Federal Court  Cour fédérale

Date: 20210423

Docket: T-336-19

Citation: 2021 FC 329

Ottawa, Ontario, April 23, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

TREATY LAND ENTITLEMENT COMMITTEE INC. ON ITS OWN BEHALF, AND AS REPRESENTATIVE OF THE TREATY LAND ENTITLEMENT FIRST NATIONS OF BARREN LANDS FIRST NATION, BUFFALO POINT FIRST NATION, GOD'S LAKE FIRST NATION, MANTO SIPI CREE NATION, NISICHAWAYASIHK CREE NATION, NORTHLANDS DENE FIRST NATION, NORWAY HOUSE CREE NATION, OPASKWAYAK CREE NATION, ROLLING RIVER FIRST NATION, SAPOTAWEYAK CREE NATION, WAR LAKE FIRST NATION, AND WUSKWI SIPIHK FIRST NATION, BUNIBONIBEE CREE NATION, BROKENHEAD OJIBWAY NATION

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS OF CANADA NOW DESCRIBED AS THE MINISTER OF INDIGENOUS SERVICES CANADA (HEREINAFTER "CANADA")

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The historic treaties between the First Nations and the Crown contain a promise to set aside reserves. To settle long-standing disputes concerning the implementation of this promise, Canada, Manitoba and the applicants have entered into the Manitoba Framework Agreement, which provides for the addition of more than 1,000,000 acres of land to the First Nations' reserves, over a certain period of time. The agreement also contains releases in favour of Canada, that is, the First Nations agree not to sue Canada with respect to the failure to comply with the provisions of the treaties regarding the creation of reserves.

[2] While the implementation of the agreement was well underway, Canada realized that it had a duty to consult with other Indigenous groups, most importantly the Métis, before adding land to the applicant First Nations' reserves. Consulting with the Métis, however, caused significant delays in the reserve creation process.

[3] Unsatisfied with this, the applicant First Nations resorted to the agreement's dispute resolution process. An adjudicator heard the matter and decided that Canada had breached the agreement. Among other reasons, the adjudicator found that Canada had inserted an additional step, not contemplated by the agreement, in the reserve creation process, without first obtaining the consent of the other parties. According to the adjudicator, this constituted an "event of default."

[4] Where an event of default continues for more than 180 days, the agreement gives the First Nations the right to apply to a Court to have the releases declared void. This is what the applicant First Nations are seeking in the present proceeding. Canada acknowledges that they are entitled to make such a request. It argues, however, that the Court's power to issue such a declaration is discretionary and that the Court should decline to void the releases.

[5] In this regard, Canada argues that there has been significant implementation of the agreement and that voiding the releases would be a disproportionate sanction depriving it of the totality of the consideration it obtained for the agreement. Canada also says that it cannot remedy the default alone and that the applicant First Nations are taking advantage of the situation to ask for a wholesale renegotiation of the agreement.

[6] These arguments do not persuade me that I should deny the relief to which the applicant First Nations are entitled. Canada minimizes the scope of its default. If it wishes to add unilaterally a new step to the reserve creation process provided in the original agreement, it cannot blame the applicant First Nations for seeking to renegotiate other aspects of the agreement. Nor can it complain about the consequences of a dispute resolution process that it bargained for.

II. Background

[7] This dispute involves a complex scheme for the large-scale redistribution of land. My role in this dispute, however, is quite narrow. To understand the parameters of this role, it is necessary to begin by explaining the roots of the dispute, the complex contractual scheme aimed

at resolving the dispute and the unforeseen circumstance that caused delays in the implementation of this scheme. I will then describe the dispute resolution mechanism contained in the parties' agreement. Lastly, I will summarize the decision rendered by an adjudicator to whom the parties submitted their dispute.

A. *Genesis of the Dispute*

(1) Historic Treaties

[8] This year marks the 150th anniversary of the signing of Treaty 1 in southern Manitoba. This treaty and others concluded in the late 19th and early 20th century are a defining component of the relationship between the Crown and the First Nations of Western Canada and northern Ontario. Treaties are "agreement[s] whose nature is sacred": *R v Badger*, [1996] 1 SCR 771 at paragraph 41. It would be beyond the scope of this judgment to provide a full account of the meaning of these treaties. Suffice it to say that First Nations and the Crown have differing perspectives on the extent of their rights and obligations. See, for example, Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishnabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013).

[9] The present dispute focuses on one very important promise contained in treaties 1, 3, 4, 5, 6 and 10, as they pertain to Manitoba: the creation of reserves. Each treaty contains a provision requiring the Crown to set apart reserves for the benefit of treaty First Nations. The area of these reserves is to be calculated according to the population. For example, under Treaty 3, the promise was for 640 acres for each family of five.

[10] The promise to set apart reserves was not kept to the satisfaction of treaty First Nations. The reserve creation process was plagued by delays and omissions. Insufficient land was set apart. Moreover, a disagreement arose as to the relevant time for the calculation of the reference population. Over time, these issues became known as “treaty land entitlement” or, in short, “TLE.”

(2) Treaty Land Entitlement Agreements

[11] Instead of turning to the courts to settle these issues, several Manitoba First Nations decided to negotiate a settlement. In 1997, these First Nations, represented by the applicant Treaty Land Entitlement Committee inc. [TLE Committee], entered into the Manitoba Framework Agreement [MFA] with Canada and Manitoba.

[12] In today’s context, fulfilling the promise to set aside an adequate amount of reserve land is a complex task. In certain areas, most of the land is privately owned. Elsewhere, public lands are owned by Manitoba, which must transfer them to Canada before they are formally set apart as reserves. Third party interests must be dealt with and environmental assessments must be performed, to highlight only a few of the potential issues.

[13] The MFA is a complex agreement setting out in detail the process for the creation of reserves to fulfil the promise of the treaties. In a nutshell, it allows signatory First Nations to select a certain amount of public lands that Manitoba will transfer to Canada, with a view to their designation as reserves. Certain First Nations are also allowed to acquire land from third parties or certain categories of public lands for the same purposes. In addition, Canada undertakes to pay

a monetary compensation to participating First Nations. Moreover, each First Nation releases Canada and Manitoba from all claims related to the fulfilment of the treaty promise regarding the creation of reserves.

[14] The MFA is a framework agreement. This means that its provisions are intended to be incorporated in separate TLE agreements entered into by each First Nation. This is accomplished through various drafting techniques, which need not be described in detail here. Parliament enacted legislation to facilitate the implementation of the MFA, in particular to allow the Minister, instead of the Governor in Council, to set apart reserves. This legislation is currently known as the *Additions of Lands to Reserves and Reserve Creation Act*, enacted by section 675 of the *Budget Implementation Act, 2018, No 2*, SC 2018, c 27.

[15] There are many steps towards the creation of a reserve and the parties understood that it would take time for all the required land to become reserves. Section 4.01 of the MFA provides that a First Nation must select Crown land within three years of the signature of its TLE agreement, and that First Nations entitled to acquire other land should do so within fifteen years. Section 4.02, however, provides for the possibility of extending these time limits. There are no time limits applicable to the remainder of the process.

[16] It is fair to say that fulfilling the promises of the MFA has taken more time and effort than initially contemplated. Twenty-four years after the signing of the MFA, about 561,000 acres, or a little over 50% of the total entitlement of 1,100,000 acres, have been set apart as reserves. About 193,000 acres are currently being processed, and 346,500 acres remain to be

selected or acquired. It is not my role to investigate the causes of these delays. I note, in this regard, that a portion of the lands remaining to be selected or acquired is intended for six First Nations who have not yet entered into a TLE agreement pursuant to the MFA and are not parties to this proceeding.

(3) Consulting With Other Indigenous Groups

[17] Even though the parties do not agree on the extent of its effects, one cause of the delays in the implementation of the MFA is that Canada decided that it needed to consult with other Indigenous groups before adding lands to reserves.

[18] Treaties, and the MFA, were made with First Nations, not the Métis. While the status of the Métis as an Indigenous people was recognized in section 35(2) of the *Constitution Act, 1982*, it took some time for governments to take stock of the implications. As holders of aboriginal rights recognized and affirmed by section 35, the Métis may assert a right to be consulted, according to the framework laid out by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

[19] In 2012, Canada determined that it had a duty to consult the Métis before creating reserves under the process provided by the MFA. There was no clearly defined process for such consultation. This resulted in significant delays. While Canada disputes the assertion, the applicants say that Canada has effectively granted the Métis a veto over reserve creation pursuant to the MFA. For the purposes of these reasons, I need not measure precisely the extent to which

consultation caused delays in the process contemplated by the MFA. The findings of the adjudicator in this regard are summarized below.

[20] Nonetheless, it is useful, at this juncture, to explain how Canada sought to integrate this newfound duty to consult in the MFA process. Canada has a formal policy, called the Additions to Reserve policy, governing the enlargement of reserves or the creation of new reserves, applicable throughout the country. Pursuant to section 8.02(2) of the MFA, this policy applies to the setting apart of lands as reserves under the MFA. Moreover, pursuant to section 8.02(3), this policy is "frozen," that is, while Canada can amend it, these amendments do not apply to the MFA process unless the parties agree. The policy in force when the MFA was entered into did not make provision for consulting other Indigenous groups. However, a new version of the policy was published in 2016, this time requiring such consultation. The consequences of this change will be explored below.

B. *The MFA's Dispute Resolution Mechanism*

[21] Given the complexity and expected duration of the reserve creation process, the parties to the MFA contemplated that it would give rise to disputes. Accordingly, they provided for a detailed and exhaustive dispute resolution process.

[22] First, section 34 of the MFA creates the Implementation Monitoring Committee, composed of representatives of the parties and an independent chairperson. Among other things, the Committee may make recommendations to the parties regarding the resolution of disputes.

[23] Second, section 35 of the MFA provides for various methods of formal dispute resolution involving an independent third party, including fact-finding, mediation, non-binding arbitration and binding arbitration pursuant to the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd suppl). Where binding arbitration is selected, the Implementation Monitoring Committee must prepare the terms of reference for the arbitration, including the questions that the adjudicator must decide. Arbitration awards may be appealed to the Manitoba Court of Queen's Bench on issues of law.

[24] Section 36 makes more detailed provisions with respect to "Material Failure and Events of Default." It provides for a special process applicable where a party has materially failed to comply with a fundamental term of condition of the MFA or a TLE agreement. Relevant to this case are the following portions of the definition of event of default in section 36.02:

> The following constitute Events of Default by a party or an Entitlement First Nation:
>
> […]
>
> (b) an Adjudicator in binding arbitration has determined:
>
> (i) that a party or an Entitlement First Nation has, repeatedly and in a manner which clearly establishes a pattern, materially failed to comply with its obligations under this Agreement or a Treaty Land Entitlement agreement; […]

[25] Where an adjudicator finds a party to have committed an event of default, that party must, according to section 36.03, "determine and identify reasonable means of remedying the Event of Default."

[26] These provisions of the MFA must be read together with those of the release and indemnity given by each First Nation to Canada. The releases are found in each TLE agreement, but they follow a template provided by section 25 of the MFA. The template uses a section number "X" and I will use this as well for ease of reference. Likewise, the indemnity regarding claims brought by third parties against Canada is found in section 26 of the MFA and is reproduced in each TLE agreement.

[27] Section X.05, which is at the crux of this case, describes the fate of the release and indemnity when an event of default happens:

> X.05 Suspension of Release
>
> (1) Subject to Subsections (2) and (3), the right of Canada to rely on the Release and Indemnity shall be suspended in the event Canada has committed an Event of Default.
>
> (2) Upon Canada remedying an Event of Default referred to in Subsection (1), Canada shall again be entitled to rely upon the Release and Indemnity, subject to Subsection (4).
>
> (3) For the purposes of Subsection (2), where the Event of Default is as described in Paragraph 36.02(b) of the Framework Agreement, Canada shall be deemed not to have remedied the Event of Default unless and until the Implementation Monitoring Committee or an adjudicator in binding arbitration has determined that Canada has taken reasonable steps to remedy the default.
>
> (4) In the event Canada has committed an Event of Default and that Event of Default continues for a period of 180 days, the Entitlement First Nation shall be entitled to request a declaration before a court of competent jurisdiction that the Release and Indemnity is void or ineffective in whole or in part and that Canada is barred from relying on the Release and Indemnity.
>
> […]

C. *The Arbitration*

[28] In 2016, the TLE Committee began the formal process set forth in the MFA for alleging that Canada's consultation with the Métis constituted a material failure to comply with the MFA.

[29] After unsuccessful negotiations, the parties agreed to send the matter to binding arbitration. To provide adequate factual context in respect of certain issues, the adjudicator's terms of reference identified 35 specific parcels selected or acquired by seven First Nations.

[30] The questions referred to arbitration included the TLE Committee's request for a declaration that Canada did not have a duty to consult with the Métis with respect to these 35 parcels. The adjudicator found that she did not have jurisdiction to render a decision regarding Canada's duties towards Indigenous groups who are not parties to the MFA.

[31] The adjudicator then considered whether Canada breached certain provisions of the MFA by consulting with the Métis before setting apart lands as reserves. She first held that Canada's conduct amounted to a breach of section 40.07, which provides that the MFA can only be amended by the agreement of the parties. Her reasoning is summarized in the following paragraphs of the award:

> 238. The evidence is clear that Canada deliberately halted its implementation of the Agreement at the point where it would have given Manitoba a legal description of the Lands at Issue which would then have prompted Manitoba to transfer administration and control of those lands to Canada, thereby allowing Canada to put them before the Minister, to set them apart as Reserve.
>
> 239. In doing this I find that Canada has effectively amended the Agreement by inserting into the agreed upon implementation

> process a step which is not provided for in the Agreement and which has a significant impact on the Agreement's implementation.
>
> 240. Canada did this without seeking written agreement of the other parties, in breach of Section 40.07 which requires that the Agreement shall not be amended except by written agreement of the parties.
>
> 241. I understand the somewhat challenging position in which Canada found itself when, well into the implementation of this Agreement, it determined that because of developments in the law, it had a duty to consult the Métis with respect to the Lands at Issue, as well as other lands which may be covered by the Agreement.
>
> 242. In my view, however, the effect of this change in circumstances ought to have been addressed by Canada in accordance with the provisions of Section 40.07. This was precisely the type of matter which the parties anticipated could arise over the course of the Agreement's implementation and which would require an amendment which was achieved by negotiation and written agreement of the parties.

[32] The adjudicator also determined that Canada breached section 8.02 of the MFA, which requires amendments to the Additions to Reserves Policy to be agreed to by the parties. She wrote:

> 268. Nonetheless, from 2012 to the present, Canada has refused to set the Lands at Issue apart as Reserve pending the results of its consultation with the Métis. This amounts, in my view, to amending the [Additions to Reserve] process on a unilateral basis, in breach of Subsection 8.02(3).

[33] The adjudicator was also invited to rule upon a breach of section 31.01, which requires the parties to use their best efforts to fulfil the terms of the MFA. She rejected Canada's submissions in this regard and noted:

> 277. What I find was missing from the evidence, however, is evidence of the efforts that Canada ought to have taken to work

> with the other parties to the MFA to address the impact of its extra-contractual consultations with the Métis, on the implementation of the Agreement. In my view, those are the efforts which Canada needed to undertake in satisfaction of the obligations to use its best efforts to fulfill the terms of the Agreement.

[34] The adjudicator then turned to the issue of whether these breaches constituted events of default under section 36. She found that sections 31.01 and 40.07 were fundamental terms of the MFA and that Canada's breach of these provisions had occurred repeatedly and in a manner establishing a pattern. She therefore declared that Canada has committed an event of default.

[35] With respect to remedies, the adjudicator found that her terms of reference did not contemplate the assessment of damages. She considered that the issue would be best resolved by negotiation or through the Implementation Monitoring Committee. Nonetheless, on the basis of section 35.04, which empowers the adjudicator to order the parties to take action to comply with the MFA, she ordered Canada to negotiate an amendment to the MFA:

> 348. Pursuant to that jurisdiction I order that Canada must now do what it previously failed to do, pursuant to its obligations under 40.07.
>
> 349. It must enter into genuine negotiations with TLEC and Manitoba with the intention of reaching a written agreement to amend the MFA, to confirm the parties' rights and obligations under the Agreement, in light of Canada's consultation with other Indigenous groups, relating to the Lands at Issue.

[36] No appeal was taken of the adjudicator's award.

III. Analysis

[37] Following the adjudicator's award, negotiations again took place, but without result. Thus, the applicants are now asking the Court to register the award and, most importantly, to declare that the releases and indemnities contained in each applicant First Nation's TLE agreement are now void.

[38] Canada disagrees. It argues that the applicants have not shown that registering the award would serve any specific purpose. While it acknowledges that it has committed an event of default with respect to six of the applicant First Nations, it asserts that the Court should exercise its discretionary power not to issue the declaration sought. In Canada's view, voiding the releases would be unjust, because 28 of the 35 parcels at issue have now been added to reserves, Canada attempted to comply with the adjudicator's directions but is unable to remedy the default by itself and voiding the releases would be a disproportionate remedy depriving Canada of the consideration it received for the MFA, especially in the context where the releases are already suspended until the default is remedied.

[39] I reject Canada's submissions. The applicants are entitled as of right to have the award registered. Properly understood, the adjudicator's finding of an event of default applies to all applicant First Nations, not only the six that have selected or acquired the 35 parcels at issue in the arbitration. Most importantly, I would not exercise the discretion to refuse to issue the declaration sought. Canada takes an overly narrow view of the extent of its default and the scope of the measures needed to remedy it. Based on this narrow view, it makes unjustified assertions

that the default has almost been remedied, that the applicants are taking advantage of the situation to tilt the bargain in their favour and that they simply need to consent to the amendments Canada is proposing to the MFA. If one adopts a more accurate perspective of the extent of the default, however, it becomes apparent that the far-reaching effects Canada is complaining of are simply the result of the complex nature of the MFA, which is composed of many interlocking components. From this perspective, the applicants are simply asserting a right that is a component of the bargain at the heart of the MFA. Canada's submissions are simply an invitation for the Court to remove this right from the bargain.

[40] The analysis below is structured in three parts. First, I address two preliminary issues: admissibility of evidence and registration of the award. Second, I verify whether the applicants have shown their entitlement to a declaration voiding the releases. In particular, I address Canada's argument that only a subset of the applicant First Nations are so entitled. Third, I review Canada's arguments in support of its request that the Court decline to issue a declaration, despite the applicants' entitlement.

A. *Preliminary Issues*

(1) Admissibility of Evidence

[41] As usual in this kind of litigation, each party asserts that the other party's affidavits contain inadmissible hearsay, opinion or argument. This, of course, is prohibited by rule 81 of the *Federal Courts Rules*, SOR/98-106. The parties have provided detailed lists of paragraphs or even sentences in the other party's affidavits that are said to offend the rule. At the hearing, I

promised to the parties that I would not base my decision on inadmissible evidence. I see no need, however, to engage in a line-by-line dissection of voluminous affidavits and provide a detailed list of what I found inadmissible.

[42] Likewise, the applicants object to most of Canada's evidence for lack of relevance. This is because the applicants assert that the Court has no discretion to refuse the declaration they are seeking once they establish their entitlement. The evidence bearing on the exercise of this discretion would therefore be irrelevant. This, however, puts the cart before the horses. It assumes that the applicants will prevail on the merits. In these circumstances, objecting to the admissibility of the evidence is simply a manner of reinforcing the substantive argument. This objection is dismissed.

[43] The applicants' last objection relates to a somewhat unusual situation. As I already mentioned, the parties have attempted to reach a negotiated settlement. There would normally be no issue that such negotiations are covered by settlement privilege. Canada, however, argues that these negotiations are relevant to the exercise of the Court's discretion. It brings evidence regarding not only the existence of the negotiations, but also the substance of the parties' positions. In particular, Canada seeks to file a settlement offer that it made with prejudice, "on the record."

[44] While I am prepared to admit evidence of the existence of negotiations, the positions taken by the parties during the negotiations are inadmissible. In recent decisions, the Supreme Court of Canada took a broad view of settlement privilege and described it as a class (or generic)

privilege, that applies unless an exception is proven: *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paragraph 12, [2013] 2 SCR 623 [*Sable Offshore*]; *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35, [2014] 1 SCR 800 [*Union Carbide*]. By preventing the contents of negotiations from being put in evidence, the purpose of the privilege is to encourage the settlement of disputes: *Sable Offshore*, at paragraph 11; *Union Carbide*, at paragraphs 31-33. While the purpose of the privilege is sometimes described in a manner that focuses on the presumed intention of the party who discloses information to the other (*Union Carbide*, at paragraph 31), its scope is usually described as encompassing the negotiations as a whole: *Sable Offshore*, at paragraphs 13-14; *Union Carbide*, at paragraph 34. There is no support for the proposition that a party may decide to tell the Court what it said during the negotiations. Such an approach would effectively destroy settlement privilege. Moreover, unlike *Union Carbide*, this is not a case where a party seeks to prove that an agreement was reached. Thus, evidence pertaining to the parties' positions in the negotiations, including Canada's so-called "on the record" offer, is inadmissible.

(2) Registration

[45] The applicants are seeking registration of the adjudicator's award with the Court's registry. Once registered, the award may be enforced as if it were a judgment of this Court.

[46] While the procedure to seek registration of an arbitral award is found in rules 326–334 of the *Federal Courts Rules*, SOR/98-106, the substantive conditions are found in the *Commercial Arbitration Code* [the Code], which is schedule 1 to the *Commercial Arbitration Act*.

[47] Canada acknowledges that these conditions are satisfied. It asserts, however, that the Court should exercise its discretion to refuse registration, as the applicants have not explained how they intend to enforce the award. Canada also argues that enforcement measures would not be available against the Crown.

[48] I reject these submissions, as they are contrary to the philosophy underpinning the Code. Articles 35 and 36 of the Code provide that recognition (also called registration or homologation) of an arbitral award may be obtained as of right and that it may be refused only for specific grounds enumerated in article 36. In a case decided under similar legislation, the Supreme Court of Canada held that "the reasons for which a court may refuse to homologate or annul an arbitration award are exhaustively set out in [article 36]": *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17 at paragraph 67, [2003] 1 SCR 178. The fact that the applicant does not disclose its intentions with respect to enforcement is not one of these grounds. For the same reasons, I need not speculate about the immunities Canada could raise if the applicants attempted to enforce the award.

[49] I will therefore allow the application to register the adjudicator's award.

B. *Applicant First Nations' Entitlement to a Declaration*

[50] I now move to the issue of the applicant First Nations' entitlement to a declaration voiding their releases. I show that, apart from Canada's invitation to withhold remedy based on the Court's discretion, the applicant First Nations are entitled to this declaration pursuant to the provisions of the MFA and the law of declaratory judgments. Canada, however, states that only

the First Nations that selected or acquired one of the 35 parcels that were the subject of the arbitration are entitled to a declaration. For the following reasons, I disagree. As the events of default pertain generally to all applicant First Nations, all are entitled to the declaration.

(1) Conditions Set by the MFA

[51] A First Nation's right to seek a declaration flows from section X.05(4) of the MFA, which I reproduce again for ease of reference:

> (4) In the event Canada has committed an Event of Default and that Event of Default continues for a period of 180 days, the Entitlement First Nation shall be entitled to request a declaration before a court of competent jurisdiction that the Release and Indemnity is void or ineffective in whole or in part and that Canada is barred from relying on the Release and Indemnity.

[52] There is no serious dispute that these conditions are met. The adjudicator found that Canada committed an event of default by engaging in consultation with the Métis without securing an amendment to the MFA. Her award has not been appealed. This event of default has continued for more than 180 days. Where the existence of an event of default has been established in binding arbitration, section X.05(3) establishes a presumption that the event of default continues until a further determination by the Implementation Monitoring Committee or another arbitration award. This has not happened. Indeed, Canada acknowledges that the conditions precedent to the issuance of a declaratory judgment under section X.05(4) are met.

(2) Which First Nations Are Entitled?

[53] While Canada acknowledges that the conditions for the issuance of a declaratory judgment are met, it qualifies this admission by saying that only First Nations that selected or acquired one of the 35 parcels at issue in the arbitration are entitled to seek a declaration. Only seven First Nations, six of which are applicants in this proceeding, are in this situation.

[54] I reject this submission. It is based on an overly formalistic view of the matter and a misapprehension of the basis for the adjudicator's decision.

[55] The contractual regime designed to address TLE issues combines general rules applicable to all participating First Nations and rules or parameters specific to each of them. The MFA contains the rules applicable to all and the specifics are found in each First Nation's TLE agreement.

[56] When the parties drafted the terms of reference for the arbitration, they included a mix of general and particular issues. For example, the TLE Committee sought decisions regarding Canada's duty to consult with respect to specific parcels, as well as damages. Because such issues could not properly be determined on a general basis, the parties identified 35 parcels of land as representative examples or "test cases," and led evidence regarding the reserve creation process with respect to each of the parcels.

[57] The adjudicator, however, found that she did not have jurisdiction to determine these particular issues. The main basis for her determination that an event of default took place is that Canada effectively amended the MFA without the consent of the other parties, by inserting an additional step in the reserve creation process. This is a general or policy issue. It does not affect specific parcels or First Nations, but rather the general process laid out by the MFA with respect to all First Nations. While the adjudicator often phrases her findings as pertaining to the "Lands at Issue," that is, the 35 parcels, nothing in her award turns on the particular circumstances of any specific parcel or First Nation.

[58] Indeed, section 40.07, which is at the heart of the adjudicator's reasoning, is a provision of the MFA that is absent from each First Nation's TLE agreement. The TLE Committee is a party to the MFA; individual First Nations are not. It is difficult to understand how the failure to renegotiate an agreement to which individual First Nations are not parties could affect some First Nations but not others.

[59] I acknowledge that, in paragraph 4 of her award, the adjudicator notes that the TLE Committee was pursuing the matter on its own behalf and on behalf of the First Nations that selected or acquired the 35 parcels. However, when she said that the TLE Committee was acting on its own behalf, she necessarily recognized that it was pursuing the matter as a party to the MFA, in the collective interest of all its members.

[60] Canada acknowledges that "the ship has sailed" with respect to the fact that consulting with the Métis is an event of default under the MFA. At paragraph 68 of its memorandum of

facts and law, it recognizes “that the logic of [the adjudicator’s] finding could also apply to other parcels of land selected or acquired pursuant to the [MFA]”. It argues, however, that events of default can only happen with respect to a specific First Nation and that evidence is needed to show that a First Nation was affected by consultation with the Métis.

[61] Again, this is based on a misapprehension of the relationship between the MFA and individual TLE agreements. The concept of event of default is defined in sections 1.01(34) and 36.02 of the MFA as including a situation where “a party … failed to comply with its obligations under this Agreement [that is, the MFA] or any Treaty Entitlement Agreement”. According to section 1.01(1)(b) of the TLE agreements filed in evidence, terms defined in the MFA have the same meaning when employed in the TLE agreements. Thus, where the phrase “event of default” is used in a TLE agreement, it includes a breach of that specific agreement—an individual event of default—as well as a breach of the MFA—a collective event of default. In this case, the event of default is collective.

[62] In any event, Canada does not suggest that different policies are applied to different First Nations with respect to consultation with the Métis. At most, each First Nation would be entitled to a different amount of damages to compensate for the delays caused by consultation. Damages, however, are not sought in this proceeding.

[63] Thus, all the applicant First Nations are entitled to seek a declaration that their releases are void.

(3) Conditions for a Declaratory Judgment

[64] Declaratory judgment is a discretionary remedy. The factors taken into account when deciding whether to issue a declaratory judgment were recently summarized in *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at paragraph 60, [2019] 1 SCR 99:

> Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought […].

[65] The Supreme Court also said that "[a] declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties": *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11, [2016] 1 SCR 99.

[66] I have no doubt that these conditions are met. This Court has jurisdiction to issue declaratory relief against the federal Crown, pursuant to sections 17 and 18 of the *Federal Courts Act*, RSC 1985, c F-7. There is a real dispute or "live controversy" between the parties. In fact, the application for a declaratory judgment is a crucial step in the dispute resolution process set forth in the MFA. The dispute has been ongoing since 2012 and is not settled. Both parties have an interest in its resolution. Most importantly, by entering into the MFA, the parties have accepted that a declaratory judgment would be an appropriate remedy in the present context. They should not be allowed to resile from this commitment lightly.

C. *The Court's Discretion*

[67] While Canada recognizes that the conditions precedent for the issuance of a declaration voiding the releases are met, it asserts that the parties to the MFA intended the Court to exercise discretion regarding the appropriateness of such a remedy. In this case, Canada invites the Court to refrain from issuing a declaration.

[68] Canada's argument regarding the discretionary nature of the Court's power to declare the releases void is based on what it calls a common-sense interpretation of the dispute resolution provisions of the MFA. The parties could not have contemplated that the Court would act as a mere rubber-stamp. While there are other explanations for the structure of the MFA in this regard—for example, giving First Nations the choice of remedy—I am prepared to accept that the Court has discretion.

[69] The Court's discretion, however, must be exercised in accordance with the letter and spirit of the MFA. The Federal Court of Appeal described this spirit as follows in *Canada v Long Plain First Nation*, 2015 FCA 177 at paragraph 117:

> …the treaty land entitlement agreements, seen in their proper historical context, reveal a genuine, *bona fide* desire, intention and commitment on the part of Canada—consistent with its obligations of honourable conduct, reconciliation and fair dealing with Aboriginal peoples—to engage in a process to rectify Canada's broken promise in Treaty No. 1 over time.

[70] Two aspects of the structure of the MFA are particularly relevant to understanding how the Court's discretion must be exercised. First, the MFA is a detailed agreement that sets out the

rights and duties of the parties throughout the reserve creation process. It is the product of a careful balancing of the parties' interests. Its goal is to avoid the judicial resolution of the underlying dispute. While the parties included a dispute resolution process, there is no indication that they intended the adjudicator or the Court to substitute their own views of what is just or equitable for the provisions of the MFA or the resulting TLE agreements. The parties did not empower the adjudicator to "decide *ex aequo et bono* or as *amiable compositeur*," as contemplated by article 28(3) of the Code. To borrow the words of Justice Nicholas Kasirer of the Supreme Court of Canada in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paragraph 5 [*Wastech*], the Court should not, through the exercise of its discretion, "displace the detailed, negotiated bargain as the primary source of justice between the parties."

[71] Second, the overall intent that emerges from a reading of the entire dispute resolution provisions is that courts would only play a subsidiary role in the resolution of disputes. The main roles are performed by the Implementation Monitoring Committee, mediators and adjudicators. Courts are involved only where an arbitration award is appealed on a question of law or where a declaration is sought pursuant to section X.05(4). This limited judicial role is consistent with what the Supreme Court of Canada said in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paragraph 33, [2017] 2 SCR 576 [*Nacho Nyak Dun*]: "[i]n resolving disputes that arises under modern treaties, courts should generally leave space for parties to govern together and work out their differences." While the MFA is not a modern treaty, it is the same kind of complex negotiated scheme for which "[i]t is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the […] relationship" (*ibid*).

[72] In particular, invoking the Court's discretion must not be a manner of relitigating issues already decided in arbitration. The MFA provides for a right of appeal to the Manitoba Court of Queen's Bench, which was not exercised in this case. Nor should this Court pronounce on issues that could be submitted to arbitration. Pursuant to section X.05(3), this would include a declaration that an event of default has ceased.

[73] Guided by these principles, I can now review Canada's submissions with respect to the exercise of the Court's discretion. Their general thrust is that the applicants are trying to take advantage of the situation to force a renegotiation of the MFA, tilting the original bargain in their favour. On close inspection, however, the picture is different. Canada's arguments systematically downplay the seriousness of its default. If I were to deny the relief sought by the applicants, the following analysis shows that Canada would effectively be in a position to declare unilaterally that it has done enough and the applicants would be forced to accept less than what they bargained for. In reality, Canada is seeking the Court's assistance to escape from a bargain that it now finds inconvenient.

(1) Parcels Added to Reserves

[74] Canada first invokes the fact that 28 of the 35 parcels that were the subject of arbitration have now been added to reserves. This amounts to an argument that there has been substantial compliance or that the event of default has almost disappeared. The argument, however, is based on a misapprehension of the scope of the event of default.

[75] In a nutshell, the event of default is the fact that Canada delayed the process set forth in the MFA pending consultation with the Métis, without first agreeing with the applicants to amend the MFA. This concerned many parcels beyond the 35 put before the adjudicator and most likely caused prejudice to the affected First Nations. The adjudicator alluded to this reality at paragraphs 355 and 357 of the award. She did not, however, make a decision concerning these issues, nor should I at this stage of the proceedings. I do not think that the applicants should be deprived of a remedy contemplated by the MFA because the reserve creation process has reached its conclusion with respect to 28 parcels. The evidence is that many more parcels remain to be processed.

[76] In any event, Canada is not claiming that the event of default has ceased and has not asked the Implementation Monitoring Committee or an adjudicator to make such a decision. Canada cannot side-step the process set forth in the MFA for finding that an event of default has ceased by asking this Court to decline to intervene while admitting that the default continues.

(2) Compliance With the Adjudicator's Directions

[77] The adjudicator ordered Canada to identify reasonable means to remedy the default and to enter into negotiations with the applicants to amend the MFA. Canada says that its compliance with these directions is a factor weighing against this Court voiding the releases.

[78] Canada, however, confuses the means and the ends. The event of default is the lack of agreement, not the failure to negotiate. The adjudicator's direction to negotiate aims at

remedying the breach, which is the lack of agreement to amend the MFA. The adjudicator did not order negotiation for its own sake.

[79] What happened here is that Canada unilaterally changed the MFA process. It feels that it needs to do so to avoid liability towards a third party, for reasons unforeseen when the MFA was negotiated. The burden of this change, however, should not be shifted to the participating First Nations. According to the adjudicator, the best way to resolve the issue is through negotiation leading to an amendment to the MFA.

[80] Canada is not relieved of its duty to reach an agreement to amend the MFA because it feels that it has negotiated enough or that its negotiating position is reasonable. Canada's argument is a transparent attempt to ask the Court to impose Canada's last offer on the applicants. It would be unjust to allow Canada to cease negotiating while insulating it from the consequences of a lack of agreement.

[81] Moreover, agreeing with Canada's submissions would necessarily involve the Court in supervising the negotiations between the parties. There is no basis in the MFA nor in contract law for the Court to take on this role. This would be contrary to the Supreme Court's direction in *Nacho Nyak Dun*.

(3) Canada's Inability to Remedy the Default

[82] Canada also argues that the Court should take into account the fact that it cannot remedy the default by itself. It cannot reach agreement alone; it needs the consent of the TLE Committee. In this regard, Canada states, at paragraph 76 of its memorandum of facts and law:

> All that is required to remedy the events of default found by the arbitrator is an amendment of the Framework Agreement to stipulate that the additions to reserve process shall include consultation with other Indigenous groups potentially impacted by the contemplated addition to reserve.

[83] This is disingenuous. It would amount to retroactively absolving Canada of the consequences of its default. Thus, by asserting its inability to remedy the default, Canada is simply blaming the TLE Committee for not accepting its proposals. Moreover, it is ignoring the real consequences of its default and denying that these consequences call for compensation. Yet, in this regard, the adjudicator noted:

> 355. It is up to Canada to determine how it will remedy the *Default*, however, the means of remedying the default could include compensating the Entitlement First Nations whose lands are at issue, for loss or damage caused as the result of the actions which led to the determination of *Default*, as well as identifying how such actions will be addressed in the future.
>
> […]
>
> 357. In identifying means of remedying the *Events of Default* Canada should be mindful that its failure to comply with a number of provisions of the Agreement as discussed above, including Section 36.01, has caused significant delay in the implementation of the Agreement.

[84] Canada blames the TLE Committee for taking advantage of the situation to ask for a wholesale renegotiation of the MFA. According to Canada, the TLE Committee would be "tilting the bargain" of the MFA. But the opposite is true. If the bargain is tilted, it is because of Canada's unilateral insertion of consultation in the MFA process. In the end, if Canada feels that it has no choice of consulting with the Métis, it must be prepared to give something in exchange and to renegotiate the MFA accordingly. If it does not, it must be prepared to face the consequences that it agreed to by entering into the MFA.

[85] This is not a matter, as Canada contends on the basis of *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at paragraph 49 [*Goodswimmer*], of allowing each generation of a First Nation to "reopen, renegotiate, and re-litigate previously settled claims". Rather, it is a matter of requiring Canada to adhere to the process it agreed to when settling the claims.

[86] Under this heading, Canada also argues that, properly interpreted, the MFA does not preclude consultation in respect of parcels selected or acquired after July 2016. I need not delve into the intricacies of this argument, which is hotly disputed by the applicants. The issue was not raised before the adjudicator, perhaps because the 35 parcels were selected or acquired long before 2016. Because it relates to the interpretation of the MFA, this issue should be decided through the dispute resolution process provided by the MFA, not by this Court. In any event, the only import of this argument is that the underlying issue may become less relevant with time. It does not detract from the fact that there is a continuing event of default. It is not relevant to the exercise of the Court's discretion.

(4) Disproportionality and Injustice

[87] At paragraph 93 of its memorandum of facts and law, Canada makes the following argument:

> It would be unjust to declare the releases void or ineffective as to do so would nullify the consideration provided by Canada through the Framework Agreement and the Treaty Entitlement Agreements after there has been significant implementation of those agreements.

[88] Canada then outlines the amount of land and financial compensation that has been provided to participating First Nations since the signing of the MFA in 1997.

[89] Yet, this overlooks the fact that the process contemplated by the MFA is far from being completed and that Canada was found in default of its obligations. Moreover, when Canada agreed to section X.05(4) of the MFA, it must have realized that it could be deprived of the benefit of the releases after having performed a significant portion of its obligations. There is nothing unjust where being deprived of this benefit results from the intended operation of the dispute resolution provisions; see, by way of analogy, *Wastech*, at paragraph 83.

[90] It could possibly be disproportionate and unjust to void the releases for a technical or insignificant breach of the MFA. The dispute resolution process, however, already contains robust safeguards against such a possibility. Not just any breach will constitute an event of default. The breach must pertain to a fundamental term, the failure to comply must be material, and it must be repeated and "in a manner which clearly establishes a pattern." In the present case, the adjudicator made findings with respect to each of these conditions. Put simply, we are not

dealing with a minor breach. I see nothing disproportionate or unjust in failing to rescue Canada from the consequence it agreed to in section X.05(4) of the MFA. In any event, it was for the adjudicator to decide whether the breach was sufficiently serious to constitute an event of default. Canada's submissions regarding disproportionality are simply an attempt to relitigate the issue under another name.

[91] Insofar as Canada complains of being deprived of the totality of the consideration it received, the broader context must be taken into account. The MFA is an agreement to settle disputes regarding the implementation of treaties. In this regard, the adjudicator noted, at paragraph 253 of her award, that the MFA "was intended to fix broken promises; promises whose fulfillment was long delayed in an era and context of colonialism."

[92] From the government's perspective, the treaties constituted a bargain by which First Nations surrendered their aboriginal title in consideration of an array of benefits, including the setting apart of reserves. Thus, the government has already received consideration—the surrender of title—while it delays performance of its side of the bargain, namely, the creation of reserves.

[93] Moreover, if the issue of treaty land entitlement were to be litigated, Canada would be in a far better position than before it entered into the MFA, because it has now added more than 500,000 acres to the reserves of the First Nations that are parties to the MFA. Its outstanding liability under the treaties is reduced accordingly. This will not disappear if the releases are voided.

(5) Suspension of Release

[94] Lastly, Canada argues that the current suspension of the releases is a sufficient consequence for its breach of the MFA. This suspension results from section X.05(1) of the MFA and lasts until the Implementation Monitoring Committee or an adjudicator finds that the default has been remedied.

[95] I disagree. There is a significant difference, under the MFA, between suspending and voiding the releases. According to section X.06, a First Nation may not assert any cause of action in respect of the matters released, "subject to Section X.05(4)," that is, unless the release is voided. Thus, even though the releases are suspended, the applicant First Nations cannot sue Canada for breach of the reserve land provisions of the treaties. They could do this only if the releases are voided.

[96] In other words, by raising this argument, Canada is simply asking for a more lenient consequence for its default than what is contemplated in the MFA.

(6) Summary

[97] Canada has not succeeded in explaining why I should exercise my discretion to refrain from voiding the releases. As we have seen above, none of the reasons it invokes in support of the exercise of my discretion withstands scrutiny.

[98] More importantly, under the guise of judicial discretion, Canada is in effect asking the Court to supervise the implementation of the MFA and the negotiations to amend it. If I were to accede to this request, my own view—or Canada's view—of what is just and reasonable in the circumstances would displace the parties' bargain.

[99] Yet, the parties chose to settle their disagreement through a detailed contract. As the Supreme Court noted in *Wastech*, adherence to the parties' bargain promotes contractual justice. Legal certainty requires no less. In *Goodswimmer*, a case dealing with another TLE agreement, the Alberta Court of Appeal stated that "[l]egal rules or approaches to the interpretations of settlement agreements should not be set in a way that acts as a disincentive to governments to settle such claims" (at paragraph 47). This, however, is a two-way street. Depriving the applicant First Nations of the ultimate remedy they bargained for would certainly not give other First Nations an incentive to settle claims in the future.

[100] Moreover, it would be contrary to the honour of the Crown to allow Canada to impose its own view of what is just in the circumstances. Rather, I should follow the path laid by the Supreme Court in *Nacho Nyak Dun* and respect the detailed process for the resolution of the parties' disputes.

IV. Conclusion

[101] For the foregoing reasons, I will allow the application, direct that the adjudicator's award be registered and issue a declaration that the releases and indemnities given by the applicant First Nations in their TLE agreements are void and ineffective in whole.

[102] The applicants are asking for costs on a solicitor-client basis. In *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paragraph 67, [2010] 2 SCR 453, the Supreme Court of Canada stated that solicitor-client costs are "very rarely granted" and gave two examples of circumstances warranting such an award: (1) where a party's conduct was "reprehensible, scandalous or outrageous"; (2) where a lawsuit was brought in the public interest. However, the mere fact that a party's position was found to be without merit is not sufficient to justify an award of costs on a solicitor-client basis: *Young v Young*, [1993] 4 SCR 3 at 134.

[103] In my view, this case does not fit within these narrow categories. Accordingly, costs will be awarded according to the tariff.

JUDGMENT in T-336-19

THIS COURT'S JUDGMENT is that:

1. The arbitration award issued by adjudicator Sherri Walsh on March 19, 2018 is registered in this Court.
2. The releases and indemnities given by the applicant First Nations in sections 25.01, 26.01 and 26.02 of their Treaty Land Entitlement Agreement with Canada and Manitoba are declared void and ineffective in whole and Canada is barred from relying on them.
3. Costs are awarded to the applicants.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-336-19
STYLE OF CAUSE:	TREATY LAND ENTITLEMENT COMMITTEE INC. ON ITS OWN BEHALF, AND AS REPRESENTATIVE OF THE TREATY LAND ENTITLEMENT FIRST NATIONS OF BARREN LANDS FIRST NATION, BUFFALO POINT FIRST NATION, GOD'S LAKE FIRST NATION, MANTO SIPI CREE NATION, NISICHAWAYASIHK CREE NATION, NORTHLANDS DENE FIRST NATION, NORWAY HOUSE CREE NATION, OPASKWAYAK CREE NATION, ROLLING RIVER FIRST NATION, SAPOTAWEYAK CREE NATION, WAR LAKE FIRST NATION, WUSKWI SIPIHK FIRST NATION, BUNIBONIBEE CREE NATION AND BROKENHEAD OJIBWAY NATION v HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS OF CANADA NOW DESCRIBED AS THE MINISTER OF INDIGENOUS SERVICES CANADA(HEREINAFTER "CANADA")
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 24, 2021
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	APRIL 23, 2021

APPEARANCES:

Harley Schachter Kaitlyn Lewis	FOR THE APPLICANTS
John Faulhammer Kelsey Desjardine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Duboff Edwards Schachter Law Corporation Winnipeg, Manitoba	FOR THE APPLICANTS
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT