FILE NO.: SCT-6001-20
CITATION: 2021 SCTC 5
DATE: 20211223

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
ENOCH CREE NATION Claimant (Respondent)	Ron Maurice and Steven Carey, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Applicant)	Tanya Knobloch and Soniya Bhasin, for the Respondent (Applicant)
	HEARD: October 7, 2021

REASONS ON APPLICATION

Honourable Todd Ducharme

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills, 1986 CarswellOnt 618, 55 OR (2d) 56 (CA); *Unwin v Crothers*, 2005 CarswellOnt 2811, 76 OR (3d) 453; *Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5, [2004] 2 FCR 514; *Gallant (Litigation guardian of) v Farries*, 2012 ABCA 98, 348 DLR (4th) 134; *Lakhoo v Lakhoo*, 2014 ABCA 98, 2014 CarswellAlta 348; *Edmonton Flying Club v Edmonton Regional Airports Authority*, 2013 ABCA 91, 359 DLR (4th) 81; *Waller v Independent Order of Foresters*, 1905 CarswellOnt 176, 5 OWR 421 (HC Div Ct); *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83; *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5; *Keeseekoose First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 3; *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

Statutes and Regulations Cited:

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 10.

Specific Claims Tribunal Act, SC 2008, c 22, s 16.

Authors Cited:

Indigenous and Northern Affairs Canada, *Re-Engaging: Five-Year Review of the Specific Claims Tribunal Act*, by Benoît Pelletier, Ministerial Special Representative (Ottawa: Indigenous and Northern Affairs Canada, September 2015).

The Canadian Bar Association, *Specific Claims Tribunal Act Five Year Review*, submission of the National Aboriginal Law Section (Ottawa: The Canadian Bar Association, April 2015).

Headnote:

Bifurcation — Bifurcated Proceedings — Specific and Compelling Evidence — Mandate of the Tribunal — Purpose of the Tribunal — Reconciliation — First Nation — Delay – Principles of Bifurcation – Just, Timely, and Cost-Effective Resolution

The Parties came before the Specific Claims Tribunal (Tribunal) on an Application by the Respondent (Crown) to bifurcate the Claim into separate phases: validity and compensation. The Respondent argued that the validity issues are too complex to be determined at the same time as the compensation issues, and that it would be inefficient to proceed in a unified claim. The Claimant, the Enoch Cree Nation, opposed this Application and argued that a litigant has the basic right to have all issues in dispute resolved in one trial, and that the bifurcation of the proceeding in the current Claim would not lead to a more timely, cost-effective and just resolution of this Claim.

The Tribunal recalled that issues before the Tribunal are properly considered in the context of the origin and purpose of the Tribunal, which was designed to achieve the distinctive task of adjudicating specific claims in a just and timely manner for the purposes of promoting reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations.

Recently in *Red Pheasant v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3, the Tribunal revisited the test established in *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5, and found that, when parties disagree on whether to bifurcate, bifurcation should be granted only in those exceptional cases wherein there is specific and compelling evidence that to do so will advance the mandate of the Tribunal. The party bringing the application to bifurcate bears the onus of showing, on a balance of probabilities, that bifurcation will so advance the Tribunal's mandate. On this Application, the Tribunal applied the newly-refined test.

After reviewing the procedural history of the Claim, and the evidence presented on the Application, the Tribunal found that the Respondent had not satisfied its onus and dismissed the Application for bifurcation.

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I. INTRODUCTION

[1] The Claimant, the Enoch Cree Nation, is located on Treaty No. 6 territory in present-day Alberta, only minutes west of Edmonton. In January 1902, the Claimant surrendered 9,113 acres of its reserve to the Canadian government to be sold. In addition to the proceeds from the sale, a number of conditions applied to the surrender: the remainder of the reserve was to be fenced, members of the Enoch Cree Nation were to be given farming implements, and elderly members were to be provided with warm clothes.

[2] In this Claim, the Claimant alleges that in accepting the surrender and fulfilling the conditions, the Respondent (Crown) failed to comply with the surrender provisions of the *Indian Act* in force at the time, breached its fiduciary and trust duties to the Enoch Cree Nation, and breached statutory and common law duties to the Enoch Cree Nation by paying for the fencing out of the Enoch Cree Nation's capital account, and providing farming implements to individual voting members as inducements to surrender the land.

[3] The Respondent denies these allegations. It says that it complied with the *Indian Act* in taking the surrender, complied with its fiduciary and trust duties, and that the expenditures from the Enoch Cree Nation's capital account were authorized by both the Governor in Council and the Enoch Cree Nation.

[4] Like many historic claims made by First Nations in Canada, this Claim is complicated in and of itself, and further complicated by the passage of time since the alleged wrongdoing. Claims by First Nations often require a multitude of experts to prove wrongdoing, followed by a similar multitude of experts to prove losses that need to be compensated. In addition, economic considerations come into play in ways they may not for non-First Nations litigants: litigation is always costly, and part of the Specific Claims Tribunal's (Tribunal) mandate is to reduce these costs through efficient processes that allows the Tribunal to deliver justice without creating additional injustices by expending funds that could be put to better use elsewhere.

[5] It is for these reasons, among others, that claims before the Tribunal are often bifurcated on consent into two phases: one to prove the validity of the claim itself, and a second to determine compensation for the proven losses. This method of proceeding often makes sense from an economic standpoint because there is no need to hire experts on compensation if validity cannot

be established in the first place. Further, by bifurcating the claim and concentrating on validity, both parties can concentrate their resources and efforts on what is often a complicated question, further complicated by its historic nature.

II. THE APPLICATION

[6] The Respondent brings this Application for Bifurcation pursuant to Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119. In bringing the Application, the Respondent makes many of the arguments these Reasons refer to above, namely that:

(a) the validity issues are too complex, wide-ranging, and varied to be determined at the same time as compensation;

(b) because the outcome on validity will determine the type or types of compensation available, it would be inefficient to engage experts on compensation prior to the determination of what compensation is due;

(c) the Tribunal may find no aspects of the Claim valid, and therefore a compensation hearing will not be necessary, which means any resources expended on compensation experts would be wasted; and,

(d) a validity finding will narrow the issues for the compensation hearing, which may help induce negotiation and settlement but will, at the very least, allow for the efficient use of experts' time when they offer opinions on compensation.

[7] The Claimant opposes bifurcation. The Claimant argues that bifurcation in this Claim will not create efficiencies and will, to the contrary, only serve to delay the resolution of the Claim. It argues that, despite the Tribunal's generally permissive stance to bifurcation on consent, bifurcating a judicial hearing remains the exception to the rule and should not be entered into without clear evidence that bifurcation will be more efficient or reduce costs. If the Claim is bifurcated, there is the potential for multiple rounds of judicial review on both the validity and compensation aspects, which will delay resolution. The Claimant argues that validity and compensation are inextricably linked, because the difference between the price paid for the land and its value at surrender, a factor relevant to compensation, represents the extent of the Crown's

liability. It also argues that bifurcation will prejudice the Claimant, especially because this Claim already has a lengthy procedural history, and Elders in the community—the best source of oral history evidence to prove the Claim—become unavailable to testify due to the passage of time, whether because of advanced age or death.

III. PROCEDURAL HISTORY OF THE CLAIM

[8] This Claim is one of four that the Enoch Cree Nation is currently pursuing before the Tribunal.

[9] An affidavit by a former Chief of the Enoch Cree Nation, Jerome Morin, shows that a claim based on the 1902 surrender was in the contemplation of the Enoch Cree Nation as early as 1985. In June of that year, the Enoch Cree Nation presented the Government of Canada with a unique proposal for the settlement of a variety of land and treaty claims entitled *The Enoch Land Claims: A Framework for Settlement*, which included reference to the 1902 surrender at issue in this Claim. No progress appears to have been made on the 1902 surrender claim at this time.

[10] This Claim was pursued via the Specific Claims Branch beginning in January 2007. A supplemental submission in the same Claim was filed in June 2009. On September 13, 2011, the Claim was rejected by the Minister of Indian Affairs and Northern Development, now the Minister of Crown-Indigenous Relations, a rejection which satisfied the condition precedent for bringing the Claim to the Tribunal under paragraph 16(1)(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

[11] A Declaration of Claim was then filed with the Tribunal on May 8, 2020, and a Response to the Declaration of Claim was filed September 4 of the same year.

[12] The Application to bifurcate this Claim was filed by the Respondent on August 30, 2021.

[13] On October 15, 2021, by Tribunal Order, I dismissed the Application for Bifurcation with Reasons to follow. The following are my Reasons for so doing.

IV. GENERAL PRINCIPLES ON BIFURCATION

[14] Courts across the country have considered the issue of bifurcation, and two principles emerge from the jurisprudence. The first is that bifurcation is the exception to the general rule that

all issues be heard at the same time, based on the "basic right of a litigant to have all issues in dispute resolved in one trial" (*Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills*, 1986 CarswellOnt 618 at para 11, 55 OR (2d) 56 (CA)). The second is that bifurcation must promote efficiency and justice, not frustrate them. To those ends, the onus rests with the moving party to show "there is a clear benefit to be gained" by bifurcation, and this onus is "particularly high when the opposing party objects to the bifurcation" (*Unwin v Crothers*, 2005 CarswellOnt 2811 at para 78, 76 OR (3d) 453).

[15] The principle that bifurcation is an exception to the rule is longstanding (*Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5 at para 11, [2004] 2 FCR 514 [*Realsearch Inc*]). In reversing the trial level bifurcation order in *Realsearch Inc*, the Federal Court of Appeal reached all the way to the late-Victorian era case *Piercy v Young* (1880), 15 Ch D 475, where Jessel MR observed that "[s]eparate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds" (*Realsearch Inc* at para 11, citing *Piercy v Young* (1880), 15 Ch D 475 at 479).

[16] The leading case on bifurcation in Alberta is *Gallant (Litigation guardian of) v Farries*, 2012 ABCA 98, 348 DLR (4th) 134 [*Gallant*]. The plaintiff in a medical malpractice case sought bifurcation into liability and damages phases arguing that, his family having moved to Prince Edward Island following the injury, witnesses on damages would be forced to travel a long way to testify about the plaintiff's condition. *Gallant* bears similarities to this Claim, in that the moving party claimed that bifurcation would lead to greater efficiency because the second phase might never occur, either due to a finding of non-liability or the increased prospect of settlement following a liability finding. Bifurcation was granted in the Court of Queen's Bench but reversed on appeal.

[17] In reversing the decision, the Alberta Court of Appeal reviewed the jurisprudence on bifurcation and concluded that bifurcation is a "dangerous but alluring siren" and that "bitter experience shows that splits rarely achieve economy in practice" (*Gallant* at paras 13, 15). Following *Gallant*, Alberta courts have generally looked askance at the practice. In a family law case, *Lakhoo v Lakhoo*, 2014 ABCA 98 at para 6, 2014 CarswellAlta 348, the Court of Appeal commented that "trials should not be split unless the savings are clear or at least probable." In

Edmonton Flying Club v Edmonton Regional Airports Authority, 2013 ABCA 91 at para 31, 359 DLR (4th) 81, the same court took the same position, writing that "severing the trial must be likely to result in disposing of all or part of a claim, or substantially shortening the trial, or saving expense, or some combination thereof."

[18] In other provinces, concerns about the inefficiency of bifurcation are longstanding. In 1905, the Ontario High Court wrote that "[e]xperience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon" (*Waller v Independent Order of Foresters*, 1905 CarswellOnt 176 at para 6, 5 OWR 421 (HC Div Ct)). In *Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills*, 1986 CarswellOnt 618, 55 OR (2d) 56 (CA), determined in 1986, the Ontario Court of Appeal wrote at paragraph 11 that the power to bifurcate "should be exercised, in the interest of justice, only in the clearest cases."

[19] Even the Supreme Court of Canada favours avoiding the practice wherever possible. In the decision *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629, Iacobucci J, writing for a unanimous court, determined at paragraph 90 that "'litigation by installments' … should be avoided." Iacobucci J then endorsed the comments of McMurtry CJO, who cautioned in the appeal decision that bifurcation risked "multiple rounds of proceedings through various levels of court" doing "little service to the parties or to the efficient administration of justice" (*Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629 at para 90, citing *Garland v Consumers' Gas Co* (2001), 57 OR (3d) 127 at para 76, 208 DLR (4th) 494 (CA)).

[20] The Tribunal is not a court, however, and principles of bifurcation have, historically, applied differently in this arena. The next section considers the principles of bifurcation as they apply specifically to the Tribunal.

V. BIFURCATION AT THE SPECIFIC CLAIMS TRIBUNAL

[21] In theory, the approach to bifurcation at the Tribunal is quite similar to that of the provincial and federal courts. Indeed, at the Tribunal, "[t]he rationale for bifurcating proceedings is to avoid the delay and expense of a compensation phase if it becomes unnecessary, or else to focus the scope of that phase" *(Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 23, [2018] 1 SCR 83, confirming *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8 at para

197).

[22] Three Tribunal decisions speak more specifically to a test on bifurcation. The first one is *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5 [*Kahkewistahaw*]. In its decision, authored by Mainville J, the Tribunal recalled that "[b]ifurcation orders are the exception to the rule that all issues should be determined in the main action" and that "[t]he onus is on the party requesting a bifurcation order" (*Kahkewistahaw* at para 21). The decision also laid out a non-exhaustive list of factors which the courts have considered as "having a bearing on the most just, expeditious and least expensive determination of the proceedings on its merits" (*Kahkewistahaw* at para 22). These factors are the following:

> i) The nature of the action, the complexity of issues and the nature of the remedies sought;
>
> ii) Whether the issues proposed for the first trial are interwoven with those remaining for the second trial;
>
> iii) Whether a decision for the first trial is likely to put an end to the action altogether, significantly narrow the issues for the second trial or significantly increase the likelihood of settlement;
>
> iv) Whether the parties have already devoted resources to all of the issues;
>
> v) Whether the bifurcation of the proceedings will save time or lead to unnecessary delay;
>
> vi) Whether the parties will suffer any advantage or prejudice;
>
> vii) Whether the bifurcation request is brought on consent or is objected to by the other party. [*Kahkewistahaw* at para 22, citing *South Yukon Forest Corp v R*, 2005 FC 670 at para 4]

[23] Applying this test to the application, the Tribunal rejected the claimant's request for a bifurcation, and concluded that "[it] do[es] not consider it appropriate in order to secure the just, timely or cost-effective resolution of th[e] claim, to order a bifurcation of the issues" (*Kahkewistahaw* at para 35).

[24] The second decision of the Tribunal dealing with bifurcation is *Keeseekoose First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 3 [*Keeseekoose*]. Here, the Tribunal also relied on the factors set out in *Kahkewistahaw*, but this time concluded that the Respondent had made a convincing case "on a balance of probabilities that bifurcation ... will not prejudice the

[c]laimant but will likely lead to a more efficient and cost-effective determination of th[e] [c]laim" (*Keeseekoose* at para 10) and granted the request to bifurcate the claim (*Keeseekoose* at para 12).

[25] Until recently, although the Tribunal in *Kahkewistahaw* insisted on the fact that bifurcation orders were the exception to the rule that all issues should be determined in the main action, Tribunal practice approached bifurcation on consent as the rule rather than the exception. Indeed, in most cases, parties regularly requested bifurcation orders of the Tribunal on a consensual basis.

[26] Despite this common practice, parties weren't willing to make bifurcation the rule. In 2015, during the five-year review of the *SCTA*, the Ministerial Special Representative put forward to stakeholders a suggestion to amend the *SCTA* to statutorily bifurcate validity and compensation hearings, as these had become "a relatively routine procedure" (Indigenous and Northern Affairs Canada, *Re-Engaging: Five-Year Review of the Specific Claims Tribunal Act*, by Benoît Pelletier, Ministerial Special Representative (Ottawa: Indigenous and Northern Affairs Canada, September 2015) at 59 [*Re-Engaging: Five-Year Review of the SCTA*]). At the time, the Canadian Bar Association in its submission warned against the potential misuse of bifurcation, stating that:

> Bifurcation may also be used strategically to prolong litigation. A party wishing to expend the resources of a less well-funded adversary may seek to bifurcate to increase the length of the litigation process and the potential costs.
>
> For these reasons, the decision to bifurcate a claim should remain at the discretion of the [Tribunal], if a party applies for bifurcation. The [Tribunal] can then weigh the evidence and arguments of both parties to make the appropriate decision in the circumstances. [The Canadian Bar Association, *Specific Claims Tribunal Act Five Year Review*, submission of the National Aboriginal Law Section (Ottawa: The Canadian Bar Association, April 2015) at 14]

[27] After review with various stakeholders, the Ministerial Representative concluded:

> Normally, the very reason for bifurcation is simplification and focus; however, some participants in the Five-Year Review engagement process said that, in smaller claims, bifurcation is not ideal, as it can complicate the proceedings unnecessarily. Some also said that bifurcation is no more desirable when it comes to larger and more complex claims, as it creates a doubling of procedures (evidence, etc.), rendering the proceedings more difficult to manage. [*Re-Engaging: Five-Year Review of the SCTA* at 60]

[28] As a result, the Ministerial Representative recommended that bifurcation remain a choice of the parties rather than being prescribed in the *SCTA*, and that the Tribunal remain flexible "to conduct hearings in a manner that serves the goal of resolving claims in an efficient and cost-

effective way" (*Re-Engaging: Five-Year Review of the SCTA* at 60).

[29] The general practice at the Tribunal nonetheless has continued to be to resort to bifurcating the proceedings on consent between a validity and a compensation phase. Recently, however, several claimants have refused to bifurcate on consent, arguing that in their cases, bifurcation was not generating time or cost reductions, and was not increasing chances of settlement after a final decision on validity. Tribunal statistics show clearly that claims are not moving quickly in general, and that additional delays caused by bifurcation, and the potential for multiple instances of judicial review, tend to amplify the issue of delay to the claimant's detriment. Thus, it appears that bifurcation, as a general practice at the Tribunal, was a failed experiment.

[30] It is in this context that the Tribunal issued its third decision on bifurcation in *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 [*Red Pheasant*], in which Tribunal Chairperson Chiappetta J refocused the Tribunal's approach to bifurcation.

[31] In this decision, the Tribunal highlighted, at paragraph 7, the initial purposes of bifurcation as "an exceptional procedural remedy" meant to simplify and focus claims, to save parties resources and time, and to improve Tribunal accessibility to First Nations who may rather proceed in phases for lack of the financial means to litigate both liability and compensation at the same time. The Tribunal established that bifurcation "should not be ordered because a party prefers to have the proceedings heard in separate stages" (*Red Pheasant* at para 12) and especially not on the basis of "broad generalizations speaking to potential complexities as opposed to cogent evidence speaking directly to why bifurcation in [a specific] case will likely promote efficiencies in costs and time" (*Red Pheasant* at para 11).

[32] Considering the disproportionate consequences of the length of the litigation process to First Nations as the less well-funded party, the Tribunal found that a contested application on bifurcation should only be granted where efficiencies are demonstrated through clear and cogent evidence. The Tribunal therefore redefined the test for bifurcation, pursuant to Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, in the following manner:

> ...the Chairperson of the Tribunal will only grant a bifurcation order when she is satisfied, on a balance of probabilities, that bifurcating the proceeding will promote

> the just, cost-efficient and timely resolution of the claim. Bifurcation is an extraordinary procedural order and should be granted only in those exceptional cases wherein there is specific and compelling evidence that to do so will advance the mandate of the Tribunal. [*Red Pheasant* at para 12]

[33] The seven factors identified in *Kahkewistahaw* to determine a bifurcation application continue to apply, but now demand "compelling evidence" that bifurcation will promote justice and efficiency.

VI. ANALYSIS

[34] This revised approach to bifurcation is the approach that will be followed in this Claim.

[35] Despite the fact that, like many disputes between First Nations and the Crown, there are complex issues at play, I find that the issues of validity and compensation are interwoven in this Claim, which weighs against bifurcation.

[36] The Respondent has made no admissions in this Claim, therefore there exists the possibility that a compensation phase will not be necessary. This might weigh in favour of bifurcation, however, as the Alberta Court of Appeal determined in *Lakhoo v Lakhoo*, 2014 ABCA 98, 2014 CarswellAlta 348, bifurcation is not justified unless the savings in time and money are clear or probable. Here they are merely possible.

[37] The Respondent has argued that bifurcation in this Claim could promote negotiation and settlement following the validity hearing. The promotion of negotiation to resolve claims is part of the Tribunal's mandate and is favoured by the Supreme Court of Canada in Aboriginal law cases (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 22, [2018] 2 SCR 765).

[38] The Respondent includes a boilerplate statement in most of its submissions expressing its own commitment to negotiation, which reads "Canada favours resolving claims made by Indigenous peoples through negotiation and settlement" (Respondent's Memorandum of Fact and Law, filed with the Tribunal on August 30, 2021, at para 5). This statement not only appears in the submissions in this Claim, but in Crown submissions in many, if not most, of the claims before the Tribunal. These broad statements are welcome when they are supported with clear evidence of efforts made to negotiate in a timely and cost-effective manner: First Nations, as the less well-

funded party, suffer disproportionality from the length of the negotiation process, especially when they do not lead to a resolution of the claim. Where evidence of negotiation efforts is absent, however, these statements are empty words. The Enoch Cree Nation, like all First Nations in Canada, is entitled to more than empty words.

[39] This particular Claim has been active since 2007. The facts which underlie it were brought to the attention of the Crown as early as 1985. The Crown has had decades to negotiate in order to reach a resolution but has, at every opportunity, refused to do so. It is hard to believe that dividing this Claim into two phases, then determining the first phase, will finally be the impetus for the Crown to do so. As the Canadian Bar Association warned at the five-year review of the *SCTA*, bifurcation has sometimes been used by better-funded parties to delay litigation and expend the resources of their adversaries.

[40] The Claimant raises the issue of prejudice, especially as it relates to the loss of oral history evidence as community Elders reach advanced age. Proving Aboriginal claims through oral history is an inherently difficult process, as the Supreme Court of Canada has readily acknowledged (*R v Van der Peet*, [1996] 2 SCR 507 at para 68, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 101, 153 DLR (4th) 193). It is made all the more difficult when that evidence is lost forever with the passage of time.

VII. CONCLUSION

[41] Bifurcation is, as the Chairperson of the Tribunal, Chiappetta J, set out in paragraph 12 of *Red Pheasant*, "an extraordinary procedural order" that ought to only be granted where it will "promote the just, cost-efficient and timely resolution of the claim." Ultimately, having considered all of the arguments and authorities, I cannot help but conclude that the Respondent has failed to meet its onus to show that a "clear benefit" is gained by bifurcating this Claim. Therefore, the Respondent's Application is dismissed, and the Claim will proceed as a unified claim before the Tribunal.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

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OTTAWA, ONTARIO December 23, 2021

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ENOCH CREE NATION

Claimant (Respondent)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent (Applicant)

COUNSEL SHEET

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As represented by Tanya Knobloch and Soniya Bhasin
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