FILE NO.: SCT-5001-16
CITATION: 2017 SCTC 3
DATE: 20170926

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

KEESEEKOOSE FIRST NATION

Claimant (Respondent)

Ron S. Maurice, Steven W. Carey and Amy Barrington, for the Claimant (Respondent)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent (Applicant)

Donna Harris, for the Respondent (Applicant)

HEARD: May 10, 2017

REASONS ON APPLICATION

Honourable Barry MacDougall

ON THE APPLICATION BY THE RESPONDENT (APPLICANT) to bifurcate the hearing of the Claim into two separate stages: a validity stage and a compensation stage.

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

Cases Cited:

Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada, 2013 SCTC 5; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14.

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 20.

Government Documents:

Specific Claims Tribunal Canada, *Submission*, submitted to Dr. Benoit Pelletier, the Minister's Special Representative Respecting the Tribunal's Five Year Review undertaken pursuant to section 41 of the *Specific Claims Tribunal Act* (Ottawa, 2015).

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I. THE APPLICATION

[1] The Respondent (Canada) brings an Application for bifurcation pursuant to Part 4 (Applications) and Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*], to have the Claim heard in two separate stages:

i. Validity Stage – dealing with issues of validity and historical value of any loss respectively whereby the Tribunal will first hold a hearing and render its decision on validity and will determine a base value loss (if validity is found) of the Claim.

ii. Compensation Stage – if the Claim is found to be valid, a second hearing will take place, including the principles of compensation, dealing with the carry forward of the base amount, and any applicable compensation criteria.

[2] Rule 10 provides that:

> **10** If validity of the specific claim and any compensation arising from it are both at issue, the Chairperson may order that the hearing of those matters proceed in separate stages.

[3] The Parties agree that the factors to take into account include, but are not limited to the factors set out by the Honourable Johanne Mainville in the Specific Claims Tribunal's (Tribunal) decision, *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5, apply to this Application:

> 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. [at para 22 citing *South Yukon Forest Corp v R*, 2005 FC 670 at para 4]

II. OVERVIEW OF THE CLAIM

[4] As summarized by Canada, the Claim raises the issues of whether the Crown complied with the surrender provisions of the relevant *Indian Act*; whether the Crown breached pre- or post-surrender fiduciary duties to the First Nation; and, whether the Crown committed fraud or equitable fraud in relation to the sale of the Claim lands, including whether the Claim lands were sold at fair market value (Memorandum of Fact and Law on the Issue of Bifurcation, Respondent's Brief at para 13).

III. BRIEF OVERVIEW OF CANADA'S POSITION

[5] Canada submits that the historical losses are intertwined with validity, not the current value of a loss, if any. If the Claim is found to be valid, the Tribunal will have to first determine the historical loss at the validity stage before any determination on current value can be made. The historical loss will be determined by the Tribunal based on either the Claimant's expert, Canada's expert or another amount assessed by the Tribunal. Until this historical loss is known, the case on compensation (i.e. current value) is speculative and an unnecessary and expensive use of resources (Memorandum of Fact and Law on the Issue of Bifurcation, Respondent's Brief at para 13).

[6] Further, until a determination on validity is made, the Parties do not know what historical amount, if any, is to be used to prepare their case on compensation. If a historical loss is found, the Parties will need to submit evidence and argument regarding the basis of any compensation awarded and interest rates to be applied. Therefore, Canada argues that it is not expeditious or cost-effective to have the Parties retain experts, devote resources and prepare their case on compensation until the value of the historical loss, if any, is determined (Memorandum of Fact and Law on the Issue of Bifurcation, Respondent's Brief at para 14).

IV. BRIEF OVERVIEW OF THE CLAIMANT'S POSITION

[7] The Claimant opposes Canada's Application for bifurcation because bifurcation will

prejudice the Claimant and lead to unnecessary delay in the resolution of the Claim. Further, Canada has failed to establish that bifurcation would likely lead to a more efficient and cost-effective determination of this Claim (Memorandum of Fact and Law on the Issue of Bifurcation, Claimant's Brief at paras 3–4).

[8] The Claimant also notes in its written submissions that in the recent past, as part of the Five-Year Review of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], the Tribunal took the position that bifurcation should not become mandatory for all claims. As the Claimant explained, "bifurcation is not a panacea, and will not always result in the most just, expeditious and least expensive determination of the claim" (Memorandum of Fact and Law on the Issue of Bifurcation, Claimant's Brief at para 14).

[9] The Tribunal's submissions on the matter of bifurcation were as follows:

> [92] Bifurcation prevents putting the parties to the task of making their cases on compensation before a decision on the validity of the claim is made. Bifurcation significantly reduces both cost and delay where a claim is found invalid.
>
> [93] It is generally neither cost effective nor expeditious to bifurcate claims where the issues of compensation and validity are inextricably intertwined (for example, adequacy of compensation for lands taken under lawful authority, losses resulting from the mismanagement of Indian monies and other assets). Validity in these circumstances depends in part on evidence of the amount of the monetary loss. In the case of land, this would be the same evidence needed in the compensation phase, namely evidence of the value of the land at the time of the taking.
>
> [94] An amendment providing for bifurcation of the hearing of validity and compensation issues is unnecessary as this is done routinely where warranted. Moreover, it would fetter the discretion of the presiding member to manage the distinctive task of adjudicating specific claims, and in some cases create unnecessary delay and cost. [Specific Claims Tribunal Canada, *Submission*, submitted to Dr. Benoit Pelletier, the Minister's Special Representative Respecting the Tribunal's Five Year Review undertaken pursuant to section 41 of the *Specific Claims Tribunal Act* (Ottawa, 2015)]

V. ANALYSIS

[10] I am satisfied that Canada has demonstrated on a balance of probabilities that bifurcation

in this case will not prejudice the Claimant but will likely lead to a more efficient and cost-effective determination of this Claim for the following reasons:

i. I agree with the Parties that as part of the determination of whether this Claim is valid, a determination will have to be made of the historical value of the Claim and expert evidence would be required. The Claimant is arguing, as part of its alleged fraud or equitable fraud argument, as well as part of its alternative post-surrender breach of fiduciary duty argument, that the First Nation received less than fair market value for the lands surrendered. Evidence will need to be tendered on the value of the lands at the time of the surrender and a historical loss amount, if any, determined.

ii. However, in my view, while the issues of validity and historical losses are "inextricably intertwined" in this Claim, they are not inextricably intertwined with compensation (i.e. how historical losses are to be brought forward to a current value) as the Claimant asserts. The Claimant asserts that alleged losses are inextricably intertwined with compensation, without explaining how bringing forward loss of use (if established) to a current value, as would be required if the surrender was found to be illegal (paragraph 20(1)(h) of the *SCTA*), bears any relation to the determination of the validity of the surrender in this Claim as framed by the Claimant in its Declaration of Claim. Rather, as mentioned above, the equitable fraud or fraud allegations, as well as the Claimant's alleged breach of post-surrender fiduciary obligations are inextricably intertwined with the allegation that the Claimant received less than fair market value for the lands surrendered at the time of their surrender. Certainly, the current, unimproved market value of the lands (paragraph 20(1)(g) of the *SCTA*) bears no relation to validity of the Claim as well.

iii. As noted by the Claimant, the issue of how to bring forward an established historical loss under the *SCTA* as decided by this Tribunal in *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14 [*Huu-Ay-Aht First Nations*], was before the Federal Court of Appeal at the time of oral submissions for this Application. However, Canada has since discontinued its application for judicial review on September 5, 2017. In the circumstances of this case, this development is a notable

one in respect of efficiency and cost effectiveness considerations. With the Tribunal's decision in *Huu-Ay-Aht First Nations* now being final, the principles of compensation have been determined before this Tribunal and should inform the Parties on the proper approach to assess compensation where applicable, should the Claimant be successful in establishing validity of its Claim. As a result, should the Claim be found valid, this development should significantly increase the likelihood of the settlement of the compensation issue in this Claim. In terms of the likelihood of the Parties settling this Claim, should the Claimant be successful at the validity stage, I also note that the Claimant has submitted that:

> The Crown is experienced in the settlement of specific claims in relation to unlawful land surrenders, and has thus established a robust institutional capacity with respect to compensating First Nations for the illegal surrender of reserve lands during the relevant historical time period [Memorandum of Fact and Law on the Issue of Bifurcation, Claimant's Brief at para 43].

iv. Even if the Respondent were to seek judicial review of the validity decision should the Claimant be successful, it is not likely that bifurcation would result in a "duplication of procedural steps and increased costs resulting from separate but overlapping discovery proceedings, separate hearings, and (in the context of claims before the Tribunal) the possibility of two separate judicial reviews and two appeals" (Memorandum of Fact and Law on the Issue of Bifurcation, Claimant's Brief at para 7 citing *South Yukon Forest Corp v Canada*, 2005 FC 670 at para 8 and *H-D Michigan Inc v Berrada*, 2007 FC 995 at para 4). Even if *Huu-Ay-Aht First Nations* does not entirely obviate the need for a second compensation hearing stage, the precedent should help to reduce the length and complexity of such a hearing should other Claim specific-matters (such as current valuation of the land, valuations of the land over time, and set-off considerations) remain contested as between the Parties.

v. Further to the point immediately above, should the same experts have to testify at a second compensation hearing stage, or should negotiations break down over potential remaining compensation-related issues, the evidence the experts would adduce before the Tribunal would be narrowed and not be in the same nature or be the same evidence as adduced to establish a baseline historical loss for the Claim at the material time of the surrender.

vi. Finally, the Claimant asserts that this is only one alleged illegal surrender case among many others for this region and time period, and that given many of these other claims have since been settled through negotiations with Canada, it is not unreasonable to believe that the Claimant may be successful before the Tribunal. However, such a consideration is not a germane one on this Application. The question of the likelihood of success at the validity stage is not a relevant factor to be considered. The Tribunal is not prepared to pre-judge the Claim's validity or likelihood of success on an Application such as this one, particularly as there are two other such mentioned claims before the Tribunal (*Carry the Kettle Band #378 v Her Majesty the Queen in Right of Canada* (SCT-5002-15) and *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada* (SCT-5001-14)) and one case which is ongoing before the Federal Court (*Chief Isabel O'Soup et al v Her Majesty the Queen* (File No. T-748-05)).

VI. RULING

[11] I am not satisfied that in these particular circumstances that the Claimant would suffer prejudice from the Claim being bifurcated, but rather, it should expedite and reduce its costs in the long run.

[12] Canada's Application to bifurcate this Claim is granted as requested.

[13] If there is an issue of costs of this Application, the Parties may contact the Tribunal for directions regarding cost submissions. However, the Parties are correct in their initial assessment that the general rule before the Tribunal is a presumption against costs awards on interim applications of this nature.

BARRY MACDOUGALL

Honourable Barry MacDougall

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20170926

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OTTAWA, ONTARIO September 26, 2017

PRESENT: Honourable Barry MacDougall

BETWEEN:

KEESEEKOOSE FIRST NATION

Claimant (Respondent)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent (Applicant)

COUNSEL SHEET

TO:	**Counsel for the Claimant (Respondent) KEESEEKOOSE FIRST NATION** As represented by Ron S. Maurice, Steven W. Carey and Amy Barrington Maurice Law, Barristers & Solicitors
AND TO:	**Counsel for the Respondent (Applicant)** As represented by Donna Harris Department of Justice