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CITATION: 2022 SCTC 2
DATE: 20220216

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN: ENOCH CREE NATION Claimant (Applicant) **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Respondent)	Steven Carey and Amy Barrington, for the Claimant (Applicant) Tanya Knobloch and Soniya Bhasin, for the Respondent (Respondent) **HEARD:** August 3, 2021, and September 24, 2021

REASONS ON APPLICATION

Honourable Todd Ducharme

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

Cases Cited:

Halalt First Nation v Her Majesty the Queen in Right of Canada, 2014 SCTC 12; *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6; *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83; *Kahkewistahaw Band #72 v Her Majesty the Queen in Right of Canada*, 2021 SCTC 4; *Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 5; *Muskowekwan First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 6; *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 OR (3d) 257 (ONCA), 1998 CarswellOnt 3409; *Collins v R*, 2011 FCA 171, 2011 CarswellNat 1616; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460; *Custom Metal Installations Ltd v Winspia Windows (Canada) Inc*, 2020 ABCA 333, 2020 CsrswellAlta 1695; *Gates Estate v Pirate's Lure Beverage Room*, 2004 NSCA 36, 237 DLR (4th) 74; *Stoughton Trailers Canada Corp v James Expedite Transport Inc*, 2008 ONCA 817, 2008 CarswellOnt 7214; *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; *Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 5; *Muskowekwan First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 6.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008 c 22, s 13.

Federal Courts Rules, SOR/98-106.

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 3.

Headnote:

Bifurcation – Setting Aside a Bifurcation Order – Bifurcated Proceedings – Unified Proceedings – Specific and Compelling Evidence – Mandate of the Tribunal – Purpose of the Tribunal – Just, Timely, and Cost-Effective Resolution – Finality and Stability of Judgements – Interlocutory Consent Order – Test to Set Aside a Bifurcation Order

On September 2, 2020, the Specific Claims Tribunal (Tribunal) issued an Order bifurcating the proceedings of this Claim in two separate stages, on consent of both Parties. Shortly thereafter, the Claimant filed this contested Notice of Application (Application) to have the Tribunal set aside its Order and allow the hearing of the Claim to proceed in a single stage. At issue was whether the Tribunal has the jurisdiction to set aside an order issued on consent of the Parties, and whether it should exercise that jurisdiction in the circumstances.

The Tribunal concluded that it holds broad powers to carry out its mandate to resolve specific claims in a just, timely and cost-effective manner, which includes the authority to set aside a consent bifurcation order upon the request of a party. Although finality of judgements is a fundamental principle of law in the Canadian justice system which must not be set aside lightly, this rule applies differently to orders that finally determine a matter of substance than to orders that are procedural and govern the conduct of litigation.

The Tribunal established that a bifurcation order issued on consent and contested only by one party should be set aside only if the order causes prejudice to either party, and if setting it aside will allow the Tribunal to better fulfill its mandate to lead to the just, timely, and cost-effective resolution of specific claims. An order should not be set aside if doing so prejudices either party. Applying this new test, the Tribunal concluded that the bifurcation Order prejudiced the Enoch Cree Nation; that setting aside the Order would promote the just, timely, and cost-effective resolution of the Claim; and that no prejudice would be caused to the Respondent by the Order being set aside. The Claimant's Application was therefore granted. The Claim will proceed in a unified manner.

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I. INTRODUCTION

[1] An Order bifurcating the hearing of this Claim into two separate stages was issued by the Specific Claims Tribunal (Tribunal) on September 2, 2020, on consent of both Parties.

[2] Nine months later, on June 7, 2021, the Claimant (Enoch Cree Nation) filed a Notice of Application (Application) to have the Tribunal set aside its Order and allow the hearing of the Claim to proceed in a single stage. The Claimant argues that there has been a material change in circumstances, nullifying any efficiencies initially anticipated as a result of a bifurcated proceeding.

[3] The Respondent opposes the Application to set aside the bifurcation Order and requests that the Tribunal continue the Claim in two separate stages.

II. BACKGROUND AND CONTEXT OF THE CLAIM

[4] The specific claim of the Enoch Cree Nation was deemed to have been filed with the Minister of Indian Affairs and Northern Development, now the Minister of Crown-Indigenous Relations (the Minister), on October 16, 2008. In September 2011, the Claimant was informed that the Minister had not accepted the specific claim for negotiation. This satisfied the requirements of paragraph 16(1)(a) of the *Specific Claims Tribunal Act*, SC 2008 c 22 [*SCTA*], for the Claim to be brought before the Tribunal.

[5] On December 5, 2019, the Claimant filed its Declaration of Claim with the Tribunal. The Claim is related to the Crown's alleged failure to provide various agricultural and other benefits under Treaty No. 6, as well as other alleged breaches of the Crown's treaty, legal, trust, fiduciary, and honourable obligations to the Claimant.

[6] On March 6, 2020, the Respondent filed its Response to the Declaration of Claim with the Tribunal in which it acknowledges that the Claimant is an adherent to Treaty No. 6 and is entitled to treaty benefits, but states that it provided the benefits to the Claimant in accordance with its treaty commitments. The Respondent denies any breach of Treaty No. 6 or any fiduciary duties in the provision of agricultural benefits to the Enoch Cree Nation.

[7] In May 2020, the Parties communicated their intentions to have the Claim proceed in two

separate stages, a validity stage followed by a compensation stage, as can be seen in the Briefs filed by both Parties ahead of the Tribunal's May 27, 2020, Case Management Conference (CMC). The Claimant agreed to bifurcation as a matter of course from the onset of the file because most claims before the Tribunal had been proceeding in this way, and bifurcation was thought to help expedite proceedings (Claimant's oral argument at the hearing on the Application held September 24, 2021). In August 2020, the Parties provided a draft consent order on bifurcation to the Tribunal.

[8] The Order bifurcating the hearing of the Claim into two separate stages was issued by the Tribunal on September 2, 2020.

[9] The Claimant sought to revisit the bifurcation Order as soon as the first CMC following its issuance, as can be seen in the Joint CMC Brief of November 17, 2020. The Parties were encouraged by the Tribunal to discuss and attempt to resolve the issue of bifurcation amongst themselves but were unable to do so. They now file this Application and Response to the Application for the Tribunal to make a final determination on the matter.

III. POSITIONS OF THE PARTIES

[10] The Claimant argues that the Tribunal may set aside the Order via the broad jurisdiction granted by section 13 of the *SCTA*, without looking to the *Federal Courts Rules*, SOR/98-106 [*FC Rules*], and that the Tribunal may consider applicable jurisprudence from superior courts of record by analogy.

[11] It submits that, pursuant to general legal principles, the bifurcation of a claim is an exception to the rule and should only be maintained where this exceptional procedural remedy will lead to a more timely and efficient hearing.

[12] The Claimant argues that the efficiencies initially foreseen as resulting from the bifurcation Order are not taking place, and that the Order is working at cross-purposes, providing an incentive to the Respondent to delay the Claim. It argues that the delays incurred by the Respondent since the issuance of the bifurcation Order would amount to a material change in circumstances.

[13] The Claimant also offers a list of 18 bifurcated claims and their respective timelines, to demonstrate that bifurcation orders at the Tribunal have not resulted in the expeditious resolution

of specific claims, but that it has rather caused the opposite (*Osoyoos Indian Band v Her Majesty the Queen in Right of Canada* (SCT-7002-11); *Kitselas First Nation v Her Majesty the Queen in Right of Canada* (SCT-7003-11);, *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada* (SCT-7004-11); Tribunal file no., *Popkum First Nation v Her Majesty the Queen in Right of Canada* (SCT-7005-11)*; Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada* (SCT-7006-11); *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada* (SCT-5002-11); *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada* (SCT-7007-11); *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada* (SCT-7006-12); *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada* (SCT-2007-11); *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada* (SCT-2006-11); *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada* (SCT-2005-11); *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada* (SCT-2004-11); *Innu First Nation of Essipit v Her Majesty the Queen in Right of Canada* (SCT-2001-13); *Tobacco Plains Indian Band v Her Majesty the Queen in Right of Canada* (SCT-7001-14); *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada* (SCT-1001-12); *Siska Indian Band v Her Majesty the Queen in Right of Canada* (SCT-7002-14); *Makwa Sahgaiehcan First Nation v Her Majesty the Queen in Right of Canada* (SCT-5003-11); *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada* (SCT-7005-13); see the Claimant's Amended Memorandum of Fact and Law, filed with the Tribunal on August 30, 2021, at paras 51–52).

[14] The Claimant argues that the issues are inextricably interwoven, and that the likelihood of success of the validity portion of the Claim is so high that the Respondent's argument that bifurcation will help avoid an unnecessary expense on compensation is inapplicable to the present Claim. It submits that bifurcation will not narrow the issues related to compensation, and that it has distorted the Respondent's risk assessment and discouraged it from settling matters. The Claimant argues that it has already devoted significant resources to prepare for both the validity and compensation stages of the Claim, whereas the Respondent has not begun any preparation and therefore will not be prejudiced should the bifurcation Order be set aside. The Claimant argues that it would suffer significant prejudice because of the duplication of evidence and submissions that will be required at both stages of the proceedings, as well as the delays that bifurcation will cause. The Claimant submits that the bifurcation Order should be set aside, and the hearing should

be allowed to proceed in a single stage to ensure the timely and cost-effective resolution of the Claim.

[15] The Respondent, on the other hand, argues that the Claim should continue to be bifurcated into separate validity and compensation stages, because it is inefficient, and likely ineffective, to seek expert evidence on the issue of compensation without first determining the validity of the Claim. The Respondent argues that, in the absence of a rule of the Tribunal providing for the setting aside of a bifurcation order, paragraph 399(2)(a) of the *FC Rules* dictates the test that the Claimant must satisfy to set aside the bifurcation Order, and that it has failed to successfully discharge its burden to do so.

[16] The Respondent submits that the significant delay argued by the Claimant is not the reason they relied on when they first raised the issue, as it was non-existent when the Claimant first started requesting that the bifurcation Order be set aside. The Respondent rejects the list of 18 claims submitted by the Claimant as examples of delay stemming from bifurcation, as these were dated or commenced prior to the date of the bifurcation Order and therefore discoverable by the Claimant before it consented to the bifurcation Order. It also submits that the argument that bifurcation may lead to judicial reviews and appeals resulting in further delays is purely speculative.

[17] The Respondent argues that the issues addressed in the validity hearing and the compensation hearing are not interwoven; that the allegations in the Claim are complex and varied, with a vast range of potential outcomes, such that validity must be determined before it can prepare its case on compensation. It argues that all these issues should be determined first, and not concurrently with preparing numerous compensation analyses to consider all the possible scenarios of historical losses the Claimant may have suffered and what the value of those losses would be.

[18] The Respondent submits that a finding on validity would, in fact, significantly narrow the issues for the compensation stage and increase the likelihood of a settlement. Given the Parties' differences in the interpretation of the nature and scope of the agricultural benefits owed to the Enoch Cree Nation pursuant to Treaty No. 6, a determination on the validity of this Claim would assist in establishing the grounds wherefrom negotiations can begin, as well as potentially decrease the amount of resources and time required without the validity decision.

[19] The Respondent rejects the idea that the Claimant's list of claims (listed at paragraph 13 above) illustrates that bifurcation does not lead to a just and timely resolution of claims, as the delay in each of these is the result of case-specific circumstances. It also argues that other agricultural benefits claims before the Tribunal are proceeding on a bifurcated basis and that it would like to remain consistent with this approach.

[20] The Respondent argues that it has not prepared its case on compensation precisely because the Parties had previously agreed to the bifurcation Order. It would now be prejudiced if the Order were set aside, as it has been preparing its case only on validity. A last-minute change of approach would result in inadequate or insufficient compensation analyses.

IV. ANALYSIS

A. The Onus

[21] In bifurcation applications, the burden of proving whether the order should be granted lies with the party seeking the bifurcation order. In the current circumstances, considering that this is an Application to set aside a bifurcation Order issued on the consent of both Parties, the Parties have acknowledged that the onus is on the moving party, the Enoch Cree Nation.

B. Can the Tribunal Set Aside a Consensual Bifurcation Order?

[22] The *SCTA* is the source of the Tribunal's powers.

[23] Pursuant to section 13 of the *SCTA*, the Tribunal has the general powers of a superior court of record on all matters "necessary or proper for the due exercise of its jurisdiction":

> **13 (1)** The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record …

[24] The Tribunal has repeatedly interpreted its statute as granting it broad powers to control its process and to carry out its mandate to resolve specific claims (See *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12 at para 44 [*Halalt*]; *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6 at para 31).

[25] In addition, Rule 3 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, establishes the Tribunal's express authority to make any order that is necessary to secure the just, timely or cost-effective resolution of a specific claim, such as the Order currently being considered:

> **3** The Tribunal may make any order that is necessary to secure the just, timely or cost-effective resolution of the specific claim.

[26] The Tribunal therefore has the authority to grant the order being sought.

[27] It does not need to rely by analogy on the *FC Rules* relative to the setting aside of a bifurcation order, nor does it need to rely on the test established in the case law under paragraph 399(2)(a), as argued by the Respondent.

1. The Mandate and Purpose of the Tribunal

[28] The Tribunal must always deal with applications following a proper consideration of its enabling statute and of the origin and purpose of the Tribunal.

[29] The *SCTA* contemplates and provides for a court-like process that ensures adjudicative independence, transparency, and procedural fairness. The process established in the *SCTA* is also by its nature remedial and seeks to address historic grievances of First Nations against the Crown. As the Tribunal itself put it in *Halalt*, at paragraph 59, "The context surrounding the enactment of the SCTA, and its preamble, reveal the ill it is intended to cure."

[30] The Tribunal's "entire reason for being is to justly, timely and cost effectively accelerate the resolution of specific claims" (*Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 at para 2 [*Red Pheasant*]). In other words, it "was established and designed to respond to 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" (*Red Pheasant* at para 2). Efficiency and reconciliation are at the centre of its mandate.

[31] As was found in many claims before the Tribunal, "[w]ith such clearly remedial objectives, the *SCTA* is to be given a broad and liberal interpretation, keeping in mind and giving effect to its purpose" (*Halalt* at para 63, quoting *Clarke v Clarke*, [1990] 2 SCR 795 at para 10, 73 DLR (4th)

1). Such an interpretation "is also warranted by the nature of the SCTA as a statute 'relating to Indians'" (*Halalt*, at para 63, quoting *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193).

2. Bifurcation

[32] The initial rationale for bifurcating proceedings was "to avoid the delay and expense of a compensation phase if it becomes unnecessary" (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 23, [2018] 1 SCR 83, affirming *Lac La Ronge Band v Canada (Indian Affairs and Northern Development)*, 2014 SCTC 8 at para 197).

[33] Bifurcation was generally believed to help First Nations manage the cost of litigation, by dividing the process into two stages (*Red Pheasant* at para 7). It was said to allow the parties to save resources and avoid spending on reports they would ultimately not use, if the validity of the claim was unsuccessful. It also avoided the Tribunal making determinations based on a wide set of hypotheticals. As a result, it became a generalized practice at the Tribunal for parties to request that the Tribunal issue bifurcation orders on consent, often as early as the first CMC, as a means to reduce costs and delays.

[34] Recent applications before the Tribunal, however, have shed light on the additional costs and delays incurred by claimants when they agree to bifurcate proceedings. In *Red Pheasant*, the Tribunal concluded, at paragraph 8, that "practice at the Tribunal seems to indicate that bifurcation rarely achieves the time and cost economy which was initially intended". It further found:

> If a claim is found valid, the parties must start over at the beginning, gathering evidence, retaining experts and exchanging expert reports, this time on the issue of compensation. There are no cost savings and the final resolution of the claim by way of settlement or adjudication is significantly delayed beyond the conclusion of the validity stage. The length of the litigation process is extended with disproportionate consequences to First Nations as the less well-funded party.

[35] Indeed, First Nations' resources to bring these claims forward do not compare to those of Canada. Funding to support First Nations' participation in the processes of the Tribunal is not guaranteed. It is limited, discretionary, provided annually, on a case-by-case basis, and all funding requests must be approved prior to any costs being incurred (Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Funding for First Nations with claims at the Specific Claims Tribunal of Canada*, online <https://www.rcaanc-cirnac.gc.ca/eng/1529351013700

/1551970150264>).

[36] Recognizing these issues, the Tribunal revised its approach to bifurcation in *Red Pheasant* followed by *Kahkewistahaw Band #72 v Her Majesty the Queen in Right of Canada*, 2021 SCTC 4 [*Kahkewistahaw Band #72*], *Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 5, and *Muskowekwan First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 6, and found that bifurcation, as an extraordinary procedural order, "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).

[37] The Tribunal was cautious in clarifying that its findings should not, however, affect the ability of parties to bifurcate proceedings if and when they consent to proceed in this way.

3. The Importance of Finality and Stability of Judgements

[38] It is of the utmost importance that parties understand that any orders made by the Tribunal cannot be rescinded or set aside lightly. It is equally important that parties honour their word and live with the consent given freely to other parties to the proceedings.

[39] Finality of judgements is a fundamental principle of law that plays an important role in the Canadian justice system. As Doherty JA stated in *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 OR (3d) 257 (ONCA), 1998 CarswellOnt 3409 at paras 15–16 [*Tsaoussis*], for the parties involved in a litigation, finality meets both an economic and psychological necessity to avoid constant variation and reassessment, and to bring a definite and discernable end to legal disputes. Finality also serves a practical purpose for the system of justice as a whole (*Tsaoussis* at paras 15–16).

[40] Applications to set aside or rescind orders ought not to be used as a vehicle to routinely revisit orders that a party is no longer satisfied with, given the rightful reliance placed on these orders by parties and their counsel (*Collins v R*, 2011 FCA 171 at para 12, 2011 CarswellNat 1616 [*Collins*]). This is essential to preserve the integrity and stability of the judicial process (*Collins* at para 12).

[41] In *Tsaoussis*, however, Doherty JA was cautious to recall that "despite the value placed on

finality, there will be situations in which other legitimate interests clearly outweigh finality concerns" (*Tsaoussis* at para 19). The Supreme Court of Canada has affirmed that doctrines of finality ought at times to be applied with flexibility to avoid injustice (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460).

4. Nature of the Order

[42] A decision by the Tribunal about setting aside a prior order is also dependent on the nature of the order in question. In the present Claim, the challenged Order is interlocutory and procedural, one that governs the conduct of litigation, not an order that finally determines a matter of substance.

[43] There is abundant guidance in the jurisprudence of provincial courts of appeal about setting aside such orders.

[44] In *Custom Metal Installations Ltd V Winspia Windows (Canada) Inc*, 2020 ABCA 333, 2020 CarswellAlta 1695 [*Custom Metal Installations Ltd*], at paragraph 42, the Alberta Court of Appeal established a distinction between two types of consent orders arising in different contexts: "final consent orders which dispose of the dispute by settling the ultimate issues between parties" and "interlocutory consent orders that move litigation forward and are thus procedural in nature".

[45] In *Gates Estate v Pirate's Lure Beverage Room*, 2004 NSCA 36, 237 DLR (4th) 74, the Nova Scotia Court of Appeal established that:

> ... the rationale for courts not varying this type of consent order is that these orders give effect to agreements reached by the parties after negotiations which may include the litigants compromising their strict legal rights and obligations in order to finally dissolve the dispute between themselves. Once the court exercises its discretion and accepts their agreement by granting a consent order, the negotiated terms and the finality the parties sought by their agreement should be respected. For a court to vary the terms of a consent order giving effect to such a negotiated contract may alter the parties' agreement in a way they would never have agreed to settle for. This is not to say that there will never be a situation where it will be just and equitable to set aside a consent order giving effect to a negotiated settlement.
>
> The order in this appeal is of a different nature. This type of order is used to ensure the carriage of an action proceeds as it should. In this case the order was an attempt to ensure timely documentary disclosure. The involvement of the court in varying this type of order does not carry the same risk of undoing a negotiated agreement of the parties. With interlocutory orders such as this dealing with the litigation process, there is residual discretion … [emphasis added; paras 28–29]

[46] The Court in *Custom Metal Installations Ltd* affirmed that this discretionary approach to setting aside interlocutory orders based on the nature of the order "represent[s] a more principled way to address the true nature of an interlocutory procedural order than to apply the law that might be relevant, for example, to a final order such as a consent judgment" (para 58).

[47] Therefore, whereas a final consent order implementing a settlement agreement would warrant the Tribunal's quasi-absolute deference to *res judicata* and ought only to be set aside in exceptional circumstances, an interlocutory order that purports to govern the conduct of litigation warrants a much lesser degree of deference. Indeed, the Court found:

> There is a marked distinction between a consent judgment that implements a settlement on the merits and creates *res judicata* and an interlocutory consent order that purports to engage the powers of the court and governs the conduct of the litigation. The contract analogy is more applicable to the former.
>
> ...
>
> Rule 9.15(4) is clearly discretionary. Once it has been determined that a consent order is interlocutory and procedural in effect and not in the nature of a final determination on a matter of substance, the Court may determine what is just in the circumstances. [emphasis added; *Custom Metal Installations Ltd* at paras 57, 59]

[48] As was established in *Stoughton Trailers Canada Corp v James Expedite Transport Inc*, 2008 ONCA 817, 2008 CarswellOnt 7214, a decision in which the Ontario Court of Appeal held that the motions judge had erred in holding that her discretion to set aside a consent order was restricted, the court found, at paragraph 1, that "the discretion is broader and should be exercised where necessary to achieve the justice of the case".

[49] Where the order is interlocutory and procedural in nature, the Tribunal therefore has a broader discretion to set it aside, to avoid causing a prejudice to a party, and to better fulfill its mandate to lead to the just, timely, and cost-effective resolution of specific claims. Flexibility in the application of the finality doctrine of *res judicata* is warranted in the circumstances.

5. The Test to Set Aside a Bifurcation Order

[50] The Tribunal has the authority to set aside a consent bifurcation order upon the request of a party. As mentioned before, however, orders issued by the Tribunal on consent of the parties are not to be set aside lightly.

[51] The Tribunal should exercise this authority and set aside an order for bifurcation only if the order causes prejudice to either party, and if setting it aside will allow the Tribunal to better fulfill its mandate to lead to the just, timely, and cost-effective resolution of specific claims. An order should not be set aside if doing so prejudices either party.

[52] This test is the option most aligned with the Tribunal's "distinctive task of adjudicating specific claims in a just and timely manner for the purposes of promoting reconciliation between First Nations and the Crown" (*Red Pheasant* at para 2).

[53] The following disclaimer is important: in the interest of the integrity and stability of the judicial process, the Tribunal will not lightly set aside interlocutory and procedural orders such as bifurcation orders and will avoid exercising its discretion to overturn a prior order when prejudice would be caused to the opposing party. Parties now having a fuller picture regarding the advantages and disadvantages of bifurcation at the Tribunal will henceforth be expected to conscientiously ponder their decision when they agree to a consent order on bifurcation.

C. Should the Bifurcation Order be Set Aside in this Claim?

[54] I will now consider whether this bifurcation Order ought to be set aside on the basis of the new test set out above.

1. Does the Bifurcation Order Cause Prejudice to Either Party?

[55] The Tribunal recently held that there were delays inherent to bifurcated claims before the Tribunal, as a result of the potential judicial review and appeal of each bifurcated phase, which can delay the final determination of the merits of the claim and be quite harmful to claimants (*Kahkewistahaw Band #72* at para 8). The potential reopening of negotiations after the validity decision and the ensuing stay of proceedings before the Tribunal also increases delays in the resolution of claims and amounts to a Catch-22 for claimants considering the respondent's policy to refuse to negotiate at the same time as specific claims are advanced before the Tribunal (*Red Pheasant* at para 32). As highlighted above, the Tribunal acknowledged that the practice at the Tribunal has been that "bifurcation rarely achieves the time and cost economy which was initially intended" (*Red Pheasant* at para 8).

[56] These recent decisions of the Tribunal on bifurcation shed new light on the Claimant's

concern with the costs and delays associated with this bifurcated hearing, and its early insistence on setting aside the bifurcation Order.

[57] The Tribunal also finds that there are specific delays caused by the bifurcation of the hearing in this Claim, which are causing prejudice to the Claimant.

[58] It is important to begin by highlighting that this Claim arises from a breach that occurred roughly 140 years ago, that it was filed with the Specific Claims Branch more than 17 years ago, and that it was kept waiting three years prior to being rejected for negotiation at the ministerial level in 2011. The Claimant is rightfully impatient and weary of any additional delays and expects that the proceedings before the Tribunal should proceed in an expeditious manner.

[59] In addition, as the Claimant notes, the Respondent has taken 18 months to retain a historical expert to prepare its case. This is a relatively straightforward matter regarding the nature, content, and intent of the Crown's promise to provide agricultural benefits and assistance to the Claimant, under the terms of Treaty No. 6. The Respondent has recently negotiated and settled a number of these types of claims, and therefore should have had an idea of who could potentially be instructed as an expert. Although the initial shockwave created by the COVID-19 pandemic can account for some delay, there is no compelling justification for such a lengthy contracting process. It is also not lost on the Tribunal that the Respondent only finished contracting with its expert when leave to present this Application to set aside the bifurcation Order was granted to the Claimant.

[60] Further, the Respondent has delayed returning comments on the draft Agreed Statement of Facts and draft Agreed Statement of Issues, prepared by the Claimant to narrow the issues in dispute. The Respondent has continued to prefer finalizing the Agreed Statement of Issues after expert evidence was completed as had been initially agreed-upon with the Claimant, further justifying the Claimant's mounting insistence on obtaining the expert report in a timely fashion.

[61] Finally, the issues of validity and compensation are interrelated, which if the Claim proceeds in a bifurcated manner is likely to cause an overlap and duplication of evidence in the validity and the compensation stages. For example, a historical accounting of the extent of the benefits provided will be necessary in both phases. Indeed, if the Claim proves valid, the Tribunal will have to discount the credits for the implements that were indeed provided to the Claimant

from its final compensation award and will have to rely on historical evidence to do so. This duplication of evidence will increase the financial burden on the Claimant.

[62] The Tribunal finds that the Claimant is indeed being prejudiced by the cost and delays incurred as a result of the bifurcation Order in this Claim. The bifurcation Order does not seem to be furthering its purpose to achieve the timely resolution of the Claim. The inherent delays related to bifurcation highlighted by the Tribunal in its recent jurisprudence also support the Claimant's concern that it will only serve to cause more delays as the Claim goes forward.

[63] The Respondent, by contrast, has not demonstrated any significant prejudice that would result from the setting aside of the bifurcation Order, except that it will be required to have its experts consider various potential scenarios on liability to make its findings on compensation. The Tribunal is not convinced that proceeding in a unified way in this relatively straightforward agricultural benefits claim would lead to such an extensive number of potential scenarios that it could reach the point of causing prejudice to the Respondent. This is the norm in other areas of the law and does not amount to prejudice.

2. Will its Setting Aside Permit the Tribunal to Better Fulfill its Mandate to Lead to the Just, Timely, and Cost-Effective Resolution of the Claim?

[64] In *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5 [*Kahkewistahaw First Nation*] at para 22, the Tribunal 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" (see also *Keeseekoose First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 3 at para 3).

[65] These factors were the following:

i. The nature of the claim, 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 stage is likely to put an end to the claim altogether, significantly narrow the issues for the second stage 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; and,

vii. Whether the bifurcation request is brought on consent or is objected to by the other party.

[66] The Tribunal maintained this test, but refined it, requiring "clear and cogent" (*Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 5 at para 32; *Muskowekwan First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 6 at para 37) as well as "specific and compelling evidence" (*Red Pheasant* at para 12) that bifurcation will promote justice and efficiency.

[67] Here, considering the reversal of the burden of proof, the Tribunal will proceed to analyze the factors established in *Kahkewistahaw First Nation* to determine if there is "clear and cogent evidence" that setting aside the bifurcation Order will allow the Tribunal to resolve this Claim in the most just, timely, and cost-effective way.

a) The Nature of the Claim, the Complexity of Issues and the Nature of the Remedies Sought

[68] The present Claim is an agricultural benefits claim, similar to others currently before the Tribunal. At issue is the nature, content, and intent of the Crown's promise to provide agricultural benefits and assistance to the Claimant under the terms of Treaty No. 6, the extent to which any such benefits were provided to the Claimant, whether the Respondent breached any of its treaty, fiduciary, honourable and/or legal obligations to the Claimant in the provision of these agricultural benefits, and how the Claimant should be compensated for the Crown's breaches.

[69] The Respondent submits the following non-exhaustive list of issues related only to the matter of validity that will have to be determined by the Tribunal as a demonstration of the

complexity of the Claim:

> a. Interpreting the nature and scope of the agricultural benefits rights under the Treaty;
>
> b. Determining the common intention of the Parties at the time of adhesion to the Treaty;
>
> c. When were Canada's Treaty obligations to Enoch Cree Nation triggered;
>
> d. Determining whether the agricultural benefits were intended to be ongoing under the Treaty;
>
> e. Should breaches of the agricultural benefits provisions of the Treaty be interpreted as a historical breach, or does the Tribunal need to modernize the agricultural benefits terms and obligations;
>
> f. Addressing the factual disputes over what Enoch Cree Nation actually received;
>
> g. Whether Canada reduced the funding attributed to the cultivation of reserve land and the provisions of livestock and agricultural implements;
>
> h. Whether the products provided by Canada were of inferior quality, and whether any complaints regarding the same were remedied; and
>
> i. Whether Canada failed to provide instruction to Enoch Cree Nation. [Respondent's Amended Memorandum of Fact and Law, filed with the Tribunal on September 10, 2021, at para 39]

[70] Although treaty interpretation can certainly be complex and although these issues will have to be considered carefully, the list of issues presented by the Respondent as evidence tending to demonstrate that this Claim is of a particularly complex nature is not compelling.

[71] All these questions are straightforward and nothing unusual on the case docket at the Tribunal. The various potential scenarios on validity that stem from them do not lead to a floodgate of potential scenarios on compensation that would be too complex for a compensation expert to assess. The Tribunal recalled, in its recent decision in *Kahkewistahaw Band # 72*, at paragraph 8, that despite the complexity of the claims before it, "the Tribunal is sufficiently equipped to adjudicate large, complicated, historically technical claims [in a unified hearing]".

b) Whether the Issues Proposed for the First Stage are Interwoven with those Remaining for the Second Stage

[72] As discussed above, the issues of validity and compensation are interwoven, which if the

Claim proceeds in a bifurcated manner it is likely to cause an overlap and duplication of evidence in the validity and the compensation stages. If the Claim proves valid, the Tribunal will have to discount the credits for the implements that were provided to the Claimant from its final compensation award and will have to rely on historical evidence to do so. The Claimant rightfully points to the additional cost that this duplication of evidence will entail if the matter remains split in two different proceedings.

c) Whether a Decision for the First Stage is Likely to Put an End to the Claim Altogether, Significantly Narrow the Issues for the Second Stage or Significantly Increase the Likelihood of Settlement

[73] The Tribunal rejects the Claimant's argument that validity will almost certainly be established in this Claim, making a hearing on compensation a practical inevitability. In similar circumstances, the Tribunal has previously clarified that it will not prejudge the likelihood of success of the claims before it (*Keeseekoose First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 3 at para 10(vi)). As there are no admissions by the Respondent, there is a possibility that a validity decision could put an end to the Claim altogether.

[74] There is also no specific evidence sufficient to demonstrate that bifurcation will increase the likelihood of settlement. The Respondent refused to negotiate the Claim at the ministerial level, and the argument that a validity decision could lead to an increased ability to negotiate compensation remains speculative. Rather, the Respondent's policy to refuse to negotiate with First Nations as specific claims are advanced before the Tribunal are placing claimants in what the Tribunal has called a Catch-22 (*Red Pheasant* at para 32). Indeed, once a validity decision is issued, the claimant's election to enter into settlement negotiations comes at the cost of advancing the litigation, which will be stayed during negotiations, and if they fail, the parties will only then begin their compensation phase before the Tribunal, at additional cost. This may discourage rather than encourage claimants from entering settlement negotiations at this stage.

[75] Bifurcation at the Tribunal was initially intended to serve the claimant as the less well-funded party (*Red Pheasant* at para 8). If the Claimant is willing and able to take the risk of going forward in a single proceeding in this Claim without the benefit of a first hearing narrowing the issues for the second hearing, then the Tribunal should only oppose it for a good reason (such as a prejudice to the opposing party), which is not present here.

d) Whether the Parties Have Already Devoted Resources to All of the Issues

[76] While waiting for the Respondent to advance this Claim, the Claimant decided to start preparing its case on compensation. Given that the Parties had previously agreed to a bifurcation order that did not require them to advance on these matters until later, this argument is entitled to less weight than it may be otherwise.

[77] On the other hand, the Respondent, who was not required to advance its case on compensation considering the agreement on bifurcation issued in the Tribunal's Order, is therefore not very advanced. Where a prejudice might have arisen if the bifurcation Order was set aside at a later stage in the proceeding, the Respondent is not sufficiently advanced in its preparation of the Claim to be able to argue that it is prejudiced because it is now being forced to change its course.

e) Whether the Bifurcation of the Proceedings Will Save Time or Lead to Unnecessary Delay

[78] The Claimant points to a list of 18 claims which it argues demonstrate that bifurcation is impeding the timely resolution of claims before the Tribunal (for the complete list, see paragraph 13 above). Although the Claimant is right when it points to the lengthy delays incurred in those 18 files—which vary from 12 years, 3 months, and 28 days to 5 years, 9 months, and 4 days—the Tribunal however cannot agree with the inference that these delays are directly the result of the bifurcated nature of the proceedings. In the absence of any claim having proceeded in a non-bifurcated manner before the Tribunal all the way to a final decision on compensation, the statistics provided by the Claimant are not helpful in isolating the impacts of bifurcation on the length of proceedings.

[79] The only claim proceeding in a unified manner before the Tribunal is *Saulteaux First Nation v Her Majesty the Queen in Right of Canada* (Tribunal file No. SCT-5003-13). This claim, which has been proceeding before the Tribunal for almost seven years, just completed its expert evidence hearing on compensation in the fall of 2021 and has not yet proceeded to oral submissions. This does not point to any major time saving attributable to proceeding in a unified manner.

[80] Delays appear to be caused by a combination of factors, such as the nature of the claim and

complexity of issues, the amount of documentary evidence filed, the presence or absence of any admissions on liability, the participation of parties to negotiations and the rhythm at which these are conducted, the filing for judicial review, or the behaviour of parties to the proceedings, among others. The Tribunal agrees, however, that some of these factors are compounded by bifurcation, which further delays proceedings.

[81] The statistics provided by the Claimant remain helpful in demonstrating the excessive length of proceedings before the Tribunal in general, and the need for the Tribunal to improve efficiency, especially when bifurcation may compound delays.

[82] The Tribunal has already detailed above the delays inherent to bifurcated claims before the Tribunal, as well as the delays specific to the current proceedings. Based on those findings, the Tribunal can here conclude that bifurcation in this proceeding will lead to additional unnecessary delays.

f) Whether the Parties Will Suffer any Advantage or Prejudice

[83] As detailed above, the Claimant has provided "specific and compelling evidence" of the prejudice it will likely suffer if the Claim is not unified (see *Red Pheasant* at para12), including the delays already incurred by the Respondent to contract its expert for the validity portion of the Claim, to advance on the Agreed Statement of Facts and Agreed Statement of Issues, and the delays inherent to bifurcated claims before the Tribunal.

[84] On the other hand, the Respondent has not provided evidence that it will suffer any particular prejudice if the bifurcation Order is set aside.

[85] A review of the *Kahkewistahaw First Nation* factors has confirmed that the Claimant has demonstrated sufficiently specific and compelling evidence that setting aside the bifurcation Order will allow the Tribunal to resolve this Claim in the most just, timely, and cost-effective way.

3. Will Either Party Suffer any Prejudice Warranting that the Bifurcation Order Not Be Set Aside?

[86] The Parties have not disclosed any prejudice that could justify the Tribunal waiving its authority to set aside the bifurcation Order to protect one of the Parties.

4. Conclusion

[87] For the reasons set out above, the Tribunal concludes that the bifurcation Order prejudices the Enoch Cree Nation; that maintaining the Order will not promote the just, timely, and cost-efficient resolution of the Claim; and, that no prejudice will be caused to the Respondent by this Order being set aside.

[88] The Claimant's Application to set aside the bifurcation Order of the Tribunal is therefore granted. The Claim will proceed in a unified manner.

V. CONCLUSION AND ORDER

[89] Pursuant to section 13 of the *SCTA*, the Tribunal holds broad powers to control its process and carry out its mandate to resolve specific claims. Pursuant to Rule 3 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, it also holds express authority to make any order that is necessary to secure the just, timely or cost-effective resolution of a specific claim. The Tribunal has authority to rescind or set aside a bifurcation order pursuant to its enabling statute and its regulation, without the need to resort to the *FC Rules* by analogy.

[90] The Tribunal acknowledges that finality of judgements is a fundamental principle of law that plays an important role in the Canadian justice system. However, this rule applies differently to orders that finally determine a matter of substance than to orders that are procedural and govern the conduct of litigation.

[91] The Tribunal has determined that it should exercise its authority to set aside a bifurcation order only if the order causes prejudice to either party, and if setting it aside will allow the Tribunal to better fulfill its mandate to lead to the just, timely, and cost-effective resolution of specific claims. An order should not be set aside if doing so prejudices either party.

[92] Here, the Claimant has provided specific and compelling evidence that the Order is currently causing it a prejudice, as it is causing additional costs and delays. After review of the criteria in *Kahkewistahaw First Nation*, the Tribunal concluded that the setting aside of the Order would allow the Tribunal to better fulfill its mandate to lead to the just, timely, and cost-effective resolution of the Claim. The Respondent could not pinpoint any concrete rather than hypothetical prejudice it would suffer as a result of the Order being set aside.

[93] Parties must understand, however, that it is important that they honour their word. As they now have the benefit of this decision helping them understand the advantages and pitfalls of bifurcation at the Tribunal, if they consent to a bifurcation order during the conduct of a specific claim, they will generally be expected to abide by their word, unless of course they can demonstrate that they are prejudiced by the continued application of the bifurcation order.

[94] Considering the additional costs and delays bifurcation would cause to the Claimant, the fact that setting aside the bifurcation Order is more in line with a just, timely, and cost-effective resolution of the Claim, and considering the lack of prejudice to the Respondent, the Tribunal finds that this Claim should proceed in a unified manner. The Order dated September 2, 2020, bifurcating the Claim into validity and compensation stages, is hereby rescinded.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20220216

File No.: SCT-6002-19

OTTAWA, ONTARIO February 16, 2022

PRESENT: Honourable Todd Ducharme

BETWEEN:

ENOCH CREE NATION

Claimant (Applicant)

and

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

Respondent (Respondent)

COUNSEL SHEET

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Department of Justice