FILE NO.: SCT-3001-20
CITATION: 2022 SCTC 4
DATE: 20220314

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
ATIKAMEKSHENG ANISHNAWBEK Claimant (Respondent)	Ron Maurice, Steven Carey and Laura Schaan, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Applicant)	Lauri Miller, Jody Lintott and Gail Soonarane, for the Respondent (Applicant)
	HEARD: June 15, 2021

REASONS ON APPLICATION

Honourable William Grist

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

Cases Cited:

Whitefish Lake Band of Indians v Canada (AG), 2006 CarswellOnt 360, [2006] 3 CNLR 384 (Ont Sup Ct J); *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, 287 DLR (4th) 480; *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12; *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; (*Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2021 SCTC 2; *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15; *Estabrooks Pontiac Buick Ltd., Re*, 44 NBR (2d) 201, 1982 CarswellNB 236 (NBCA); *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77; *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at 254, 47 DLR (3d) 544; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460; *McIntosh v Parent*, [1924] 4 DLR 420, 55 OLR 552 (Ont CA); *Ernst & Young Inc v Central Guaranty Trust Co*, 2006 ABCA 337, [2006] AJ No 1413; *Armoyan v Armoyan*, 2013 NSCA 99, [2013] NSJ No 438; *Western Canada Power Co v Bergklint* (1916), 54 SCR 285, 34 DLR 467; *Southwind v Canada*, 2021 SCC 28, 459 DLR (4th) 1.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 15, 16, 17, 20, 37, 42.

Official Languages Act, RSC 1985, c 31 (4th Supp), s 13.

Authors Cited:

Indian and Northern Affairs Canada, *Specific Claims: Justice at Last* (Ottawa: Indian and Northern Affairs Canada, 2007).

Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto: LexisNexis, 2021).

Headnote:

Jurisdiction – Application to Strike – Res Judicata – Issue Estoppel – Abuse of Process – Appropriate Forum – Conditions Precedent – Transitional Provisions – Historical Loss – Present Value – Equitable Compensation

On September 16, 2020, the Claimant, Atikameksheng Anishnawbek (previously known as the Whitefish Lake Band), filed its Declaration of Claim with the Specific Claims Tribunal (Tribunal), alleging multiple breaches of the Crown's obligations related to the unlawful surrender and sale of timber rights on the Claimant's reserve in 1886, and seeking equitable compensation for these breaches.

The same cause of action was previously brought to the Ontario Superior Court of Justice for determination (*Whitefish Lake Band of Indians v Canada (AG)*, 2006 CarswellOnt 360, [2006] 3 CNLR 384 (Ont Sup Ct J)). The court was solely focused on the issue of assessing compensation as the Crown admitted to the breach of fiduciary duty by failing to obtain fair value for a timber lease of 79 square miles of reserve land. On appeal, the Court of Appeal for Ontario confirmed the trial judge's conclusion on the fair value of the timber rights in 1886 but found three errors in the assessment of the fair present value. The later portion of the matter was returned to the Ontario Superior Court of Justice for rehearing (*Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, 287 DLR (4th) 480). The matter did not advance to a retrial before the Ontario courts. The Claimant sought to avail itself of the existence of the Tribunal to adjudicate the matter.

On March 12, 2021, the Respondent filed a Notice of Application to strike the Claim in whole without leave to amend, on the basis that, among other arguments, the Claim seeks to re-litigate issues conclusively determined in Ontario courts, in a manner contrary to the principles of res judicata, issue estoppel, collateral attack and abuse of process.

At issue is whether the Tribunal can hear this Claim despite it having been initially commenced, but not concluded, before Ontario courts; and if so, under what conditions.

The Tribunal has concluded that it can hear the Claim, in part. Issue estoppel has application in this Claim. Where the trial court decides a substantive question in the litigation, in this case affirmed on appeal, that question is conclusively determined between the parties. The matter of the historic loss suffered by Atikameksheng Anishnawbek (then the Whitefish Lake Band) was conclusively determined before the Ontario courts and thus the Claimant is estopped from advancing the issue again. The issues related to the bring-forward of the loss to establish present-day equitable compensation which remain undecided can however be resolved before the Tribunal, a specialized tribunal set up to adjudicate these types of matters in a just, timely and cost-effective manner.

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I. THE APPLICATION

[1] The Respondent filed a Notice of Application (Application) with the Specific Claims Tribunal (Tribunal) under section 17 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], to strike the Declaration of Claim filed by the Claimant, Atikameksheng Anishnawbek, for noncompliance with sections 15, 16 and 42 of the *SCTA*, and argues that the Claim is vexatious and contrary to paragraph 17(c), raising issues relating to res judicata, issue estoppel, collateral attack and abuse of process.

[2] An additional issue presented in the Respondent's Supplementary Memorandum of Fact and Law deals with the admissibility into the evidence of a forestry report commissioned by the Respondent, released to the Claimant during the course of previous negotiations. The Respondent asserts negotiation privilege in respect of this document, which was filed by the Claimant in support of its position on this Application through the affidavit of Elizabeth Carson.

II. OVERVIEW

[3] The matter has a long litigation history. The Claimant, then known as the Whitefish Lake Band, filed a claim with the Specific Claims Branch of the then-Department of Indian and Northern Affairs in 1995. The claim arose out of the 1886 surrender of 79 square miles of reserve timberlands subsequently leased by the Crown to an Ontario Member of the Provincial Parliament for a price of $316. The claim was not resolved and the Band brought an Ontario Superior Court of Justice action in December 2002 alleging a Crown breach of fiduciary duty in entering into the timber lease on behalf of the Band. This duty arose under a provision of the 1850 Robinson–Huron Treaty, which provided that the Band could surrender lands to the Crown for the purpose of leasing timberlands "for [the Band's] sole benefit, and to the best advantage" (*Whitefish Lake Band of Indians v Canada (AG)*, 2006 CarswellOnt 360 at para 2, [2006] 3 CNLR 384 (Ont Sup Ct J) [*Whitefish*]).

[4] In the course of the litigation, the Crown admitted that it "was in breach of its fiduciary duty by failing to obtain fair value" (*Whitefish* at para 6). The trial judge then proceeded to assess damages and determine the fair market value of the timberlands lease, which he found should be assessed at the highest value paid for timberlands at public auction in 1885: $400 per square mile of timber. Fair market value for the 79 square miles was determined to be $31,600. The trial court

then determined, under a heading entitled "**Fair Value in 2005 Dollars**" (emphasis in original), a bring-forward of the historical loss by an application of simple interest from February 1, 1992, the date of onset of prejudgment interest in Ontario, to the date of the judgement. The total judgement sum was determined to be $1,095,888.

[5] The Band appealed and the Crown cross-appealed the assessment of historic loss to the Court of Appeal for Ontario (*Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, 287 DLR (4th) 480 [*Whitefish CA*]). The Band also raised the issue of the bring-forward calculation to 2005 values. The Court of Appeal for Ontario found no basis to interfere with the finding of the trial judge in respect of the historical loss. Laskin JA found that the trial judge "was justified in … using the highest comparable sale price." He also found that "[t]he Crown had a fiduciary obligation to sell Whitefish's timber rights at fair value … [and that] [t]he Crown's failure to undertake more than a perfunctory investigation by itself supported the trial judge's use of the highest comparable figure" (*Whitefish CA* at para 32).

[6] On the second issue, the court accepted the Band's appeal of the method of bringing forward the historical loss. Laskin JA held:

> The trial judge's award does not fairly compensate Whitefish for the money the Crown failed to obtain, invest, and hold for Whitefish and its members. It does not do so because it is tainted by the three errors Whitefish alleges. That the Crown did not profit from its breach does not preclude taking compound interest into account as an element of equitable compensation. That the Crown was not obliged to pay prejudgment interest similarly does not preclude an award of compound interest as an element of equitable compensation. And a finding that any money invested would soon have been "dissipated" is both unsupported by the record before the trial judge and contrary to the principles governing equitable compensation. Because the trial judge's award is tainted by these three errors in principle, it cannot stand. [*Whitefish CA* at para 41]

[7] This finding that the trial judge's method of bringing forward the historical loss did not meet the standards of equitable compensation appropriate to the case resulted in the matter being remitted for a rehearing to bring the historic loss forward to present-day value.

[8] The rehearing never took place. Successive hearing dates were vacated as the Parties pursued further negotiations, the last of these negotiations commenced in December 2017 when the claim was considered by the Specific Claims Branch, the department of the Ministry of Crown-Indigenous Relations responsible for negotiating specific claims. This resulted in a settlement offer

that was rejected by the Band who then gave notice of its intention to advance a claim to the Tribunal. The Declaration of Claim was filed September 16, 2020.

III. MANDATE AND PURPOSE OF THE TRIBUNAL

[9] The Tribunal was established in 2008 by way of the *SCTA*. The Tribunal first began to process claims under the *SCTA* in 2011. Prior to the 2008 *SCTA*, the jurisdiction to review decisions of the then-Department of Indian and Northern Affairs was limited to an appeal to the Indian Specific Claims Commission, whose jurisdiction was limited to a recommendation that a claim be renegotiated.

[10] The jurisdiction given to the Tribunal in respect of the grounds founding claims that can be filed under the *SCTA* is indicated in section 14 of the *SCTA*:

> **Grounds of a specific claim**
>
> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> **(a)** a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;
>
> **(e)** a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
>
> **(f)** fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

[11] The "context surrounding the enactment of the *SCTA*, and its preamble, reveal the ill it is intended to cure" (*Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12 at para 59). The Tribunal was set up as a result of the *Justice at Last* policy developed in

collaboration with the Assembly of First Nations to complete three fundamental tasks: to address the backlog of specific claims and their slow resolution, settle specific claims through negotiation when possible and to compensate First Nations for damages associated with Canada's outstanding lawful obligations.

[12] The policy set for the Tribunal is clear: "[t]he immediate priority is to bring justice to First Nation claimants with legitimate grievances and certainty to government, industry and all Canadians" (Indian and Northern Affairs Canada, *Specific Claims: Justice at Last* (Ottawa: Indian and Northern Affairs Canada, 2007) at 12). In the words of the Tribunal's Chairperson, 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).

[13] The Tribunal must deal with this Application keeping this in mind and giving effect to the *SCTA*'s purpose (*Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12 at para 63). Claims brought to the Tribunal often are grounded in events that occurred many decades in the past. The Tribunal is particularly well suited to deal with claims of historic breaches of fiduciary duty based on large and specialized evidentiary records (see *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 35, 38, [2018] 1 SCR 83; *Kahkewistahaw Band #72 v Her Majesty the Queen in Right of Canada*, 2021 SCTC 4 at para 8). The determination of present-day equitable compensation for a historic breach of fiduciary duty has been dealt with in a number of Tribunal decisions (*Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2021 SCTC 2; *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; and *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15).

IV. VALIDITY AND COMPENSATION

[14] The Tribunal frequently bifurcates claims into two stages, validity and compensation, as this process generally provides an economy in preparation of the claim and gives an opportunity to negotiate compensation if validity is established. The admission by the Respondent in the Ontario Superior Court of Justice action that the sale was not at fair value would base a finding of

validity in respect of at least paragraph 14(1)(e) of the *SCTA*. On a finding of validity, the matter before the Tribunal would then proceed to the compensation phase of the hearing under at least paragraph 20(1)(e) of the *SCTA*. Paragraph 20(1)(e) directs that compensation for such a claim requires "the market value of a claimant's reserve lands at the time they were taken [be] brought forward to the current value of the loss".

V. POSITIONS OF THE PARTIES

[15] The Claimant presents the Claim based both on validity and compensation. It proposes to expand on the admission of the Crown in the original action and says that a reassessment of the historical loss would be appropriate if the full aggravating circumstances of the Claim were heard. The Claimant proposes to provide evidence for an alternative ground for a finding of validity under paragraph 14(1)(f) of the *SCTA*:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> ...
>
> **(f)** fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

[16] The Respondent says that the filing of the Claim is an attempt to relitigate the issues determined in the Ontario Superior Court of Justice proceedings, as they were affirmed on appeal. Further, the Respondent says that sections 15, 16 and 42 of the *SCTA* proscribe the filing of this Claim. Lastly, the Respondent argues res judicata, issue estoppel, collateral attack and abuse of process.

VI. ANALYSIS

A. The Jurisdiction to File the Claim

[17] Subsection 16(1) of the *SCTA* provides:

> **16 (1)** A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and
>
> **(a)** the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

> **(b)** three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
>
> **(c)** in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or
>
> **(d)** three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

[18] The transitional provisions of the *SCTA* in relation to claims initially presented prior to its enactment provide:

> **42 (1) If a First Nation has submitted a claim based on any one or more of the grounds referred to in subsection 14(1) to the Minister before the day on which this Act comes into force containing the kind of information that would meet the minimum standard established under subsection 16(2), or if the claim is being negotiated on the day on which this Act comes into force, the claim is deemed to have been filed with the Minister in accordance with section 16, or the Minister is deemed to have decided to negotiate the claim and to have notified the First Nation in writing of that decision, as the case may be, on the day on which this Act comes into force.**
>
> **42 (1) Si, avant la date d'entrée en vigueur de la présente loi, une première nation a présenté au ministre une revendication fondée sur l'un ou l'autre des faits mentionnés au paragraphe 14(1), et lui a communiqué le type de renseignements requis par la norme établie en application du paragraphe 16(2) :**
>
> **a) la première nation est réputée avoir déposé la revendication conformément à l'article 16 à la date d'entrée en vigueur de la présente loi;**
>
> **b) si le règlement de tout ou partie de la revendication est en cours de négociation à cette date, le ministre est réputé avoir avisé la première nation de son acceptation de négocier le règlement au titre de cet article à la même date.**
>
> [emphasis in original]

[19] Interpretation of the English version of this provision is a confusing exercise. After study of the wording of the section and on consideration of the French version of the provision, I interpret the section as follows. The first set of circumstances to be considered for transition ends with the reference to subsection 16(2) of the *SCTA* and relates to claims filed with the Minister before the *SCTA* came into force (pre-existing claims). If the claim is a pre-existing claim, it is deemed to have been filed under section 16 of the statute on the date the *SCTA* came into force. The second

circumstance for transition relates to a claim being negotiated on the date the *SCTA* came into force or a claim the Minister has decided should be negotiated and has given notice of that decision prior to the *SCTA* coming into force (claims under negotiation). If the claim is a claim under negotiation, the Minister's decision to negotiate (or the date the Minister gave notice of the decision) is deemed to have occurred on the date the *SCTA* came into force. These deeming provisions pair with paragraph 16(1)(b) in the case of pre-existing claims, and paragraph 16(1)(d) in the case of claims under negotiation. The French version of the provision is of assistance and makes it clear that the first set of circumstances relating to a pre-existing claim, circumstances applicable to this Claim, results in consideration of the case as if filed on the date the *SCTA* came into force.

[20] The *Official Languages Act*, RSC 1985, c 31 (4th Supp), states, at section 13, that in every federal Act of Parliament, both language versions are equally authoritative:

> **13** Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.

[21] Equal authority requires that both versions should be read to adequately interpret the provision. In *Estabrooks Pontiac Buick Ltd, Re*, 44 NBR (2d) 201, 1982 CarswellNB 236 (NBCA), La Forest JA wrote at paragraph 11: "Since … the two versions are equally authoritative, both must be examined to determine the intention of the Legislature." Here, the French version settles any ambiguity in the English form of the provision and the meaning as expressed in French will be adopted.

[22] The first presentation of the Claim was in 1995. This was followed by litigation leading to the 2007 Court of Appeal for Ontario decision. The litigation did not proceed to a further hearing after the appeal court remitted the case for a rehearing and reassessment of the appropriate bring-forward of the historical loss, to determine the final sum to be awarded as equitable compensation. The series of adjournments that followed eventually led to an agreement to place the litigation in abeyance, on June 8, 2018. The subsequent offer advanced by the Crown on August 16, 2019, was rejected by the Band and the Claim giving rise to this Application was filed on September 16,

2020. Notwithstanding the time the matter was before the Ontario Superior Court of Justice, there is nothing in the transitional provision, subsection 42(1) of the *SCTA*, to suggest it is inoperative in the case where there has been an attempt to reach resolution by prior litigation, and as is the case here, through the then only form of litigation available to the Band.

[23] The nature of the admission establishing a breach of fiduciary duty before the trial court is an acknowledgement that the Claim is based on one or more of the grounds referred to in subsection 14(1) of the *SCTA*, in particular as establishing a failure to provide adequate compensation for reserve lands taken by the Crown (paragraph 14(1)(e)). No issue has been taken as to a failure to meet the minimum standards of subsection 16(2), and, under the provisions of section 42, the Claim is deemed to have been filed with the Minister in accordance with section 16 on the day on which the *SCTA* came into force. Accordingly, paragraph 16(1)(b) allows for the filing of the Claim on September 16, 2020, a date more than three years after the deemed filing on the date the *SCTA* came into force.

[24] The questions yet to be determined, however, are whether the proceedings are nonetheless improperly brought and excepted from the Tribunal's jurisdiction by subsection 15(3) of the *SCTA*, or otherwise constrained by the doctrines of res judicata, issue estoppel, collateral attack and/or abuse of process.

B. The Rules Against Duplicate Proceedings

[25] The Respondent argues that if the Claim meets the requirements of the transitional provisions for consideration by the Tribunal, subsection 15(3) of the *SCTA* prohibits the filing of a claim already before a court, in this case the Ontario Superior Court of Justice. Subsection 15(3) provides:

> **(3)** A First Nation may not file a claim if
>
> **(a)** there are proceedings before a court or tribunal other than the Tribunal that relate to the same land or other assets and could result in a decision irreconcilable with that of the claim, or that are based on the same or substantially the same facts;
>
> **(b)** the First Nation and the Crown are parties to those proceedings; and
>
> **(c)** the proceedings have not been adjourned.

[26] A further section of the *SCTA* provides:

> **37** A specific claim is discontinued if the claimant
>
> > **(a)** commences, before another tribunal or a court, a proceeding against the Crown that is based on the same or substantially the same facts as the claim, or that relates to the same land or other assets as the claim and could result in a decision irreconcilable with that of the claim, unless the claimant immediately has the proceeding adjourned; or
> >
> > **(b)** takes a new step in, or does not continue to adjourn, a proceeding mentioned in paragraph (a) or in subsection 15(3).

[27] These sections make it clear that a claimant can only proceed with one action. In the case of an earlier action before the filing of a claim, the earlier action must be adjourned to allow the Tribunal process to proceed, and should a claimant commence a duplicate court action or not continue to adjourn an earlier proceeding, the *SCTA* proceeding will be discontinued. The statement of facts in the Respondent's Memorandum of Fact and Law indicates the last step taken by the Parties was by consent on December 11, 2019, when they adjourned a trial scheduling court date to December 2, 2020. Prior to the December 2, 2020 date, the Ontario Superior Court of Justice removed the proceedings from the long trial scheduling court list because the Parties had not filed the required expert report schedule. No further court dates have been set. The Ontario court proceedings are therefore in a state of adjournment.

[28] I note that subsection 15(3) of the *SCTA* requires only that a previous court proceeding be adjourned and that it need not be discontinued or stayed to advance a *SCTA* claim. Further, there have been no steps taken since the filing of the Claim in September 2020 that would constitute taking a new step in the prior proceeding, or not continuing to adjourn said proceeding Accordingly, I conclude that the Claim before the Tribunal has proceeded within the strictures of subsection 15(3) and section 37.

C. Res Judicata, Issue Estoppel, Collateral Attack and Abuse of Process

[29] The Respondent advances these common law doctrines as further grounds to reject the Claim. In each case, these doctrines are focused on prevention of the negative aspects of re-submitting pleadings which challenge a resolution of a cause of action, or a discrete issue, through earlier litigation. In this case, the applicable doctrine is issue estoppel. *Whitefish* made a discrete finding quantifying historical loss. This aspect of the trial decision was affirmed on appeal leaving

the bring-forward assessment of equitable damages to be determined.

[30] Issue estoppel provides that a litigant is precluded from bringing a matter where the issue has been clearly decided in a previous proceeding (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 23, [2003] 3 SCR 77 [*Toronto (City)*]). Issue estoppel focuses on the interests of the parties, such as the costs associated with multiple litigations as well as the emotional and psychological impacts for a party of being "twice vexed" (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto: LexisNexis, 2021) (*Res Judicata in Canada*) at 5; *Toronto (City)* at para 38).

[31] In *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at 254, 47 DLR (3d) 544, the Supreme Court of Canada restated the three preconditions that must be met for issue estoppel to apply:

> … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.... [citing *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*, [1967] 1 AC 853; see also *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25, [2001] 2 SCR 460; *Toronto (City)* at para 23]

[32] The first precondition requires that the same issue has been decided in a prior decision. As established in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 24, [2001] 2 SCR 460, issue estoppel extends only "to the material facts and the conclusions of law or of mixed fact and law … that were necessarily (even if not explicitly) determined in the earlier proceedings".

[33] The second precondition requires that a decision be final and that it be conclusive in determining the question between the parties (*McIntosh v Parent*, [1924] 4 DLR 420, 55 OLR 552 (Ont CA)), leaving the judge *functus officio* with regards to that question. In other words, "[t]he test of finality for issue estoppel, therefore, is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding" (*Res Judicata in Canada* at 98; *Ernst & Young Inc v Central Guaranty Trust Co*, 2006 ABCA 337, [2006] AJ No 1413 at para 37; leave to appeal refused ([2007] SCCA No 9)).

[34] In contrast to cause of action estoppel, a decision does not need to be final on the entire subject matter of the litigation to engage issue estoppel; it must only make a conclusive finding on

a specific question (*Res Judicata in Canada* at 99; *Armoyan v Armoyan*, 2013 NSCA 99 at para 343, [2013] NSJ No 438; leave to appeal refused ([2013] SCCA No 446)). Indeed, "[a] decision is final in nature because it finally disposes of a substantive right raised between the parties which may or may not be determinative of the entire action" (*Res Judicata in Canada* at 99; *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13 at para 83, [2015] MJ No 21). Regarding the finality of decisions that have been appealed, it appears that "where a court of appeal, in granting a new trial, decides a substantive question in the litigation, that question, for the purposes of that litigation, is [to be] taken to have been conclusively determined [as] between the parties" (*Res Judicata in Canada* at 117; *Western Canada Power Co v Bergklint* (1916), 54 SCR 285 at 299, 34 DLR 467).

[35] In the present circumstances, the third precondition is not challenged and does not warrant a detailed analysis.

[36] The aggravating circumstances alleged by the Band of fraud perpetrated by agents of the Crown references a further paragraph of subsection 14(1) of the *SCTA* but would not add to an already made admission of breach of fiduciary duty. If a claim is found valid, compensation is to be awarded in accord with paragraphs 20(1)(a) to (i) of the *SCTA*:

> **20 (1**) The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> **(a)** shall award monetary compensation only;
>
> **(b)** shall not, despite any other provision in this subsection, award total compensation in excess of $150 million;
>
> **(c)** shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;
>
> **(d)** shall not award any amount for
>
> **(i)** punitive or exemplary damages, or
>
> **(ii)** any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature;
>
> **(e)** shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant

> establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid;
>
> **(f)** shall award compensation equal to the value of the damage done to reserve lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that certain of its reserve lands were damaged under legal authority, but that inadequate compensation was paid;
>
> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;
>
> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g); and
>
> **(i)** shall, if it finds that a third party caused or contributed to the acts or omissions referred to in subsection 14(1) or the loss arising from those acts or omissions, award compensation against the Crown only to the extent that the Crown is at fault for the loss.

[37] Paragraphs 20(1)(c) and (d) of the *SCTA* make it clear that the Tribunal is to award compensation it "considers just, based on the principles of compensation applied by the courts" but "shall not award any amount for … punitive or exemplary damages". Breach of fiduciary duty gives rise to damages under the principles of equitable compensation applied by the courts and the Tribunal, but further exemplary or punitive damages based on fraud are excluded from the Tribunal assessment. Here the historic loss assessed on the basis of an agreed-upon admission of a breach of fiduciary duty is clearly a decided element of the Claim. It is in a final form, underlined by the affirmation on appeal, and issue estoppel precludes further proceedings on this issue, leaving the bring-forward of the loss to establish present-day equitable compensation as the remaining issues to be determined by way of a tribunal hearing the Claim.

VII. CONCLUSION AND ORDER

A. The Application to Strike the Claim

[38] In this Claim there has been a clear decision, affirmed on appeal, in relation to the historic loss suffered by the Band. As is appropriate in cases founded on a breach of fiduciary duty, the trial judge applied a more expansive measure of damages than would be relied upon in, say, a contract case in assessing the historic loss, basing the assessment on the highest auction price from

the year before, rather than an average value calculation. This is in accord with the Supreme Court of Canada's findings in *Southwind v Canada*, 2021 SCC 28 at para 66, 459 DLR (4th) 1, which stated that "equitable compensation is a loss-based remedy that deters wrongdoing and enforces the trust at the heart of the fiduciary relationship" and that "[i]t differs from common law damages because of the 'unique foundation and goals of equity'" (citing *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 543).

[39] The case law is clear in outlining the policy against presenting issues already settled in ongoing litigation: "... where a court of appeal, in granting a new trial, decides a substantive question in the litigation, that question, for the purposes of that litigation, is [to be] taken to have been conclusively determined [as] between the parties" (*Res Judicata in Canada* at 117; *Western Canada Power Co v Bergklint* (1916), 54 SCR 285 at 299, 34 DLR 467).

[40] While the Claimant satisfies the requirements for filing the Claim with the Tribunal, the issues the Tribunal will hear are those that remain outstanding in coming to a present-day equitable compensation for the historic loss.

[41] The Application to strike the Declaration of Claim is therefore dismissed. The Claimant may resort to the Tribunal to hear its Claim, but only within the limited scope permitted in the present Reasons on Application.

B. The Issue of Negotiation Privilege

[42] The evidence giving rise to the allegation of privilege is contained in the affidavit of Elizabeth Carson, who appends three reports prepared by experts who have given opinions relating to the issues arising from the original claim. The first of these is a draft report prepared in 2004 for Indian and Northern Affairs Canada, Litigation Management and Resolution Branch, which gives a historical overview of the events giving rise to the Claim. This document was apparently provided to the Claimant during negotiations which were undertaken after the Court of Appeal for Ontario decision was handed down. The report provides an account of the events after the surrender and comments on the sale of the timber rights following the initial lease and issues raised in Parliament concerning the lease. The relevance of this document would have been in respect of the determination of the historic value of the timber rights, which was settled by the trial judge, affirmed on appeal, and does not assist in determining the procedural issues before the Tribunal.

Whether it might have some relevance should the matter proceed needs context and a further decision, should the issue arise on the claim of privilege.

[43] In the present context, the report has no bearing on the procedural issues and in light of the issue of privilege, should not be included in the record. I order reference to it and the report itself should be removed from the affidavit of Elizabeth Carson.

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20220314

File No.: SCT-3001-20

OTTAWA, ONTARIO March 14, 2022

PRESENT: Honourable William Grist

BETWEEN:

ATIKAMEKSHENG ANISHNAWBEK

Claimant (Respondent)

and

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

Respondent (Applicant)

COUNSEL SHEET

TO: **Counsel for the Claimant (Respondent) ATIKAMEKSHENG ANISHNAWBEK**
As represented by Ron Maurice, Steven Carey and Laura Schaan
Maurice Law, Barristers & Solicitors

AND TO: **Counsel for the Respondent (Applicant)**
As represented by Lauri Miller, Jody Lintott and Gail Soonarane
Department of Justice