Lake.

[4] The Applicant, Ayoni Keh Land Corporation, is a non-profit organization within the Sahtu.

[5] The Intervener, Sahtu Renewable Resources Board (“SRRB”), is recognized under s. 9(1) of the *Wildlife Act* as the main instrument of wildlife management in areas of the Northwest Territories with land claims agreements. The SRRB is established under the Treaty as the main instrument of wildlife management in the Sahtu Settlement Area (“SSA”), to which the Treaty applies.

[6] The Respondent, Minister of Environment and Natural Resources (the “Minister”), Government of the Northwest Territories (“GNWT”) represents the GNWT. The Minister is responsible for the *Wildlife Act* and regulations *Wildlife Act*, s. 11(1) and is tasked with ultimate governance of the Treaty under the collaborative wildlife management schema identified therein. The Minister must promote a collaborative approach to conservation and management of wildlife and habitat, consistent with applicable land claims agreement(s). *Wildlife Act*, ss. 11(3) and (4) The Minister has discretion to enter into agreements with local harvesting committees regarding their involvement in the conservation and management of wildlife. *Wildlife Act*, s. 14(1).

[7] The Respondent, the Attorney-General of the Northwest Territories, is entitled to be part of these proceedings as of right, and pursuant to the *Rules of the Supreme Court of the Northwest Territories*.

[8] The Intervener, Inuvialuit Game Council (“IGC”), is a co-management partner of the Inuvialuit Final Agreement and shares management responsibilities within the Inuvialuit Settlement Region. The IGC has an interest in the Herd. Along with the SRRB, on September 16, 2022 the IGC was granted standing in this matter.

[9] A “Sahtu Community” is defined as the Community of Participants in Fort Good Hope, Colville Lake, Fort Norman, Deline, and/or Norman Wells.

[10] A “Participant” refers to a representative from each of the five communities within the SSA. Participants have rights under the Treaty as a member of the Sahtu Dene or Metis community and are enrolled in the Enrolment Register pursuant to chapter 4 of the Treaty. The Treaty defines all beneficiaries of the Treaty as Participants.

[11] The Treaty is considered a “Modern Treaty” within the meaning of s. 35 of the *Constitution Act, 1982*, being signed in 1993 by the Governments of Canada and the Northwest Territories, and the Sahtu, Dene and Metis.

[12] The Treaty governs relations between the Applicants and Respondents and applies within the SSA.

[13] Chapter 13 of the Treaty governs wildlife and harvest management within the SSA.

[14] Chapter 13 places the Applicants and Respondents in a wildlife co-management regime within the SSA.

[15] Chapter 13 sets out the duties, powers, and responsibilities of three bodies involved in the co-management regime: the local Renewable Resources Council (“RRC”) for each community; the Sahtu Renewable Resources Board (“SRRB”); and the Minister.

[16] By virtue of the Treaty, the SRRB has several powers, including but not limited to establishing its own internal governance policies, and approving plans relating to wildlife management and protection in the SSA. The Board may also hold public hearings regarding wildlife management in the SSA.

[17] The Herd which is the subject of the dispute in this matter has a range that includes three (3) different settlement zones within the Northwest Territories: the Inuvialuit Settlement Region; the Gwich’in Settlement Area; and the SSA.

[18] Each of these settlement zones are covered by a modern treaty unique to that zone.

[19] Within the SSA, the Herd is mainly harvested by the communities of Colville Lake, Fort Good Hope and Norman Wells, each of which are in or on the boundary of wildlife zone 01 (S/BC/01).

[20] In 2007, due to declines in the Herd, SRRB recommended that the Minister impose a Total Allowable Harvest (“TAH”) of 4%, representing the total number of animals in the Herd that could be harvested per year.

[21] The Minister accepted and set the quota through Regulations.

[22] Based on population estimates at the time, Participants were allocated 350 caribou from the Herd.

[23] In 2008, the Advisory Committee for Cooperation on Wildlife Management (“ACCWM”) was established to make recommendations regarding wildlife which cross modern treaty boundaries.

[24] The ACCWM is composed of 6 wildlife management boards, including the SRRB. These boards all stem from various modern Treaties.

[25] The GNWT supports the work of the ACCWM but is not a party to it.

[26] In 2014, the ACCWM released “Taking Care of the Caribou”, a report on the Herd that noted a population decline from approximately 110,000 animals in 1992 to 10,000 in 2012. The Report recommended a TAH.

[27] In 2017, the ACCWM released an action plan, which indicated the Herd is “orange status”, meaning that Herd population is intermediate and decreasing. The ACCWM action plan recommended a mandatory limit on sustenance harvest based on a TAH accepted by the ACCWM.

[28] In 2019, the ACVWM released “Action Plan for Bluenose West Caribou Herd”, an updated action plan that noted the Herd was still orange status but may be improving to yellow status.

[29] The updated ACCWM action plan places reliance upon the precautionary principle to recommend that the TAH in the SSA remain in place, but also recommended that the Ministry of Environment and Natural Resources (“ENR”) increase the allowable Herd harvesting allocations of the Participants.

[30] On October 21, 2019, the Colville Lake Renewable Resources Council (“CLRRC”) proposed the “Colville Plan”, which proposes to remove the TAH. Further, the Colville Plan requires that other s. 35 rights holders obtain prior authorization from the CLRRC to harvest the Herd, stating:

The harvest of [the Herd] be authorized by Colville Lake RRC in accordance with the Plan and the [Treaty]Other Sahtu Beneficiaries, and other Indigenous persons authorized by the Colville Lake RRC may hunt under direct supervision of Dehla Go'tine.

[31] The Colville Plan also includes a draft “Colville Law” that gives the CLRCC this authority.

[32] In the summer of 2019, the SRRB advised the ENR that it will hold five (5) public hearings regarding caribou conservation and the Colville Plan.

[33] The SRRB also indicated it will be taking a new approach to hearings, the “Public Listening Session Approach”.

Overview of the Dispute

[34] On October 30, 2020, after conducting the Colville Public Listening Hearing in January of 2020, the SRRB issued a report/decision, part of which included removing the TAH and allowing the Herd to be subject to Community Conservation Planning (“CCP”).

[35] The Treaty provides that once the SRRB renders a decision and forwards to the Minister a four-step decision-making process is triggered involving the Minister and the SRRB.

[36] The SRRB can make recommendations and suggest decisions, which the Minister can accept, reject, or vary.

[37] Under the Treaty, the Minister has ultimate decision-making authority.

[38] On December 4, 2020, the Minister received a letter from the NWT Wildlife Management Advisory Council (“WMAC”), a body established under the Inuvialuit Final Agreement indicating concerns with the SRRB Decision 6.1 and saying more comprehensive submissions would follow. On January 25, 2021, the Minister received those submissions, which detailed the WMAC’s concerns regarding the SRRBs proposed removal of the TAH.

[39] On January 29, 2021, the Minister responded to the SRRB (“Minister’s Initial Decision”). The Minister’s Initial Decision, in part, indicated an intention to vary SRRB Recommendation 4.1 and SRRB Decision 6.1, both of which involve approaches to harvesting of caribou within a Settlement Area to which the Treaty

applies. The contentious parts of the decision, and which are at the heart of this JR, are:

SRRB Decision	Minister’s Initial Decision (variations)
<p><u>Recommendation 4.1</u>: “The SRRB recommends to the Minister that the CLRCC be granted the power to issue authorizations to all types of harvesters in the entire Sahtu Barren-ground caribou area 01 (S/BC/01), subject to a periodic review of the status and location of the Bluenose-West caribou.” “SRRB Recommendation 4.1”;</p>	<p><u>Recommendation 4.1</u>: “It is recommended to the Minister that the Colville Lake Renewable Resources Council be granted the power to issue barren-ground caribou authorizations to Dehla Got’ine and non-participant harvesters in the entire Sahtu barren-ground caribou area 01(S/BC/01)” “Minister’s Recommendation 4.1”</p>
<p><u>Decision 6.1</u>: “The SRRB has decided that it will remove the total allowable harvest in the in the Sahtu Barren-ground hunting Area 01 (S/BC/01), once Colville’s community conservation plan has been completed and approved. The SRRB reserves the right to re-apply the total allowable harvest if required for effective conservation. “SRRB Decision 6.1”</p>	<p><u>Decision 6.1</u>: “In addition to measures put in place under the community conservation planning approach, the previously approved total allowable harvest in Sahtu Barrenground caribou hunting Area 01 (S/BC/01) will remain in effect. The SRRB will regularly review the conservation outcomes under the community conservation planning approach.” “Minister’s Decision 6.1”</p>

[40] On February 25, 2021, the CLRRC responded to the Minister’s Initial Decision, alleging it is incorrect and not supported by evidence and, additionally, was incorrect in its interpretation of the Treaty and the applicable case law.

[41] On February 26, 2021 the SRRB provided *Public Listening Update – Comment, Next Steps, and Timeline*, stating within that document:

The SDMCLCA [the Treaty] decision framework should be understood in light of the SRRB’s amended Hearing Rules (October 23, 2019), which provides for Public Listening Sessions (PLS) as part of a larger hearing proceeding: “The Board, in its discretion, may hold a Hearing comprised of two or more Public Listening Sessions over a period of time exceeding six months in order to encourage increased participation of the Renewable Resources Councils, Participants and the public in the Hearing (Hearing Rule 4.9). The SRRB has accordingly planned a five-part proceeding during 2020-2024.

[42] On March 30, 2021, the SRRB issued a second report on the Colville Public Listening Hearing containing its recommendations and decisions (the “second report”), including a policy statement on Community Conservation Planning, and the Board’s analysis and reply to the Minister’s proposals. In this second report, the SRRB maintains the recommendations and decisions as stated in its initial report of October 30, 2021 and does not accept the variations in the Minister’s Initial Decision.

[43] Purportedly per the process stipulated in the Treaty, the Minister regarded the SRRB second report as the SRRB’s final decision and, on April 30, 2021, the Minister made a Final Decision (the “Minister’s Final Decision”).

[44] The Minister’s Final Decision was also issued in purported compliance with the process set out in the Treaty.

[45] The Minister’s Final Decision did not accept the SRRB’s position and essentially finalized and maintained the varied wording in the Minister’s Initial Decision.

[46] On May 28, 2021, pursuant to s. 6.12 of the Treaty, the Applicants filed their Originating Notice in this matter, seeking judicial review of the Minister’s Final Decision of April 30, 2021.

[47] The Applicant’s position as expressed in its Originating Notice is:

The issues at hand relate to the Minister’s determination of the extent of the powers of the CLRRC as recognized in 13.9.4(b) of the Treaty, how these powers relate to the SRRB’s powers under 13.8.23 and 13.8.27 of the Treaty, and the Minister’s powers to accept, vary, or set aside and replace the decisions of the SRRB pursuant to 13.8.25 and 13.8.28 of the Treaty.

Judicial Review of the Minister's Decision requires consideration of the jurisdictional boundaries between the RRCs, the SRRB, and the Minister, all of whom are administrative bodies. Also, the subject matter of the Minister's Decision is the scope of the treaty rights of the Participants and their representative bodies under the Treaty. They fall within the scope of Aboriginal and treaty rights issues contemplated by the Supreme Court of Canada in *Vavilov*. For both reasons, the standard of review is Correctness.

[48] The Applicants' Grounds of Review are based on the Minister's alleged incorrect interpretation of the Treaty when he varied Recommendation 4.1 and Decision 6.1. The Grounds are:

- I. the Minister incorrectly interpreted s. 13.9.4(b) of the Treaty and erroneously determined that RRCs do not have power to manage the local exercise of Participants' harvesting rights; and
- II. the Minister's Decision to maintain a TAH relies on an incorrect interpretation of ss. 13.5.2, 13.8.25, and 13.8.28 of the Treaty, and also misapplies the common law requirement of minimal impairment of treaty rights as precluding any other limitation on Participant's harvesting rights other than through the imposition of a TAH.

Issues

[49] The issues to be determined are as follows:

- a) What is the correct standard of review?
 - b) Whether the Minister failed to consider the same factors the SRRB considered, as required by s. 13.8.25 of the Treaty;
 - c) Whether the Minister had the jurisdiction under the Treaty to accept the SRRBs request to defer the decision-making process;
 - d) Whether the Minister's Final Decision to vary Recommendation 4.1 is supported by the Treaty;
 - e) Whether the Minister's Final Decision to vary Decision 6.1 is supported by the Treaty.
- (i) Standard of Review

[50] The Applicants and Intervener, SRRB, hold the position that since this matter involves constitutional rights and jurisdictional boundaries between administrative bodies, judicial review of the Minister's Decision is subject to a correctness standard of review.

[51] The Respondents agree that correctness is the standard of review for issues such as treaty interpretation and the scope of Aboriginal and treaty rights, but reasonableness, the Respondents argue, is the standard of review for extricable findings of fact made by the Minister.

[52] The Respondents rely upon *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 for the proposition that extricable findings of fact may be separable from the broader issue(s). In that case, the Federal Court of Appeal stated, at para 82:

Before leaving the subject of the standard of review of the Minister's decision, I should signal one important qualification to my conclusion that issues of treaty interpretation and scope are reviewable on the correctness standard. Prior to *Vavilov*, it had been recognized that, while questions of constitutional interpretation were reviewable for correctness, any extricable findings of fact, and the assessment of the evidence on which the constitutional analysis was premised, were entitled to deference, and were therefore reviewable for reasonableness.... *Vavilov* has not affected this position...

[53] The Respondents further assert the Minister's decision was reasonable, being based on findings of fact about the status and importance of the Herd and the need for the TAH to remain in place for conservation purposes.

[54] In determining the TAH needed to remain in place because the status of the Herd had not improved, the Minister's Initial Decision explained:

The status of the caribou herd has not improved since the Minister of ENR accepted the SRRB decision to impose a total allowable harvest (TAH) on the Caribou herd in 2008.

...

At the latest ACCWM herd status meeting, the SRRB agreed to the caribou herd being in the orange zone, which means that it is recommended that there be a mandatory limit on subsistence harvest based on a TAH accepted by the ACCWM. It is important that this conservation measure be applied at a herd-wide level, with the approach for the caribou herd taken within the Sahtu Settlement Area for the caribou herd consistent with parts of the herd's range in other land claim areas.

[55] The Respondents assert these were factual findings of the Minister informed by the precautionary principle, and as such must be given deference and reviewed on a reasonableness standard.

[56] The Applicants reply that the reasonableness standard should not apply, as the facts are not extricable but are so connected to the Minister's reasons on the broader constitutional issues that they must also be subject to a correctness review.

[57] In sum, the parties are in general agreement that the applicable standard of review for constitutional questions is correctness. Though there is some dispute between the parties whether this matter involves jurisdictional boundaries as contemplated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, there does not appear to be any true dispute that the correctness standard applies by virtue of the constitutional dimensions of this matter. To the extent that there is a dispute on this issue, I find that jurisdictional disputes as between the co-managing partners must be assessed on a standard of correctness, as their co-management involves treaty and constitutional issues.

[58] The unresolved review question is whether there are extricable findings of fact that ought to be reviewed on a reasonableness standard.

[59] In my view, if an error is alleged respecting a readily extricable finding of fact or law underlying a discretionary decision, this will call for a two-step analysis:

- (i) the readily extricable finding will be reviewed on the standard applicable to the issues of fact or law; and
- (ii) if there is an error, the court will analyze the effect of that error on the exercise of discretion.

[60] I agree with the Applicants that some of the Minister's findings of fact are so well accepted and beyond dispute, that they can hardly be called 'findings.' If facts are clearly uncontroversial or beyond reasonable dispute or so generally accepted as not to be subject to debate among reasonable persons, there is no sense in terming them 'findings'.

[61] However, a distinction is evident in that the decision(s) of the Minister are informed by the facts and his reliance upon or the weight given to certain facts is in dispute. In this circumstance, even the undisputed facts must be regarded as *findings*.

[62] Given his role as the ultimate decision-maker under the Treaty, the Minister needed facts on which to base his decision. In furtherance of this, he made findings of fact.

[63] With respect to the Applicants' argument that the facts and the final decision are inextricably linked and thus must be assessed on the same standard of correctness, which is essentially a statement against parsing the standard of review, I disagree.

[64] In my view, the decision of the Minister to rely on evidence that the Herd requires protection for conservation and management purposes is a finding of fact based on evidence. That the evidence the Herd requires protection is undisputed does not detract from the position that the Minister made a finding of fact based on the evidence.

[65] If a discretionary decision involves a finding of fact or law that is extricable, then the standards of review applicable to the extricable elements will be applied. *Morgan-Hung v British Columbia (Human Rights Tribunal)*, 2011 BCCA 122, at para 28.

[66] Though connected, this finding of fact is extricable from the broader question(s) of Treaty interpretation. That the parties dispute how best to protect and conserve the Herd illustrates that the Minister made extricable findings of fact of the sort envisioned in *Makivik*.

[67] I endorse *Makivik*, in which the Federal Court of Appeal asserts that *Vavilov* has not altered the pre-*Vavilov* position that,

...questions of constitutional interpretation were reviewable for correctness, any extricable findings of fact, and the assessment of the evidence on which the constitutional analysis was premised, were entitled to deference, and were therefore reviewable for reasonableness... *Makivik*, at para 82.

[68] The Minister's findings regarding the need for continued conservation and management measures can be considered independently of the decision the facts ultimately informed. Therefore, in my view, these findings of fact are extricable. As findings of fact that are properly separable from the decision itself, they are reviewable on a standard of reasonableness.

[69] The Record indicated a TAH was warranted, and that the status of the herd had not changed from "orange" status.

[70] The Minister's acceptance of these as facts does not require this court to look for additional justification of that decision, as the Minister was not legally obligated to give reasons for relying on these facts. *Vavilov*, at paras 136-138.

[71] Based on the Record, the Minister's decision was justified, intelligible and transparent and, therefore, reasonable.

(ii) *Whether the Minister failed to consider the same factors as required by s. 13.8.25*

[72] The Applicants argue that s. 13.8.25 of the Treaty creates a constitutional obligation on the Minister to demonstrate in the Minister's decision that he considered the same factors as the SRRB and his failure to so demonstrate indicates the Minister's decision violates the Honour of the Crown and the Duty to Consult, which is formalized in s. 13.8.25 of the Treaty.

[73] Section 13.8.25 of the Treaty states:

The Minister may, within 60 days of the receipt of a decision under 13.8.24, accept, vary or set aside and replace the decision. The Minister must consider the same factors as were considered by the Board and, in addition, may consider information not before the Board and matters of public interest not considered by the Board. Any proposed variation or replacement shall be sent back to the Board by the Minister with written reasons.

[74] The Applicants assert the Minister's decision interprets the Treaty in an unduly restrictive way inconsistent with modern treaty interpretation principles and the Honour of the Crown and misconstrues the role and responsibilities of RRCs for managing participant harvesting rights under the Treaty.

[75] The Applicants also argue that the Minister's written reasons do not demonstrate that he considered all the same factors as required by s. 13.8.25 and they cannot know if he made a correct decision since his written reasons are not sufficiently detailed to allow others to examine them. As the Minister's reasons do not explicitly discuss all the same factors considered by the SRRB, such as the effectiveness of community conservation plans ("CCPs"), cultural inappropriateness of a TAH, and regional support for the CLRRCs regulation of the Herd, the Minister's decision violates the requirement of providing written reasons.

[76] The Respondents note this ground of review was not included in the Originating Notice, contrary to the *Rules of the Supreme Court of the Northwest Territories* and was raised as an issue only weeks before the pre-hearing; and argue this ground should not be permitted to proceed. In the alternative, the Respondents

assert the Applicants are conflating evidence and factors. The Treaty does not require the Minister to consider the same evidence that was considered by the SRRB, but only to consider the same factors as the SRRB. To impose such a requirement on the Minister would be inconsistent with the roles as set out in the Treaty. The Minister, as the party with ultimate decision-making authority for the management of wildlife, is tasked with considering SRRB decisions alongside broader matters of public interest. He is permitted but not required to reweigh the evidence.

[77] The Respondents further argue the Applicants incorrectly focus on the Minister's written decision instead of the entire decision-making process and fail to acknowledge the flexible review process advanced in *Vavilov*. Further, a review of the entire Record is the proper method to determine what factors were considered by the Minister, and the Record in this matter shows he did consider the factors considered by the SRRB.

[78] The Applicants reply not only that the statements in *Vavilov* upon which the Respondents rely were made in the context of reasonableness review, not correctness review which applies here, but are also statements from the minority concurring opinion which are not good law to the extent they disagree with the majority opinion, which affirms the importance of paying close attention to a decision-maker's written reasons. Further, the Applicants reply that if the Minister's decision does not address a key argument made by the SRRB's report, a reviewing court cannot buttress the Minister's reasons to address the argument.

[79] I begin by noting that this issue is reasonably connected to the issues raised in the Originating Notice. I find it appropriate to consider this issue and not to dismiss it as the Respondents request on the basis of a technical breach of the *Rules of the Supreme Court of the Northwest Territories*.

[80] Regarding the substance of this issue, I note that treaties represent an "exchange of solemn promises between the Crown and the various Indian nations." *R v Badger*, 1996 CanLII 236 (SCC), [1996] 1 SCR 771, at para 41.

[81] Interpretation of the Treaty is to be conducted based on the principles of modern treaty interpretation.

[82] In the decisions of *R v Badger* and *R v Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456, at paras 10–12, the Supreme Court of Canada set out the basic principles of Aboriginal treaty interpretation:

- (1) "a treaty represents an exchange of solemn promises between the Crown" and Aboriginal peoples; *Badger*, para 41

- (2) “the honour of the Crown is always at stake” and no “sharp dealing[s]” will be sanctioned; *Badger*, para 41
- (3) “ambiguities or doubtful expressions ... must be resolved in the favour of the [Aboriginal party]”; *Badger*, para 41.
- (4) evidence other than the written text of the treaty must be considered, even in the absence of “ambiguity on the face of the written text”; *Marshall*, paras 10-12; and
- (5) treaties were intended to reconcile the goals and interests of the parties to the treaty at the time and should be interpreted in a way consistent with those intentions. *Marshall*, paras 10-12.

[83] Subsequent to those decisions the Supreme Court of Canada has decided *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58, which both parties reference and agree is the leading decision regarding the interpretation of modern treaties, which are constitutional documents per the *Constitution Act, 1982. Nacho Nyak Dun*, paras 8, 34.

[84] In *Nacho Nyak Dun* the Court recharacterized the nature of modern treaties and reframed the question of the honour of the Crown in a modern treaty context.

[85] In that case, Justice Karakatsanis, writing for the Majority, noted the “sui generis nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.” *Nacho Nyak Dun*, para 22. She further noted:

Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership [... and] in resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance [with the qualification that] judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

[86] Treaty interpretation in this context requires deference to text, with Justice Karakatsanis writing that since modern treaties are “meticulously negotiated by well-resourced parties,” courts must “pay close attention to [their] terms”. *Nacho Nyak Dun*, para 36.

[87] Modern treaties, in other words, are “detailed documents and deference to their text is warranted.” *Nacho Nyak Dun*, para 36. Justice Karakatsanis explains:

Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text as a whole and the treaty’s objectives ... Indeed, a

modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted “in an ungenerous manner or as if it were an everyday commercial contract”... Furthermore, while courts must “strive to respect [the] handiwork” of the parties to a modern treaty, this is always “subject to such constitutional limitations as the honour of the Crown”...

By applying these interpretive principles, courts can help ensure that modern treaties will advance reconciliation. [...] *Nacho Nyak Dun*, at paras 37, 38 (citations omitted).

[88] As constitutional documents, s. 35 of the *Constitution Act, 1982* applies to modern treaties. The honour of the Crown, codified in s. 35, is relevant in this case; it is well accepted that “the honour of the Crown infuses every treaty and the performance of every treaty obligation.” *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para 57. Section 35 both codifies the rights of Indigenous peoples and facilitates the reconciliation of these rights with the sovereignty of the Crown. This is evident in the fact that s. 35 has dual purposes: “to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown’s assertion of sovereignty over them.” *R v Desautel*, 2021 SCC 17, at para 22. Reconciliation is thus the basis of the “legal approach to treaty rights” and also of the “overarching purpose” of treaty making and, perforce, treaty promises.” *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, at para 71. Modern treaties can aid in reconciliation, “as expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric. Negotiating modern treaties and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples.” *Nacho Nyak Dun*, para 1. Thus, the objective of reconciliation is an “ongoing project” underlying both the development and the implementation of treaties. *Southwind v Canada*, 2021 SCC 28, at para 55, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para 10.

[89] But, as with other constitutional rights, treaty rights are not absolute and may be subject to justifiable infringement. *R v Sparrow*, 1990 CanLII 104 (SCC).

[90] A Treaty imposes a special duty on the Crown, which must act honourably in the negotiation, interpretation and implementation of treaties. To do otherwise could leave the other parties to the Treaty with only the “empty shell of a treaty promise.” *Manitoba Metis*, at para 80.

[91] The honour of the Crown may give rise to different duties in different circumstances. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC

73, at para 16. At a minimum, this court must assume the Crown intends to fulfill its promises and the Crown must seek to perform its Treaty obligations “in a way that pursues the purpose behind the promise.” *Manitoba Metis*, at para 80.

[92] In all cases, it is important to consider “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.” *Manitoba Metis*, at para 80.

[93] I note that the Applicants assert that the principle of reconciliation in relation to the Treaty can be supplemented by the principles of reconciliation in the *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (“UNDRIP”). The Applicants assert UNDRIP informs the scope of the government’s obligations when interpreting and implementing modern treaties. This point is not in dispute and, even if it were, this court agrees that UNDRIP is relevant to the interpretation of modern treaties. Domestic laws are subject to a presumption of conformity in relation to binding international instruments. *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32, at para 32. The legislature is presumed to act in compliance with Canada’s international obligations. In the case at bar, I find that the domestic instruments, such as the Treaty, the *Constitution Act, 1982*, and domestic case law satisfy the presumption of conformity and provide adequate bases on which to determine the objectives of reconciliation. It is, therefore, unnecessary to delve more deeply into the application of UNDRIP in this case.

[94] With these considerations in mind, I nevertheless find that the Applicants over-emphasize the need for written reasons to discuss all the same factors considered by the SRRB. While s. 13.8.25 does require the Minister to consider the same factors as the SRRB and to provide written reasons, it does not require that his consideration of each of these factors be specified in his written reasons. When interpreting a treaty provision a court must pay close attention to the terms of the provision, the treaty text as a whole, and the treaty's objectives. *Nacho Nyak Dun*, at paras. 36-38. While a modern treaty is a sophisticated document negotiated by sophisticated parties, it should not be interpreted in an ungenerous manner as if it were an everyday commercial contract. Even though courts must strive to respect the negotiated wording of the parties to a modern treaty, this is always subject to such constitutional limitations as the honour of the Crown.

[95] I agree with the Respondents that s. 13.8.25 requires the Minister to consider the same factors but does not require that the Minister consider of all the same evidence. It is enough that the written reasons show he considered the same factors.

The Minister's decision, therefore, is consistent with seeking to perform Treaty obligations "in a way that pursues the purpose behind the promise."

[96] A treaty is to be interpreted in a manner that does not dishonour the Crown. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para 12.

[97] I find that the Minister's decision is consistent with s. 13.8.25 and does not impugn the honour of the Crown.

(iii) *Whether the SRRBs deferral was a decision*

[98] In its final report, dated March 30, 2021, the SRRB declares its Recommendation 4.1 and Decision 6.1 are each deferred as the SRRB invites further engagement via Public Listening sessions.

[99] As Intervener, the SRRB reiterates this position, that a decision to defer is not a final decision that the Minister had authority to vary or set aside and doing so was both incorrect under the Treaty and inconsistent with the Honour of the Crown.

[100] SRRB also asserts that the Minister's reasons in its final decision were required to explain why the deferral was rejected and did not do so.

[101] The Applicants rely on section 13.8.27(b) of the Treaty to argue that when the SRRB indicated it was deferring its decision on Recommendation 4.1 and Decision 6.1, it was asking for an extension of time to submit its final decision.

[102] The Respondents assert that the SRRB had no option to defer other than to seek a time-extension under s. 13.8.27(b), which they did not request. The Respondents further argue that the Treaty provides a process for finality in decision-making and the Applicants' position would violate this and, therefore, the Minister was entitled to treat the SRRB's second report as the SRRB's final decision and, accordingly, to issue the Minister's Final Decision.

[103] The Applicants reply that the GNWT's treatment of the SRRB's second report and its deferral statement as having put an end to the iterative decision-making process in the Treaty ignores the SRRB's role in hearing from communities, participants and RRCs in its policy-making function. The Applicants further assert that the SRRB decided to seek more input from the Sahtu communities and RRCs in response to concerns raised by the Minister. The SRRB's decision to seek this additional information is consistent with core objectives of the Treaty.

[104] In my view, the Respondents' position is correct. Though it is accepted that the SRRB was acting in good faith and in a manner deemed consistent with the Treaty's objectives and guiding principles, and with the SRRB's own obligations under the Treaty, if the Treaty is to be a meaningful agreement this court must interpret the respective parties' obligations under the Treaty as meaningful.

[105] An iterative decision-making regime is established under the Treaty to manage wildlife and is set out in ss. 13.8.24 to 13.8.28 of the Treaty.

[106] Under the regime, a decision of the SRRB is forwarded to the Minister (13.8.24). The Minister then reviews the SRRB's decision and sends back any proposed variation or replacement with written reasons (13.8.25). The Minister may extend this time by 30 days (13.8.26). The SRRB then, within 30 days, makes its final decision on any replacement or variations received from the Minister, and forwards this to the Minister with written reasons 13.8.27(a). The Minister is empowered to extend the time provided for the SRRB to forward its final decision to the Minister 13.8.27(b). The Minister may, within 30 days of receipt of a final decision of the SRRB accept or vary it, or set it aside and replace it, with written reasons. The Minister may consider information not before the SRRB and matters of public interest not considered by the SRRB (13.8.28).

[107] Neither party has brought to my attention a specific provision in the Treaty that would allow a party to defer or unilaterally remove itself from the decision-making process once that process is engaged.

[108] While *Nacho Nyak Dun* directs that close attention be paid to the terms of a modern treaty, and its provisions are to be interpreted in light of the treaty text as a whole, and not interpreted ungenerously, this, in my view, does not resolve this issue in favour of the Applicants' argument. The Court also said that "reconciliation often demands judicial forbearance." In my view, forbearance in this matter, requires this court to defer to the parties' negotiated language and find that the parties are bound by the negotiated decision-making process of the Treaty.

[109] As the Respondents rightly point out, there is no ability to unilaterally defer under the Treaty.

[110] Though there is an ability under 13.8.27(a) for the SRRB to request an extension in time to submit the final report to the Minister, the SRRB did not request an extension. In lieu of formally requesting an extension, the SRRB provided its Second Report to the Minister, which stated the SRRB was deferring Recommendation 4.1 and Decision 6.1.

[111] Based on the co-management decision-making regime in the treaty and consistent with obligations under the *Wildlife Act*, once the Minister received the SRRB's second report, the Minister was then required to issue his final decision within 30 days, consistent with the negotiated process in Chapter 13 of the Treaty.

[112] Under the principles of modern treaty interpretation, the decision-making regime in Chapter 13 of the Treaty must not be considered in isolation, but with reference to the treaty text as a whole, and the treaty's objectives, set out in s. 1.1.1 of the Treaty.

[113] The SRRB's decision to invite community engagement via Public Listening Sessions is in keeping with the objectives of the Treaty. That is not the question. The question is whether the Treaty required, or even authorized, the Minister to defer his final decision whilst the SRRB continued to conduct Public Listening Sessions. In my view, the Minister had neither the obligation, nor the authority to defer his own decision.

[114] I have considered the recent decision of *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*, 2023 YKSC 5 in which the court considered whether the Crown had violated the Honour of the Crown by failing to consult properly. At para 157, Chief Justice Duncan found:

Part of consultation at the higher end of the spectrum involves the Crown understanding fully and considering seriously the First Nation concerns. If the First Nation requests the government hear from the rights-holders in the hope this will assist in explaining their concerns fully, then the government must consider this request seriously, in the spirit of reconciliation and fair dealing.

If the Crown does not consult with community members upon request by the representative Indigenous body, any refusal must include a reasoned explanation and be consistent with the Duty to Consult.

[115] In the present case, I find the Crown did satisfy its Duty to Consult and uphold the Honour of the Crown when the Minister adhered to the provisions of the Treaty as negotiated between the parties.

[116] I have also considered the decisions put forth by the Intervener, SRRB, in support of its position that a deferral is not a decision, that in order to be a "decision" a decision must determine rights and/or interests, and where a decision does not do so it is not a decision in the full sense of the term. The SRRB asserts that in choosing to defer, it did not make a decision that required, or even enabled, the Minister to render its final decision. In my view, the authorities presented are distinguishable and do not respond to the issue in these proceedings.

[117] The Treaty does not provide opportunity for the SRRB to defer. Nor does the Treaty permit the Minister to delay its own decision at this stage. Under s. 13.8.28 of the Treaty, the Minister has 30 days to issue a decision once having received the final decision of the SRRB. Thus, without an extension request from the SRRB, the Minister was bound to issue his final decision.

[118] As a result, issuance of the Minister's final decision complies with the Treaty and was correct.

(iv) *Whether the decision to vary Recommendation 4.1 is supported by the Treaty*

[119] The Applicants assert that the Minister's Final Decision misconstrues SRRB Recommendation 4.1.

[120] In his final decision dated April 30, 2021, the Minister rejects the SRRB's purported deferral of Recommendation 4.1 and confirms his own varied wording that was provided to the SRRB on January 29, 2021 in response to the SRRB's initial decision.

[121] In this final decision the Minister indicates the SRRB has recommended that the CLRRC be granted the power to issue barren-ground caribou authorizations to Dehla Got'ine and non-participant harvesters in the entire Sahtu Barren-ground caribou area 01 (S/BC/01). The Minister's final response indicates that the since SRRB Recommendation 4.1 would delegate decision-making over the extent to which the rights of participants, specifically the Norman Wells and Fort Good Hope RRCs, are restricted, he consulted with these RRCs to ensure they supported the Colville Lake draft community CCP.

[122] The Minister received written responses from the Norman Wells and Fort Good Hope RRCs on April 9 and 10, 2021, neither of which indicated clear support for providing the CLRRC this power and requested further discussions to occur within their communities and with the SRRB.

[123] Also at issue here is s. 13.9.4(b) of the Treaty, which reads:

13.9.4 A Renewable Resources Council shall have the following powers:

(b) to manage, in a manner consistent with legislation and the policies of the Board, the local exercise of participants' harvesting rights including the methods, seasons and location of harvest;

[124] An issue for the parties is the meaning of "local" within s. 13.9.4(b).

[125] The Minister's Final Decision interprets "local" narrowly and grants the CLRRC authority to manage the Herd for its own residents and non-participants, but not for the residents of the other Sahtu communities.

[126] The Respondents assert that the Minister's reasons for this decision were based on three overarching considerations:

1. Pursuant to the Treaty, the Minister is the ultimate authority for managing wildlife in the SSA. The Minister's role is to safeguard the interests of all who rely on the Herd;
2. The SRRB – not the local RRCs – is the main instrument for wildlife management within the SSA; and
3. The role of the RRCs is to manage local issues in each community and harvest by Participants from that community – broad herd management of a transboundary species was never their intended purpose.

[127] The Respondents argue that the Applicant is seeking "exclusive regulatory control of the Caribou Herd" and that the Applicants effort to give RRCs the power to regulate wildlife harvesting for all Participants, could not have been the intent of the Treaty's drafters and would set an "untenable and problematic precedent."

[128] The Respondents further argue that the Treaty offers no basis for a RRC to regulate the affairs of Participants in such a broad manner, and, given there are five RRCs, creates the possibility of a "conflicting patchwork of harvesting laws." This cannot have been the intent of the Treaty's drafters.

[129] According to the Respondents, the correct approach is to limit the wildlife management powers of RRCs to only the residents of the specific community that the RRC represents. The Respondents argue this interpretation is consistent with s. 13.5.2 of the Treaty, which stipulates that the SRRB, and not any of the RRCs, may limit the quantity of wildlife harvest by any Participant.

[130] The Respondents summarize by stating that while general support for the CLRRC is evident from the Record, the more nuanced question of whether the CLRRC should have exclusive regulatory control of the Herd is less clear. The Respondents argue that to confer the CLRRC with authority to manage the Herd is contrary to both the Treaty and to the Honour of the Crown.

[131] The Applicants reply that the Respondents misunderstand their position and disagree with the Respondents on several bases. First, the Applicants note that the

Respondents claim the Treaty's drafters could not have intended for RRCs to have such powers but offer nothing to support this opinion. In addition, it is improper to speculate that conflicting harvesting laws could result, and the Minister cannot interpret the Treaty based on speculation of possible outcomes of yet-to-be developed CCPs. The Minister must also consider the terms and objectives of the Treaty.

[132] Referring to section 13.4.6 and 13.9.4 of the Treaty, the Applicants argue that the Treaty provides RRCs with power to, among other things, allocate Sahtu Needs Level, manage the local exercise of participants' harvesting rights, and establish group trapping areas. These powers undermine the Respondents' position that the Treaty drafters could not have intended to give RRCs the "power to regulate within their own territory."

[133] In addition, the Applicants reply that it is not their position that RRCs should have exclusive regulatory control of the Herd and that such a position would be inconsistent with the Treaty. They assert the Respondents incorrectly conflate the exercise of RRC powers to regulate the local exercise of participants' harvesting rights under s. 13.9.4(b) with the total management and control of harvesting of the migratory Herd. The Applicants further note that the powers granted to RRCs under s. 13.9.4(b) are both "local" and must be exercised "in a manner consistent with legislation and the policies of the Board." Allowing RRCs to regulate local exercise of participants' harvesting rights per a CCP that must be approved by the SRRB is consistent with the Treaty and creates little risk of creating conflict as envisioned by the Respondents. Further, via the iterative decision-making process of the Treaty, the Minister has the power to review the SRRB's determination on how to coordinate among various CCPs and to make ultimate decisions. In short, the Treaty has mechanisms to limit any risks of conflicting harvesting laws. The proper way to deal with risks is to follow the Treaty procedures that require CCPs to be approved by both the SRRB and the Minister.

[134] In my view, based on the above statement(s), the parties have a different sense of each other's positions and are thus making argument based on conflicting assumptions. As a result, the arguments are not entirely responsive to the matters, at least insofar as the other party is receiving a response to a question, they do not acknowledge is a question. For example, if in fact the position of the Applicants is not that the SRRB should be able to grant the CLRRC "exclusive regulatory control of the Caribou Herd", a position the Applicants acknowledge would not be consistent with the Treaty, then both the Minister's reasons and the Respondents' response as expressed in the Respondents' Brief is not responding to an actual issue.

[135] It is important to review the language of the Treaty and the SRRB Recommendation 4.1 to determine if the effect of the decision would be to cede to the CLRRC regulatory control of the Herd.

SRRB Recommendation 4.1	Treaty, s. 13.9.4(b)
The SRRB recommends to the Minister that the CLRCC be granted the power to issue authorizations to all types of harvesters in the entire Sahtu Barren-ground caribou area 01 (S/BC/01), subject to a periodic review of the status and location of the Bluenose-West caribou.”	13.9.4 - A Renewable Resources Council shall have the following powers: (b)to manage, in a manner consistent with legislation and the policies of the Board, the local exercise of participants' harvesting rights including the methods, seasons and location of harvest;

[136] In reviewing SRRB Recommendation 4.1 and Treaty s. 13.9.4(b) it is easy to see cause for the Minister’s apprehensions. Section 13.9.4(b) grants RRCs powers to manage the “local” exercise of participants’ harvesting rights. Section 13.9.4(b) also constrains these powers by stipulating “participants”. Recommendation 4.1 appears to significantly broaden this power, proposing to grant the CLRRC the power to grant authorizations to “all types of harvesters”. In addition, while the Treaty grants the CLRRC rights to manage the “local” exercise of harvesting rights, Recommendation 4.1 grants authority over the “entire” area of 01 (S/BC/01). Also, while the Treaty grants RRCs the power to “manage”, Recommendation 4.1 grants the CLRRC the power to “issue authorizations.” Further, the Treaty grants powers to RRCs generally, while Recommendation 4.1 grants powers to the CLRRC specifically.

[137] On the face of it, Recommendation 4.1 is a significant expansion of the powers of the CLRRC and inconsistent with the Treaty. From this perspective, the Respondents and the Minister would be correct to vary the Recommendation 4.1 to comply with the Treaty.

[138] However, a closer reading supports the Applicants reply statement that:

...the GNWT is incorrectly and unreasonably conflating the exercise of RRC powers to regulate the local exercise of participants' harvesting rights under s. 13.9.4(b) with 'complete management and control over harvesting of the migratory Caribou Herd'...

[139] The Applicants position is that a RRC, including the CLRRC, would still need to propose a CCP to the SRRB, which may approve plans via s. 13.8.23(c), and the SRRB would still need to follow the Treaty's iterative decision-making process and seek ultimate approval from the Minister, unless the Minister directs otherwise. For this reason, the Applicants take the position that Recommendation 4.1 would not have the effect of unduly empowering the CLRRC over other RRCs.

[140] In considering whether SRRB Recommendation 4.1 violates the Treaty, it is also important to be mindful that modern treaties are "intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership." *Nacho Nyak Dun*, at para 33.

[141] Based on a review of Recommendation 4.1, the Treaty, and the law regarding modern treaties, and the parties' positions, I find that Recommendation 4.1 is not violative of the Treaty.

[142] Reviewed on a correctness standard where deference is not given to the Minister's decision, I find the Minister's decision incorrect to the extent that it fails to consider that the position taken in Recommendation 4.1 would be constrained by the guardrails already negotiated into the Treaty.

[143] The Minister's decision to vary Recommendation 4.1 is not supported by the language in Recommendation 4.1 or by the language of the Treaty itself.

[144] This aspect of the Minister's decision is incorrect.

(v) *Whether the decision to vary SRRB Decision 6.1 is supported by the Treaty*

[145] The Applicants argue the Minister's Decision to maintain a TAH relies on an incorrect interpretation of sections 13.5.2, 13.8.25, and 13.8.28 of the Treaty, and misapplies the common law requirement of minimal impairment of treaty rights.

[146] Sections 13.5.2, 13.8.25, and 13.8.28 read:

13.5.2 The Board may, in accordance with this chapter, establish, modify or remove total allowable harvest levels from time to time in the settlement area but shall establish or modify such levels only if required for conservation and to the extent necessary to achieve conservation. Unless a total allowable harvest is established, the quantity of the harvest by participants may not be limited.

13.8.25 The Minister may, within 60 days of the receipt of a decision under 13.8.24, accept, vary or set aside and replace the decision. The Minister must consider the same factors as were considered by the Board and, in addition, may consider information not before the Board and matters of public interest not considered by the Board. Any proposed variation or replacement shall be sent back to the Board by the Minister with written reasons.

13.8.28 The Minister may, within 30 days of receipt of a final decision of the Board accept or vary it, or set it aside and replace it, with written reasons. The Minister may consider information not before the Board and matters of public interest not considered by the Board.

[147] The Applicants submit that the Minister did more than simply “vary” SRRB Decision 6.1, exceeding the Minister’s powers under sections 13.8.25 and 13.8.28 of the Treaty.

[148] Further, the Applicants assert that s. 13.5.1 sets out a process for limiting the harvest and, per s. 13.5.2, a TAH may only be implemented to the extent necessary for conservation, and only where the necessity of a TAH for conservation is specifically considered and established based on evidence presented to the SRRB at a public hearing, called per s. 13.8.21(b) specifically to consider a TAH.

[149] Section 13.8.21(b) reads:

(b) A public hearing shall be held when the Board intends to consider establishing a total allowable harvest and a Sahtu Needs Level in respect of a species or population of wildlife which has not been subject to a total allowable harvest level within the previous two years.

[150] The Applicants also allege the Minister did not follow the procedures in the Treaty when he issued the Minister’s Final Decision involving a TAH. Evidence required to establish or modify a TAH was not adduced, and the Minister did not adequately consider evidence presented at the 2020 Public Listening Hearing, evidence which demonstrates a TAH is detrimental and ineffective as a conservation tool.

[151] Finally, the Applicants argue the Minister’s reasons did not disclose a basis for concluding a TAH is needed for conservation purposes.

[152] The Respondents assert the TAH needed to remain in place because the status of the Herd had not improved. As the Minister’s Initial Decision explained:

The status of the caribou herd has not improved since the Minister of ENR accepted the SRRB decision to impose a total allowable harvest (TAH) on the Caribou herd in 2008.

...

At the latest ACCWM herd status meeting, the SRRB agreed to the caribou herd being in the orange zone, which means that it is recommended that there be a mandatory limit on subsistence harvest based on a TAH accepted by the ACCWM. It is important that this conservation measure be applied at a herd-wide level, with the approach for the caribou herd taken within the Sahtu Settlement Area for the caribou herd consistent with parts of the herd's range in other land claim areas.

[153] The Respondents further assert the Minister's Final Decision is consistent with the precautionary principle, and he rejected the removal of the TAH on the basis that the alternative proposed by the SRRB (i.e. the Colville Plan) inappropriately vested the CLRRC with complete management and control over harvesting of the migratory Herd while within the area of 01 (S/BC/01), which would have implications for the overall management and conservation of the Herd.

[154] The Minister confirmed as much in both his Initial and Final Decisions:

As has been previously stated, the three wildlife management boards with authority over the...Herd (the SRRB, GRRB, and WMAC-NWT) established and subsequently reconfirmed the need to continue a sustainable overall harvest level of 4%. The effectiveness of management actions is eroded when not implemented equally across the range of the...Herd.

...

As noted in the reasons for varied Recommendation 4.1, participants from other Sahtu communities cannot be required to obtain an authorization from CLRRC to harvest caribou from the caribou herd in S/BC/01. The TAH allocations for the caribou herd to applicable Sahtu communities must therefore be maintained to provide a means of regulating the harvest of caribou that restricts the right to harvest under 13.4.1...to the minimum extent necessary to achieve the conservation objective.

[155] The Respondents argue:

...to remove the TAH, and replace it with the Colville Plan, which the Applicants admit 'does not impose a predetermine limit on the quantity of the harvest', would have meant there would be no defined limits on the harvest of the Caribous Herd, while the caribou were in S/BC/01. Such a decision would have the potential to seriously impact the constitutionally protected treaty rights of all Participants, the Inuvialuit, and the Gwich'in, each of whom also have an interest in the Caribou Herd and the health of its population.

[156] The Respondents also argue allowing the CLRRC to authorize harvesting of the Herd would violate s. 13.5.2 of the Treaty, which provides that only the SRRB can impose a restriction on harvest through the TAH mechanism. These management decisions, which affect the entire Herd, must be made and applied by the Minister following the appropriate Treaty processes. Thus, the Minister was correct to conclude that “the effectiveness of management actions is eroded when not implemented equally across the range of the Bluenose-West herd.”

[157] The Applicants reply that, while the Board criticized the TAH and made findings about the ineffectiveness of a TAH, it did not remove the TAH. The Board’s decision was to direct Colville to submit another draft CCP with additional details on key points, and:

If and when Colville does this, the revised CCP will be reviewed by the Board and the Minister under the process set out in s. 13.8.23 to 13.8.28. At that time, the Board and Minister will also consider whether a TAH is required in light of the submitted CCP.

[158] According to the Applicants, the Minister’s findings about the TAH cannot be separated from the fact he “failed to consider several core factors the Board considered in coming to its deferral.” One such factor, according to the Applicants, is evidence that a TAH has been ineffective at protecting the Herd, and the finding that a well-designed CCP, such as the Dehla Got’ine CCP, is likely to be more effective than a TAH.

[159] The Applicants argue that the Board, not the Minister, is the main fact-finding and decision-making body for wildlife management under the Treaty process. Therefore, the “Minister owes respectful consideration to the Board’s determinations,” an obligation, the Applicants assert, the Minister failed to fulfill.

[160] In my view, the Respondents’ position must prevail. The Minister is responsible for the health of the wildlife for the Northwest Territories as a whole and must consider the health of the Herd for the entirety of its Range within the Northwest Territories, not just within the SSA. The Applicants did not present a completed CCP or a justification for removing the TAH that was acceptable to the Minister.

[161] The Applicants assert a TAH is not the optimal approach to management of the Herd, but they had not completed with public hearings prior to the Minister’s Final Decision being issued.

[162] I begin by noting that the precautionary principle has been included in many treaty and policy documents related to the protection and preservation of wildlife.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, at para 32. The principle can be regarded as a general principle of precaution which holds that a lack of full scientific certainty must not be used as cause for postponing measures to avoid or minimize threats to environment, wildlife, or habitat.

[163] It is this principle upon which the Minister purported to base the Minister's decision, at least in part.

[164] With this in mind, I find that without further evidence, the Minister was entitled to rely on the most recent complete reports which showed the Herd was still in orange status. Consistent with the precautionary principle, disagreement and lack of complete scientific certainty regarding the most optimal approach to conserving the Herd, the Minister chose to maintain the TAH.

[165] Per s. 13.3.1 of the Treaty, the "Government shall retain the ultimate jurisdiction for the management of wildlife and wildlife habitat."

[166] Since a TAH was recommended when the Herd was in orange status the Minister chose to maintain a TAH while the Herd remained in orange status.

[167] Whether a TAH is the best conservation method is not the role of this court to decide.

[168] This court is reviewing the Minister's decision on a standard of correctness. I find that the Minister's action in this respect is authorized by the Treaty and must survive correctness review.

Disposition of Application

[169] In this Application, the Applicants sought the following Relief:

- (a) An Order to quash and set aside the Minister's decision to vary Decision 6.1 and Recommendation 4.1
- (b) A Declaration the Minister's interpretation of the Treaty is wrong in that it limits the rights and powers granted to RRCs and unnecessarily impairs the wildlife harvesting and management rights of participants under the Treaty through the imposition of a TAH when the Treaty provides for other less intrusive and more appropriate means to manage wildlife harvesting by participants.

- (c) A Declaration that Colville Lake Renewable Resources Council has power under s. 13.9.4 (b) to manage the exercise of participant harvesting rights under the Treaty within a local area in a manner consistent with legislation and the policies of the Board.

[170] The Supreme Court of Canada has explained the purpose and availability of declaratory relief:

A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available ... A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought ... (*Ewert v Canada*, 2018 SCC 30, at para 81)

[171] In the present case, I am satisfied granting declaratory relief is an available option for this court.

[172] I will not declare the Minister's imposition of the TAH to be a violation of the Treaty.

[173] I do declare that the Treaty does not prevent consideration of a community conservation plan that would enable the CLRRC to exercise its powers under s. 13.9.4(b) of the Treaty to manage the exercise of Participant harvesting rights within a local area in a manner consistent with legislation and the policies of the SRRB, subject to review by the Minister in his capacity as ultimate decision-making authority in matters of Herd management and conservation.

[174] On this narrow issue alone, of whether the Minister misapplied s. 13.9.4(b), the Minister's Final Decision is set aside. This aspect of the matter will return to the Minister for further consideration.

COSTS

[175] The Applicants were unsuccessful in their efforts to have the Minister's Decision quashed or set aside and I have not found the Minister violated the Treaty by maintaining a Total Allowable Harvest for the Herd. However, I have ordered that the Minister's Final Decision be amended to reflect the Declaration respecting the powers of Renewable Resources Councils under s. 13.9.4(b) of the Treaty. Thus, in my view, success on this Application was mixed. For that reason, I would think that the parties might agree to bear their own costs. If either party wishes to attempt

to persuade me that a different result should obtain, they may make written submissions, limited to five typewritten pages, excluding attachments, as follows:

- a) The Applicants shall serve and file their submissions within 10 days of the release of this endorsement.
- b) The Respondents shall serve and file their submissions within 10 days of the receipt of the Applicants' submissions or, if none are received and the Respondent wishes to pursue costs, within 20 days of the release of this endorsement, in which case the Applicants shall serve and file her submissions within 10 days of the receipt of the Respondents submissions; and
- c) The parties shall serve and file reply submissions, if any, within 10 days of the receipt of the opposing party's submissions.

S.H.Smallwood

for/A.M. Mahar
J.S.C.

Dated at Yellowknife, NT, this
11th day of August, 2023

Counsel for the Applicants:

Larry Innes
Senwung Luk
Krista Nerland
Jennifer Duncan
Gaëlle Groux

Counsel for the Respondents:

Maren Zimmer
Karin Taylor
Kyle Ereaux

Counsel for Sahtu Renewable Resources Board:

Kate Phipps
Mark Underhill

Counsel for Inuvialuit Game Council:

John Donihee
Raeya Jackiw
Julie Abouchar

**Corrigendum of the Memorandum of Judgment
Of
The Honourable Justice A.M. Mahar**

1. An error occurred on Page 30 in the Judge's signature block.

It reads:

A.M. Maher

It has been amended to read:

A.M. **Mahar**

1. An error occurred on Page 30 regarding Counsel names.

It reads:

Counsel for the Applicants:	Larry Innes Senwung Luk
Counsel for the Respondents:	Karin Taylor Kyle Ereaux
Counsel for Sahtu Renewable Resources Board:	Kate Phipps Mark Underhill
Counsel for Inuvialuit Game Council:	John Donihee Raeya Jackiw

The Counsel names have now been amended to read:

Counsel for the Applicants:	Larry Innes Senwung Luk <u>Krista Nerland</u> <u>Jennifer Duncan</u> <u>Gaëlle Groux</u>
Counsel for the Respondents:	<u>Maren Zimmer</u> Karin Taylor Kyle Ereaux

Counsel for Sahtu Renewable Resources Board: Kate Phipps
Mark Underhill

Counsel for Inuvialuit Game Council: John Donihee
Raeya Jackiw
Julie Abouchar

The Citation has been amended to read:

Colville Lake Renewable Resources Council et al v Gov't of the NWT et al,
2023 NWTSC 22. cor 1

(The changes to the text of the document are highlighted and underlined)

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

COLVILLE LAKE RENEWABLE
RESOURCES COUNCIL; BEDHZI AHDA’’
FIRST NATION and AYONI KEH LAND
CORPORATION

Applicants

-and-

GOVERNMENT OF THE NORTHWEST
TERRITORIES, AS REPRESENTED BY
MINISTER OF ENVIRONMENT AND
NATURAL RESOURCES

Respondents

-and-

SAHTU RENEWABLE RESOURCES BOARD
and INUVIALUIT GAME COUNCIL

Intervenors

Corrected judgment: A corrigendum was issued on August 14, 2023 the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE A.M. MAHAR
