FILE NO.: SCT-7007-11
CITATION: 2014 SCTC 2
DATE: 20140220

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
DOIG RIVER FIRST NATION Claimant (Respondent)	Allisun Rana and Julie Tannahill, for the Claimant (Respondent)
– and –	
BLUEBERRY RIVER FIRST NATIONS Claimant (Respondent)	James Tate and Ava Murphy, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Applicant)	Brett C. Marleau and Naomi Wright, for the Respondent (Applicant)
	HEARD: May 29-30, 2013

REASONS FOR DECISION

Honourable Patrick Smith

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I. THE CLAIMS

[1] The Respondents (the Claimants), Doig River First Nation ("DRFN") and Blueberry River First Nations ("BRFN"), assert breaches of fiduciary duty and contract arising from the Crown's alleged failure to obtain mineral rights in Indian Reserves 204, 205, 206 (the "Replacement Reserves") when the Crown purchased those reserves for the Claimants' use and benefit and the Crown's alleged failure to correct that error once it was discovered or to compensate for any resulting loss (the "Claims").

II. THE APPLICATION

[2] The Applicant (the Respondent in the Claims), Her Majesty the Queen in Right of Canada as represented by the Minister of Aboriginal Affairs and Northern Development ("Canada" or "the Crown") has brought an Application, pursuant to sub-section (s.) 17(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], to strike as vexatious both of the Declarations of Claim.

[3] Canada relies on two grounds in its Application: (1) both Claims should be considered barred by the doctrine of *res judicata*; and (2) both Claims should be considered barred by the Release and Indemnity Agreement (the "Release") entered into following the Supreme Court of Canada's decision in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 [*Apsassin* SCC], rev'g [1993] 3 FC 28 [*Apsassin* FCA]; [1988] 3 FC 20 [*Apsassin* FCTD], referred to collectively as "the *Apsassin* litigation".

III. CLAIM BACKGROUND

[4] On April 12, 1999, DRFN submitted its Claim to the Minister via the Treaty 8 Tribal Association acting on its behalf. On October 23, 2003, the Treaty 8 Tribal Association submitted the same Claim on behalf of the Blueberry River Indian Band.

[5] On November 24, 2008, the Director General of the Specific Claims Branch (SCB) informed the DRFN that their Claim met the minimum standard established by the Minister pursuant to the *SCTA* and was deemed to be claiming compensation as set out in the Specific Claims Policy. According to this letter, the DRFN says that their mineral rights Claim was deemed to have been filed with the Minister on October 16, 2008.

[6] The Crown says that on February 26, 2008, the BRFN advised Canada in writing that it was withdrawing its Claim.

[7] On May 24, 2009, DRFN filed supplemental submissions updating the original Claim. The Crown says that in addition to an alleged breach of a fiduciary obligation, the supplemental submission advanced a Claim that there was a contractual obligation to provide DRFN with the mineral rights under the Replacement Reserves.

[8] DRFN filed its Claim with the Tribunal on December 15, 2011, alleging sub-sections 14(b) and (c) of the *SCTA* as the grounds for their Claim. After a request for an extension of time to file the Response was granted on December 21, 2011, Canada filed its response on February 24, 2012.

[9] The Parties agreed that the Claim is eligible to come before the Tribunal on the basis of section 16(1)(a) of *SCTA*, the Minister having notified the DRFN in writing of its decision not to negotiate the Claim on December 21, 2009, on the basis that, in the Minister's view, the Crown had no outstanding lawful obligation.

[10] The BRFN, after receiving a notice of the DRFN claim on May 17, 2012, pursuant to section 22 of the *SCTA*, applied to be added as a Claimant in the proceedings before the Tribunal. The Crown opposed the addition of BRFN as a Claimant. A hearing of that issue was held on October 4, 2012, via videoconference. On November 30, 2012, the Tribunal issued a decision adding BRFN as a Claimant. BRFN then filed its Declaration of Claim on December 20, 2012, and the Crown filed its Response on January 9, 2013.

[11] The Crown filed its Notice of Application to strike both Claims on April 24, 2013.

IV. FACTUAL OVERVIEW

[12] The Claimants are present day descendants of the Fort St. John Beaver Band (FSJBB) who adhered to Treaty 8 in 1900. Pursuant to Treaty 8, the FSJBB was provided with Indian Reserve 172 by Order in Council dated April 11, 1916.

A. The 1945 Surrender of I.R. 172

[13] On September 22, 1945, the FSJBB surrendered I.R. 172 to Canada for sale or lease to

the benefit of the Band.

[14] In the 1945 meeting which led to the surrender of I.R. 172, Canada promised the FSJBB new reserves which would be purchased with the proceeds from the surrender of I.R. l72.

B. The Purchase of the Replacement Reserves

[15] In 1946, Canada surveyed the land that would become the Replacement Reserves (I.R. 204, 205, 206), which together totalled 6194 acres. In 1947, Canada accepted the Province of British Columbia's (the Province) offer to sell the sites that would eventually comprise the Replacement Reserves.

[16] On March 30, 1948, Canada sold and transferred I.R. 172 to the Director of the *Veterans' Land Act*, 1942, SC 1942, c 33 for $70,000.00. In June 1948, the FSJBB passed a Band Council Resolution (BCR) authorizing the disbursement of not more than $5,000 for Canada to purchase the Replacement Reserves using the funds from the FSJBB's capital funds. Canada approved the expenditure of $4,932.50 from the FSJBB's capital funds for the purchase of the Replacement Reserves by PC 9/2300. These funds were transferred to the Province as payment for the lands.

[17] On July 25, 1950, by OIC 1655 the Province transferred to Canada the administration and control over the Replacement Reserves, minus the mineral rights, which the Province had reserved.

[18] On August 25, 1950, by PC 4092, the Replacement Reserves were set apart as reserves to be administered under the *Indian Act*, RSC 1927, c 98 for the FSJBB.

C. Post-purchase Treatment of Mineral Rights in the Replacement Reserves

[19] On September 8, 1950, Canada, apparently believing that mineral rights now belonged to the Band, obtained a surrender of the mineral rights in the Replacement Reserves so that they could be leased for the use and benefit of the Band.

[20] On October 11, 1950, Canada confirmed the surrender of mineral rights in the Replacement Reserves for lease by PC 4875. On October 26, 1950, Canada issued mineral exploration permits with respect to the Replacement Reserves to Halfway River Development Co. Ltd.

[21] The Crown admits that on January 26, 1952, following the issuance of the exploration permits, the Province advised Canada that it had retained mineral rights in the Replacement Reserves at the time of transfer of the land. Upon examining its title, Canada agreed.

[22] The Director of the Indian Affairs Branch then informed Halfway River Development Co. Ltd. that the mineral rights to the Replacement Reserves were vested in the Province and reimbursed the mining company for the license fees it had paid to Canada.

D. Band Split and Creation of DRFN and BRFN

[23] In 1977, the members of the FSJBB split into two new bands – Blueberry River First Nations and Doig River First Nation. DRFN obtained I.R. 206 and the northern half of I.R. 204. BRFN obtained I.R. 205 and the southern half of I.R. 204.

E. *Apsassin* Litigation – Brief Overview

[24] In 1978, the Bands filed a Statement of Claim (SOC) in the Federal Court alleging that Canada had breached its fiduciary duty in relation to the surrender of I.R. 172 and its post-surrender dealings concerning I.R. 172 and mineral rights. The Bands sought declarations that:

a. The 1945 surrender of I.R. 172 was null and void;

b. The 1948 transfer of the land to Veterans' Affairs was null and void;

c. In the alternative, that the 1945 surrender and the 1948 transfer are of no force and effect with respect to mineral rights in I.R. 172; and

d. The Plaintiffs continue to be entitled by the terms of Treaty 8 to 18,168 acres of reserve land.

[25] The original SOC also included claims for declaratory relief relating to the mineral rights in the Replacement Reserves.

[26] On June 10, 1986, before the commencement of trial, the Bands filed a Further Amended Statement of Claim (FASOC), which abandoned the claim for declaratory relief that the Bands had a beneficial interest in the mineral rights in the Replacement Reserves.

[27] At the Federal Court, the trial judge briefly commented on mineral rights in the Replacement Reserves in his decision. The parties disagree on the effect of this discussion.

[28] The Supreme Court of Canada held that the plaintiffs' claims regarding Canada's failure to remedy its breach in the sale of the Montney Reserve (I.R. 172) were not barred by the 30 year limitation period set out in the *Limitation Act*, RSBC 1979, c 236. The cause of action arose on August 9, 1949, when Canada knew that it had transferred the mineral rights in relation to the I.R. 172 in error. As such, the Court held that the Bands were entitled to compensation for any losses stemming from transfers of land held by the Director of the *Veterans' Land Act* to private parties, where losses took place on or after August 9, 1949.

[29] Following the decision of the Supreme Court of Canada, the parties settled the actions and signed the Release on February 26, 1998.

V. ISSUES

[30] There are two main issues. First, are the Claimants estopped from bringing the Claims before the Tribunal by the principle of *res judicata*, specifically cause of action estoppel. There are three sub-issues involved in this discussion:

- Are the Claims separate and distinct from the causes of action litigated in *Apsassin*?
- Should the Claimants have advanced the Claims in *Apsassin*?
- If the technical requirements of *res judicata* are not met, should the Tribunal exercise its discretion to bar the Claims as an abuse of process?

[31] The second issue concerns the Release: does it bar the Claimants from asserting the Claims?

VI. LEGISLATIVE FRAMEWORK

[32] The *SCTA* accords the Tribunal the powers, rights and privileges that are vested in a superior court of record to determine any question of law or fact in relation to any matter within its jurisdiction (*SCTA*, s 13(1)(*a*)).

[33] The Tribunal may strike a claim, with or without leave to amend pleadings, if the claim is found to be vexatious:

> **17.** On application by a party to a specific claim, the Tribunal may, at any time, order that the claim be struck out in whole or in part, with or without leave to amend, on the grounds that it
>
> (…)
>
> (c) is frivolous, vexatious or premature;
>
> (…)

VII. DISCUSSION/ANALYSIS

A. Part 1 – *Res Judicata* and Abuse of Process

1. Positions of the Parties

a) Canada's Position

[34] The Crown argues that the Claimants are estopped by the doctrine of res judicata (cause of action estoppel) from advancing their Claims of breach of fiduciary duty and/or contract because these Claims were or ought to have been advanced in the *Apsassin* litigation. Canada argues that there are no new facts that were not discoverable then that are being advanced now and that the Claims are sufficiently related to the surrender transaction that was before the Federal Courts and Supreme Court of Canada that the present Claims should be considered part of that same transaction.

[35] The Crown further asserts that there are no circumstances warranting judicial discretion to allow the Claims; the Claimants were represented by counsel throughout *Apsassin*; the Claimants chose to amend their pleadings in 1986 to abandon their 1978 pleading that included a claim for a beneficial interest in the mineral rights to the Replacement Reserves; and the Claimants must now accept the consequences of that decision.

[36] If the Tribunal finds the technical elements of *res judicata* are not satisfied, the Crown asks, in the alternative, that the Tribunal exercise its discretion to dismiss the Claims as an attempt to litigate by instalment and thus an abuse of process.

b) Claimants' Position

[37] The Claimants submit that the doctrine of *res judicata* does not apply. They assert that the claim in the 1978 pleadings for a beneficial interest in the Replacement Reserves was discontinued by amendment of the pleadings before trial in *Apsassin*; that the Crown argued in *Apsassin* SCC that the claims there dealt solely with I.R. 172; that the Claims are separate and distinct and have never been argued or adjudicated; and that the complexity and uncertainty of the legal landscape at that time did not support a decision to bring the Claims. In the Claimants' view the comments of the trial judge regarding the absence of mineral rights in the Replacement Reserves are not binding and are strictly *obiter dicta*.

[38] The Claimants emphasize that despite some overlapping facts, the Claims regarding mineral rights in the Replacement Reserves were not essential to the determination of the actions in *Apsassin* and arise from different material facts, addressing different reserve lands and different alleged breaches by the Crown. In addition, the Claimants assert that the Claims are distinct because they involve a different assessment of damages and these alleged damages were not compensated as part of the *Apsassin* settlement.

[39] The Claimants assert that the law does not require that all possible Claims must be brought together and advanced at the same time. The Claimants say that the *Apsassin* litigation involved a 10-week trial addressing complex legal principles that were just beginning to evolve. While a broad factual matrix was important to provide context, the inclusion of additional causes of action was not practical. The Claims are not, in the Claimants' view, ones that should have been brought in *Apsassin* or ones that constitute an abuse of process by being advanced now.

[40] The Claimants also argue that, if the technical requirements of cause of action estoppel are satisfied, the Tribunal should exercise its discretion to allow the Claims to proceed to prevent an injustice in view of all the circumstances of the Claims.

2. Principles of *Res Judicata*

[41] The doctrine of *res judicata* evolved primarily to advance the public interest by encouraging finality of litigation and, to a lesser degree, protect the interests of individual litigants not to be 'twice vexed in the same cause' (*Donald Lange, The Law of Res Judicata in*

Canada (Toronto: Butterworths, 2000) at 4-5 [Lange, *Res Judicata*]; *Toronto (City) v CUPE, Local 79,* 2003 SCC 63 at paras 32, 34, 50, and regarding abuse of process at paras 43, 51 [*Toronto*]). Countless decisions employing the doctrine in numerous jurisdictions emphasize this concern while, at the same time, exhibiting a reluctance to deny a litigant the opportunity to have his or her claim adjudicated on its merits.

[42] The Supreme Court of Canada in *Maynard v Maynard*, [1951] SCR 346 [*Maynard*] adopted the following definition of *res judicata* citing the 1843 case of *Henderson v Henderson* (1843), 67 ER 313 (QB) [*Henderson*]:

> I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. [pp 358-359]

[43] The standard of proof on an application to strike a claim or action is whether it is plain and obvious that *res judicata* applies (*Chapman v Canada (Minister of Indian and Northern Affairs*), 2003 BCCA 665 at paras 23-25; *Lehndorff Management v LRS Development Enterprises* (1980), 109 DLR (3d) 729 (BC CA) at para 22, Lambert JA, concurring).

[44] There are two categories of *res judicata*: issue estoppel and cause of action estoppel. In these Claims, Canada asserts that cause of action estoppel applies.

[45] The British Columbia Court of Appeal explained the distinction between issue and cause of action estoppel:

> Where the cause of action is the same, cause of action estoppel operates to prevent re-litigation of any matter that was raised or should have been raised in the prior proceeding. Where the cause of action in the two proceedings is different, issue estoppel operates to prevent re-litigation of any issue determined in the prior proceeding. [*Innes v Bui*, 2010 BCCA 322 at para 19]

[46] Following the Supreme Court of Canada's decision in *Grandview v Doering*, [1976] 2 SCR 621 [*Grandview*], the Manitoba Queen's Bench in *Bjarnarson v Government of Manitoba* (1987), 38 DLR (4th) 32 [*Bjarnarson*] ruled that four (4) criteria must be satisfied for cause of action estoppel to apply:

> 1. There must be a final decision of a court of competent jurisdiction to the prior action ("finality");
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action ("mutuality");
>
> 3. The cause of action and the prior action must not be separate and distinct; and
>
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [para 6, summarizing the legal principles in *Grandview*]

[47] The Parties in the Claims agree that the first two elements of the four-part test in *Bjarnarson* are met, leaving (3) and (4) in issue.

[48] Regarding part (4) of the criteria, it is now generally accepted that "could have been argued" is too broad of an articulation, and has been replaced by the requirement that the cause of action "should have been argued" instead: (*Hoque v Montreal Trust*, (1997), 162 NSR (2d) 321 (CA) [*Hoque*], leave to appeal refused; *Erschbamer v Wallster*, 2013 BCCA 76 at para 14).

[49] In Hoque at para 37, the Court stated:

> Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is those issues which the parties had the opportunity to raise and, in all the circumstances, <u>should</u> have been raised, will be barred. [Emphasis in original]

[50] Cases in which cause of action estoppel has been successfully upheld often involve attempts to re-litigate the same wrong with a new legal theory or venue. In *Henderson*, the plaintiff sought an accounting of the same partnership that had been adjudicated by another court. In *Maynard*, a plaintiff tried to reopen alimony with new arguments on matters already

decided in earlier divorce proceedings. In *Bjarnarson*, the defendant had previously been found negligent causing flood damage to the property of a neighbour of the plaintiff. The new plaintiff successfully estopped the defendant from re-litigating the same negligent conduct that had been the subject of the earlier action.

[51] While re-litigating the same point with a new theory is clearly barred, caution should be exercised in applying broad principles from the case law without sufficient attention to context. Where the facts and policy basis of an application for *res judicata* are more equivocal, courts generally allow greater flexibility and exercise more discretion, as in *Hoque*.

a) Separate and Distinct Causes of Action

[52] Black's defines a "new cause of action" as "[a] claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading" (*Black's Law Dictionary*, 8th ed, *sub verbo* "new cause of action").

[53] Deciding whether two causes of action are separate and distinct involves a comparison of the material facts in both actions, which becomes difficult when there are overlapping facts.

[54] The Supreme Court of Canada in *Danyluk v Ainsworth Technologies*, 2001 SCC 44 [*Danyluk*] adopted a 'material facts' approach and defined "cause of action" in the context of *res judicata* as follows:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. [para 54]

[55] The Court of Appeal in *Cliffs Over Maple Bay Investments (Re)*, 2011 BCCA 180 explained the material facts approach:

> In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy. [para 28]

[56] Furthermore, in *Fournogerakis v Barlow*, 2008 BCCA 223 [*Fournogerakis*], the Court of Appeal stated:

> It is not that litigants have to raise every cause of action they may have against each other in one action to avoid the estoppel being raised in another later action; rather it is they must exhaust reliance on any given cause of action - any one series of material facts - in an action where such facts are first put in issue and adjudicated upon. Generally, a cause of action can only be raised and adjudicated upon once. The focus of the inquiry is on whether the material facts on which the determinations sought in any two actions are the same. [para 22]

[57] *Fournogerakis* was a case involving overlapping facts. The parties had been involved in an action in which alleged breaches of contract were in issue. That action was dismissed and Fournogerakis brought a new action alleging unjust enrichment. The Court of Appeal concluded that the evidence did not support the view that all the parties' disputed dealings were one transaction because the consideration in each case was not proven to be the same (*Fournogerakis, supra* at paras 27-30).

[58] In the frequently cited case, *Greymac Properties v Feldman* (1990), 1 OR (3d) 686 (Gen Div) [*Greymac*], the Court articulated a corollary to the material facts approach: if the new claim can stand on its own facts, then it is separate and distinct.

> That the plea of *res judicata* applies to every point which properly belonged to the subject of the previous litigation is clear. (…)
>
> In my view, none of the cases relied on by the respondent goes so far as to suggest that a litigant cannot raise a separate and distinct cause of action in a litigation because he might have done so on the occasion of an earlier litigation on a different issue. There is a large and important difference between, on the one hand, a defence which is intimately related to the issues in the earlier litigation and, on the other hand, a separate litigation against a party to the earlier litigation, a claim which stands on its own separate set of facts and could have been brought at any time without reference to the issues in the earlier action. [691-692]

[59] In *Batchelor v Morden*, [1985] 50 CPC 39 (Ont Dist Ct) at paras 11-12, two parties were in an ongoing contractual relationship. Despite an earlier judgment, one party was permitted to bring a new action based on overlapping facts.

[60] In *Thandi v Burnaby (City)*, 2005 BCSC 1479 at para 123 [*Thandi*], it was sufficient that the facts of the claim in issue were not "in substantial part" the same.

[61] In summary, many of the leading cases on *res judicata* are clear examples of a party attempting to re-litigate a single wrong with a new theory. *Res judicat*a bars this type of re-

litigation. However, a large body of case law wrestles with cases that are not so clear, where the parties have a history together that yields various causes of action that may be considered separate and distinct. Thus, in *Fournogerakis, Greymac, Thandi, supra and Batchelor,* distinct causes of action existed because, despite some overlap, the material facts differed in significant and material ways.

[62] These cases advance and clarify *Maynard*, where as noted above, the Court stated that *res judicata* applies "not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation" (*Maynard, supra* at 359).

b) When Should a Cause of Action Have Been Argued in the Earlier Proceeding?

[63] The issue of whether a cause of action should have been argued in the earlier proceeding is designed to protect against vexatious litigation by instalment – an argument advanced by Canada before the Tribunal.

[64] The rule is not that all possible causes of action must necessarily be brought at once *(Fournogerakis, supra; Greymac, supra*). The Court in *Hoque* considered this issue. Hoque held mortgages with Montreal Trust and had made a refinancing agreement that he failed to honour. Montreal Trust had a foreclosure judgment against Hoque during which proceedings Hoque's trustee did not appear. Hoque sought to bring a new action alleging malicious actions to destroy his business, interference with economic relations, unconscionable elements in the financing agreement, abusive conduct, disclosure of confidential information and mental distress.

[65] Allowing the action, Cromwell JA in *Hoque* identified several factors regarding whether the new causes of action ought to have been argued during the earlier foreclosure proceedings:

> My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including *whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which*

> *could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.* [Underlining in original, italics added; para 64]

[66] The Court in *Hoque* put considerable weight on the fact that the allegations in the later action were not inconsistent with the prior action. Broader policy objectives were also found to be relevant in *Hoque*, including the policy objectives of applicable legislation. The overarching concern was whether allowing the cause of action to proceed tended to uphold the integrity of the administration of justice.

3. Does the *Apsassin* Litigation Render the Claims *Res Judicata*?

[67] As noted, the Parties agree that the finality and mutuality elements of the test in *Grandview* have been met.

a) Are the Claims Separate and Distinct?

[68] I find that the Claims are separate and distinct from the causes of action in the *Apsassin* litigation with certain limited exceptions, discussed in detail below.

[69] The *Apsassin* litigation focused on the loss of mineral rights in I.R. 172 following its surrender and sale. The original 1978 Statement of Claim in *Apsassin*, before the Federal Court, also included a pleading "in the alternative" for a declaration regarding mineral rights in the Replacement Reserves. However, in 1986, before trial, the plaintiffs amended their pleadings to remove the alternative claim and focused on I.R. 172 –including allegations that the 1945 surrender of I.R. 172 and 1948 transfer of I.R. 172 were void, voidable or of no effect with respect to mineral rights in I.R. 172.

[70] If a pleading is amended prior to the commencement of trial, that pleading is not treated as having been dismissed or ruled upon by the court and thus barred in subsequent proceedings (*McNichol v Co-Operators General Insurance Co*, 2006 NBCA 54 at paras 28-29).

[71] The plaintiffs' allegations in *Apsassin* regarding Replacement Reserves were directed to the issue of the validity of the surrender. Specifically, the plaintiffs pleaded that when Canada promoted and accepted the surrender and agreed to the transfer of I.R. 172, Canada knew or ought to have known that it could not fulfill the promises it had made to the FSJBB. These

promises included, among other things, a promise to provide Replacement Reserves using proceeds from the sale of I.R. 172. The FASOC framed its references to Replacement Reserves within the context of attacks on the validity of the surrender of I.R. 172.

[72] The FASOC did not include any claim for breach of fiduciary duty during the later purchase of the Replacement Reserves or discovery in 1952 that they lacked mineral rights, nor did it include any claims for damages for loss of mineral rights in the Replacement Reserves.

[73] The material issue in the *Apsassin* litigation was whether the validity of the I.R. 172 surrender was affected by any promises made by Canada. At the Federal Court, Addy J addressed the Replacement Reserves to discuss the validity of the surrender, and whether the promises made at the surrender had in fact been fulfilled (*Apsassin* FCTD, *supra* at paras 141-149). Addy J found insufficient evidence to confirm an undertaking regarding future reserves and mineral rights in them, thus rejecting the argument that such promises tended to invalidate the surrender of I.R. 172. Beyond that point, in my view the comments on mineral rights in Replacement Reserves at the Federal Court were *obiter dicta*.

[74] In the appeals to the Federal Court of Appeal and the Supreme Court of Canada, the alleged breaches around the purchase and failure to remedy that the Claimants now pursue were not addressed. At the Supreme Court of Canada, the majority and minority dealt with the Crown's obligations regarding I.R. 172. Gonthier J noted that "alternate sites" were promised at the 1945 surrender, and McLachlin J noted that the "replacement reserves purchased" did not include mineral rights, but neither were concerned with the Crown's obligations regarding the Replacement Reserves and whether they were fulfilled (*Apsassin* SCC, *supra* at paras 9, 86, 100).

[75] The history and timing of the actions taken by the Crown is significant. The alleged breaches of fiduciary duty and/or contract in the current Claims occurred at two stages: the Crown's steps to carry out the purchase of the Replacement Reserves without mineral rights up to and including 1950; and the Crown's failure to remedy that alleged error once the Crown became aware in 1952 that the province had reserved the mineral rights. Both occurred after the 1945 surrender transaction.

[76] The purchase of the Replacement Reserves involved distinct, further steps subsequent to the 1945 surrender. These included further actions by the Crown as well as by the FSJBB, including: the Crown's 1947 acceptance of the Province's offer; the FSJBB's 1948 BCR authorizing up to $5,000 to be expended for the purchase of Replacement Reserves; the Order in Council (PC 9/2300) approving that expenditure; and the 1950 transfer from the Province to Canada of administration and control over the surface rights but not the mineral rights in the Replacement Reserves. These further steps were not material to the *Apsassin* litigation, but are central to the Claims at this Tribunal.

[77] The proceeds from the sale of I.R. 172 were in the hands of the Crown once I.R. 172 was sold, but further approvals and authorizations from the FSJBB and by the Crown were required. The FSJBB could have directed the Crown to put those proceeds to other uses, and in fact most of the proceeds were applied to other uses. These are indicators of a separate transaction at the purchasing stages.

[78] Similarly, it is clear that the Crown was unaware that the Province had, in 1950, retained the mineral rights in the Replacement Reserves until this was discovered in 1952. These facts, subsequent to 1945, are essential to the current Claims but these facts were not material to whether the I.R. 172 surrender in 1945 was valid or the question of possible breaches of fiduciary obligations considered in *Apsassin*.

[79] Quite simply, the Crown's conduct regarding the proceeds of the I.R. 172 transaction was not in issue in *Apsassin* and was not material to the causes of action adjudicated in that litigation. For this reason, the alleged breaches in the purchase transaction and the alleged failure to remedy before the Tribunal are separate and distinct from the causes of action adjudicated in *Apsassin*.

[80] It should also be noted that the Supreme Court of Canada in *Apsassin* viewed the failure to reserve mineral rights in I.R. 172 and the later failure to remedy that error as two distinct causes of action, yielding separate treatment by the *Limitation Act*. The breaches were essential part of the causes of action. This further supports the view that the alleged breaches by the Crown during the purchasing steps and alleged failure to remedy in 1952 once they were aware that the Province had not conveyed mineral rights in the Replacement Reserves should be considered as separate and distinct causes of action.

[81] Finally, the material facts relating to the calculation of damages would also be separate and distinct from the *Apsassin* litigation, as the damages here, if any, would relate to the Replacement Reserves only, while the Supreme Court of Canada considered liability for the loss of mineral rights in I.R. 172 only. The Supreme Court of Canada directed the parties to address compensation relating to I.R. 172 in the Federal Court proceedings on damages.

[82] It is apparent, however, that the promise of new reserves was part of the persuasion for the surrender of I.R. 172 and was therefore material to the validity of the surrender evaluated in *Apsassin*. That promise is an overlapping material fact.

[83] On this basis, the Crown alleges that despite the differences between the causes of action in *Apsassin* and the Claims now before the Tribunal, the Claims should be viewed as part of the same overall transaction - the surrender of I.R. 172.

[84] The pleadings in the Claims are broadly drafted suggesting multiple causes of action, in the material facts sense, in fiduciary duty and in contract. Regarding expectations for and obligations related to mineral rights in the Replacement Reserves, the Claimants' Declarations of Claim refer to the 1945 surrender but also to the later facts and events through 1952:

> 42. It is clear that the original Fort St. John Beaver Band and Canada reached an agreement at the time of the surrender of the Montney Reserve to the effect that Canada would supply the Band with Replacement Reserves.
>
> 43. Further, it is clear that the parties understood that the Replacement Reserves were to include mineral rights because:
>
> a. The legislation in force at the relevant time defined a "reserve" as including mineral rights. […];
>
> b. The Fort St. John Beaver Band had mineral rights in the Montney Reserve;
>
> c. The Band surrendered its interests in the Montney Reserve on the understanding that it would receive Replacement Reserves and, barring any specific agreement to the contrary, Canada and the Band must have intended that the Band would receive these Replacement Reserves on the same terms that had applied to its original Montney Reserve;
>
> d. Both parties' subsequent conduct in executing a surrender (for lease) of mineral rights in the Replacement Reserves demonstrates that they

> understood that the Replacement Reserves were to include mineral rights; and/or
>
> e. Canada's subsequent conduct in issuing exploration permits in relation to the Replacement Reserves demonstrates that Canada intended and understood that the replacement reserves were to include mineral rights. [DRFN Declaration of Claim at paras 42-43; BRFN Declaration of Claim at paras 44-45 to the same effect]

[85] The Claimants thus seek to base their allegations both on promises made at the I.R. 172 surrender in 1945 and, additionally or in the alternative, on the later transactions between the parties and unilateral acts by the Crown through to 1952.

[86] As discussed, the allegations based on these later events focus on different interests, obligations and decisions by the FSJBB and the Crown, and therefore, address significantly different material facts and causes of action than were adjudicated in *Apsassin.* That new reserves were promised in 1945 was known to the parties in 1947-1952 and is part of the uncontested background to the purchase-related transactions during that period. Similarly, provincial land policies leading up to 1950 are part of the factual matrix of the current Claims before this Tribunal. There is no question that this factual matrix overlaps with the *Apsassin* litigation, but, in my view, the points of overlap are not enough to render the material facts the same. Some overlap is admissible (*Fournogerakis, supra; Greymac, supra; Batchelor, supra; Thandi; supra).*

[87] I therefore find the pleadings that are based on transactions and events subsequent to the 1945 surrender refer to that surrender contextually as part of the background expectations of the parties as they entered those later transactions. Those pleadings address causes of action that are separate and distinct. *Res judicata* does not apply to them.

[88] However, to the limited extent that the Declarations of Claim refer to the 1945 surrender to allege that a binding obligation for mineral rights in the Replacement Reserves arose at the surrender meeting itself, that surrender was the same transaction adjudicated in *Apsassin*. Applying *Grandview*, it is necessary to consider whether this pleading should have been argued in *Apsassin.*

b) Should the Claims have been argued in the *Apsassin* proceedings?

[89] In *Hoque*, the Court considered whether the new cause of action was separate and distinct, but also considered whether it was a collateral attack, whether the Court was being asked to do something inconsistent with an earlier decision, the policy context of the claims in the new action, and the overall effects on the integrity of the administration of justice in allowing or disallowing the new action.

[90] The Claims before me raise no inconsistency or collateral attack on the *Apsassin* litigation. If anything, the Claims seek to apply fiduciary principles articulated in *Apsassin* by the Supreme Court of Canada to the Crown's conduct when purchasing the Replacement Reserves and upon discovering that it had not obtained mineral rights in the Replacement Reserves.

[91] The issue whether mineral rights were presumptively included in the 1945 promise of Replacement Reserves was never decided in the Supreme Court of Canada or Federal Court of Appeal as it was unnecessary to do so; as mentioned, the trial judge's comments on the Replacement Reserves went beyond evaluating the validity of the surrender of I.R. 172, and as such, are *obiter dicta*.

[92] The Crown nevertheless asserts that the Claims are an affront to the integrity of the administration of justice because they are an attempt to litigate by instalment.

[93] I do not agree. The Claims do not seek an inconsistent result and do not attempt to re-litigate substantially the same material facts. The Claimants do not seek to re-litigate the validity of the surrender. The breaches they allege came later and are separate and distinct. The Declarations of Claim plead multiple bases for the alleged obligation. The basic promise of new reserves that was noted by the Supreme Court of Canada is not contested. The Crown's actual purchase of the Replacement Reserves and the alleged failure to fulfill obligations regarding mineral rights in the Replacement Reserves were irrelevant to the *Apsassin* proceedings. To the limited extent that the Claimants assert binding obligations that arose in 1945 surrender meeting (as opposed during later interactions between the parties) that were later breached, I find that it is not plain and obvious that even those pleadings should have been brought with the *Apsassin* litigation.

[94] I agree with the submissions of the Claimants. The *Apsassin* litigation was already very long (spanning some 10 weeks), expensive and complex. The law of the day with respect to the fiduciary role of the Crown was in the process of evolving and was far less clear than at the present time. It is not reasonable or evident that the present Claims should have been advanced alongside the causes of action adjudicated in *Apsassin* or that it would have been more efficient or practical to do so.

[95] Furthermore, as expressed below regarding the Release and the way the Parties defined the "Action", it is also not at all clear that the Parties expected finality regarding the Replacement Reserves with the close of the *Apsassin* proceedings.

[96] Also, significant for the administration of justice, the available evidence does not establish that the Claims would expose the Crown to possible double recovery. The Supreme Court of Canada found liability relating to the loss of mineral rights in I.R. 172 only and ordered a trial regarding damages on that basis. The Vanderkruyk Affidavit further supports this view of the compensation resulting from the *Apsassin* litigation. The Claims before the Tribunal address what was done with a small portion of the $70,000 in proceeds, something to which the *Apsassin* settlement process was not directed by the Supreme Court of Canada.

[97] Canada has not satisfied the onus of proof placed upon it to demonstrate that it is plain and obvious that *res judicata* should bar the Claims.

[98] "[T]he administration of justice is not threatened, but rather served, by giving this plaintiff his day in court" (*Rivet v BC*, 2007 BCSC 731 at para 126).

4. Should the Claims be barred as an abuse of process?

[99] The abuse of process doctrine protects the integrity of the administration of justice where the technical requirements of *res judicata* cannot be made out (*Toronto, supra*). The key concerns are whether the cause of action represents a collateral attack, seeks results inconsistent with a prior decision and finality (*Toronto, supra*).

[100] For the reasons given above, the Claims before the Tribunal are not collateral attacks and, if successful, would not create inconsistent results.

[101] The Claims do not attack the finality of the Supreme Court of Canada's conclusions in *Apsassin* regarding mineral rights in I.R. 172 or the validity of the surrender.

[102] While a party is entitled not to be vexed twice for the same cause, no such protection extends where causes of action are sufficiently separate and distinct so as to form the basis for a different claim. I have found that the breaches alleged in the purchase of the Replacement Reserves to be separate and distinct.

[103] The Claimants do seek to rely on the surrender promises, but the Claims are very significantly different from *Apsassin* and for the reasons given already, I do not conclude that those pleadings should have been argued in *Apsassin*. Abuse of process is not a rigid doctrine. The efficiencies and conveniences of finality are not the primary concern of abuse of process although they are factors *(Toronto, supra).* Instead, the primary consideration is the integrity of the administration of justice.

[104] I have already given reasons related to the integrity of the administration of justice for why the Claims should be permitted to proceed in their entirety to an adjudication of their merits.

[105] Allowing the Claims to proceed is consistent with the procedural powers granted by *SCTA*, s 17(c) and with the intention of the legislation described in the preamble, which states:

> it is in the interests of all Canadians that the specific Claims of First Nations be addressed;
>
> resolving specific Claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations….

[106] In view of the substantial difference in material facts than those in the *Apsassin* litigation, the reasons above relating to the integrity of the administration of justice, the purpose and policy of the specific Claims process and *SCTA*, and the high burden of proof for dismissal on the ground, it cannot be said that these Claims constitute an abuse of process.

B. Part 2 – The Release and Indemnity Agreement

[107] Following the Supreme Court of Canada's judgment in *Apsassin*, the parties to that litigation reached a Settlement Agreement executed on February 27, 1998. Pursuant to the Settlement Agreement, the Claimants also signed a Release on February 26, 1998. The

Settlement Agreement was then approved and incorporated into a judgment of the Federal Court of Canada ordering damages to be paid to the Claimants *(Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development,* [1998] FCJ No 1952).

[108] At issue is the interpretation of the words "with respect to the Action" that appear in clause 2 (a) and (b) of the Release. Clause 2 of the *Release* (CBD Vol 8, doc 50) says:

> (a) to forever release and discharge Canada and Her Ministers, officials, servants, employees, agents and their successors and assigns from any Proceeding whether known or unknown, and whether in law, in equity or otherwise, which the Bands and members of the Bands and any of their respective heirs, descendants, legal representatives, successors and assigns may every have had, may now have or may in the future have against Canada and Her Ministers, officials, servants, employees, agents and their successors and assigns with respect to the Action;
>
> (b) not to assert any Proceeding whether known or unknown, and whether in law, in equity or otherwise, which the Bands and members of the Bands and any of their respective heirs, descendants, legal representatives, successors and assigns may ever have had, may now have or may in the future have against Canada and Her Ministers, officials, servants, employees, agents and their successors and assigns with respect to:
>
> (i) the Action;
>
> […][para 2]

[109] The word 'Action' is specifically defined in clause 1(a) of the Release:

> …all of the claims made in Action No. T-4178-78 as set out in the Further Amended Statement of Claim dated December 17, 1985, and filed June 10, 1986 and the judgment of the Supreme Court of Canada dated December 14, 1995 as revised May 23, 1996 in SCC No. 23516; [para 1(a)]

1. Positions of the Parties

a) Canada's Position

[110] Canada argues that the Release discharges it from obligations "with respect to" the surrender of I.R. 172. Canada asserts they are released from the Claims because they were known at the time the Release was executed and are relevant and rationally connected to the surrender or I.R. 172.

[111] Because the Claims were known to exist at the time the Release was executed, Canada

submits that, had the Parties intended to exclude these Claims from the Release, they would have used explicit language to do so. Canada argues that, had the Parties intended to restrict the Release only to the pleadings in the 1986 FASOC and Supreme Court of Canada's judgment in *Apsassin*, they would have chosen to use more restrictive language such as, "in the Action".

[112] Canada also asserts that support for this proposed interpretation flows from interpreting clause 2 as a whole. Canada argues that, because that clause releases "unknown" claims, any reasonable interpretation cannot be restricted to only those pleadings advanced in the 1986 FASOC and adjudicated in *Apsassin.*

[113] Canada argues that "with respect to" means anything relevant or rationally connected to the subject matter in issue. Canada maintains that the Claims could have been advanced in the *Apsassin* trial since no new evidence was required to do so, which demonstrates a significant factual connection between the two proceedings. Canada also points to the plaintiffs' use of evidence regarding the Province's retention of mineral rights in the Replacement Reserves to suggest that Canada had a fiduciary duty to reserve mineral rights in I.R. 172. In Canada's view any post-surrender duties were rationally connected to the adjudication of the surrender in *Apsassin.*

[114] Canada points to the surrounding circumstances as being supportive of the interpretation that they advance. These circumstances include the fact that the Parties had been in lengthy and complex litigation regarding the surrender of I.R. 172; that the Claimants had knowledge of the present Claims and chose not to advance them; and, that the Recitals to the Release demonstrate an intention to release all Claims "arising from or in connection with the Action" (Recital C).

[115] Lastly, Canada argues that it is in the interests of justice to uphold the Release to give finality to the litigation over the surrender of I.R. 172 thereby providing an end to the lengthy legal dispute adjudicated in *Apsassin.*

b) Claimants' Position

[116] The Claimants submit that the Release expressly defined "Action" as encompassing all of the Claims made in the *Apsassin* litigation as set out in the FASOC filed in 1986, which did not include a claim to mineral rights in the Replacement Reserves. They argue that the word

"Action" also includes reference to the judgment of the Supreme Court of Canada, which contains no finding or ruling on the issue of mineral rights in the Replacement Reserves.

[117] The Claimants argue that the application of proper interpretative principles to the words of the Release and consideration of the language used in the document as a whole in the context of the surrounding circumstances in which it was negotiated, support the position that the Release does not apply to the Claims before the Tribunal for loss of the mineral rights on the Replacement Reserves. As the Claimant's Joint Memorandum of Law and Argument states:

> The purpose of the release was to finally resolve any and all claims - whether known or unknown, and whether arising in the past, present or future - for the surrender, sale and transfer of IR 172, including the loss of mineral rights in IR 172. The recitals and limited definition of "Action" contained in the release support this view. Further, the factual matrix supports this interpretation, given that the parties' negotiations and agreement on the sum of $147,000,000 to resolve the litigation appear to have been based on their respective valuations of the loss of IR 172 mineral rights alone. [para 116]

[118] The Claimants argue that a consideration of surrounding circumstances indicates the compensation the plaintiffs received related solely to I.R. 172 indicating that this was what was intended and in the contemplation of the Parties when they executed the Release. The Claimants assert that this interpretation is the most fair and reasonable and therefore should be taken as the interpretation that best promotes the intentions of the Parties.

2. Principles of Interpretation

[119] The interpretation of a release is guided by contract law and governed by the written text. In *Bank of British Columbia Pension Plan v Kaiser*, 2000 BCCA 291 at para 17 [*Kaise*r], the Court of Appeal listed the relevant principles to be applied when interpreting a release. In Anthony Gordon Guest, ed, *Chitty on Contracts*, vol 1 (London: Sweet & Maxwell Ltd, 1994), they include:

> […]
>
> 1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.

> 2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
>
> 3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.
>
> 4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
>
> 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology. [Underlining added; 1074-5]

[120] Contracting parties use recitals to confine the operation of general words. Reading a document as a whole "is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest terms. Thus reference is frequently made to recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of general words" (*White v Central Trust* (1984), 54 NBR (2d) 293 (CA) [*White*], per La Forest JA at para 32).

[121] Similarly, the Court of Appeal in *Kaiser* explained that because releases in particular are often drafted broadly, the confining effects of recitals are especially significant, and general words should be limited to what was in the contemplation of the parties:

> […]
>
> Like other written documents, one must seek the meaning of a release from the words used by the parties. Though the context in which it was executed may be useful in interpreting the words, it must be remembered that the words used govern. As in other cases, too, the document must be read as a whole. This is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest of terms. Thus reference is frequently made to recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of general words.
>
> As Lord Westbury stated in the House of Lords' case of *Directors of London & South Western R. Co. v. Blackmore* (1870), L.R. 4 H.L. 610 at p. 623: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given." [para 18]

[122] Referring to those same comments by Lord Westbury, La Forest JA stated in *White*,

affirmed in *Hannan v Methanex Corp*, [1998] BCJ No 318 at para 39*; Xu v Ching*, 2008 BCSC 1796 at para 28:

> By referring to what was in the contemplation of the parties, Lord Westbury was, of course, not opening the door to adducing evidence of what was actually going on in their minds, still less to making inferences about it. Such considerations are relevant solely to issues such as undue influence, mistake, fraud and the like which have no application here. What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about. [*White* at para 33]

[123] Traditionally, a finding that the words are framed in a general manner must precede a consideration of the surrounding circumstances.

[124] The scope of the surrounding circumstances or factual matrix was explained in *PC Devlin Law Corp v 403827 BC Ltd*, 2011 BCSC 1255:

> The surrounding circumstances which give rise to a contract are commonly referred to as the factual matrix. The frequently cited definition of the factual matrix comes *from Prenn v. Simmonds*, [1971] 3 All E.R 237 (HL), at 241:
>
> > ...evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.
>
> In *Penderville Apts. Development Partnership v. Cressey Development Corp.*, [1990] 43 B.C.L.R. (2d) 57, 39 C.P.C. (2d) 18 (BCCA), Southin J.A. said:
>
> > The matrix does not include either party's own reasons for wanting a particular clause or form of words used in a document or any particular subject addressed by it. The matrix is the genesis, aim and object of the whole transaction – the sort of thing that was once contained in recitals to instruments.
> >
> > The authorities make clear that the evidence that is admissible to establish the factual matrix does not include evidence of what may have been said in negotiations or draft agreements. It is only the final agreement that records a consensus: *Prenn v Simmonds*, at 240. [Emphasis added; paras 27-29]

[125] In *Abundance Marketing Inc v Integrity Marketing Inc*, [2002] OTC 731 (Ont Sup Ct J) at paras 11-16, the Court explained in detail the use of evidence regarding surrounding circumstances:

Extrinsic evidence is not admissible if a document is clear and unambiguous on its face. There may be pristine examples of drafting which may be so described, however, the verbiage of many documents can lead to confusion and ambiguity. Today *"words do not have immutable or absolute meanings, they take their meanings from their context.*" Ref. S.M. Waddams. The Law of Contracts, 3rd edit. (Toronto, Canada Law Book) at p. 215.

There are going to be degrees of clarity and lack of ambiguity, and the evaluation of such cannot be taken without a contextual approach. To do otherwise could lead to absurd situations in which factually disconnected issues are allegedly resolved.

… [citation to *White*, similarly quoted above, omitted]…

Context is defined by Justice Lane in Trans Canada Pipelines Ltd. v. Potter Station Power Ltd. Partnership, (2002) O.J. No. 42 (Ont. Sup. Crt.) para 35; *"Context consists of two elements: the background, business purpose analysis; and the context of words within which the difficult passage is found."*

Context or factual matrix can be derived from;

> a) the exchange between the parties leading up to the creation of a document, whether orally or in printed form (ie. correspondence or e-mails);
>
> b) the actual creation of the document, was it a product of consultation and review;
>
> c) the conduct of the parties before, during and after the execution of the document;
>
> d) any personal circumstances of a party which would impact upon comprehension or understanding, for example, education, business or legal acumen.

This contextual analysis, in so far as it touches upon the intentions and expectations of the parties, must be an objective one. Lord Wilberforce in Reardon Smith Lime Ltd. v. Hansen-Tangen (1976) 3 All E.R. 570(H.L.) at page 574 stated:

> *"When one speaks of the intentions of parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim or object, or commercial purpose, one is speaking objectively of what a reasonable person would have in mind in the situation of the parties."* (as quoted by Wilkinson J. in Cinabar Enterprises Ltd. v. Bertelson, Ibid. para. 51).

[126] The broader the terms used in a release, the more important it becomes for a Court to consider the surrounding circumstances when evaluating what was in the contemplation of the Parties at the time they executed the release.

[127] Where a document is truly capable of two or more interpretations, "the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties" (*Consolidated Bathurst Export Ltd v Mutual Boiler*, [1980] 1 SCR 888 at 901 [*Consolidated Bathurst*]).

[128] The overall goal is to find, "an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract" (*Consolidated Bathurst, supra* at 889).

3. Should the Claims be dismissed based on the Release?

[129] The purpose of the Parties in executing the Release was to provide finality to the lengthy litigation in *Apsassin.*

[130] The Parties agree that the "Action" referred to in the Release was the action described in the FASOC filed in 1986 in *Apsassin.* In the Release the parties very specifically defined "Action" so as not to include the known Claim regarding loss of the mineral rights in the Replacement Reserves. By referring specifically to the FASOC as opposed to the original 1978 SOC, the definition of "Action" chosen by the parties indicates that the pleadings regarding Replacement Reserves in the 1978 Statement of Claim were not intended to be included in and governed by the Release.

[131] Consideration of the document as a whole may shed light on the intention of the Parties including the words "with respect to" in clause 2 of the Release.

[132] Recitals confine the generality of words in a release. Paragraph A of the Recitals refers to the claims set out in the FASOC which, unlike the original SOC, did not include a claim for loss of mineral rights in the Replacement Reserves.

[133] Paragraph B of the Recitals refers to the judgment of the Supreme Court of Canada and notes that:

> [t]he Supreme Court of Canada ordered that the plaintiffs are entitled to damages against the defendant for breach of fiduciary duty with respect to mineral rights in Indian Reserve 172 as were conveyed by the Director of *the Veterans' Land Act* after August 9, 1949...

[134] In paragraph C of the Recitals, the Parties noted that Canada had offered to settle "all claims arising […] from or in connection with the Action" and that the resulting settlement was "based on Canada's offer".

[135] Paragraph E of the Recitals notes that the trial of the assessment of damages for the breaches of fiduciary duty found by the Supreme Court of Canada are adjourned to allow settlement discussions to take place.

[136] The Recitals, together with the definition of "Action", indicate that the intention of the Parties was that "with respect to the Action" in clause 2 of the Release related exclusively to limiting the Crown's liability flowing from the Crown's breaches with reference to I.R. 172.

[137] Canada was represented at the time the Release was negotiated and drafted. Had the Parties intended to release all claims for mineral rights in the Replacement Reserves they could have, and should have, explicitly drafted the Release in a manner giving effect to that intention.

[138] The Parties' acknowledgement in Recital C that Canada had offered to settle all claims "arising from or in connection with the Action" is not sufficiently clear to yield an "evident intention to renounce" any possible causes of action relating to mineral rights in the Replacement Reserves *(Kaiser, supra).* That Recital describes what Canada offered to settle, not what the Parties agreed to release, and as Recital B indicates, the settlement process was directed only to damages for lost mineral rights in I.R. 172.

[139] Thus, after considering the document as a whole, I am not persuaded by Canada's argument that the words "with respect to" in the Release signals an "evident intention" by the Parties to have the Release encompass claims for loss of mineral rights in the Replacement Reserves. While the Supreme Court of Canada interpreted the words "with respect to" as having a broad meaning in *CanadianOxy Chemicals Ltd v Canada (Attorney General*), [1999] 1 SCR 743, the circumstances in that case involved the interpretation of statutory provisions relating to an environmental offence. The same words may convey a narrow meaning in a different context.

[140] Where the interpretation of a release was at issue, La Forest JA, as he then was, considered the words "in relation to the estate" to have a distinctly narrow meaning so as to allow the action for unjust enrichment pursued by the disinherited in that case (*White, supra*, at paras 34-35).

[141] Similarly, taking the words "in respect of" from Henderson, supra and *Nowegijik v Canada*, [1983] 1 SCR 29 at 39, out of the context of those cases and attributing very broad meaning to them here is not justified. I am not persuaded to expand the meaning of "with respect to the Action" to any matter the Crown argues is rationally connected to the "Action".

[142] I find that the Release read as a whole is sufficiently clear such that a consideration of surrounding circumstances is not necessary. However, if I were to consider the surrounding circumstances as urged by the Parties, then I would reach the same conclusions regarding the meaning of "with respect to the Action".

[143] The surrounding circumstances were the settlement of the *Apsassin* litigation, as the Recitals themselves indicate. That litigation, thoroughly described already, did not address potential liability for the absence of mineral rights in the Replacement Reserves. As Recital B states, the Supreme Court of Canada found the appellants entitled to damages "with respect to mineral rights in Indian Reserve 172".

[144] There is no evidence to suggest any reason why a reasonable person in the circumstances of the plaintiffs would have agreed to release their known claim to mineral rights in the Replacement Reserves. There is no evidence that releasing the known claim to mineral rights in the Replacement Reserves was what was in the contemplation of the Parties when they executed the Release.

[145] The Crown raised concerns regarding the weight that may be given to evidence presented by the Claimants as to what losses the plaintiffs in the *Apsassin* litigation were compensated for in their settlement of that litigation.

[146] Section 13(1)(b) of *SCTA* states that the Tribunal may "…receive and accept any evidence...and other information…that it sees fit, whether or not that evidence would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege

under the law of evidence". Canada did not raise an objection to the admissibility of this evidence on the basis of privilege, but rather, confined its objection to the operation of general evidence law, to which I am not bound by statutory exemption.

[147] The contested evidence is contained in the Vanderkryuk Affidavit, which was submitted to the Federal Court to support the settlement in *Apsassin.* The Vanderkryuk Affidavit indicates that the Supreme Court of Canada awarded damages in relation to 6.75 sections of I.R. 172, which at the hearing of this Application was described as representing approximately one third of the lands on I.R. 172 in relation to which the Claimants had lost mineral rights. The Vanderkryuk Affidavit also indicates that the parties in *Apsassin* prepared expert reports on damages regarding mineral rights in I.R. 172 only.

[148] This evidence supports my view that the *Apsassin* settlement process addressed I.R. 172 only and not the known claim regarding mineral rights in the Replacement Reserves. This evidence is insignificant; it merely adds another layer of confirmation to the interpretation I have given to the Release read as a whole, above.

[149] I conclude that the Parties did not intend for the Release to encompass the Claimants' grievance that mineral rights were not purchased with the Replacement Reserves. Given the length, effort and cost put into that litigation and the amount of compensation involved, it is reasonable to conclude that "with respect to the Action" was intended by the Parties to refer to causes of action based on the validity of the surrender of I.R. 172, its sale and the loss of mineral rights in I.R. 172. It is implausible to conclude in the circumstances that those words were intended to include another claim of potentially very significant value that was already known to the Parties, that was based on a different reserve and different alleged breaches, and that could easily have been included with more specific language.

[150] Even if the words were considered to be truly ambiguous, which I find they are not, the interpretation that is most reasonable and fair will best reflect the intentions of the Parties (*Consolidated Bathurst, supra*). It would be unfair to prevent the Claims from being heard on their merits and deny the Claimants access to the Tribunal based on speculation that the words "with respect to the Action" were intended to encompass claims to mineral rights in the Replacement Reserves given the language of the Release, the surrounding circumstances, and the

damages at stake.

[151] The Claims regarding mineral rights in the Replacement Reserves were not intended by the Parties to be encompassed by the Release when that document was executed. This conclusion is based upon the specific language in paragraphs A, B and E of the Recitals, the definition of "Action" in the Release, and the wording of clause 2.

[152] If the Application is considered from the point of view that there is further ambiguity in the words "with respect to the Action", then the surrounding circumstances support the same result. Applying *Consolidated Bathurst* to address any remaining ambiguity, the most reasonable and fair conclusion is that the Parties did not intend the Release to bar the Claimants' grievance regarding mineral rights in the Replacement Reserves.

VIII. FINAL CONCLUSION

[153] The Application by Canada is dismissed.

[154] The Parties may file written argument with respect to the issue of costs within 30 days of the release of this decision and shall not exceed five pages each in length.

PATRICK SMITH

Honourable Patrick Smith
Specific Claims Tribunal Canada

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140220

File No.: SCT-7007-11

OTTAWA, ONTARIO February 20, 2014

PRESENT: Honourable Patrick Smith

BETWEEN:

DOIG RIVER FIRST NATION

Claimant (Respondent)

and

BLUEBERRY RIVER FIRST NATIONS

Claimant (Respondent)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent (Applicant)

COUNSEL SHEET

TO: **Counsel for the Claimant DOIG RIVER FIRST NATION**
As represented by Allisun Rana and Julie Tannahill
Rana Law, Barristers & Solicitors

AND TO: **Counsel for the Claimant BLUEBERRY RIVER FIRST NATIONS**
As represented by James Tate and Ava Murphy
Ratcliff & Company LLP

AND TO: **Counsel for the Respondent**
As represented by Brett C. Marleau and Naomi Wright