

**FILE NO.:** SCT-5005-19  
**CITATION:** 2021 SCTC 4  
**DATE:** 20211110

**SPECIFIC CLAIMS TRIBUNAL**  
**TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**BETWEEN:**

KAHKEWISTAHAW BAND #72

Claimant (Respondent)

– and –

HER MAJESTY THE QUEEN IN RIGHT  
OF CANADA

As represented by the Minister of Crown-  
Indigenous Relations

Respondent (Applicant)

Ryan M. Lake and Sheryl Manychief, for the  
Claimant (Respondent)

Scott Bell and Jessica Karam, for the  
Respondent (Applicant)

**HEARD:** October 21, 2021

**REASONS ON APPLICATION**

**Honourable Victoria Chiappetta, Chairperson**

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

**Cases Cited:**

*Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3.

**Statutes and Regulations Cited:**

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

**Headnote:**

*Application for Bifurcation – Complicated Claim – Complex Claim – Interwoven – Just, Timely and Cost-Effective*

These Reasons address an Application for bifurcation filed by the Respondent and opposed by the Claimant. The Tribunal acknowledged that the present Claim is complicated and spans over 80 years. The Tribunal however found that it is sufficiently equipped to adjudicate large, complicated, historically technical claims of this type. In addition, it found that the issues of causation at the validity stage and of damages were undeniably connected and interwoven, and that the Parties would gain efficiencies by the collaboration of the different experts and appraisers.

The Tribunal found that no “specific and compelling” (*Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 at para 12) evidence, rather than speculative evidence, was provided to the Tribunal to demonstrate that bifurcating the proceeding would result in the most efficient, expeditious and cost-effective determination of the Claim.

The Application is dismissed.

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## **I. INTRODUCTION**

[1] The Respondent, Her Majesty the Queen in Right of Canada as represented by the Minister of Crown-Indigenous Relations, brings this Application for bifurcation seeking an order directing the Claim proceed in separate validity and compensation stages. It submits that a bifurcation order will result in the most efficient, expeditious and cost-effective determination of the Claim and is consistent with the practice guidance of the Specific Claims Tribunal (Tribunal).

[2] The Claimant, Kahkewistahaw Band #72, disagrees. It submits that it is unnecessary and wasteful to advance the Claim as a bifurcated proceeding and that to do so would prejudice the Claimant who has committed to advancing the Claim in its entirety. The issues arising from the Claim, the Claimant argues, are fundamentally interwoven and interdependent such that allowing the Respondent's Application for bifurcation would cause significant delay in reaching a final resolution of this long-standing Claim.

[3] For the reasons set out below, I have concluded that the Application for bifurcation is dismissed as the Respondent has not established that bifurcation would result in the most just, expeditious and least expensive determination of the Claim on its merits.

## **II. BACKGROUND**

[4] In October 2008, the Claimant submitted a specific claim to the Minister of Indian Affairs and Northern Development (as the Minister of Crown-Indigenous Relations was then known) alleging that the Respondent breached obligations to the Claimant in relation to the illegal construction and operation of water control structures built at Crooked Lake and Round Lake in 1941 and associated flooding, trespass and other damage to the Claimant's reserve lands.

[5] Although the Minister's letter was not tendered into evidence by the Parties, the Claimant affirms that, by letter dated May 20, 2011, the Minister informed the Claimant that: a) it decided not to accept the Claim for negotiation on the basis that there was no outstanding lawful obligation on the part of Canada; b) for three of the allegations, the Claimant had provided "insufficient evidence" that the dams caused the flooding on its reserves; and, c) any flooding was seasonal or caused by weather (Claimant's Memorandum of Fact and Law, filed with the Tribunal on August 19, 2021, at para 5).

[6] On June 19, 2019, the Claimant filed its Declaration of Claim with the Tribunal, with amendments filed on May 12, 2021. The Respondent filed its Response to the Declaration of Claim on September 13, 2019.

### III. DISCUSSION

[7] The *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, at Rule 10, provide that the Chairperson may order that a claim proceed in separate stages if validity of the claim and compensation arising from it are both in issue. For reasons more specifically set out in *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3, the Tribunal found at paragraph 12 that:

When parties disagree on whether to bifurcate, the Chairperson of the Tribunal will only grant a bifurcation order when she is satisfied, on a balance of probabilities, that bifurcating the proceeding will promote the just, cost-efficient and timely resolution of the claim. Bifurcation is an extraordinary procedural order and should be granted only in those exceptional cases wherein there is specific and compelling evidence that to do so will advance the mandate of the Tribunal. The burden of proving whether the order should be granted lies with the party seeking the bifurcation order (*Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5 at para 15, [2004] 2 FCR 514; *Apotex Inc v Bristol-Myers Squibb Co*, 2003 FCA 263 at para 10, [2003] FCJ No 950).

[8] I have concluded that the Respondent has not proven on a balance of probabilities that bifurcating the proceeding will promote the just, cost-efficient and timely resolution of the Claim on its merits. There is no evidence in this case sufficient to demonstrate that bifurcation will promote settlement, beyond a bald statement that it may. Similarly, there is no evidence before the Tribunal sufficient to demonstrate that bifurcation will more timely resolve all the issues. The Respondent has yet to commence its case on compensation. Given the possibility of separate judicial reviews and of their potential subsequent appeal and considering the time it takes historically for the Respondent to retain experts and have those experts prepare a report, there will be a significant delay between the end of the validity stage and a hearing on compensation. Finally, there is no “specific and compelling” evidence sufficient to demonstrate that bifurcating the proceeding will narrow the issues beyond speculation that both experts may be unable to establish causation between the construction of the Crooked Lake and Round Lake water control structures and the flooding or other damage to reserve lands, leaving only the issue of trespass and the location of the Round Lake dam for determination. The Claim is complicated and spans over 80

years, but the Tribunal is sufficiently equipped to adjudicate large, complicated, historically technical claims.

[9] The Respondent argues that without knowing the nature, location, timing and cause of any flooding or other damage, the compensation experts would be working without necessary context to inform and focus their research. The range of potential outcomes would make the task onerous and their work inefficient and costly. Expert evidence on compensation in the nature of loss of use and current unimproved market value expert reports, it is submitted, will be discrete and separate from expert evidence related to validity, comprised of historical, agrolgy and hydrology reports.

[10] I do not agree that bifurcating the Claim will, on a balance of probabilities, result in less costs and more efficiencies. Determining the nature, location, timing and cause of any flooding will be a complex exercise requiring opinions from three different experts: historical, agrolgical and hydrological (the three experts). The extensive research, studies, information, assumptions and conclusions of the three experts will necessarily inform the damages incurred. The appraiser will not be able to opine and value any losses prior to the findings of the three experts, but will be primed and contextually prepared to do so upon their conclusions, having been originally involved with the complex process required to inform causation. All four experts will be able to put a cohesive and congruent opinion before the Tribunal on the two most significant and foundationally interwoven issues raised by the Claim: causation and damages.

[11] The Respondent submits that the appraiser will be forced to prepare supplementary reports every time the three experts revise their opinion, causing further costs and inefficiencies. The three experts, it is submitted, will in all probability be revising their opinion upon review of the Respondent's expert opinions on validity. In my view, the submission is speculative. More importantly, it ignores the efficiencies of collaboration between the three experts and the appraiser. The issues of causation and damages are undeniably connected; the opinions on one issue entirely informs the opinions on the other. The possibility of revisions itself will require professional collaboration. It is not efficient in these circumstances to have the appraiser work outside of the three experts, without access to the context within which they made their findings or revisions to those findings. Nor is it efficient to have the three experts consider any revision in isolation, without the benefits of the original valuation or the effect of a considered revision on damages.

[12] The Respondent further submits that the Tribunal may not accept either Party's opinion on causation as submitted, rendering futile all opinions on the historical and current market appraisal and loss of use prepared prior to the Tribunal's ruling on validity. Again, this submission is speculative and remote. If it did occur, however, the Tribunal and the Parties would be better served to address it at that time. It is not a reason to bifurcate the Claim at this early stage in the proceedings.

[13] The Claimant has retained experts in history, agrology and hydrology. It has also retained an expert appraiser. The four experts are working collaboratively to provide opinion reports in their area of expertise. The Respondent has not commenced preparations towards its case on compensation. The time has come for it to do so to ensure there is no delay in narrowing the issues and comprehensively putting those issues before the Tribunal for final resolution.

#### **IV. CONCLUSION**

[14] The Respondent's Application to bifurcate the Claim into separate validity and compensation stages is dismissed.

VICTORIA CHIAPPETTA

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Honourable Victoria Chiappetta, Chairperson

**SPECIFIC CLAIMS TRIBUNAL  
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**Date: 20211110**

**File No.: SCT-5005-19**

**OTTAWA, ONTARIO November 10, 2021**

**PRESENT: Honourable Victoria Chiappetta, Chairperson**

**BETWEEN:**

**KAHKEWISTAHAW BAND #72**

**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) KAHKEWISTAHAW BAND #72**  
As represented by Ryan M. Lake and Sheryl Manychief  
Maurice Law, Barristers & Solicitors

**AND TO: Counsel for the Respondent (Applicant)**  
As represented by Scott Bell and Jessica Karam  
Department of Justice