Federal Court of Appeal | Cour d'appel fédérale

Date: 20210921

Dockets: A-447-19 (lead file)
A-445-19
A-448-19

Citation: 2021 FCA 184

CORAM: **WEBB J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

MAKIVIK CORPORATION, THE GRAND COUNCIL OF THE CREES, and NUNAVIK MARINE REGION WILDLIFE BOARD

Appellants/Respondents by cross-appeal

and

THE ATTORNEY GENERAL OF CANADA

Respondent/Appellant by cross-appeal

and

NUNAVUT TUNNGAVIK INCORPORATED

Intervener

Heard by online video conference hosted by the Registry on June 7 and 8, 2021.

Judgment delivered at Ottawa, Ontario, on September 21, 2021.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: WEBB JA.
MACTAVISH J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210921

Dockets: A-447-19 (lead file)
A-445-19
A-448-19

Citation: 2021 FCA 184

CORAM: **WEBB J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

MAKIVIK CORPORATION, THE GRAND COUNCIL OF THE CREES, and NUNAVIK MARINE REGION WILDLIFE BOARD

Appellants/Respondents by cross-appeal

and

THE ATTORNEY GENERAL OF CANADA

Respondent/Appellant by cross-appeal

and

NUNAVUT TUNNGAVIK INCORPORATED

Intervener

REASONS FOR JUDGMENT

LASKIN J.A.

Table Of Contents (by paragraph) **Para.**

Table Of Contents (by paragraph) **Para.**

I. Introduction

[1] The Nunavik Inuit Land Claims Agreement (NILCA[*]) is a modern treaty between the Nunavik Inuit, represented by the appellant Makivik Corporation, and the Government of Canada. It applies to the offshore region around northern Québec, northern Labrador and offshore northern Labrador. The rights that it grants to the Nunavut Inuit are constitutionally protected by section 35 of the *Constitution Act, 1982*.

[2] Among the many important provisions of NILCA is Article 5, which establishes a co-management regime for wildlife in the Nunavik Marine Region (NMR). This regime contemplates decision-making roles for both the Nunavik Marine Region Wildlife Board (NMRWB), established under NILCA, and federal and Nunavut Ministers. It also contemplates that in the operation of the regime, Nunavik Inuit approaches to wildlife management, and Nunavik Inuit traditional knowledge of wildlife and wildlife habitat, will be integrated with knowledge gained through scientific research.

[*] Consistent with the parties' written and oral submissions, and with day-to-day usage outside the courtroom by those concerned with the subject of this appeal, these reasons make frequent use of acronyms. For convenience, a complete list of the acronyms used in these reasons can be found in Appendix 1 attached.

[3] The species subject to this regime include the polar bear. Polar bears are of great cultural, nutritional, social, and economic significance for the Nunavik Inuit. They have harvested polar bears for thousands of years.

[4] This appeal arises from the decision of the Minister of the Environment and Climate Change Canada – the first of its kind by the Minister under NILCA – to vary a decision of the NMRWB. Acting in response to a request by a predecessor of the Minister, the Board had set an annual total allowable take (TAT) – the total number that can be lawfully harvested – of 28 bears for polar bears in the Southern Hudson Bay (SHB) management unit of the NMR.[†] In her decision, the Minister reduced the TAT to 23, and also, among other things, established certain non-quota limitations (NQLs) on harvesting that the NMRWB had rejected and rejected certain other NQLs that the NMRWB had established.

[5] Makivik brought an application for judicial review of the Minister's decision in the Federal Court. As first constituted, the application sought both a declaration that the Minister's decision was unauthorized or invalid, and an order quashing the decision and remitting the matter to the Minister to make a new decision. Makivik subsequently amended its notice of application to claim only declaratory relief. It raised a total of 10 issues questioning the Minister's jurisdiction and the reasonableness or correctness of her decision. These included issues as to the role that Inuit traditional knowledge played – or, according to Makivik, should have played – in the Minister's decision.

[†] Maps showing Polar Bear Management Units in the Arctic and the SHB Subpopulation (Appeal Book, pp. 851, 853) are attached as Appendix 2.

[6] In its argument in the Federal Court, the NMRWB, a respondent to Makivik's application, also sought declaratory relief, though it did not commence its own application for judicial review. The declarations it sought overlapped to some degree with those sought by Makivik, but were cast in more general terms. In view of this overlap and the manner in which the parties had made their arguments, the application judge dealt with the issues as they had been identified by Makivik.

[7] The application judge dismissed the application (2019 FC 1297, Favel J.). He found fault with the Minister's decision on one of the 10 issues raised by Makivik, that relating to NQLs. However, he exercised his discretion to decline to grant declaratory relief. He found among other things that to grant declaratory relief at the current stage of development of the wildlife management system would adversely affect the parties' intention to improve the system, and would be premature. He also took into account the Supreme Court's call, in *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at paras. 33, 60, for judicial forbearance from closely supervising the conduct of parties to modern treaties.

[8] Makivik, the Grand Council of the Crees (GCC) (which represents the Crees of Eeyou Istchee) and the NMRWB now appeal from the judgment of the application judge dismissing the application. Makivik submits that the application judge made errors of principle, of law, and of mixed fact and law in deciding the issues raised by its application for judicial review, and in declining to grant declaratory relief. It sets out a series of declarations that it submits this Court should grant.

[9] Both the GCC and the NMRWB also allege errors on the part of the application judge, and seek declaratory relief. The declarations that they claim are cast in terms different from, though they again in part overlap with, those sought by Makivik.

[10] The respondent, the Attorney General of Canada, cross-appeals from the granting by the application judge of a motion by Makivik to strike out a portion of an affidavit of Dr. Rachel Vallender, filed by the Attorney General. The motion was brought on the basis that the targeted portions of the affidavit set out new information that had not been available to the Minister when she made her decision, and was therefore inadmissible on judicial review. The Attorney General submits that the evidence struck out was relevant to the exercise of the Federal Court's discretion (and potentially also this Court's discretion) whether to grant declaratory relief.

[11] For the reasons that follow, I would allow the appeal in part, grant declaratory relief, and dismiss the cross-appeal.

[12] In explaining why I reach these conclusions, I will first review the wildlife management regime set out in NILCA, and the decision-making process for which it provides. I will then consider in turn the issues raised by the parties.

[13] Before proceeding further, I should mention two additional points of context. First, the Minister's decision in issue in this proceeding was made in relation to both the decision of the NMRWB under NILCA and the identical decision of the Eeyou Marine Region Wildlife Board (EMRWB) under the parallel wildlife co-management regime set out in the Eeyou Marine

Region Land Claims Agreement (EMRLCA). EMRLCA is a modern treaty between the Crees of Eeyou Istchee and the Government of Canada, which covers an area off the Quebec shore in the eastern James Bay and southern Hudson Bay. Given the nature of the relationship between the two regimes and the decisions of the two Boards, as well as the scope of the Minister's decision, I will follow the lead of the parties in referring almost exclusively to the provisions of NILCA and the decision made under it. The conclusions that apply under NILCA also apply under EMRLCA.

[14] Second, the Minister of the Environment, Government of Nunavut, also rendered a decision varying the decision of the NMRWB and the EMRWB on substantially the same terms as the federal Minister, under provisions of NILCA and the EMRLCA very similar to those invoked by the federal Minister. Makivik has commenced an application for judicial review in the Nunavut Court of Justice of the Nunavut Minister's decision. Counsel for Makivik advise that that application is being held in abeyance pending the outcome of this proceeding. The Attorney General of Nunavut was an intervener in the Federal Court, but does not appear in this appeal.

II. The NILCA wildlife management regime

[15] NILCA came into force in 2008. As mentioned above, Article 5 deals with wildlife management. It is one of many topics that NILCA addresses.

A. *Principles and objective*

[16] Article 5 begins with statements of the principles that it recognizes and reflects, as well as its objective. By section 5.1.2, these principles include that

- "Nunavik Inuit are traditional and current users of wildlife and other resources of the NMR and have developed particular knowledge and understanding of the region and resources" (paragraph 5.1.2(c));
- "there is a need for an effective system of wildlife management that respects Nunavik Inuit harvesting rights and priorities" (paragraph 5.1.2(f));
- "the wildlife management system and the exercise of Nunavik Inuit harvesting rights are governed by and subject to the principles of conservation" (paragraph 5.1.2(h));
- "Nunavik Inuit shall have an effective role in all aspects of wildlife management" (paragraph 5.1.2(i)); and
- "Government [defined in section 1.1 as "the Government of Canada or the Government of Nunavut, or both, as the context requires"] has ultimate responsibility for wildlife management and agrees to exercise this responsibility in the NMR in accordance with the provisions of [Article 5]" (paragraph 5.1.2(j)).

[17] The objective of Article 5 is stated in section 5.1.3 to be to create a wildlife management system for the NMR that, among other things,

- "defines and protects Nunavik Inuit harvesting rights" (paragraph 5.1.3(a));

- "promotes the long-term economic, social and cultural interests of Nunavik Inuit" (paragraph 5.1.3(d));
- "recognizes the value of Nunavik Inuit approaches to wildlife management and Nunavik Inuit knowledge of wildlife and wildlife habitat and integrates those approaches with knowledge gained through scientific research" (paragraph 5.1.3(f)); and
- "establishes the NMRWB to make decisions pertaining to wildlife management" (paragraph 5.1.3(i)).

[18] Sections 5.1.4 and 5.1.5 elaborate on the content and application of the principles of conservation. By section 5.1.4, "[t]he principles of conservation will be interpreted and applied giving full regard to the principles and objective outlined in sections 5.1.2 and 5.1.3 and the rights and obligations set out in this Article." Section 5.1.5 states that for the purposes of Article 5, the principles of conservation are:

(a) the maintenance of the natural balance of ecological systems within the NMR;

(b) the maintenance of vital, healthy wildlife populations capable of sustaining harvesting needs as defined in [Article 5];

(c) the protection of wildlife habitat; and

(d) the restoration and revitalization of depleted populations of wildlife and wildlife habitat.

B. *The NMRWB's composition and mandate*

[19] Part 5.2 of NILCA establishes the NMRWB as an institution of public government. It consists of seven members: three appointed by Makivik, two by federal ministers, one by a Nunavut minister, and a chairperson chosen jointly by a federal and a Nunavut minister from nominations provided by the other members.

[20] The mandate of the NMRWB is set out in section 5.2.3. According to this provision, the NMRWB is to be "the main instrument of wildlife management in the NMR and the main regulator of access to wildlife and have the primary responsibility in relation thereto in the manner described in [NILCA]." Section 5.2.3 goes on to specify the functions of the NMRWB as including, among other things,

- with an exception not relevant here, "establishing, modifying or removing levels of total allowable take for a species, stock or population of wildlife in accordance with sections 5.2.10 and 5.2.11" (paragraph 5.2.3 (a)); and
- "establishing, modifying or removing non-quota limitations [defined in section 5.1.1 as "a limitation of any kind, except a total allowable take …]" in accordance with sections 5.2.19 to 5.2.22 (paragraph 5.2.3 (e)).

[21] Section 5.2.10 states that subject to the terms of Article 5, and to one exception (again not relevant here), the NMRWB shall have "sole authority to establish or modify or remove from time to time as circumstances require levels of total allowable take or harvesting for all species in the NMR." By section 5.2.19, the NMRWB has "sole authority to establish, modify or remove,

from time to time and as circumstances require, non-quota limitations on harvesting in the NMR."

[22] Part 5.5 of NILCA addresses decisions made under Article 5. Section 5.5.1 states that judicial review of decisions of the NMRWB shall be available on the grounds set out in the *Federal Courts Act*, R.S.C. 1985, c. F-7, at the motion of a person personally aggrieved or materially affected by the decision. Section 5.5.2 is a privative clause barring all other forms of review of the NMRWB's decisions. There are no similar provisions applicable to decisions of the Minister. However, the parties agree that her decisions are subject to judicial review.

C. *Decision-making criteria*

[23] Part 5.5 includes provisions setting criteria for decision-making applicable to both the NMRWB and the Minister. Key among them is paragraph 5.5.3(a), which stipulates that "[d]ecisions of the NMRWB or a Minister made in relation to Parts 5.2 and 5.3 [which deal with harvesting] shall restrict or limit Nunavik Inuit harvesting only to the extent necessary […] to effect a conservation purpose in accordance with sections 5.1.4 and 5.1.5."

[24] Subsection 5.5.4.1 is also important in considering the issues raised by the parties as to the Minister's entitlement to consider certain agreements. It reads as follows:

> Certain populations of wildlife found in the NMR cross jurisdictional boundaries and are harvested outside the NMR by persons resident elsewhere. Accordingly, the NMRWB and the Minister in exercising their responsibilities in relation to section 5.2.3, paragraphs 5.2.4 (b), (c), (d), (f), (h), and sections 5.2.10 to 5.2.22, 5.3.8, 5.3.10 and 5.3.11 shall also take account of harvesting activities outside the NMR and the terms of domestic interjurisdictional agreements or international agreements pertaining to such wildlife.

[25] Section 5.1.1 defines “international agreement” as “a wildlife agreement between the Government of Canada and one or more foreign states or associations of foreign states.”

D. *Decision-making process*

[26] By section 5.5.6, all decisions of the NMRWB in relation to certain specified matters within Government of Canada (as opposed to Nunavut) jurisdiction, including establishing levels of TAT and establishing NQLs, are to be made following the decision-making process set out in sections 5.5.7 to 5.5.13.

[27] These provisions establish a two-way, conversation-like process (see *Nacho Nyak Dun* at para. 55) that begins with the NMRWB sending the Minister an initial decision, which is not to be made public (section 5.5.7). The Minister must then either accept the decision and notify the NMRWB in writing of its acceptance, or reject it, and “give the NMRWB reasons in writing for so doing” (section 5.5.8). There is no provision for variation at this stage.

[28] Where the Minister rejects the initial decision, the NMRWB must reconsider the decision in light of the Minister’s reasons, and then make and forward to the Minister a final decision, which it may make public (section 5.5.11). The Minister may then accept, reject or vary the final decision, and must again provide reasons in the event of a rejection or variation (section 5.5.12). Where the Minister decides to accept or vary the final decision, the Minister is to “proceed forthwith to do all things necessary to implement the final decision or the final decision as varied” (section 5.5.13).

III. The decision-making process for SHB polar bears

[29] By section 5.2.18 of NILCA, the NMRWB is to conduct its review for various species, stocks or populations from time to time as requested by, among others, the appropriate Minister.

[30] In January 2012, following a significant increase in the polar bear harvest in 2010-2011, and in response to a letter from the then chair of the NMRWB expressing concern that other processes were pre-empting the NMRWB's mandate, the then federal Minister of the Environment asked the NMRWB to establish a level of TAT for each subpopulation of polar bears in the NMR, and to work toward the development of a management plan. There are three subpopulations of polar bears in the NMR: Davis Strait, Foxe Basin and SHB. The NMRWB decided to focus first on the SHB management unit. Not only Nunavik Inuit, but also Nunavut Inuit and the Crees of Eeyou Istchee, harvest polar bears in SHB.

[31] After a delay pending completion of an aerial survey of the polar bear population, the NMRWB convened a three-day public hearing in Inukjuak, Quebec in February 2014, and invited pre-hearing written submissions. More than a dozen parties filed written submissions, and most of these parties also made oral submissions at the hearing. The parties included government departments, aboriginal organizations, environmental non-governmental organizations, local Inuit hunting groups, and individual Inuit hunters.

[32] Following the hearing, the NMRWB concluded that it required further information from users of the resource before it could make a decision. It commissioned a study of Inuit traditional knowledge (ITK) of polar bears, which entailed interviewing elders, hunters, and local officials

in three Nunavik communities. The results of the study were summarized in a seven-page table. While the NMRWB retained a third party to prepare a final report, only the summary was available at the time of the decisions of the NMRWB and the Minister in relation to the SHB subpopulation. The final report did not become available until May 2018; it was not part of the record before the application judge, and is not before this Court.

[33] The NMRWB proceeded to make its decision and forward it to the Minister. Its decision set the TAT for SHB polar bears at 28 bears per year, a level that it saw as representing the low end of estimated past annual harvests, and as having allowed the population to remain relatively stable. It concluded that the Crees of Eeyou Istchee would be permitted to harvest at least one polar bear of the 28. It also decided that there should be no requirement of sex-selective harvesting, but set out nine other NQLs.

[34] In explaining its decision on the TAT, the NMRWB stated that, while further work was required to improve the way by which ITK is brought together with knowledge gained by scientific research for decision-making, it had made efforts to consider knowledge from all sources. This included the available ITK. It added that based on the information it had gathered, it had concluded that the SHB polar bear subpopulation continued to be relatively healthy, despite environmental changes, and that historical harvest levels had been sustainable. It noted that while some scientific data indicated that polar bears' body condition was deteriorating, Inuit had not observed a similar trend.

[35] The NMRWB also set out the basis for its decision not to require sex-selective harvesting. It noted among other things that according to harvest records, Nunavik Inuit had historically harvested SHB polar bears at a 2:1 (male:female) ratio, so that legislating that requirement would be contrary to the "only to the extent necessary" provision of NILCA section 5.5.3.

[36] In listing the nine NQLs that its decision would establish, the NMRWB advised that a majority of them had been adapted from the 1984 agreement on polar bear hunting between the Quebec government and the Nunavik Fishing and Trapping Association and from recent voluntary agreements.

[37] The Deputy Minister of Environment Canada (acting for the Minister during an electoral period), rejected the NMRWB's decision, and in particular the 28-bear TAT, under paragraph 5.5.3(a) of NILCA (quoted in part above at paragraph 23). In his letter advising the NMRWB of the rejection, the Deputy Minister expressed the view that a regional TAT of 28 polar bears was likely not sustainable. He went on to state that "a maximum sustainable harvest of 4.5 percent should not be exceeded as it could cause the population to decline."

[38] The letter also stated that in reconsidering its decision, the NMRWB should include a sex-selective harvest of two males to one female. In addition, the letter asked that a voluntary agreement on harvesting levels that had been concluded in 2014 be considered in the reconsideration process, on the basis that it was a "domestic interjurisdictional agreement" within the meaning of NILCA subsection 5.5.4.1 (quoted above at paragraph 24). The Deputy

Minister's letter made no mention of ITK or of any reservations concerning it. The letter also said nothing about the nine NQLs that the NMRWB had included in its decision.

[39] In accordance with the process set out in NILCA, the NMRWB reconsidered its decision in light of the written reasons provided by the Deputy Minister, and issued and sent to the Minister its final decision.

[40] The decision re-affirmed the TAT of 28 bears, which it again described as at the low-end of historical Nunavik Inuit harvests. It also rejected the recommendation for a sex-selective harvest, which, it stated, would go against traditional Inuit values, upset the natural balance of wildlife populations, and tend to remove the fittest breeders. The decision referred in some detail to the available ITK. It disagreed with the characterization of the 2014 voluntary agreement as a "domestic interjurisdictional agreement," and noted that, in any case, the agreement was expressly entered into "without prejudice to the decision-making processes defined in the applicable Land Claims Agreements." With respect to NQLs, it stated that "[b]ecause neither government offered concerns about the non-quota limitations proposed initially, the Boards [had] maintained them, in their entirety, within the final decision."

[41] After the NMRWB had rendered its final decision but before the Minister had rendered hers, Environment and Climate Change Canada (ECCC) officials met with the NMRWB and raised for the first time some of their concerns relating to the NQLs included in the Board's final decision. They followed up the meeting by sending to the NMRWB a chart setting out their concerns. The NMRWB responded in a letter to ECCC stating that it was "greatly concerned that

this exchange is coming after the final decision was issued," and that it was especially disappointing when ECCC had the opportunity to raise these issues through its technical advisors during the Boards' deliberations, but failed to do so.

[42] The Minister varied the NMRWB's final decision. She reduced the annual TAT from 28 to 23, of which one was expected to be allocated to the Cree of Eeyou Istchee. Further, while she accepted certain NQLs included in the NMRWB's final decision, she also added others – most notably, the requirement of a sex-selective harvest of one female for two males – and rejected or varied four. It was this decision of the Minister, rendered in October 2016, that was the subject of the application for judicial review.

[43] In her letter accompanying the decision, the Minister stated that she would be open to reconsidering the total allowable take when new survey results and the complete ITK study became available. In the concluding paragraph, she stated that for future decisions, her Department would "work closely with the [Boards] through technical advisors to ensure that they are informed of concerns earlier in the process, and to enhance opportunities for the use of traditional knowledge in the management of polar bears."

[44] The Minister advised in the letter that her reasons for varying the TAT and NQLs were described in an analysis document, which she also provided. That document explained that the decision "[took] into account that there are differences between the available scientific information and Traditional Knowledge, that new science and Traditional Knowledge [would] be available within a year or two, and that it [was] important to avoid actions that could jeopardize

trade in polar bear parts." The decision also recognized, the document stated, "the need to exercise caution so as to ensure a sustainable harvest, and the fact that once new information [was] available, the TAT [could] be re-assessed."

[45] The document went on to state that the TAT of 23 bears established a harvest of close to 4.5%, "which aligns with the widely accepted sustainable removal level." It stated further that the available information had been weighed carefully in determining the varied TAT, and that the TAT set out in the NMRWB's final decision was "likely not sustainable." It noted that there were some similarities and some differences as between ITK and scientific data in relation to subpopulation size and body condition of the polar bears in SHB. With respect to the NQL of a sex-selective harvest, it stated among other things that the limitation was consistent with polar bear management regimes across Canada and "consistent with a cautionary approach."

IV. The application for judicial review

[46] As noted above, Makivik initially sought, in its notice of application for judicial review of the Minister's decision to vary, both declaratory relief and an order quashing the decision and remitting the matter for redetermination. In amending its notice of application, Makivik abandoned the claim for quashing relief and claimed declaratory relief only, based on the 10 issues that it formulated and argued before the application judge. As also noted above, the application judge agreed with Makivik on one of those issues – whether the Minister's decision to establish a sex-selective harvest and vary other NQLs decided by the NMRWB was unreasonable – but declined to grant declaratory relief.

[47] Rather than include here a more detailed overall review of the application judge's decision, I will discuss his conclusions and reasoning below on an issue-by-issue basis, as they relate to the issues on appeal.

[48] I should, however, mention at this juncture that it was in the course of the application, when the record before the Minister when she made her decision was disclosed, that the appellants learned of what they assert were the "true reasons" for the Minister's decision to vary the NMRWB's final decision – that Government officials in ECCC had decided that they could not rely on, or had to give minimal weight to, the ITK that was before the NMRWB – and the Minister's failure to disclose those reasons.

[49] The record contained a memorandum to the Minister with an appendix setting out for the Minister the rationale for varying the NMRWB's final decision. The appendix raised certain methodological and other issues relating to the available ITK. It commented on the two sources of ITK considered by the NMRWB in the following terms:

> Unfortunately, both are provided without needed context, and this makes it difficult for the Government of Canada and Nunavut to consider this information alongside recent scientific results. For example, the public documents describing TK information contain no information about the number of people interviewed or about the spatial scale at which the observations were made. It is therefore difficult to determine whether this is a consensus position of all knowledge holders and the geographic coverage this TK pertains to.

[50] In referring to the NMRWB's report that traditional harvest levels were higher than previously assumed and documented, the memorandum noted that "[t]he lack of an official reporting system in Quebec until recently [made] it challenging to determine the historical rates of take accurately from this subpopulation by Nunavik Inuit." It went on to state that

"[u]nderstanding what science or TK can tell us about the status of a subpopulation requires a more detailed assessment of the assumptions and biases of both scientific and TK observations." Referring to differences in the assessment of polar bears' body conditions by scientific studies and by TK, the memorandum stated that "the conclusions that can be drawn from these differing observations require more detailed analysis. These conflicting conclusions, however, are a source of uncertainty that supports a cautious approach to management decisions for conservation."

V. Relief sought on appeal

[51] Makivik's framing of the issues and the declaratory relief sought has evolved to some extent, at least in form, since the hearing in the Federal Court. On this appeal, it now asks this Court to set aside the judgment of the Federal Court and grant six declarations, based on the failures on the part of the Minister that it asserts. For two of the proposed declarations, alternatives are also provided. I propose to examine the issues largely using the framing adopted by Makivik in its memorandum of fact and law in this appeal.

[52] Though they did not file their own applications for judicial review, the appellants the GCC and the NMRWB also claim declaratory relief, in terms that, again, are different from, though they overlap to some degree with, the terms of the relief claimed by Makivik. For example, the GCC seeks among other things a declaration "that the Minister disregarded the nation-to-nation partnership established by the NILCA for the co-management of wildlife in the NMR," and the NMRWB seeks among other things a declaration "that the Minister may only 'reject' or 'vary' a decision by the [NMRWB] to the extent that said decision is unreasonable."

Makivik's claim encompasses neither of these broad declarations. The Attorney General objects to the other appellants seeking relief outside the bounds of that claimed by Makivik.

[53] I agree that they are not entitled to do so. The scope of an application for judicial review is determined by the applicant in its notice of application, which is to contain both "a precise statement of the relief sought," and "a complete and concise statement of the grounds intended to be argued": *Federal Courts Rules*, S.O.R./98-106, rule 301. A respondent to an application for judicial review – like the GCC and the NMRWB in the Federal Court here – must file its own application if it wishes to seek review of the decision on grounds different from those put forward by the applicant: *Larsson v. Canada*, [1997] F.C.J. No. 1044 (C.A.) at paras. 27-28, 216 N.R. 315; *Systèmes Equinox Inc. v. Canada (Public Works and Government Services),* 2012 FCA 51 at para. 12.

[54] Having had no entitlement at first instance to raise grounds beyond those raised by Makivik, or to seek relief beyond that claimed by Makivik, these appellants can hardly go beyond those grounds and claims for relief on appeal, and assert that the application judge erred in denying them remedies they did not properly seek. The general rule that new issues may not be raised on appeal applies: *Shoan v. Canada (Attorney General),* 2020 FCA 174 at para. 13. However, like the application judge (see paragraph 75 of his reasons), I will consider the submissions of the GCC and the NMRWB as they relate to the substance of the issues framed and relief sought by Makivik.

VI. Issues

[55] I now turn to the issues raised by Makivik, at paragraph 42 of its memorandum – issues that underlie its claims for corresponding declaratory relief, set out at paragraph 140 of its memorandum – and to the issue raised by the Attorney General's cross-appeal. I will first list these issues, and then deal with them, and a further issue that arises, in turn.

A. What are the principles applicable to the interpretation of modern treaties and how do they determine this Court's approach to the review of the Minister's decision? This includes the standard of appellate review and the standard of review applicable to the Minister's decision.

B. Did the Minister give full regard to the integration of Nunavik Inuit knowledge of wildlife and wildlife habitat with knowledge gained through scientific research when making her decision?

C. Was the Minister's approach to the Boards' traditional knowledge study in accordance with NILCA and the honour of the Crown?

D. Does NILCA authorize the Minister's reliance on a "cautious management approach" as justification for limiting Nunavik Inuit harvesting?

E. Does NILCA authorize the Minister to consider the politics of international trade and/or issues related to CITES [the *Convention on International Trade in Endangered Species of Wild Flora and Fauna*] when making her decision?

F. Was the Minister's reliance on the 2014 voluntary agreement authorized by NILCA and in accordance with the honour of the Crown?

G. Was the Minister's decision to vary the non-quota limitations established by the Boards authorized by NILCA? If yes, was it nonetheless unlawful?

H. Did the application judge commit reviewable error in granting Makivik's motion to strike out certain portions of the evidence filed by the Attorney General?

[56] To this list I would add a further issue, which arises directly from the relief sought by Makivik:

I. Should this Court grant declaratory relief?

[57] In approaching these issues, I am mindful, like the application judge, of the Supreme Court's directions in *Nacho Nyak Dun* as to the appropriate judicial role in disputes arising under modern treaties. The Court set out these directions as follows (*Nacho Nyak Dun* at paras. 33, 60, citations omitted):

> Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership […]. In resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance […]. It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which […] may set out in precise terms a co-operative governance relationship.
>
> […]
>
> The court's role [in a judicial review involving a modern treaty dispute] is not to assess the adequacy of each party's compliance at each stage of a modern treaty process. Rather, it is to determine whether the challenged decision was legal, and to quash it if it is not. Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster. Judicial restraint leaves space for the parties to work out their understanding of a process – quite literally, to reconcile – without the court's management of that process beyond what is necessary to resolve the specific dispute.

[58] I am also mindful of the caveat the Court set out (*Nacho Nyak Dun* at para. 34):

> That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

[59] The application judge took these directions into account in deciding whether to grant declaratory relief. In my view, they may also come into play at an earlier stage, in determining the extent to which the Court should address the merits of the issues raised by the parties.

[60] Both remedies on judicial review, and undertaking judicial review in the first place, are discretionary: *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paras. 37-38; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 at para. 35. The categories of cases in which courts may exercise the discretion not to undertake judicial review are not closed. In my view, they include cases involving disputes under modern treaties, in which the Supreme Court has directed judicial forbearance and restraint. For a court to hear and decide a dispute under a modern treaty on the merits, and then exercise its discretion only at the remedy stage, risks sapping the Supreme Court's directions to practise judicial forbearance and restraint of much of their force. Even where the reviewing court chooses not to grant declaratory relief, its reasons for judgment on the merits will be binding on the parties, the administrative decision-maker, and (depending on the judicial hierarchy) other courts: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 105-106.

[61] However, in this case, it does not appear that any of the parties raised before the application judge, or that he otherwise considered, the possibility of declining altogether to undertake judicial review, in the exercise of judicial forbearance. Nor was that possibility raised before this Court. In these circumstances, I propose to consider the issues raised before us on their merits, leaving the question of judicial forbearance to be addressed in considering remedies.

VII. Analysis

A. *What are the principles applicable to the interpretation of modern treaties and how do they determine this Court's approach to the review of the Minister's decision? This includes the standard of appellate review and the standard of review applicable to the Minister's decision.*

(1) Modern treaty interpretation

[62] In its recent jurisprudence, the Supreme Court has set out certain principles of modern treaty interpretation. It summarized these principles as follows in *Nacho Nyak Dun* at paras. 36-37 (emphasis in original; citations omitted):

> Because modern treaties are "meticulously negotiated by well-resourced parties", courts must "pay close attention to [their] terms" […]. "[M]odern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability" […]. Compared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted […].
>
> Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole* and the treaty's objectives […]. Indeed, a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract" […] Furthermore, while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always "subject to such constitutional limitations as the honour of the Crown […]."

[63] Also relevant are any interpretation principles set out in the treaty itself: *Nacho Nyak Dun* at para. 36. Here, section 2.22 of NILCA states that it "shall be governed by and construed in accordance with the laws of Nunavut, Newfoundland and Labrador and the laws of Canada as otherwise applicable," and adds that "[f]or greater certainty, the federal Interpretation Act [R.S.C. 1985, c. I-21] shall apply to this Agreement." Section 12 of the *Interpretation Act*, to which the Court also referred in *Nacho Nyak Dun* at para. 37, provides that "[e]very enactment is

deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

(2) Appellate standard of review

[64] In an appeal from a decision of the Federal Court on an application for judicial review, this Court ordinarily follows the appellate standard of review set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47: it asks whether the application judge chose the correct standard of review and properly applied it. Applying this standard entails what has been described as "stepping into the shoes" of the Federal Court, and focusing on the administrative decision that was the subject of the application rather than potential errors by the application judge in coming to the judgment under appeal.

[65] But as both Makivik and the Attorney General recognize, there are exceptions to the application of the *Agraira* standard, including an exception for the decision of the application judge as to what if any remedies should be granted. Remedial decisions by the application judge on judicial review are subject to appellate review on the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33 – correctness on questions of law and palpable and overriding error on questions of fact or mixed fact and law (absent an extricable question of law): *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 at para. 51. As this Court explained in *Canada v. Long Plain First Nation*, 2015 FCA 177 at paras. 88-89, these decisions are not about what the administrative decision-maker decided, but rather about what the reviewing court itself should do, in light of its review of the administrative decision. A decision about what remedies should

be granted typically raises questions of mixed fact and law, on which the application judge's decision is reviewable on the deferential standard of palpable and overriding error.

[66] Makivik submits that this Court should apply the *Agraira* standard here, except on what it characterizes as the narrow question (dealt with at paragraphs 211 to 215 of the application judge's reasons) whether it was appropriate to grant declaratory relief on the component of the Minister's decision that was found to be unreasonable. Only on that question, it submits, should the *Housen* standard apply. The Attorney General suggests that this Court should go further, and apply the *Housen* standard to all parts of the test for declaratory relief, including the question whether the declarations sought would be legally accurate. He relies for this position on the fact that Makivik chose not to pursue its claim to quash the Minister's decision, so that only declaratory relief is now sought.

[67] I would not accept the Attorney General's suggestion. The *Agraira* standard applies to the substantive issues on appeal from a decision on judicial review where the only relief sought is declaratory relief, just as in other cases: *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at paras. 17-20; *Canada (Attorney General) v. Distribution G.V.A. Inc.*, 2018 FCA 146 at paras. 24-26; *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206 at para. 32. The Attorney General has suggested no good reason why it should not apply to the question whether the declarations sought would be legally accurate. The focus of that question is on the Minister's decision.

[68] Do modern treaty interpretation principles play a role in determining and applying the appellate standard of review? They could do so if, for example, a modern treaty contained language specifying the circumstances in which particular remedies could be granted. But the parties do not submit that there is any provision of that kind in this case.

(3) Standard of review of the Minister's decision

[69] The application judge dealt with the standard of review applicable to the Minister's decision before the Supreme Court recast the law of judicial review in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Consistent with the then-governing administrative law authorities, and finding no well-established standard of review for the type of case before him, he therefore conducted a contextual analysis (at paragraphs 90 to 105 of his reasons) to determine the applicable standard. He concluded (at paragraphs 106 and 107) that whether the Minister adhered to the decision-making process set out in NILCA should be reviewed on the correctness standard, but that the Minister's decision as a whole should be reviewed on the standard of reasonableness. He saw the call for judicial restraint in *Nacho Nyak Dun* as supporting the application of the reasonableness standard (at paragraph 108).

[70] Makivik submits that the application judge's decision on standard of review ignored the principles of modern treaty interpretation set out and applied by the Supreme Court in *Nacho Nyak Dun*, and that he should have applied those principles, rather than administrative law principles, in determining the standard of review. It argues that treaty interpretation principles, with their emphasis on deference to the text of the treaty, preclude giving any deference to the Minister, and therefore require the correctness standard. It submits alternatively that if

administrative law principles are to be applied, the applicable standard of review must be reconsidered in light of the Supreme Court's decision in *Vavilov*.

[71] In *Vavilov*, the Supreme Court set reasonableness as the presumptive standard of review for administrative decisions, subject to certain categories of exceptions. One of these categories covers cases where the rule of law requires correctness – "a final and determinate answer from the courts." This category, the Court held, includes "[q]uestions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters […]": *Vavilov* at para. 55 (emphasis added). Makivik thus submits that, under administrative law principles, any question in this proceeding involving the interpretation of NILCA must be assessed on the standard of correctness.

[72] In its submissions, the GCC agrees with Makivik that the application judge should have applied modern treaty interpretation principles, rather than administrative law principles, in determining the standard of review applicable to the Minister. On treaty interpretation principles, it submits, correctness must be the standard. On either basis, it argues, the application judge failed to consider the limited role of the Minister under the terms of the NILCA decision-making process as a whole. That role, it submits, requires the Minister to show deference to the NMRWB. It does not permit the Minister to make decisions herself, and permits her to alter the fundamental nature of a decision of the NMRWB only where she determines that it was unreasonable.

[73] For its part, the NMRWB similarly submits that given its mandate and the principles and objectives of NILCA, the Minister has no authority to vary or reject a decision of the NMRWB unless the decision is unreasonable or unfounded in law. According to the NMRWB, the scope of the Minister's authority should be determined taking into account administrative law and judicial review principles, together with the principles and objectives of NILCA, modern treaty interpretation, the imperative of reconciliation, and the honour of the Crown.

[74] The intervener, Nunavut Tunngavik Incorporated (NTI), which obtained leave to address the standard of review along with certain other issues, agrees with Makivik that the appropriate standard of review of the Minister's decision is correctness. It sees the Supreme Court's decision in *Nacho Nyak Dun* as implicitly requiring the correctness standard. It also agrees that the "constitutional matters" category of exceptions from reasonableness review set out in *Vavilov* applies to questions of modern treaty interpretation and implementation. It refers both to *Vavilov* and to cases decided before and after *Vavilov* as supporting the proposition that a court should never defer to the Crown's interpretation of a treaty.

[75] NTI also supports the submissions of the GCC and the NMRWB that the Minister owed deference to the final decisions of the NMRWB. It bases its submission on the text, purpose, and context of NILCA read in its entirety, but also emphasizes sections 5.5.1 and 5.5.2 of NILCA. As set out above, section 5.5.1 provides for judicial review of decisions of the NMRWB in the Federal Court "at the motion of a person personally aggrieved or materially affected by the decision," while section 5.5.2 is a strong privative clause that otherwise bars judicial review. It argues that these provisions indicate the need for the Minister to show deference to the

NMRWB, because otherwise the Minister could avoid the deference that the Federal Court would show to the NMRWB.

[76] The Attorney General's position, which he sees as consistent with *Vavilov*, is that reasonableness is the appropriate standard of review, except for questions related to the scope of treaty rights under section 35. He submits that, leaving aside the section 35 issues, reasonableness is required by the highly factual and polycentric nature of the issue before the Minister, the language of NILCA that recognizes Government's "ultimate responsibility for wildlife management," and the Supreme Court's emphasis in *Nacho Nyak Dun* on judicial forbearance and restraint in disputes under modern treaties.

[77] In my view, the standard of review applicable to the Minister's decision is correctness on matters of treaty interpretation, the scope of Aboriginal and treaty rights under section 35, and procedural fairness, and reasonableness for any decisions outside these categories. I come to this conclusion for two main reasons.

[78] First, it is consistent with *Vavilov* – with the presumptive standard of reasonableness on judicial review and the correctness exceptions that it sets out for questions regarding the scope of Aboriginal and treaty rights under section 35. It is also consistent with *Vavilov* in a further respect. *Vavilov* left untouched what this Court has described as "the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness": *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196 at para. 35.

[79] I do not agree that *Vavilov* should not apply in this case because it dealt only with the standard of review in administrative matters. The Court in *Vavilov* expressly addressed the standard of review in Aboriginal and treaty rights and other constitutional matters. Moreover, modern treaties "are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system […]": *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 12. That system includes administrative law, which "is flexible enough to give full weight to the constitutional interests of" Indigenous peoples, so that "[t]here is no need to invent a new 'constitutional remedy'": *Little Salmon/Carmacks* at para. 47. Indigenous parties typically seek to vindicate these interests by seeking administrative law remedies through an application for judicial review, and in many cases must proceed in this manner: *Federal Courts Act*, s. 18. Indeed, they have done so here.

[80] Second, the standard of review that in my view applies is consistent with both what occurred, and what was said, in *Nacho Nyak Dun*. There the Supreme Court came to its own view on the treaty interpretation and compliance issues that arose, without deference either to government or to the First Nations parties. While the Supreme Court did not expressly address standard of review in its decision, both lower courts did, and both applied the correctness standard: *The First Nation of Nacho Nyak Dun v. Yukon (Government of)*, 2014 YKSC 69 at paras. 136-137; *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18 at para. 112. Their doing so attracted no criticism from the Supreme Court.

[81] As the Supreme Court stated in *Nacho Nyak Dun*, "modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership": at para.

33. Deferring to one "partner's" view of the meaning of or compliance with the treaty would be inconsistent with the nature of that relationship.

[82] Before leaving the subject of the standard of review of the Minister's decision, I should signal one important qualification to my conclusion that issues of treaty interpretation and scope are reviewable on the correctness standard. Prior to *Vavilov*, it had been recognized that, while questions of constitutional interpretation were reviewable for correctness, any extricable findings of fact, and the assessment of the evidence on which the constitutional analysis was premised, were entitled to deference, and were therefore reviewable for reasonableness: *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 at para. 26; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262 at para. 75, leave to appeal refused, [2019] S.C.C.A. No. 478. *Vavilov* has not affected this position: *'Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2020 FCA 122 at para. 21; *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2019 ABCA 134 at para. 18; *Procureur général du Québec c. Association canadienne des télécommunications sans fil*, 2021 QCCA 730 at para. 62.

[83] I would also add that I do not accept the submissions that the authority of the Minister to vary or reject decisions of the NMRWB is limited to cases in which the NMRWB's decision is unreasonable or unlawful. This is not a standard of review issue in the usual sense, because it does not address the role of the court in relation to an administrative decision. But since the appellants have addressed it in that context, I will follow suit.

[84] I see no textual or contextual basis in NILCA for these submissions. Section 5.5.3, subsections 5.5.4.1 and 5.5.4.2, and section 5.5.5 set out, as the heading preceding them states, "[c]riteria for decisions restricting or limiting Nunavik Inuit harvesting by NMRWB and/or Minister." These include (in paragraph 5.5.3(a)) the requirement that decisions of the NMRWB or a Minister shall restrict or limit Nunavik Inuit harvesting only to the extent necessary to effect a conservation purpose. None of these criteria are cast in terms of unreasonableness or unlawfulness.

[85] The NILCA provision that comes closest to setting a criterion of unreasonableness for a decision of the Minister to reject or disallow a decision of the NMRWB is section 5.5.5, which reads as follows:

> Where a decision of the NMRWB is made in relation to a presumption as to needs or adjusted basic needs level, the Minister may reject or disallow that decision only if the Minister determines that the decision is not supported by or consistent with the evidence that was before the NMRWB or available to it.

[86] A decision that is not supported by or consistent with the evidence before the decision-maker may be regarded as unreasonable: *Vavilov* at para. 126.

[87] But on its face, section 5.5.5 applies only to the Minister's rejection or disallowance of decisions of the NMRWB in relation to a presumption as to needs or adjusted basic needs level under sections 5.2.12 and following of NILCA. The specific mention of these categories of decisions carries a strong implication that the rejection or disallowance of other decisions is not subject to the same constraint. To read a general unreasonableness or unlawfulness prerequisite into the Minister's entitlement to reject or vary a decision of the NMRWB would also be

inconsistent with Government's "ultimate responsibility for wildlife management," established by paragraph 5.1.2(j), and for this reason too would amount to a significant amendment to a carefully negotiated treaty. I would not take up the invitation to interpret NILCA in that way. To do so would be inconsistent with the principles of modern treaty interpretation set out above.

B. *Did the Minister give full regard to the integration of Nunavik Inuit knowledge of wildlife and wildlife habitat with knowledge gained through scientific research when making her decision?*

[88] This issue was among those put by Makivik to the application judge. He agreed with Makivik (at paragraph 187 of his reasons) that, under NILCA, Nunavik Inuit harvesting rights can be limited only to the extent necessary to effect a conservation purpose in accordance with sections 5.1.4 and 5.1.5. He also agreed that the Minister was required to give full regard to the objective set out in paragraph 5.1.3(f) (quoted above at paragraph 17) – to create a wildlife management system that recognizes the value of ITK and integrates it with Western scientific research. He noted that Makivik had quoted the leading federal expert as recognizing that "neither western science nor traditional ecological knowledge is sufficient in isolation for understanding the complexities of polar bear ecology, especially in the context of climate change."

[89] However, the application judge rejected (at paragraphs 189 to 195) Makivik's argument that the Minister had essentially set aside the summary of the results of the ITK study commissioned by the NMRWB. He found on the evidence that the Minister took into account, along with other factors, the available ITK, including the summary, when assessing the available scientific evidence. He noted among other things (at paragraph 190) that while the widely

accepted sustainable removal level, based on science, was 4.5% of the population, the 23-bear annual TAT set out in the Minister's decision equated to a higher removal level, of 4.7%. There was evidence that without the ITK, the level would have been set at the lower figure. He therefore found that, in respect of this issue, the Minister's decision was reasonable. He did not in express terms address the question whether the Minister had given the available ITK "full regard." It does not appear that any of the parties put forward a definition of that expression that the application judge could have applied.

[90] Before this Court, Makivik focuses its submissions on what it characterizes as the Minister's failure to integrate the summary of the study results (and other ITK) with knowledge gained through scientific research. Makivik relies on a dictionary definition of "integrate" as meaning "to form, coordinate, or blend into a functioning or unified whole." It submits (at paragraph 77 of its memorandum) that to implement the terms of NILCA, the NMRWB and the Minister were each required "to meld the science and traditional knowledge regarding the health of the SHB polar bear population to arrive at a result that was a new whole, one that demonstrated respect for both approaches." This, it submits, is an obligation "of a completely different kind than an obligation to simply 'consider' the traditional knowledge – it required that the Boards and the Minister find a way to put the two systems together, regardless of whether their findings agreed on all points."

[91] Makivik further submits (at paragraphs 78 and 79 of its memorandum) that while the final decision of the NMRWB showed an explicit effort to integrate knowledge from the two cultures, "there is nothing in the Minister's reasons for varying the TAT that demonstrates that

such integration took place." Instead, it submits, the "cautious approach" adopted by the Minister amounted to setting a TAT based on science alone.

[92] I would not give effect to these submissions, which largely raise questions of fact.

[93] In my view the differences between the approaches taken by the NMRWB and the Minister in their respective final decisions are not nearly as stark as Makivik and the other appellants suggest. In its final decision, the NMRWB described the evidence that it considered, which included both science-based knowledge and ITK. It then drew a series of conclusions. These included a conclusion, based on its assessment of the science-based information and ITK it reviewed as to population size and trend, that the SHB polar bear subpopulation had at a minimum remained stable, as well as a conclusion, "[c]onsidering the totality of the evidence provided," some of which was conflicting, that the subpopulation remained healthy. It went on to state that the TAT that it established was based on the assumption that these conclusions were correct, and repeated that its conclusion as to the stability of the subpopulation was "supported by all of the evidence." Based on the findings that it set out, it stated that "the body of evidence considered" continued to support its initial decision that the annual TAT should be 28 bears. It described this conclusion as "reasonable in light of the information presented," and as a "defendable and prudent approach."

[94] As for the Minister's final decision, the analysis document that accompanied it began by stating that the decision took into account, among other things, "that there are differences between the available scientific information and Traditional Knowledge." It went on to provide

what it described as “an analysis of why certain aspects of the Final Decision have been rejected or varied.” It explained that the TAT of 23 bears established a combined harvest of close to 4.5%, “which [aligned] with the widely accepted sustainable removal level.” But it went on to state that “[t]he information available was weighed carefully,” and to express the view that a TAT of 28 was “likely not sustainable, and [created] a conservation concern for [the] management unit.” It then referred to the extent to which ITK and findings from scientific data aligned or differed, and noted that one area of difference was with respect to trends in subpopulation size and body condition. In concluding on the basis for the varied TAT of 23 bears, it stated that assumptions could not be made about the ability of the subpopulation to continue to support historical harvest levels, and that “[c]onsequently, caution must be exercised at this time.”

[95] There is no doubt that the NMRWB and the Minister came to different conclusions. But the processes they followed were not dissimilar: they amounted in both cases to reviewing information that was before them – both science-based information and ITK – and coming to a judgment based on all of what they reviewed. If, as the appellants submit, the NMRWB engaged in integration, the Minister must be said to have done so too.

[96] I also note that in oral argument, the Court asked counsel for Makivik what is to be done towards integration if the science-based knowledge and the ITK conflict. Counsel’s response was that the question was a difficult one, and the answer would depend on the circumstances, though they did emphasize the importance of being able to show in the Minister’s decision that ITK had been taken into account. Counsel for the GCC submitted that integration is a matter of giving

information from the two sources equal weight. Asked in cross-examination on her affidavit how the NMRWB integrates science-based information with ITK, Kaitlin Breton-Honeyman, the NMRWB's Director of Wildlife Management, testified that there were multiple ways of doing so when the two types of information were complementary, but that "it becomes more difficult" when they diverge. She added that how to resolve the divergence must be considered case-by-case, and there were no formal guidelines or protocol for doing so. In its initial decision, the NMRWB acknowledged that "[f]urther work [was] needed to improve the way by which the knowledge of Nunavik Inuit is brought together with knowledge gained by scientific research for decision-making." A recent article focused on the wildlife management system in Nunavut observes, similarly, that "there is currently no formula or algorithm which determines how [Nunavut Wildlife Management Board] decisions are made using both western science and/or [ITK]": Daniel W. Dylan, "Wildlife Management, Privative Clauses, Standards of Review, and Inuit Qaujimajatuqangit: The Dimensions of Judicial Review in Nunavut" (2021), 34 Can. J. Admin. L. & Prac. 265 at 307-308.

[97] These statements provide a further reason, in my view, why the Court should decline to fault the Minister for the treatment of the two categories of information here.

[98] To the extent that the finding of the application judge that the Minister took the available ITK into account in coming to her decision is still in issue, I see no basis to interfere with that finding. As the Supreme Court stated in *Vavilov* (at paras. 125-126), "[i]t is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings." A reviewing court,

"must refrain from 'reweighing and reassessing the evidence considered by the decision maker.'" While "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it," this is a high threshold.

[99] In my view, that threshold is not met here. There was evidence in the record before the Minister to support her finding, including the Minister's decision itself, which I have already reviewed. I appreciate that Makivik disagrees with the application judge's assessment of the evidence, some of which it describes as self-serving. But that is not a sufficient basis for this Court to conclude that the application judge's conclusion was in error, given the limits on judicial review of determinations of fact and assessments of weight.

C. *Was the Minister's approach to the Boards' traditional knowledge study in accordance with NILCA and the honour of the Crown?*

[100] The background to this issue is set out in part above at paragraphs 37, 38 and 48 to 50. To recapitulate, the Deputy Minister's letter providing reasons for rejecting the NMRWB's initial decision made no mention of ITK or of any reservations concerning it. The record before the Minister when she varied the NMRWB's final decision included a memorandum, not previously disclosed, setting out certain methodological and other concerns on the part of federal officials with both the NMRWB's ITK study and another primary source of ITK considered by the NMRWB. According to the memorandum, these concerns made considering the information from these sources difficult at best, absent further context and details. The concerns had not been communicated to the NMRWB, and accordingly, the NMRWB had not responded to them.

[101] This issue raises questions as to the scope of the rights constitutionally protected by section 35 and as to constitutional compliance. It is among the issues raised before this Court in terms that differ to some degree from those of the issues put to the application judge. The questions he was asked to answer included the following as questions (f) and (g), which he addressed together:

> Did the Minister act reasonably or was she correct in law when she failed to provide the NMRWB with the opportunity to respond to her concerns regarding the methodology and results of its Inuit traditional knowledge study prior to making her decision?
>
> Did the Minister act reasonably or was she correct in law when she failed to seek further information regarding the methodology and results of the NMRWB's Inuit traditional knowledge study prior to making her decision?

[102] The application judge answered "yes" (at paragraphs 175 and following of his reasons) to both of these questions. He observed that, on its face, the decision-making process that NILCA sets out does not include any requirement for dialogue while the Boards and the Minister are engaged in their respective decision-making processes, and that the NMRWB and the Minister or her officials were simply not raising issues with each other as the process unfolded. He recognized that the NMRWB would have preferred to be told earlier of the Minister's concerns, and to have an opportunity to respond to them. But he found that in light of the terms of NILCA, both the Minister's decision not to apprise the NMRWB of her concerns and her decision not to seek further information from the NMRWB concerning methodology were reasonable. He also noted the Minister's statement in her letter communicating her final decision that she was open to reconsidering the TAT once the full ITK study report and the new aerial survey information became available (which was expected within the next year or two). The application judge made no reference in his analysis of the two questions to the honour of the Crown.

[103] Before considering this issue further, I turn briefly to a review of certain potentially relevant aspects of the honour of the Crown.

[104] The honour of the Crown is a constitutional principle: *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 24. It is always at stake in the Crown's dealings with Aboriginal peoples, though determining what constitutes honourable dealing, and what specific obligations the honour of the Crown imposes, depends heavily on the circumstances: *Mikisew Cree* at paras. 23-24.

[105] Among the contexts in which the honour of the Crown applies is that of treaty-making and implementation. Its application in this context "[leads] to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing," as well as a broad, purposive approach to treaty interpretation. "[A]n honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose": *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paras. 73, 76-77. Moreover, "Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise": *Manitoba Metis* at para. 80.

[106] Makivik submits that the Minister had a legal and a moral obligation – the legal based on the terms of the NILCA, and the moral on the honour of the Crown – to disclose to the NMRWB her officials' concerns regarding the available ITK, and to give the NMRWB an opportunity to address them before the Minister made her final decision. The NMRWB makes a similar submission, grounded in the Minister's legal obligation under NILCA to provide reasons if she

rejects the NMRWB's initial decision. It focuses on the absence from the Minister's reasons of any reference to methodological concerns with the ITK considered by the NMRWB, and submits that the Minister's failure to discharge this obligation usurped the NMRWB's role in the decision-making process prescribed by NILCA, and resulted in a final decision that disregarded ITK.

[107] The Attorney General submits that the Minister had no obligation either to raise her methodological concerns with the NMRWB in her reasons for rejecting its initial decision or to seek clarification to address these concerns. He argues that the process prescribed by NILCA does not require an exhaustive listing of all considerations, especially when they are not material to the Minister's decision, and that all available information, including ITK, was considered at face value. He points out that the final ITK report would not have been available in any event until after the Minister's final decision in October 2016; it did not become available until May 2018.

[108] I do not accept the appellants' submissions to the extent that they would require the Minister and the NMRWB to engage in dialogue outside of the conversation-like decision-making process prescribed by sections 5.5.7 to 5.5.13 of NILCA (summarized above at paragraphs 27 and 28), and to raise concerns with each other as they arise. I agree with the application judge that while communications of that kind could be valuable, to require them would take the process outside the text of NILCA that the parties negotiated. I do not see section 5.2.2, under which "Makivik and Government shall have the right to have technical advisors attend all meetings [of NMRWB] as non-voting observers," as supporting a conclusion

otherwise. Rather, it appears to provide a means for a one-way flow of technical information from the NMRWB to the Minister.

[109] However, I agree with Makivik and the NMRWB that the requirements in NILCA for the Minister to give reasons must be interpreted purposively. The main purpose of the requirement in paragraph 5.5.8(b), that the Minister give the NMRWB reasons in writing for rejecting an initial decision of the NMRWB, is apparent. It is to enable the NMRWB to do what section 5.5.11 requires: to "reconsider the decision in light of the written reasons provided by the Minister and make a final decision." In this way, as under the scheme considered in *Nacho Nyak Dun* (see para. 43), each step in the process can build on decisions at an earlier stage. But this purpose cannot be fulfilled unless the Minister's written reasons disclose the real reasons for the Minister's decision to reject. In my view, Makivik is correct in observing (at paragraph 85 of its memorandum) that "[t]he fact that the NMRWB is 'the main regulator of access to wildlife' in the NMR must mean, at the very least, that it be given the opportunity to consider and respond to all the issues and factors that the Minister plans to rely on in her decision" (emphasis added).

[110] The purpose of the requirement in section 5.5.12, that the Minister give reasons for rejecting or varying a final decision of NMRWB, is different in part, and perhaps less obvious. At the point at which this requirement comes into play, the decision-making process is at an end (subject to reconsideration initiated under section 5.2.18), and there is no longer any opportunity for the NMRWB to reconsider. But other important functions of reasons remain fully in play.

[111] As the Supreme Court stated in *Vavilov* at para. 79 (citation omitted),

> [r]easons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power.

More specifically in this context, "[w]ritten reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed […]." Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation": *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 41 (citations omitted).

[112] In my view, both the failure of the Deputy Minister to advise of ECCC's methodological concerns with the available ITK in rejecting the NMRWB's initial decision, and the failure of the Minister to do so in varying the NMRWB's final decision, constituted a less-than-purposive interpretation and implementation of NILCA's requirements to give reasons, and a breach of the honour of the Crown. That is especially so given the importance that NILCA ascribes to ITK.

[113] The failure to communicate ECCC's concerns in this case could also be characterized as a breach of procedural fairness, also subject to the correctness standard as explained in paragraph 78 above, on the basis that it denied the NMRWB the opportunity to address those concerns in its final decision. However, the parties did not take that approach in their submissions, and my conclusion that there was a breach of the honour of the Crown renders that analysis unnecessary in any event.

D. *Does NILCA authorize the Minister's reliance on a "cautious management approach" as justification for limiting Nunavik Inuit harvesting?*

[114] The application judge concluded on this issue (at paragraph 202 of his reasons) that "it was necessary and reasonable to adopt a cautious management approach in light of the state of the information before the Boards and the Minister, which could be described as interim information." He observed that in the wildlife context, information is constantly changing, and decisions would have to be revisited as conditions changed. He found that paragraph 5.1.2(h) of NILCA (which provides that "the wildlife management system and the exercise of Nunavik Inuit harvesting rights are governed by and subject to the principles of conservation") and the principles of conservation set out in sections 5.1.4 and 5.1.5, together with the limited information before the Minister, had led to the adoption of a cautious management approach. He also found that the Minister had recognized the need to consider further information in providing that her decision would remain in effect only until new information became available. He described the Minister's approach as "reasonable under these particular circumstances."

[115] Makivik submits that this conclusion rests on two fundamental misconceptions. The first, it submits, is that the purpose of Article 5 of NILCA is to make conservation decisions. Instead, it argues, NILCA enshrines a principle of minimal interference in stating in paragraph 5.5.3(a) that "[d]ecisions of the NMRWB or a Minister made in relation to Parts 5.2 and 5.3 shall restrict or limit Nunavik Inuit harvesting only to the extent necessary […] to effect a conservation purpose in accordance with sections 5.1.4 and 5.1.5" (emphasis added). The application judge's approach, it says, turns this principle on its head. The second misconception is that further and better information would be immediately available.

[116] NTI agrees that a precautionary approach is inconsistent with NILCA. NTI treats the Minister's statements such as those referring to the need for "caution" and a "cautious management approach," and the presence of a "conservation concern" as an invocation of the "precautionary principle." As the Supreme Court has described it, "[t]his emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation": *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 at para. 20 (citations omitted). NTI submits that the precautionary principle in this sense must give way to paragraph 5.5.3(a) of NILCA.

[117] Consistent with the submissions of the Attorney General, I do not see the Minister as having adopted the precautionary principle in this formal sense and given its precedence over NILCA paragraph 5.5.3(a). Rather, in my view, the Minister chose to be cautious in fixing a TAT in light of the factual uncertainties that she identified. Under the terms of NILCA, it was, in my view, open to her to do so, and to conclude that the TAT that she established was, in the language of paragraph 5.5.3(a), "necessary […] to effect a conservation purpose." That was especially so in light of paragraph 5.1.5(b) of NILCA, which includes among the principles of conservation "the maintenance of vital, healthy wildlife populations capable of sustaining harvesting needs […]." I also note that the NMRWB characterized its own final decision concerning the TAT as "a defendable and prudent approach" in the circumstances. While the NMRWB and the Minister plainly had different perspectives on what level of TAT would be cautious, or prudent, they were both entitled under NILCA to come to a judgment on that question.

E. *Does NILCA authorize the Minister to consider the politics of international trade and/or issues related to CITES [the Convention on International Trade in Endangered Species of Wild Flora and Fauna] when making her decision?*

[118] The application judge's analysis of this issue focused on CITES, 993 UNTS 243, rather than the politics of international trade more generally. CITES is an international treaty, to which Canada along with 182 other states is party, that regulates the trade in certain species of animals and plants. Polar bear are currently listed in Appendix II of CITES, which includes "all species which although not necessarily now threatened with extinction may become so unless trade […] is subject to strict regulation […]." When a species is listed in Appendix II, a member state cannot allow its export without first granting an export permit. A member state may grant an export permit only when its designated scientific authority has determined that export will not be detrimental to the species' survival.

[119] On a number of occasions, CITES member states have proposed "up-listing" polar bear from Appendix II to Appendix I, which lists species at risk. This would in effect stop international trade in polar bear. Inuit organizations, including Makivik, have expressed concern about this possibility, given the economic benefits of international trade in polar bear hides.

[120] The application judge began his analysis (at paragraph 136 of his reasons) by acknowledging Makivik's argument that the profound cultural importance of the polar bear hunt was the most important factor for the Inuit, and should therefore have weighed more heavily in the Minister's decision-making process than any threat of a trade ban. However, he did not accept that CITES had played too great a role. He concluded that CITES was one factor among many for the Boards and the Minister to consider, "with the ultimate goal of making a reasonable

decision that had its basis on the principles of conservation as set out in sections 5.1.4 and 5.1.5." He found (at paragraph 142) that the Minister's decision was not focused on CITES and that CITES had not disproportionately affected her decision.

[121] While he agreed with Makivik that the harvesting of polar bears would continue even if the trade in polar bear skins were banned under CITES, he found that the Minister had properly considered the prospect of a trade ban in her balancing of the various factors. The Minister's consideration of CITES was reasonable, he found, because it informed her understanding of NILCA's goals of proper wildlife management and principles of conservation. He did not consider it necessary to determine whether CITES was an international agreement pertaining to wildlife within the meaning of subsection 5.5.4.1 (quoted above at paragraph 24).

[122] On appeal, Makivik submits that the Minister's consideration of the politics of international trade was incorrect or unreasonable for two reasons: it was not authorized by subsection 5.5.4.1 of NILCA, and it placed undue weight on Inuit's economic interests relative to their cultural interests. NTI agrees that consideration of CITES was not authorized by subsection 5.5.4.1. It points out that, while this subsection requires consideration of "international agreements," that term is defined in section 5.1.1 to mean "a wildlife agreement between the Government of Canada and one or more foreign states or associations of foreign states" (emphasis added by NTI). It submits that CITES is not a "wildlife agreement" but a "trade agreement," and that to permit the minister to consider it would be contrary to NILCA's plain meaning.

[123] The Attorney General responds that the Minister's reasons relied on principles of conservation, not CITES, of which the Minister's decision made no mention, and that her officials' recommendation referred to CITES only as background or the source of an additional potential negative consequence of a decision that did not follow principles of conservation as set out in NILCA. The Attorney General embraces the application judge's conclusion that CITES was just one factor among many. He further submits that there is no inconsistency between CITES and NILCA, and that NILCA's objective includes promoting the long-term economic interests of Nunavik Inuit. He adds that on a proper reading of subsection 5.5.4.1, CITES could be taken into account in the decision concerning the SHB subpopulation, and that not only that subsection, but also other provisions (sections 5.5.23 and 5.8.4), recognize that international agreements are "part of the fabric" of NILCA (Attorney General's memorandum, paras. 166-167).

[124] In my view, it is important in addressing this issue to recognize that subsection 5.5.4.1 is a limited, mandatory provision. It requires the NMRWB and the Minister to take into account the two categories of agreements that come within it (domestic interjurisdictional agreements and international agreements relating to wildlife). But it does not bar the NMRWB or the Minister from taking into account other categories of agreements that do not come within it. This means that even if CITES is not an international agreement relating to wildlife within the meaning of subsection 5.5.4.1, it was open to the Minister to consider it, provided that it could be regarded as relevant under the scheme of the NILCA and there were no other provisions precluding the Minister from taking it into account: see *Vavilov* at para. 108.

[125] In my view, both of these prerequisites were met. First, as the Attorney General submits, paragraph 5.1.3(d) of NILCA includes in the objective of Article 5 the creation of a wildlife management system for the NMR that "promotes the long-term economic, social and cultural interests of Nunavik Inuit." Potential economic impacts, such as those that might flow from CITES, were therefore relevant under the NILCA scheme. And second, there is no exhaustive statement of relevance or other limiting provision of NILCA that precluded consideration of CITES.

[126] It follows that, like the application judge, I see no need to determine whether CITES is an international agreement relating to wildlife within the meaning of subsection 5.5.4.1 of NILCA. Nor is it necessary to deal separately with the portion of this issue relating to the politics of international trade.

F. *Was the Minister's reliance on the 2014 voluntary agreement authorized by NILCA and in accordance with the honour of the Crown?*

[127] Makivik put a somewhat different version of this issue to the application judge. He was asked to consider (as issue (d)) "whether it was correct or reasonable for the Minister to have considered the 2014 voluntary agreement when making her decision."

[128] The 2014 voluntary agreement was reached at a meeting convened in September 2014 by the then federal Minister of the Environment. The NMRWB's process leading to its initial decision was then under way. In her letter convening the meeting, the Minister expressed concern about the time that would be required to complete the formalized management system

for polar bears contemplated by NILCA, and the potential for delay to impair Canada's position under CITES and trigger further trade restrictions from certain countries. She expressed the view that it would be desirable to come to a voluntary agreement until a formal management system could be put in place in Nunavik.

[129] The meeting included representatives from Makivik, NTI, the GCC, local hunters' groups, Ontario, Nunavut, and ECCC. The parties reached a voluntary agreement that, among other things, limited their total harvest to 45 bears during the 2014-2015 and 2015-2016 hunting seasons. The total of 45 bears would be divided 22 for Nunavik Inuit, 20 for Nunavut Inuit, and three in total for Ontario and Quebec Cree.

[130] The agreement included the following provision:

> 7. This voluntary agreement is without prejudice to other agreements pertaining to the harvest of polar bears, or to the decision-making processes defined in the applicable land claims agreements.

[131] The application judge first concluded (at paragraph 153 of his reasons) that, as Makivik and the GCC had submitted to him, the 2014 voluntary agreement was not a "domestic interjurisdictional agreement" within the meaning of the term as used in subsection 5.5.4.1 of NILCA (quoted above at paragraph 24). He found it surprising that the parties who had negotiated the NILCA would not have a clear shared understanding of what agreements came within this term. He also found it significant that, while section 5.8.5 of NILCA provides for the NMRWB to "have a role in the negotiation or amendment of domestic interjurisdictional agreements commensurate with its status and responsibilities in the management of wildlife in the NMR," the NMRWB had participated only as an observer in the development of the 2014

voluntary agreement. Given the application judge's first conclusion and the language of subsection 5.5.4.1, he concluded that the Minister was not required to take account of the 2014 voluntary agreement in considering the TAT.

[132] The application judge went on to consider whether the Minister was nonetheless entitled to consider the agreement. He quoted (at paragraph 155) from the evidence of Adamie Delisle Alaku, Executive Vice-President for Makivik's Resource Development Department. Mr. Alaku explained that in light of the "without prejudice" provision and the context of the 2014 voluntary agreement, Makivik was very upset, and felt a sense of betrayal, when it learned that one of the reasons the Minister had rejected the NMRWB's initial decision was that federal officials considered the agreement to be a domestic interjurisdictional agreement under NILCA, which NMRWB was obliged to consider.

[133] Despite what he described as the "tension" arising from resorting to voluntary agreements when formal processes were established under modern treaties such as NILCA, the application judge concluded (at paragraph 157) that the 2014 voluntary agreement was "one factor among many to consider," the Minister had acted reasonably in considering it, and she had not over-relied on it. He found that the "without prejudice" language in the agreement did not render it a privileged document, and did not preclude its consideration.

[134] Before this Court, Makivik submits that the application judge was correct in determining that the 2014 voluntary agreement was not a domestic interjurisdictional agreement within the meaning of NILCA. It now focuses its submissions on two alleged errors. First, it submits that if,

as the application judge determined, the 2014 voluntary agreement was not a domestic interjurisdictional agreement, there was nothing in NILCA that would support the Minister's entitlement to consider it. Second, it submits that for the Minister to consider the 2014 voluntary agreement in the face of its "without prejudice" provision was a failure to uphold the honour of the Crown.

[135] I do not accept these submissions. As to the first, I have already discussed, in the context of CITES, the role of subsection 5.5.4.1: while it requires that certain agreements be considered, it does not preclude considering other agreements or matters that are relevant under the NILCA scheme. NTI has referred the Court (at paragraph 44 of its memorandum) to four provisions of NILCA that support considering the 2014 interjurisdictional agreement: (1) subsection 5.5.4.1 itself, which requires that NMRWB and the Minister "shall also take account of harvesting activities outside the NMR"; (2) paragraph 5.3.3(a), which speaks of a "conservation purpose"; (3) paragraph 5.1.3(j), which includes as part of the objective of the NILCA wildlife management scheme provision for "effective coordination with other institutions responsible for the management of wildlife migrating between the NMR and other areas"; and (4) subsection 5.5.4.2, under which the NMRWB and the Minister are to "take into account the special purposes and policies related to [protected] areas."

[136] As to Makivik's second submission, I agree that in this context, two duties of the Crown are potentially engaged: the duties to avoid sharp dealing (or even its appearance) and to implement treaties to give effect to their purpose. However, Makivik's second submission rests on the premise that through the words "without prejudice," ECCC officials promised that the

2014 voluntary agreement would not be considered in fixing the annual TAT for SHB polar bears, and that they and the Minister then failed to respect this promise.

[137] I do not read the "without prejudice" clause in the 2014 voluntary agreement in this way. While Makivik's representative at the meeting that led to the agreement gave evidence (referred to above at paragraph 132) that he felt a sense of betrayal when ECCC took the position that the 2014 voluntary agreement was a domestic interjurisdictional agreement, a party's subjective intentions or understanding as to the meaning of the words in a contract has no place in its interpretation: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 59. The 2014 voluntary agreement was not itself a treaty to which other interpretive principles apply.

[138] What then is the meaning of the "without prejudice" clause of the 2014 voluntary agreement? For convenience, I set it out again:

> 7. This voluntary agreement is without prejudice to other agreements pertaining to the harvest of polar bears, or to the decision-making processes defined in the applicable land claims agreements.

[139] Reading these words in light of the other provisions of the agreement and the surrounding circumstances (see *Sattva* at paras. 47-48, 57-58), I substantially agree with NTI (at paragraphs 53-55 of its memorandum) that the clause means two things in the current context: that the 2014 voluntary agreement can be superseded by other agreements, and that parties to the NILCA process may take positions in that process unconstrained by the 2014 voluntary agreement. The clause does not, however, confer a privilege on the agreement that prevents giving it consideration in the NILCA process, and the Minister did not act dishonourably in taking it into account.

G. *Was the Minister's decision to vary the non-quota limitations established by the Boards authorized by NILCA? If yes, was it nonetheless unlawful?*

[140] This is another of the issues that was put to the application judge in terms different to some extent from those of the issues put before this Court. The questions before the application judge included the following:

> At the time she rendered her decision, did the Minister have jurisdiction to vary the non-quota limitations established by the Boards in their final decision?
>
> In the alternative, if the answer to the question above is yes, is the Minister's decision to establish a sex-selective harvest and vary other non-quota limitations decided by the Board correct and/or reasonable?

[141] These questions arose from the failure of the Deputy Minister to raise any concerns about the NQLs included in the NMRWB's initial decision when he rejected that decision, and the Minister's final decision varying the NQLs nonetheless.

[142] The application judge concluded (beginning at paragraph 116 of his reasons) that the Minister had jurisdiction to vary, in her final decision, the NQLs established by the Boards. He distinguished *Nacho Nyak Dun*, on the basis that there the Supreme Court found that a departure from a prescribed earlier step in a multi-step conversation/decision-making process would, if permitted, leave the government with unconstrained decision-making authority at the final step, and that this would render the process meaningless. Here, he found, the Minister's authority was not left unconstrained. The Minister was obliged to follow, and followed, the process set out in sections 5.5.7 to 5.5.11 of NILCA, and those provisions set out what the Minister could do. They "[did] not specify any additional steps for the Minister to take in considering the decisions of the

NMRWB and making her own decisions." Nor did they contain any specific restrictions on the Minister's authority or jurisdiction to vary any NQLs.

[143] The application judge then turned to consider (beginning at paragraph 125) whether the Minister's jurisdiction in relation to the NQLs was exercised reasonably. Taking into account the terms of NILCA, the interactions of the treaty partners, NILCA's status as a constitutionally-protected treaty, and the honour of the Crown, he concluded that "the omission between the response from the Deputy Minister and the Minister or between the ECCC staff and the NMRWB or its staff [rendered] the Minister's decision unreasonable with respect to the non-quota limitations." He suggested that had there been evidence of discussions regarding NQLs at the NMRWB level or the technical representative level, his decision might have been different.

[144] In its detailed submissions to this Court, Makivik reverts, despite its framing of this issue, to the language of jurisdiction. It submits that the failure to provide reasons at the section 5.5.8 stage of the NILCA decision-making process for rejecting the NQLs established by the NMRWB in its initial decision deprived the Minister of jurisdiction to vary or reject the NQLs in her final decision. It argues that the application judge failed to give meaning to the Minister's obligation to give reasons, and that, if the application judge's reasoning is allowed to stand, the Minister will be able to impose restrictions on Inuit harvesting without ever having sought the input of the NMRWB. It also submits that a failure to act in accordance with the process prescribed by a modern treaty is a breach of the honour of the Crown. If the Minister had jurisdiction, Makivik submits, she exercised it in an unreasonable manner.

[145] The Attorney General supports the conclusion of the application judge that the Minister had jurisdiction, but does not contest the finding that she acted unreasonably. He argues that as long as the process set out in sections 5.5.7 to 5.5.11 of NILCA was followed, the Minister retained her jurisdiction.

[146] I do not find it helpful to consider this issue in terms of jurisdiction, a troublesome concept which the Supreme Court has now dispensed with in the administrative law context: see *Vavilov* at paras. 65-68. In my view, to rely on it here imports unnecessary complication. Rather, on much the same basis as is set out above (at paragraphs 109 and following) in relation to the Minister's failure to communicate through reasons the ECCC's methodological concerns, I see the failure to communicate in reasons any concerns about the NQLs established by the NMRWB in its initial decision as a breach of the honour of the Crown. The effect of the breach was to deny the NMRWB an opportunity to address these concerns in its final decision, and to stifle the dialogue for which the NILCA process was intended to provide. I respectfully disagree with the conclusion of the application judge to the extent that he found it sufficient for the Minister to take the formal steps set out in sections 5.5.7 to 5.5.11 of NILCA regardless of what she communicated.

H. *Did the application judge commit reviewable error in granting Makivik's motion to strike out certain portions of the evidence filed by the Attorney General?*

[147] In granting Makivik's motion to strike out a portion of Dr. Vallender's affidavit, the application judge relied (at paragraph 64 of his reasons) on the principle that, subject to limited exceptions, the evidence before a reviewing court on judicial review is confined to the evidence

that was before the administrative decision-maker. He reasoned that the evidence targeted by Makivik related to the 2016 aerial survey results, which were not available when the NMRWB and the Minister made their decisions. The evidence was accordingly not relevant or admissible for purposes of the judicial review. The evidence also contained more than background information, and therefore did not come within the exception for evidence of that nature.

[148] As the Attorney General and Makivik both recognize, there are also certain other exceptions, among them an exception for evidence relevant to the reviewing court's exercise of its remedial discretion: *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 10. While the Attorney General relies on this exception in asking us to set aside the application judge's decision, it is not apparent from the record or from counsel's submissions whether this exception was put to the application judge. Makivik did not refer to it in its notice of motion to strike, despite referring to other exceptions. Nor did the application judge advert to it in granting the motion. However, I assume from the Attorney General's account of the basis on which the evidence was filed that the exception was indeed put to him, or that he was otherwise aware of it.

[149] In any event, it is now more than four years since the 2016 aerial survey results to which Dr. Vallender refers in the struck-out portions of her affidavit became available. Its evidentiary value in the consideration of remedy seems limited at best. Given the impact of the passage of time, the other evidence in the record, and the fact that the application judge found it unnecessary to consider the struck-out evidence in exercising his discretion as to remedy, I would not at this stage interfere with the application judge's decision on this issue.

I. *Should this Court grant declaratory relief?*

[150] The application judge found (at paragraph 212 of his reasons) that declaratory relief would not be appropriate. Granting declaratory relief, he stated, would affect the parties' intention to improve the wildlife management system established by NILCA for Nunavik Inuit, when there were other subpopulations of polar bear the NMRWB and the Minister still had to consider and other wildlife species they would need to manage. Referring to the Supreme Court's statement in *Nacho Nyak Dun* that "the court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process," he found that it would be both premature and not useful to grant declaratory relief on issues regarding the interpretation of NILCA that could have been resolved by the parties at an earlier stage.

[151] After referring to *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 1979 CanLII 9 (SCC) (a seminal Supreme Court decision on the appropriateness of declaratory relief), and quoting again from *Nacho Nyak Dun*, he concluded that declining to grant declaratory relief would leave the parties to continue "to govern together and work out their differences" and "to work out their understanding of a process – quite literally to reconcile – without the Court's management of that process." It would thus fulfil the purpose of the Supreme Court's call for judicial forbearance and restraint.

[152] A court may grant a declaration where it has jurisdiction to hear the issue, the dispute before the court is real and not theoretical, the party raising the issue has a genuine interest in its resolution, and the respondent has an interest in opposing the declaration sought: *Ewert v. Canada*, 2018 SCC 30 at para. 81. In the exercise of its remedial authority, a court may grant a

declaration that the Crown failed to act honourably in fulfilling its constitutional obligations to Indigenous peoples: see, for example, *Manitoba Metis* at paras. 140, 143-144, 154; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 80, affirming in part *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147 at para. 60.

[153] The granting of declaratory relief, like the granting of any relief on judicial review, is discretionary: *Ewert* at para. 83; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 36; *Strickland* at paras. 37-38; *Bessette* at para. 35; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3). As discussed above (at paragraphs 65) remedial decisions on judicial review are accordingly subject to appellate review on the standard set out in *Housen v. Nikolaisen* – correctness on questions of law and palpable and overriding error on questions of fact or mixed fact and law (absent an extricable question of law). The application judge's exercise of his discretion not to grant declaratory relief in this case would, therefore, ordinarily be entitled to deference.

[154] But circumstances have changed since the application judge made his remedial decision. While the application judge found that the Minister had acted unreasonably in relation to the NQLs, I have concluded that the Minister's conduct in relation not only to the NQLs but also to ITK failed to uphold the honour of the Crown. These findings call for a fresh exercise of discretion by this Court: *Ewert* at para. 80; *Iris Technologies Inc. v. Canada (National Revenue)*, 2020 FCA 117 at para. 31; *Federal Courts Act*, s. 52(b)(i).

[155] The prerequisites for granting declaratory relief are met in this case: there is no question as to the Court's jurisdiction; the dispute is real and not theoretical; Makivik has a genuine interest in its resolution, especially since the parties must now follow the NILCA process with respect to two further subpopulations of polar bears; and the respondent Attorney General has, and has pursued, an interest in opposing the declaration sought.

[156] Should declaratory relief then be granted? In my view, there are good reasons to grant it, despite the directive in *Nacho Nyak Dun* to exercise judicial forbearance and restraint.

[157] First, although paragraphs 112 and 146 of these reasons set out conclusions as to the conduct of the Crown that amount in substance to declarations, a formal judgment of the Court granting declaratory relief would add further solemnity to the Court's conclusions. This would in turn help to underline the importance in the reconciliation endeavour of the Crown's honouring its section 35 obligations, and of avoiding similar failures in the NILCA processes that are to follow. And finally, granting rather than withholding declaratory relief would, in my view, be more consistent with the Supreme Court's admonition that "judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance."

VIII. Proposed disposition

[158] I would allow the appeals in part, set aside paragraphs 3 and 4 of the judgment of the Federal Court, and, giving the judgment the Federal Court should have given, declare that in participating in the decision-making process under the Nunavik Inuit Land Claims Agreement to determine the total allowable take and non-quota limitations for the Southern Hudson Bay

subpopulation of polar bears, the Crown failed to interpret and implement that process in accordance with the honour of the Crown. I would dismiss the cross-appeal. In all of the circumstances, I would make no order as to costs of the appeal or the cross-appeal.

"J.B. Laskin"
J.A.

"I agree.
Wyman W. Webb J.A."

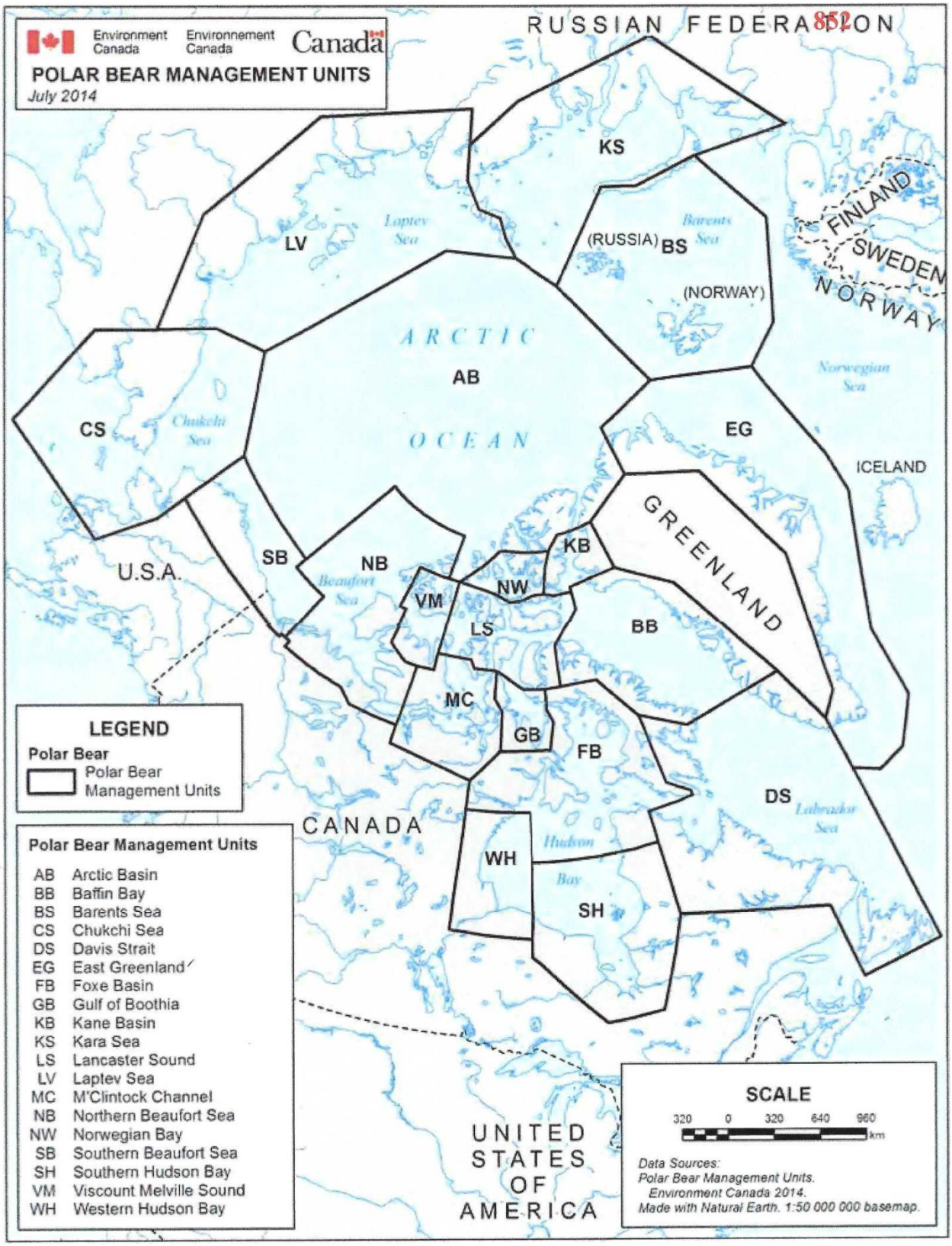
"I agree.
Anne L. Mactavish J.A."

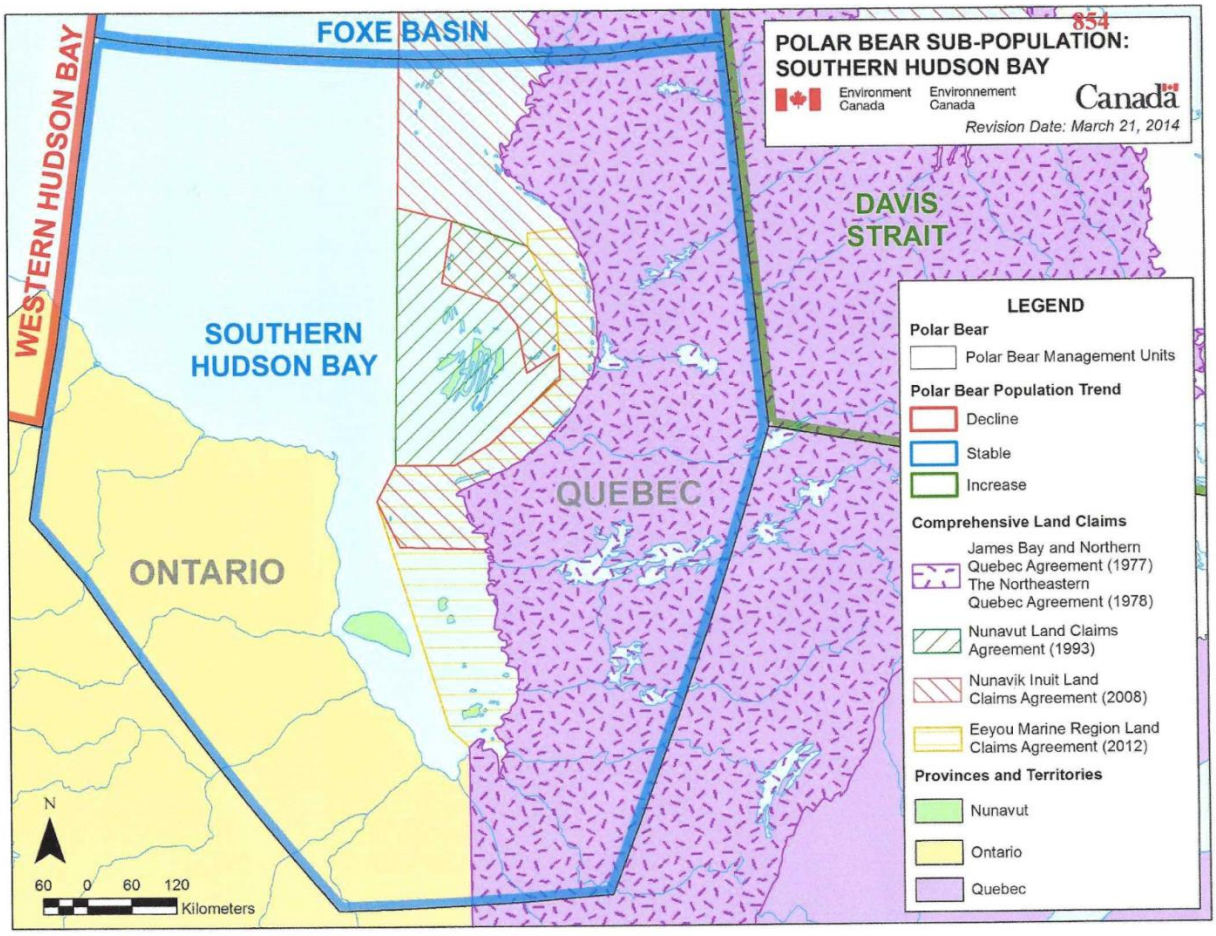
APPENDIX 1

LIST OF ACRONYMS

CITES	*Convention on International Trade in Endangered Species of Wild Fauna and Flora*
ECCC	Environment and Climate Change Canada
EMR	Eeyou Marine Region
EMRLCA	Eeyou Marine Region Land Claims Agreement
EMRWB	Eeyou Marine Region Wildlife Board
GCC	Grand Council of the Crees
ITK	Inuit traditional knowledge
NILCA	Nunavik Inuit Land Claims Agreement
NMRWB	Nunavik Marine Region Wildlife Board
NQLs	Non-quota limitations
NMR	Nunavik Marine Region
NTI	Nunavut Tunngavik Incorporated
SHB	Southern Hudson Bay
TAT	Total allowable take
TK	Traditional knowledge

APPENDIX 2


Environment Canada
Environnement Canada
Canada
POLAR BEAR MANAGEMENT UNITS
July 2014
RUSSIAN FEDERATION
852
KS
LV
Laptev Sea
(RUSSIA)
BS
Barents Sea
FINLAND
SWEDEN
NORWAY
(NORWAY)
ARCTIC
OCEAN
AB
Norwegian Sea
CS
Chukchi Sea
EG
ICELAND
GREENLAND
U.S.A.
SB
NB
Beaufort Sea
KB
NW
VM
LS
BB
MC
GB
FB
DS
Labrador Sea
CANADA
Hudson Bay
WH
SH
UNITED STATES OF AMERICA
LEGEND
Polar Bear
Polar Bear Management Units
Polar Bear Management Units
AB Arctic Basin
BB Baffin Bay
BS Barents Sea
CS Chukchi Sea
DS Davis Strait
EG East Greenland
FB Foxe Basin
GB Gulf of Boothia
KB Kane Basin
KS Kara Sea
LS Lancaster Sound
LV Laptev Sea
MC M'Clintock Channel
NB Northern Beaufort Sea
NW Norwegian Bay
SB Southern Beaufort Sea
SH Southern Hudson Bay
VM Viscount Melville Sound
WH Western Hudson Bay
SCALE
320 0 320 640 960
km
Data Sources:
Polar Bear Management Units.
Environment Canada 2014.
Made with Natural Earth. 1:50 000 000 basemap.


854
POLAR BEAR SUB-POPULATION:
SOUTHERN HUDSON BAY
Environment Canada
Environnement Canada
Canada
Revision Date: March 21, 2014
FOXE BASIN
WESTERN HUDSON BAY
SOUTHERN HUDSON BAY
DAVIS STRAIT
QUEBEC
ONTARIO
LEGEND
Polar Bear
Polar Bear Management Units
Polar Bear Population Trend
Decline
Stable
Increase
Comprehensive Land Claims
James Bay and Northern Quebec Agreement (1977) The Northeastern Quebec Agreement (1978)
Nunavut Land Claims Agreement (1993)
Nunavik Inuit Land Claims Agreement (2008)
Eeyou Marine Region Land Claims Agreement (2012)
Provinces and Territories
Nunavut
Ontario
Quebec
N
60 0 60 120
Kilometers

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-447-19 (lead file), A-445-19 and A-448-19

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE FAVEL OF THE FEDERAL COURT DATED OCTOBER 30, 2019, DOCKET NO. T-1994-16)

STYLE OF CAUSE:	MAKIVIK CORPORATION, THE GRAND COUNCIL OF THE CREES, and NUNAVIK MARINE REGION WILDLIFE BOARD v. THE ATTORNEY GENERAL OF CANADA and NUNAVUT TUNNGAVIK INCORPORATED
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	JUNE 7 and 8, 2021
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WEBB J.A. MACTAVISH J.A.
DATED:	SEPTEMBER 21, 2021

APPEARANCES:

Nick Dodd David Janzen	FOR THE APPELLANT/RESPONDENT BY CROSS-APPEAL MAKIVIK CORPORATION
Jean-Sébastien Clément Alex O'Reilly	FOR THE APPELLANT/RESPONDENT BY CROSS-APPEAL THE GRAND COUNCIL OF THE CREES
Cristina Birks	FOR THE APPELLANT/RESPONDENT BY

	CROSS-APPEAL NUNAVIK MARINE REGION WILDLIFE BOARD
Pavol Janura Vincent Veilleux	FOR THE RESPONDENT/APPELLANT BY CROSS-APPEAL
Christopher Rootham	FOR THE INTERVENER

SOLICITORS OF RECORD:

Dionne Schulze s.e.n.c. Montreal, QC	FOR THE APPELLANT/RESPONDENT BY CROSS-APPEAL MAKIVIK CORPORATION
Gowling WLG (Canada) S.E.N.C.R.L., S.R.L. Montreal, QC	FOR THE APPELLANT/RESPONDENT BY CROSS-APPEAL THE GRAND COUNCIL OF THE CREES
Borden Ladner Gervais LLP Montreal, QC	FOR THE APPELLANT/RESPONDENT BY CROSS-APPEAL NUNAVIK MARINE REGION WILDLIFE BOARD
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT/APPELLANT BY CROSS-APPEAL
Nelligan O'Brien Payne LLP Ottawa, ON	FOR THE INTERVENER