Federal Court Cour fédérale

**Date: 20250509**

**Dockets: T-2508-23**
**T-1988-24**

**Citation: 2025 FC 864**

**Ottawa, Ontario, May 9, 2025**

**PRESENT: Mr. Justice Sébastien Grammond**

**Docket: T-2508-23**

**BETWEEN:**

**LAC STE. ANNE MÉTIS COMMUNITY ASSOCIATION**

**Applicant**

**and**

**THE MINISTER OF FINANCE**

**Respondent**

**Docket: T-1988-24**

**AND BETWEEN:**

**ASENIWUCHE WINEWAK NATION OF CANADA, A FELLOWSHIP OF ABORIGINAL PEOPLE ON BEHALF OF THE ASENIWUCHE WINEWAK NATION**

**Applicant**

**and**

**THE DEPUTY PRIME MINISTER AND
THE MINISTER OF FINANCE**

**Respondent**

## JUDGMENT AND REASONS

[1] The Government of Canada initiated discussions aimed at granting an equity stake in the Trans Mountain pipeline project to Indigenous groups affected by the project. The Minister of Finance [the Minister], however, decided that the applicants were ineligible to take part in those discussions, mainly because they are not recognized by Canada as the holders of rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, even though both applicants were consulted regarding the impacts of the project. The applicants are now seeking judicial review of their exclusion.

[2] I am allowing the applications. The process by which the Minister set criteria for participation was a blatant case of reverse engineering that does not provide a reasonable justification for the decision. The criteria ostensibly adopted by the Minister were only applied to the groups who were excluded, whereas several groups who were found eligible would have failed the same test. Moreover, while the stated purpose of the criteria is to ensure that only legitimate Indigenous groups are offered an equity stake in the project, there is no rational link between full proof of section 35 rights and the legitimacy of Indigenous groups, and there is no suggestion that the applicants are not legitimate. Lastly, the Minister breached procedural fairness by not giving the applicants notice of her concerns regarding potential membership overlaps with other Indigenous groups.

## I. Background

[3] The backdrop for the present matter is the evolving framework for the recognition of Indigenous groups in Canada. As I explained in *Metis Settlements General Council v Canada (Crown-Indigenous Relations)*, 2024 FC 487 [*Metis Settlements*], at paragraph 62, "recognition is the process by which the state chooses the Indigenous communities whose rights it will acknowledge, as well as the identity of the bodies the state will acknowledge as representing them."

[4] There was a time where the only Indigenous groups Canada recognized were "bands" referred to in the *Indian Act*, now commonly known as First Nations. However, given the enactment of section 35 of the *Constitution Act, 1982*, which recognizes and affirms the rights of "Indian, Inuit and Métis peoples," and the decision of the Supreme Court in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99, one must now look beyond the *Indian Act*. For example, Indigenous groups who are not First Nations may benefit from the duty to consult and accommodate laid out in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]. As there is no comprehensive framework, statutory or otherwise, for the recognition of such groups, difficulties are bound to arise.

### A. *The Applicants*

[5] The applicants are Indigenous groups who assert that they hold section 35 rights. However, they are not First Nations (or *Indian Act* bands).

(1) Lac Ste. Anne Métis

[6] The Lac Ste. Anne Métis community describes itself as being comprised of the descendants of a Cree-speaking Métis community that arose around Lac Ste. Anne (or *mânitow sâkahikanihk*), in west-central Alberta, in the early 19th century, before effective European control. It asserts that it holds aboriginal rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

[7] Prior to 2021, the Lac Ste. Anne Métis were represented by a provincial society called The Métis Nation of Alberta Association Local Council #55 Gunn [the Gunn Métis Local]. This society was an affiliate of the Métis Nation of Alberta [MNA], an association that represents Métis at the provincial level. Although the details are not in evidence, I understand that the Lac Ste. Anne Métis disassociated themselves from the MNA and dissolved the Gunn Métis Local. The applicant, Lac Ste. Anne Métis Community Association, was incorporated in 2018 pursuant to federal legislation to represent the community.

[8] The province of Alberta has set up a process for the recognition of Indigenous communities who have credibly asserted section 35 rights. The aim is to identify the proper representatives of communities for the purposes of discharging the duty to consult and to accommodate flowing from section 35, according to *Haida Nation*. In September 2022, Alberta recognized Lac Ste. Anne pursuant to this process.

[9] After receiving provincial recognition, Lac Ste. Anne communicated several times with Canada to seek federal recognition. However, it never received any substantive response.

[10] It is noteworthy that in 2023, Canada entered into an agreement with the MNA purporting to grant the latter a monopoly on the representation of the Métis of Alberta for the purposes of section 35 rights, including the duty to consult and accommodate. In the *Metis Settlements* case, I found that the agreement was invalid to the extent that it excluded Métis organizations not represented by the MNA that Canada nonetheless found to have credibly asserted section 35 rights. Lac Ste. Anne was not a party to this proceeding.

(2) Aseniwuche Winewak

[11] The Aseniwuche Winewak describe themselves as a Cree-speaking Indigenous group that has inhabited the eastern slopes of the Rocky Mountains since at least the 18th century. While their traditional territory lies within the region covered by Treaty 8, they were never asked to adhere to that treaty. They have never been recognized as a "band" pursuant to the *Indian Act*.

[12] The Aseniwuche Winewak came into closer contact with the Canadian state when several families were expelled from what was to become Jasper National Park, in 1910. They moved further north, near what became the town of Grande Cache, Alberta. When the development of the area intensified in the 1960s, Alberta concluded agreements with them to set apart areas of land in or around Grande Cache on which they could settle. These agreements establish a regime of landholding that shows certain similarities with the regime governing reserves under the *Indian Act*.

[13] It appears that Alberta directs proponents of development projects to consult with Aseniwuche Winewak where a project may have impacts on the latter's asserted section 35 rights. However, Alberta has not granted Aseniwuche Winewak formal recognition pursuant to its Métis recognition policy. Some federal organizations, such as Parks Canada, consult with Aseniwuche Winewak on a regular basis.

[14] In 2004, Aseniwuche Winewak brought a claim against Canada and Alberta in the Alberta Court of Queen's Bench, seeking a declaration of aboriginal title. This claim was dismissed for delay. In 2017, a new claim was brought, asking the Court to declare that the Aseniwuche Winewak are "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*. In 2018, Canada initiated discussions with Aseniwuche Winewak pursuant to the Recognition of Indigenous Rights and Self-Determination [RIRSD] framework. Meetings were held over a period of approximately one year, after which Canada ceased its participation. Canada then suggested that Aseniwuche Winewak file a "special claim" for recognition, a process for which there appears to be no guidelines. Although it obtained a historical research report, Aseniwuche Winewak indicated that it is not yet ready to file such a claim.

B. *The TMX Project*

[15] In 2013, Kinder Morgan Canada Inc. [Kinder Morgan] or its affiliates asked the National Energy Board [the NEB] to approve the twinning of the existing Trans Mountain pipeline between Edmonton, Alberta, and Burnaby, British Columbia [the TMX project]. Kinder Morgan concluded Mutual Benefits Agreements with several Indigenous communities likely to be affected by the project, including Lac Ste. Anne and Aseniwuche Winewak. Indigenous

communities who signed these agreements undertook to inform the NEB of their support for the TMX project. In addition, Lac Ste. Anne participated in the NEB hearings. In 2016, upon the NEB's positive recommendation, the Governor in Council approved the project.

[16] Several parties filed applications for judicial review of this decision. In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3 [*Tsleil-Waututh*], the Federal Court of Appeal found that certain aspects of the consultation process were inadequate and quashed the approval of the project.

[17] Meanwhile, Canada acquired the existing Trans Mountain pipeline and the TMX project from Kinder Morgan. After the decision of the Federal Court of Appeal, consultations were resumed. The Crown consulted Lac Ste. Anne and Aseniwuche Winewak. The Governor in Council approved the project again in June 2019. Another set of applications for judicial review were filed, but this time the Federal Court of Appeal found that the Crown had met its duty to consult and accommodate: *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, [2020] 3 FCR 3.

[18] In March 2019, as consultations were underway, the Minister announced a commitment to explore the economic participation of affected Indigenous communities in the TMX project, a process which became known as "Indigenous Economic Participation". Meetings with those communities began in August 2019 but were suspended in late 2021. Lac Ste. Anne took an active part in those meetings. The evidence does not reveal the extent of Aseniwuche Winewak's involvement, if any.

C. *The Decisions Under Review*

[19] After a pause of a year and a half, Canada resumed the discussions and invited most affected Indigenous communities to a meeting to be held in late September 2023. However, Lac Ste. Anne and Aseniwuche Winewak, like seven other Indigenous groups, were not invited. Instead, on August 10, 2023, Canada informed them that it was considering setting criteria for Indigenous Economic Participation. According to the proposed criteria, an eligible group had to be:

> 1. One of the 129 Indigenous communities identified on the 2019 Crown consultation list for the Trans Mountain Expansion Project;
>
> 2. A federally recognized rights-bearing group that holds rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; and
>
> 3. Not a member of, or affiliated with, another eligible Indigenous community.

[20] Canada invited comments by September 29, 2023. Both Lac Ste. Anne and Aseniwuche Winewak provided detailed answers objecting to the proposed criteria and explaining why they should be found eligible. In March 2024, a briefing note was prepared for the Minister, summarizing the comments received and recommending that the three criteria be adopted and that the nine groups under review, including Lac Ste. Anne and Aseniwuche Winewak, be found ineligible [the Briefing Note].

[21] The Briefing Note explained why the list of Indigenous groups consulted prior to the approval of the project was not an adequate basis to determine eligibility for Indigenous Economic Participation:

> In reviewing the Crown Consultation List, it became clear that there were issues of overlap and duplication amongst some Indigenous groups, while others are not recognized as representative of rights-bearing collectivities. Given that population numbers for Indigenous groups could be a factor in determining distribution of equity ownership interest, Indigenous groups that represent the same population base needed to be reviewed. Also, since the Government of Canada is likely to provide extraordinary assistance to finance the transaction, it is important to ensure that the Indigenous groups represent collectivities that are recognized by Canada as being Indigenous or treaty rights holders and that they are the appropriate body representing those collectivities. Otherwise, it would be unclear whether the benefits are being provided to Indigenous peoples as part of advancing economic reconciliation. In light of these concerns, the consultation list was reviewed and criteria were considered in order for an Indigenous group or community to be eligible to participate.

[22] More specifically, the following justification was provided for criterion no. 2, namely, that the group be a "federally recognized rights-bearing group that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*":

> The principle behind criteria 2 is to ensure that Government of Canada assistance and economic benefits from Trans Mountain flow to legitimate Indigenous peoples. Finance Canada is not conducting its own exercise to assess whether a group is recognized by Canada. Instead, Finance Canada is taking the current position of the Government of Canada, as articulated by the department for the responsible Minister, the Minister of Crown-Indigenous Relations. Finance Canada has consulted with Crown Indigenous Relations and Northern Affairs Canada (CIRNAC) on which Indigenous groups are recognized by Canada.

[23] It is also useful to mention the justification offered for criterion no. 3:

> The principle behind criteria 3 is to prevent any unfair duplication of benefits that could disproportionately enrich specific Indigenous groups. Specifically, it is to avoid double counting members between Indigenous groups.

[24] With respect to the application of criteria no. 2 to the applicants, the annex to the Briefing Note states peremptorily that they are not "federally recognized rights-bearing groups." It adds that Aseniwuche Winewak has brought a lawsuit against Alberta and Canada, but that it "has yet to submit a request to begin a federal recognition process." It mentions that Lac Ste. Anne has written to CIRNAC to seek recognition, but that "CIRNAC has yet to respond to this request." The outcome of criterion no. 3 is said to be "unknown" with respect to both applicants. Nevertheless, the Briefing Note states that Lac Ste. Anne "would need to show a separate and distinct membership list from MNA." It also noted that Aseniwuche Winewak and Kelly Lake Métis Settlement Society "have all described a similar ancestral heritage and historical connection to the Jasper and Lac Ste. Anne areas, which leaves a potential for overlap."

[25] The Minister accepted these recommendations on May 24, 2024. The decision sheet deemed the applicants ineligible because "they are not a federally recognized rights-bearing group that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and because there is the potential for membership overlap," with the Métis Nation of Alberta in the case of Lac Ste. Anne and with Kelly Lake Métis Settlement Society in the case of Aseniwuche Winewak.

[26] On May 30, 2024, the Special Representative for the Deputy Minister wrote to Lac Ste. Anne to inform it of the decision. In its relevant part, the letter reads:

> As the Lac Ste. Anne Métis Community Association is aware, the Department of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) manages a federal rights recognition process on behalf of the Government of Canada. We understand that Lac Ste. Anne Métis Community Association has sought federal recognition through this process, but that no final determination has been made by CIRNAC. Therefore, at this time, the Lac Ste. Anne Métis Community Association is not a federally recognized rights-bearing group with rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

[27] The Special Representative wrote a similar letter to Aseniwuche Winewak on July 4, 2024, the relevant part of which reads:

> The Department of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) manages a federal rights recognition process on behalf of the Government of Canada. The Indigenous Economic Participation transaction is not a section 35 rights determining exercise. As a result, the Government of Canada is relying upon the existing status of claims in the federal rights recognition process led by CIRNAC in making its determination on the applicability of this criterion. CIRNAC has confirmed that Aseniwuche Winewak Nation is not a federally recognized rights-bearing group with rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

[28] In both cases, the letter stated that because criterion no. 2 was not met, it was not necessary to assess criterion no. 3.

[29] Both Lac Ste. Anne and Aseniwuche Winewak brought applications for judicial review of the Minister's decision to find them ineligible for Indigenous Economic Participation.

## II. Analysis

[30] I am allowing the applications. Contrary to Canada's submissions, the adoption of the criteria is a justiciable matter and the applications are not premature. The evidence shows that the criteria were reverse-engineered to effect the exclusion of the applicants. Criterion no. 2 is also unreasonable because it is not rationally linked to its stated purpose of weeding out illegitimate Indigenous groups. In any event, there is no evidence that the applicants are illegitimate Indigenous groups. Moreover, Canada breached procedural fairness by failing to disclose its concerns regarding criterion no. 3.

### A. *Justiciability and Prematurity*

[31] I must first dispose of two preliminary objections brought by Canada.

[32] Canada contends that the adoption of the three criteria is not a justiciable matter, although it concedes that their application is. It asserts that because Indigenous Economic Participation would be offered through the Crown's power to contract as a natural person, there are no statutory constraints on the Crown's decision.

[33] Canada's submissions confuse justiciability with the extent of the constraints bearing on the decision-maker. A matter is not justiciable only in "rare cases [where] exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis": *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paragraph

66. In the present case, as far as we can determine, the decision was based on factual findings regarding the membership of the applicants as well as CIRNAC's decision that the applicants did not meet certain undisclosed criteria for recognition. There is no indication that the decision was based on the kind of considerations that might take it outside of the sphere of justiciability or make it unsuitable for judicial review.

[34] Moreover, a decision does not become non-justiciable simply because it was based on the Crown's powers as a natural person: *Stagg v Canada (Attorney General)*, 2019 FC 630 at paragraphs 41–53. The cases cited by Canada to support the assertion that the Crown was exercising its natural person powers do not address the question of justiciability. Likewise, the fact that there are few or no statutory constraints bearing on the decision maker does not render the matter non-justiciable, as demonstrated by the recent case concerning the prorogation of Parliament: *MacKinnon v Canada (Attorney General)*, 2025 FC 422.

[35] A parallel may be drawn with *Richard v Canada (Attorney General)*, 2024 FC 657 [*Richard*], which concerned *ex gratia* payments made to thalidomide survivors. Those payments were made pursuant to eligibility criteria set by the government in the absence of any statutory regime. The applicant challenged the reasonableness of one of these criteria, which limited eligibility to individuals born between 1957 and 1967 on the basis that thalidomide was withdrawn from the market in 1962. Canada argued that the matter was not justiciable, putting forward the same arguments as in the present case. Yet, the Court found that the matter raised a justiciable issue, and that the criterion was unreasonable as it lacked justification, transparency and intelligibility. The Court determined that the criterion was based on unfounded

generalizations “with no reliable information about the quantity of thalidomide still available or about the shelf life of the medication”: *Richard* at paragraphs 75–76. Therefore, a decision subject to few legal constraints may still be reviewed for its compatibility with factual constraints as well as the coherence of its internal reasoning.

[36] Lastly, Canada argues that the applicants’ challenge is premature because the Minister never made a firm commitment to give Indigenous groups an equity stake in the TMX project. In other words, the outcome of the ongoing negotiations is unknown and until they conclude, the applicants’ rights are not affected. In my view, this is an overly formalistic view of the situation. The Minister’s commitment to explore the possibility of Indigenous Economic Participation must not be taken lightly. While the outcome of the process is not known yet, what is certain is that the applicants will be excluded from its benefits if the Minister’s decision stands. In other words, the decision is final as far as they are concerned. This is enough to give the applicants standing to pursue this application for judicial review.

B. *Criterion no. 2 was Reverse-Engineered*

[37] According to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], a decision is reasonable if it is based on an internally coherent reasoning and it is justified in light of the relevant legal and factual constraints. When dealing with the constraints flowing from the principles of statutory interpretation, at paragraph 121, the Supreme Court noted that it would be unreasonable to “reverse-engineer” a desired outcome. While these comments were made in respect of a specific category of legal constraints, they

reflect the basic principle that the ends cannot justify the means. In other words, there is no logical justification when the reasoning proceeds backwards from the desired outcome.

[38] Here, criterion no. 2 was reverse-engineered. It was never meant to be evenly applied to all Indigenous groups, and it cannot be the real basis for the decision to exclude the applicants because many Indigenous groups that Canada found eligible would fail this test. Indeed, Canada admitted at the hearing that the criteria were not applied to the 120 Indigenous groups who were found eligible. Moreover, the sequence of events shows that the decision to exclude the applicants was made before the criteria were adopted.

(1) Criterion no. 2 is not the Real Test

[39] The conclusive proof that the criteria were reverse-engineered is that they were never applied to the 120 Indigenous groups with whom Canada continued the discussions. At the hearing of this application, Canada admitted as much. If the criteria had been applied evenly, there is every reason to believe that many of those groups would not have qualified.

[40] To understand this, one must differentiate the standards of proof for the recognition of aboriginal rights. An Indigenous group has brought "full proof" of its aboriginal rights if it obtained a judicial decision to this effect (for example, *R v Gladstone*, [1996] 2 SCR 723) or if the government recognized this by way of agreement, typically a land claims agreement or "modern treaty" (such as the Nisga'a Final Agreement). In contrast, pursuant to *Haida Nation*, a duty to consult and accommodate is triggered where an Indigenous group brings a "prima facie" proof of its aboriginal rights. The phrase "asserted rights" is often used to convey the same idea.

In practice, this is a much lower standard than full proof. In addition, the mere fact that an Indigenous group is a First Nation pursuant to the *Indian Act* does not automatically mean that it has proven its asserted section 35 rights—being recognized pursuant to a statutory scheme has no bearing on constitutional entitlement.

[41] In the present case, the Briefing Note makes it clear that Canada considered that a prima facie proof was insufficient for the purposes of eligibility to Indigenous Economic Participation. Therefore, criterion no. 2 must mean that full proof is required. Yet, many Indigenous groups that Canada found eligible have not reached this point, have not obtained either a judicial declaration of their aboriginal rights or their recognition by agreement, and would not be "federally recognized rights-bearing groups" holding section 35 rights. Three categories of groups would likely fail the test, based on circumstances well known to anyone familiar with aboriginal law.

[42] First, many First Nations in British Columbia have not obtained a judicial declaration of their aboriginal rights, nor have they reached a final settlement with Canada to that effect. This, indeed, is the situation that prompted the Supreme Court to recognize a duty to consult in *Haida Nation*. Even though these First Nations are recognized as "bands" pursuant to the *Indian Act*, this is something entirely different from being recognized as a section 35 rights-holder. For example, several First Nations who were applicants in the *Tsleil-Waututh* judicial review assert aboriginal rights but have not fully proved them: *Tsleil-Waututh* at paragraphs 20, 29 and 34. Canada found them eligible to Indigenous Economic Participation, even though they meet only the lower standard of prima facie proof, in apparent contradiction to criterion no. 2.

[43] Second, Canada has extended an invitation to discuss Indigenous Economic Participation to First Nations (that is, *Indian Act* bands), not to larger entities such as Indigenous nations. Yet, the British Columbia Court of Appeal stated that section 35 rights are not necessarily held by *Indian Act* bands. Rather, the proper rights holder may be a larger entity, such as an Indigenous nation: *William v British Columbia*, 2012 BCCA 285 at paragraphs 132–157, aff'd by *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, without discussion of this point. For example, in *Tsleil-Waututh*, at paragraphs 41-44, the Federal Court of Appeal noted that the Upper Nicola band is a member of the Sylix Nation, a larger entity asserting aboriginal rights. Canada found the Upper Nicola band eligible to Indigenous Economic Participation, even though it does not assert aboriginal rights for itself and would not be considered a section 35 rights-holder within the meaning of criterion no. 2.

[44] Third, Canada has invited three Alberta Métis settlements to the discussions even though it does not recognize them as section 35 rights-holders. Rather, Canada concluded an agreement granting the MNA a monopoly on the representation of Alberta Métis for section 35 purposes. It is difficult to understand how Canada could have concluded that three Métis settlements were "federally recognized rights-bearing groups" without breaching its commitment to the MNA. If Canada changed its position in the wake of the *Metis Settlements* decision, it is difficult to understand why Métis settlements are treated differently from Métis locals that disassociated from the MNA, such as Lac Ste. Anne.

[45] At the hearing, I suggested that in reality, to be eligible, a group needs to be either an *Indian Act* band, the MNA or a Métis settlement. Counsel for Canada was unable to contradict

my observation. This reinforces the conclusion that the three criteria communicated to the applicants were not the real criteria applied to all groups who were seeking to participate. To put it differently, one set of criteria was applied to groups who were included, and a different set of criteria was applied to those who were excluded. It is hard to imagine a clearer example of arbitrary decision-making.

(2) The Decision Preceded the Criteria

[46] Moreover, the process followed by the Department of Finance shows that the outcome was pre-ordained and reinforces the conclusion that the justification process was nothing but an exercise of reverse engineering.

[47] A decision to target nine groups for exclusion from Indigenous Economic Participation was made prior to the beginning of the process by which the Department of Finance attempted to justify the decision. It is clear from the Briefing Note that nine groups were singled out for review and excluded from the meetings that began in September 2023 and that steps were taken to "reset [their] expectations." In other words, the decision was implemented before it was supposed to be made. No reason was provided for selecting these nine groups, other than vague statements that only legitimate Indigenous groups should be allowed to participate or that the applicants' inclusion would create "difficulties" in the "Métis policy space."

[48] The manner in which the Briefing Note addresses the nine groups' submissions buttresses the conclusion that the outcome was pre-ordained. While their submissions were summarized, nothing shows that they were seriously considered. For example, their concerns regarding the

length of CIRNAC's decision-making process were noted, but little was offered in terms of meaningful response.

[49] Hence, the decision cannot be justified by the three criteria set by the Department of Finance, because these criteria were not the real basis for the decision. The reasons given therefore "fail to reveal a rational chain of analysis": *Vavilov*, at paragraph 103. This is enough to render the decision unreasonable. Moreover, the fact that the criteria were reverse-engineered is an additional reason to reject the distinction put forward by counsel for Canada between the adoption of the criteria and their application to a specific case—here, there is every indication that the outcome preceded the adoption of the criteria.

C. *Criterion no. 2 is Unreasonable*

[50] Even if it had been consistently applied, criterion no. 2 would be unreasonable because it is not rationally linked to its stated purpose, namely, weeding out illegitimate Indigenous groups. It disqualifies groups that are undoubtedly legitimate Indigenous groups.

[51] One must assume, at a minimum, that First Nations (or *Indian Act* bands) are legitimate Indigenous groups. Yet, as explained above, not all First Nations who assert aboriginal rights have yet been able to fully prove them. Some First Nations may never be able to prove aboriginal rights: see, for example, *Drew v Newfoundland and Labrador (Minister of Government Services and Lands)*, 2006 NLCA 53. Simply put, holding aboriginal rights, let alone making full proof of them, cannot be a condition sine qua non for being a legitimate Indigenous group.

[52] *Haida Nation* reinforces this point. The Supreme Court decided that certain measures, namely, the duty to consult and accommodate, should be offered to Indigenous groups without requiring full proof of their aboriginal rights; rather, prima facie proof will suffice. One must assume that by doing this, the Supreme Court did not intend to confer benefits on illegitimate Indigenous groups. Hence, an Indigenous group cannot be deemed illegitimate simply because it has only brought prima facie proof of its aboriginal rights, as opposed to full proof.

[53] The applicants' case further illustrates the unreasonableness of criterion no. 2. Both applicants failed criterion no. 2, and by implication were held to be illegitimate groups, simply because they did not bring full proof of their rights. Nevertheless, after a careful analysis, Canada determined that both groups have credibly asserted section 35 rights and had to be consulted with respect to the TMX project. It would be surprising if Canada found that an illegitimate group had a credible claim, that is, it has made a prima facie proof. The same can be said of Alberta, which came to a similar conclusion with respect to Lac Ste. Anne and conferred special rights on Aseniwuche Winewak on account of its indigeneity. Moreover, until recently Lac Ste. Anne was affiliated with the MNA. Had it chosen to remain so, Canada would have readily recognized that its members can exercise section 35 rights, and no one would have suggested that they were illegitimately claiming Indigenous identity.

[54] At the hearing, I asked whether Canada had any grounds to believe that Lac Ste. Anne and Aseniwuche Winewak were not legitimate Indigenous groups, and there was no answer.

[55] CIRNAC's "recognition process" cannot rescue criterion no. 2 from a finding of unreasonableness because the process is poorly defined, takes considerable time and resources and appears to be entirely discretionary on Canada's part. It does not provide a justification because in the end, we still do not know why the applicants are not recognized.

[56] The applicants' experience shows that the process is opaque at best and undefined at worst. While Canada held discussions with Aseniwuche Winewak in 2018 under the RIRSD framework, it withdrew from the discussions and told Aseniwuche Winewak to bring a "special claim." Aseniwuche Winewak asserts that there are no published criteria or guidelines for a "special claim," no funding available and no clarity as to the duration of the process. Lac Ste. Anne, on its part, wrote to CIRNAC to request recognition, but never received an acknowledgement.

[57] Canada did not contradict these assertions, nor did it provide evidence regarding its alleged "federal rights recognition process." In fact, the Briefing Note acknowledged that "[t]he average timeframe for CIRNAC processes can be upwards of 5-10 or more years" and that

> There was frustration that the CIRNAC Section 35 recognition process is lengthy and provides no funding, effectively blocking groups from participation in Finance's current process should the criteria be applied without a feasible or timely option to address their current issues. . . . As the Government of Canada lead on the topic, CIRNAC will be responsible for responding appropriately.

[58] In the end, it appears that criterion no. 2 simply means whoever CIRNAC chooses to recognize in its entire discretion. As the Briefing Note recognizes, CIRNAC's position is

unlikely to change within the timeframe of the Indigenous Economic Participation. Such a circuitous and arbitrary process cannot provide a reasonable justification for a decision.

[59] Of course, Canada is not required to accept the claims of every group that self-identifies as Indigenous. Nevertheless, the *Vavilov* framework requires it to provide a rational justification for its decision not to recognize a particular group. Here, no explanation was provided for the differential treatment of the MNA and three Métis settlements, on the one hand, and the applicants, on the other hand, other than the circular assertion that this is CIRNAC's position.

D. *The Process was Unfair in Respect of Criterion no. 3*

[60] Both applicants also argue that the Minister breached procedural fairness by relying on undisclosed concerns to find that they did not meet criterion no. 3. I agree.

[61] As explained above, the text of the decision sheet signed by the Minister referred to both criteria nos. 2 and 3 to justify the exclusion of the applicants. Canada nevertheless argues that the decision was not based on criteria no. 3. It relies on an annex to the decision sheet that states that criterion no. 3 is "unknown with information currently available" with respect to both applicants. I disagree. While the formal decision must be read in light of the annex, it is clear from the wording of the decision that uncertainty, or a "potential" overlap, was considered sufficient to fail the applicants. Thus, the decision is the document signed by the Minister and it was based on a failure to meet both criteria nos. 2 and 3. A breach of procedural fairness with respect to criterion no. 3 therefore taints the decision.

[62] Criterion no 3 requires that a beneficiary of Indigenous Economic Participation not be "a member of, or affiliated with, another eligible Indigenous community." As the Briefing Note explained, the point of this criterion is to "to avoid double counting members between Indigenous groups." This is readily understandable, and the applicants accept that in principle, this is a reasonable requirement.

[63] The difficulty, however, is that the applicants were not made aware of the Minister's precise concerns with respect to a potential overlap with other groups and were thus deprived of the opportunity of making meaningful submissions. For example, the Minister found that there was a potential overlap between Aseniwuche Winewak's membership and that of the Kelly Lake Métis Settlement Society. Nothing in the record suggests that Aseniwuche Winewak could have anticipated this concern.

[64] Even where the scope of the duty of procedural fairness lies at the low end of the spectrum, an applicant is entitled to know the "case to meet" or, in other words, to be apprised of the facts on which the decision maker intends to rely with sufficient precision to allow it to make meaningful submissions: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56, [2019] 1 FCR 121; *Sexsmith v Canada (Attorney General)*, 2021 FCA 111 at paragraphs 24–25. This was not done here.

[65] This is even more surprising as the only substantive concerns apparent from the record pertain to criterion no. 3 or, more generally, membership issues. Aseniwuche Winewak gave evidence that the main concerns expressed by Canada during the RIRSD process pertained to its

membership and the fact that it included non-Indigenous spouses of descendants of the original group. With respect to Lac Ste. Anne, the Briefing Note suggests that some of its members may also be members of the MNA. Even though the decision process lasted nine months from the initial letter to the decision, no one contacted the applicants to inform them of these concerns and to ask them to clarify the matter. This reinforces the conclusion that the outcome of the process was pre-ordained.

E. *Other Issues*

[66] The parties made extensive submissions regarding a broad range of issues. I will restrict myself to what is necessary to decide the case. In particular, as the matter can be decided on the administrative law grounds set forth above, it is not necessary to address the applicants' submission regarding the honour of the Crown.

[67] As the matter will be sent back for redetermination, I nevertheless offer the following observation. Canada has repeatedly insisted that Indigenous Economic Participation is not an accommodation measure governed by the framework laid out in *Haida Nation*. Rather, it would constitute something else, a "benefit" or an "economic reconciliation measure" governed by an entirely different legal framework. This distinction is difficult to understand.

[68] Canada is possibly right to say that the duty to consult and accommodate does not require it to offer Indigenous Economic Participation. I refrain from expressing any opinion on the issue. But once Canada decides to make such an offer, it is difficult to describe this otherwise than as an accommodation measure, especially because it is made only to those Indigenous groups

"identified on the 2019 Crown consultation list," that is, those who were affected by the TMX project. If an accommodation measure is offered to certain groups but not to others, Canada will have to provide a rational justification. This question cannot be side-stepped by labelling the measure as a "benefit" or as "economic reconciliation."

F. *Remedy*

[69] Both applicants are asking me to send the matter back to the Minister, with directions regarding the decision to be rendered. In particular, Lac Ste. Anne is effectively asking me to decide that it is eligible to Indigenous Economic Participation.

[70] Where a decision is unreasonable, the usual remedy is to send the matter back for redetermination: *Vavilov*, at paragraphs 139–142. I have not been persuaded that the outcome is inevitable, largely because the Minister has not credibly explained the basis for her decision. I do not think it is proper to give specific directions to the Minister. Of course, the Minister "must always take into account the decision and findings of the reviewing court": *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48 at paragraph 25.

III. Disposition

[71] For the foregoing reasons, the applications for judicial review will be granted. The Minister's decisions are quashed, and the matters are sent back to the Minister for redetermination.

[72] The parties have asked to be given an opportunity to make further submissions regarding the issue of costs. Accordingly, I will defer my decision on this issue.

**JUDGMENT in T-2508-23 and T-1988-24**

**THIS COURT'S JUDGMENT is that**:

1. The applications for judicial review are granted.
2. The decision made by the Minister of Finance on May 24, 2024, excluding the applicants from participating in the process to share the benefits of the Trans Mountain pipeline, is quashed.
3. The matter is remitted to the Minister of Finance for reconsideration.
4. The applicants will serve and file their submissions regarding costs, not to exceed 10 pages in length, no later than 30 days after the date of this judgment.
5. The respondent will serve and file its responding submissions regarding costs, not to exceed 10 pages in length, no later than 15 days after the day the applicants serve their submissions.

"Sébastien Grammond"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-2508-23 |
| **STYLE OF CAUSE:** | LAC STE. ANNE MÉTIS COMMUNITY ASSOCIATION v THE MINISTER OF FINANCE |
| **AND DOCKET:** | T-1988-24 |
| **STYLE OF CAUSE:** | ASENIWUCHE WINEWAK NATION OF CANADA, A FELLOWSHIP OF ABORIGINAL PEOPLE ON BEHALF OF THE ASENIWUCHE WINEWAK NATION v THE DEPUTY PRIME MINISTER AND THE MINISTER OF FINANCE |
| **PLACE OF HEARING:** | EDMONTON, ALBERTA |
| **DATE OF HEARING:** | MARCH 19–20, 2025 |
| **JUDGMENT AND REASONS:** | GRAMMOND J. |
| **DATED:** | MAY 9, 2025 |

**APPEARANCES:**

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| Jeff Langlois<br>Jason M. Harman | FOR THE APPLICANT ASENIWUCHE WINEWAK NATION |
| Paul Shenher<br>Cameron Regehr<br>Katherine Starks<br>Darren Grunau | FOR THE RESPONDENT |

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