FILE NO.: SCT-5010-19
CITATION: 2021 SCTC 3
DATE: 20211110

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

<table>
<tr><td>BETWEEN:

RED PHEASANT CREE NATION

Claimant</td><td>Steven Carey, Amy Barrington and Susannah Walton, for the Claimant</td></tr>
<tr><td>– and –</td><td></td></tr>
<tr><td>HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent</td><td>Patricia Warwick, for the Respondent</td></tr>
<tr><td></td><td>HEARD: October 14, 2021</td></tr>
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REASONS ON APPLICATIONS

Honourable Victoria Chiappetta, Chairperson

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

Cases Cited:

Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills, 1986 CarswellOnt 618, 55 OR (2d) 56 (CA); *Slate Falls Nation v Canada (AG)*, 2007 CanLII 1928 (ON SC), [2007] OJ No 348; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Gallant v Farries*, 2012 ABCA 98, 348 DLR (4th) 134; *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; *Merck & Co v Brantford Chemicals Inc*, 2004 FC 1400, [2004] FCJ No 1704; *H-D Michigan Inc v Berrada,* 2007 FC 995; *South Yukon Forest Corp v R*, 2005 FC 670; *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, 2010 FC 581; *Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5, [2004] 2 FCR 514; *Apotex Inc v Bristol-Myers Squibb Co*, 2003 FCA 263, [2003] FCJ No 950; *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, [2013] 2 SCR 623.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 13(1), Preamble.

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

Government Documents Cited:

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

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

Headnote:

Bifurcation — Bifurcated Proceedings — Specific and Compelling Evidence — Mandate of the Tribunal — Purpose of the Tribunal — Reconciliation — First Nation — Settlement Privilege — Exception to Settlement Privilege — Expert Report — Report Prepared in Contemplation of Settlement — Public Interest — Just, Timely and Cost-Effective Resolution

The Parties came before the Specific Claims Tribunal (Tribunal) to debate two Applications. The first was an Application brought by the Respondent to bifurcate the Claim in two separate stages: validity and compensation. The Claimant, the Red Pheasant Cree Nation, opposed this Application and argued that a litigant has the basic right to have all issues in dispute resolved in one trial, and that the bifurcation of the proceeding in the current Claim would not lead to a more timely, cost-effective and just resolution of this Claim. The second was an Application brought by the Claimant to have an expert valuation report prepared by Thompson Agricultural Consulting Ltd entitled "A Valuation of Agricultural Benefits in Treaty 6: Final Report" (Expert Valuation Report or Report) and dated April 2019 admitted in evidence for consideration in this Claim. The Respondent opposed this Application and submitted that the Report was subject to settlement privilege and was therefore inadmissible.

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

The Tribunal undertook to revisit the test established in *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5, and found that, when parties disagree on whether to bifurcate, bifurcation should be granted only in those exceptional cases wherein there is specific and compelling evidence that to do so will advance the mandate of the Tribunal. The Tribunal found that the Respondent had not satisfied this burden and dismissed the Application for bifurcation.

It further allowed the Application to have the Expert Valuation Report admitted into evidence as the public interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just and timely manner outweighed the public interest in

encouraging settlement such that the justice of this Claim required that there be an exception to settlement privilege. The Claimant has already waited eight years to have this specific claim resolved and spent over $50,000 on the Report alone. The Tribunal was unable to see how ordering the Claimant to wait another year and spend another $100,000 to produce an almost identical report could serve the goals of a just, timely and cost-effective resolution of the Claim, and further the interest of reconciliation at the center of the Tribunal's mandate. The Report would therefore be admissible in a court under the law of evidence and thus satisfies the requirements of paragraph 13(1)(b) of the *Specific Claims Tribunal Act*, SC 2008, c 22. A redacted version of the Expert Valuation Report will be admitted into evidence, pursuant to the guidelines provided by the Tribunal.

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I. INTRODUCTION

[1] There are two Applications before the Specific Claims Tribunal (Tribunal). Firstly, the Respondent, Her Majesty the Queen in Right of Canada as represented by the Minister of Crown-Indigenous Relations, has brought an Application for bifurcation pursuant to 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: validity and compensation. The Claimant, the Red Pheasant Cree Nation, opposes this Application and submits that the Claim should not be bifurcated. Secondly, the Claimant has brought an Application to have an expert valuation report prepared by Thompson Agricultural Consulting Ltd entitled "A Valuation of Agricultural Benefits in Treaty 6: Final Report" and dated April 2019 (Expert Valuation Report or Report) admitted into evidence for consideration in this Claim. The Respondent opposes this Application and submits that the Report is subject to settlement privilege and is therefore inadmissible.

[2] The issues presented by the Applications are properly considered in context with the origin and purpose of the Tribunal. The Tribunal came into existence on October 16, 2008, as part of the federal government's *Justice at Last* policy and joint initiative with the Assembly of First Nations. Its entire reason for being is to justly, timely and cost-effectively accelerate the resolution of specific claims. The Tribunal's mandate to secure the just, timely and cost-effective resolution of specific claims is repeated throughout the *Rules*. The Preamble to the *Specific Claims Tribunal Act,* SC 2008, c 22 [*SCTA*], recognizes that the Tribunal 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.

[3] For 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. I have further concluded that the Application to have the Expert Valuation Report admitted into evidence is allowed as the public interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just and timely manner outweighs the public interest in encouraging settlement such that the justice of this Claim requires that there be an exception to settlement privilege.

II. BACKGROUND

[4] In October 2013, the Claimant submitted a claim to the Minister of Indian Affairs and Northern Development (as the Minister of Crown-Indigenous Relations was then known) alleging that the Respondent had breached its treaty, fiduciary, trust and honourable obligations owed to the Claimant by failing to provide agricultural and other benefits under Treaty 6, thereby impeding its transition to an agricultural economy. On March 12, 2014, the claim was deemed filed with he Minister. On March 9, 2017, the Respondent advised the Claimant that it would accept for negotiation the portion of the claim relating to its failure to provide agriculture benefits and instruction (Agricultural Benefits Claim or the Claim). On March 15, 2017, the Claimant accepted the Respondent's offer to negotiate the Agricultural Benefits Claim. Active negotiations took place between March 2017 and December 2019. During the negotiations, the Parties jointly commissioned the Expert Valuation Report.

[5] Negotiations eventually stalled. As a result, on October 18, 2019 and November 28, 2019, the Claimant requested the Respondent's written consent to file the claim with the Tribunal. The Crown did not respond. On December 2, 2019, the Claimant filed its Declaration of Claim with the Tribunal. The Declaration of Claim was served on the Respondent on December 4, 2019. The Respondent advised the Claimant that it would withdraw from negotiations and advised the Tribunal that it objected to the filing of the Declaration of Claim for lack of consent to its filing pursuant to paragraph 16(1)(c) of the *SCTA*. After its initial objection to what it argued to be the premature filing of the Claim, the Respondent revised its position and on February 7, 2020, provided its consent in writing for the Claimant to file the Claim with the Tribunal. On February 14, 2020, the Claimant filed an Amended Declaration of Claim to indicate that the condition precedent contained in paragraph 16(1)(c) of the *SCTA* had now been satisfied. The Respondent filed its Response to the Declaration of Claim on March 19, 2020. In terms of validity, the Respondent admits that certain implements and livestock promised to the Claimant were not provided but it disagrees with the Claimant on the nature and scope of the agricultural benefits promised under Treaty 6 and whether there were additional Treaty promises made outside of the text of the Treaty.

III. BIFURCATION

[6] The Respondent submits that the Claim should properly be heard in two stages. First, the validity stage to determine issues of interpretation of the agricultural benefit clauses in Treaty 6, entitlement to agricultural benefits and the extent to which the Respondent fell short in those obligations. Second, the compensation stage to determine the value of any shortfall of agricultural benefits as determined during the validity stage. The Claimant submits that the nature of the Claim is not such to warrant the exceptional procedural remedy of bifurcation. The Respondent has admitted validity in part. The remaining issues to be determined in terms of the nature and scope of the promises made and the corresponding shortfall are directly related and applicable to how the Claimant should be compensated.

[7] Bifurcating a hearing is an exceptional procedural remedy as generally all issues should be determined in one main action (*Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills,* 1986 CarswellOnt 618 at para 11, 55 OR (2d) 56 (CA); *Slate Falls Nation v Canada (AG)*, 2007 CanLII 1928 (ON SC) at para 57, [2007] OJ No 348). Despite this, parties appearing before the Tribunal have customarily agreed to bifurcate the claim between the validity and the compensation stages for reasons of "simplification and focus" (Indigenous and Northern Affairs Canada, *Re-Engaging: Five-Year Review of the Specific Claims Tribunal Act*, by Benoît Pelletier, Ministerial Special Representative (Ottawa: Indigenous and Northern Affairs Canada, September 2015, at 5). It was acknowledged that First Nations may not have the financial means to litigate both liability and compensation at the same time (The Canadian Bar Association, *Specific Claims Tribunal Act Five Year Review*, submission of the National Aboriginal Law Section (Ottawa: The Canadian Bar Association, April 2015) at 13–14). Funding cycles made it easier for First Nations to divide the claims in stages. It allowed the parties to save resources and avoid spending resources on reports that they would ultimately not use. It was also the Respondent's contention that bifurcation created better conditions for the negotiation of the claim.

[8] If the Parties do not have to prepare their case on compensation before a decision on the validity of the claim is made, logic would dictate a significant decrease in costs and delay consistent with the Tribunal's mandate. Such logic does not necessarily follow, however, unless the claim is found invalid. As was affirmed in the Supreme Court of Canada's decision of *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para

23, citing *Lac La Ronge Band v Canada (Indian Affairs and Northern Development)*, 2014 SCTC 8 at para 197, "[t]he rationale for bifurcating proceedings is to avoid the delay and expense of a compensation phase if it becomes unnecessary". 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. Just as practice has demonstrated in provincial courts, the practice at the Tribunal seems to indicate that bifurcation rarely achieves the time and cost economy which was initially intended (see, among others, *Gallant v Farries*, 2012 ABCA 98 at para 15).

[9] When parties consent to bifurcation and believe it to be their best advantage, the Tribunal will generally follow their wishes. When parties disagree, however, the Tribunal must take a closer look.

[10] Tribunal jurisprudence presents a non-exhaustive list of factors to consider when the issue of a consented request for a bifurcation order is presented:

> 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 hearing 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 objected to by the other party. [*Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5 at para 22, citing *South Yukon Forest Corp v R*, 2005 FC 670 at para 4; *Keeseekoose First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 3 at para 3]

[11] This enumerated list of principles was adopted from those established by the Federal Court in a number of decisions (such as *Merck & Co v Brantford Chemicals Inc*, 2004 FC 1400, [2004] FCJ No 1704; *H-D Michigan Inc v Berrada,* 2007 FC 995; *South Yukon Forest Corp v R*, 2005 FC 670; *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, 2010 FC 581), in the context of contested orders for bifurcation of intellectual property, torts, negligence or Crown liability matters. They can be helpful in determining the *prima facie* appropriateness of an order for bifurcation when parties disagree on whether the claim should be bifurcated. The difficulty with this approach, however, is that the desire to bifurcate the proceeding at an early stage in the proceedings impairs a party's ability to fully understand how complicated the claim is or may be. In the present case, the Respondent has not begun to prepare its position on compensation and has yet to file an expert report on validity. It is left only with broad generalizations speaking to potential complexities as opposed to cogent evidence speaking directly to why bifurcation in this case will likely promote efficiencies in costs and time. If the parties' immediate focus after pleadings was the timely delivery of expert reports on both validity and compensation, as opposed to an application for bifurcation, they would more urgently narrow the issues before the Tribunal and proceed more efficiently to a hearing wherein the expert reports address only the central matters at issue.

[12] Bifurcation should not be ordered because a party prefers to have the proceedings heard in separate stages. The *Rules* provide that the Chairperson may order that a claim proceed in separate stages if validity of the specific claim and compensation arising from it are both in issue (Rule 10). 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).

[13] I have concluded that the Respondent has not proven on a balance of probabilities that bifurcating the proceeding will promote the just, cost-effective and timely resolution of the Claim.

I make this conclusion for the following reasons taken together:

i. This Claim relates to agricultural benefits under Treaty 6. Beyond broad conclusions, there is no evidence that the issues related to validity and compensation are sufficiently complex to warrant two proceedings.

ii. The Respondent has admitted validity in part, necessitating a compensation assessment in any event.

iii. There is no evidence sufficient to demonstrate that the Tribunal's assessment of liability will have a significant impact on its assessment of compensation, beyond the natural impact caused by the principles of equitable compensation, that could not be met by instructing compensation experts to opine on a range of potential outcomes.

iv. The evidence required for validity and compensation is similar in part as it relates to a historical account of what was provided in Treaty 6, particularly as the Respondent is seeking a set-off for any implements that may have been provided.

v. There is no evidence sufficient to demonstrate that bifurcation will increase the likelihood of settlement or the timeliness of any settlement. Commencing in 2013, the Parties attempted to settle this Claim, focusing on compensation, without success.

vi. There is no evidence sufficient to demonstrate that the Respondent will suffer prejudice if the Claim proceeds in a single phase.

vii. As discussed below, significant costs have been expended on the jointly commissioned Expert Valuation Report pertaining to compensation. The Claimant wishes to rely on the Report at the hearing.

viii. The Respondent has acknowledged that it has not prepared its case on compensation and that it does not intend to do so until a determination on validity is made. It has admitted validity to the extent that an assessment of compensation is required. It follows then that there will be a delay between the conclusion of the

validity stage until the commencement of the compensation stage while the Respondent retains an expert and the report is prepared. The final resolution of the Claim will be delayed.

[14] The Respondent's Application to bifurcate this Claim is therefore dismissed.

IV. SETTLEMENT PRIVILEGE

[15] The Claimant has brought an Application seeking to have an expert valuation report prepared by Thompson Agricultural Consulting Ltd entitled "A Valuation of Agricultural Benefits in Treaty 6: Final Report" and dated April 2019, admitted into evidence in the Claim. The Respondent opposes the Application arguing that the Expert Valuation Report is subject to settlement privilege and not admissible at the hearing of the Claim.

[16] During negotiations, the Parties jointly retained Thompson Agricultural Consulting Ltd to prepare the Expert Valuation Report. The Parties shared the cost of the Report equally, which exceeded $100,000. The joint Terms of Reference for the Report state that "[*t*]*he requested report is being prepared in contemplation of settlement and is intended to be tabled in settlement negotiations*" (emphasis added; Book of Documents of the Claimant, Exhibit F, Schedule A, at para 1.2.2).

[17] The Claimant acknowledges that the Expert Valuation Report is likely subject to settlement privilege. To be clear, it is. The Report was created during settlement discussions with an intention for use during settlement negotiations (*Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, [2013] 2 SCR 623 [*Sable Offshore*]).

[18] The Claimant makes three arguments in support of its submission that the Report is properly admissible in the Claim.

[19] First, the Claimant argues that the Respondent has waived its privilege over the Expert Valuation Report. The Respondent requested that the Claimant consent to share the Report with third parties involved in negotiations on similar claims. The Claimant provided its consent and the Respondent then shared the Report with those third parties. By doing so, the Claimant argues, the Respondent has impliedly waived its privilege over the Report. I disagree. The Terms of Reference

for the Report expressly confirm that it is the joint property of the Respondent and the Claimant. They further acknowledge the Parties' intention that the Report may help inform future negotiations of similar claims. The Report was shared at the request of the Respondent with the approval of the Claimant, as joint owner of the property, for a reason intended by the Parties when they commissioned the Report. The Respondent, therefore, took specific steps to ensure the settlement privilege attached to the Report was not waived.

[20] Second, the Claimant argues that the Tribunal has jurisdiction to admit the Report subject to certain conditions. Subsection 13(1) and paragraph 13(1)(a) of the *SCTA* confirm the Tribunal has "*with respect to…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*" and may "*determine any questions of law or fact in relation to any matter within its jurisdiction under this Act*" (emphasis added). The Claimant submits that this permits the Tribunal to strike an appropriate balance between the Respondent's interest in maintaining privilege and the Tribunal's mandate to adjudicate the Claim justly. It suggests a redacted version of the Report be ordered into evidence removing the Respondent's involvement in commissioning the Report or a confidentiality order be made such that the Report would not form part of the public record. Paragraph 13(1)(b) of the *SCTA*, however, specifically prohibits the discretionary power of the Tribunal to admit evidence at a hearing that would be inadmissible in a court by reason of any privilege under the law. Subject to an exception to settlement privilege, joint waiver or consensus on conditions, the Report would not be admissible in a court. The Respondent has not agreed to waive privilege and has not consented to the admission of the Report with conditions. The conditions contemplated by the Claimant would only be available for use by the Tribunal upon a finding of an exception to settlement privilege.

[21] Third, the Claimant argues that the Report is admissible because of an exception to settlement privilege. In *Sable Offshore*, at paragraph 12, the Supreme Court of Canada described settlement privilege as a class privilege, meaning there is a *prima facie* presumption of inadmissibility. For the Court, Justice Abella confirmed that, when the justice of the case requires it, there are exceptions to settlement privilege. A party seeking an exception must show on a balance of probabilities that there is a competing public interest that outweighs the public interest in encouraging settlements (*Sable Offshore* at para 19).

[22] The Claimant submits that the justice of the Claim requires that the Report be admissible as an exception to the settlement privilege. The Report provides a recent, reliable, independent and objective estimate of the modern-day equivalent value (MEV) of the unfulfilled Treaty promise at the core of the Claim. If the Report is not admissible, the Claimant will be forced to use its time and resources to recreate the same report, causing further delay and expense. The Claimant therefore argues that the Report should be admitted into evidence on the basis that the public interest in the timely, cost-effective and just disposition of the Claim outweighs the public interest of encouraging settlement in legal disputes. Admitting the Report, it is submitted, would not expose the Crown to undue prejudice, while excluding it would result in significant prejudice to the Claimant in the form of unnecessary expense and delay and would create barriers rather than facilitate access to justice.

[23] The Respondent argues that a competing interest must be a public interest and it must outweigh the public interest in encouraging settlements. The Respondent submits that the interests asserted by the Claimant are private interests, saving it time and money in preparing its position on compensation. It is important to protect settlement privilege, it is submitted, to further the goals of the Tribunal of just, timely and cost-effective resolution of specific claims. Settlement privilege promotes timely settlement because it permits parties to make admissions or communications without any prejudice. To allow the Report to be admitted would prejudice the Respondent as it agreed to commission the Report in the context of negotiations where not all of the Respondent's legal arguments and positions were developed or made. The Report was an opinion with respect to the MEV of the Treaty 6 agricultural benefits based on a particular set of assumptions for the Parties to engage in negotiations. It is an approach that the Respondent does not consider supportable by law and is not relevant to the Claimant's potential rights for compensation under the Treaty.

[24] I disagree that by seeking an exception to settlement privilege the Claimant is asserting strictly a private interest. It is true that relying on the Report before the Tribunal will reduce costs and delay for the Claimant. The expert required approximately one year to produce the Report and the cost exceeded $100,000. If the Report is inadmissible, the Claimant intends to commission an identical report requiring additional time and additional money. The analysis of a public versus a private interest cannot be made in a vacuum, however. It is properly assessed at the Tribunal,

considering the nature of the Claim and the context within which it is being adjudicated.

[25] This is a historical specific claim. It has been outstanding for over 140 years. The Claim as filed with the Tribunal is one small part of the overall federal effort to accelerate the resolution of specific claims to provide justice for First Nations. The just resolution of this Claim informs the greater initiative to finally fulfill and resolve the Respondent's lawful obligations with respect to First Nations' lands and assets. As recognized in the *Justice at Last* policy and in the Preamble of the *SCTA*, it is in the interest of government, industry and all Canadians that this Claim be resolved timely and cost-efficiently as part of the Respondent's continued efforts to advance reconciliation and a mutually respectful relationship between Indigenous and non-Indigenous people.

[26] The interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just, timely and cost-efficient manner is a competing public interest to that of encouraging settlement. For reasons set out below, I have concluded that the Claimant has demonstrated on a balance of probabilities that, in the circumstances of the Claim, this competing interest outweighs the public interest in encouraging settlements.

[27] A specific claim cannot be filed directly with the Tribunal. The *SCTA* requires that, as a condition precedent to filing a claim with the Tribunal, a First Nation must file a specific claim with the Minister of Crown-Indigenous Relations. Under Canada's Specific Claims Policy and Process Guide, the Minister is afforded three and a half years to review a specific claim submission. A First Nation may only file a claim with the Tribunal if, following the Minister's review, the claim is not accepted for negotiation or if the Minister fails to respond within three years from the date the claim is deemed filed. If the claim is accepted for negotiation, it does not become eligible for filing with the Tribunal until an additional three years has elapsed without settlement being reached or until the Minister consents to the filing of the claim with the Tribunal. The First Nation is governed by the legislated timelines and can negotiate a settlement only if the Minister accepts the claim for negotiation. The negotiations will cease only after the expiry of three years unless the Minister agrees with the filing of a claim. Canada has made a policy decision to automatically discontinue negotiations upon a First Nation's assertion of its right to advance its claim before the Tribunal. If the claim is accepted for negotiation, Canada largely controls the lengthy negotiation process. First Nations have limited resources to pursue specific claims. They are the less well

funded party at the negotiating table.

[28] The Claimant first submitted its claim to the Minister in October 2013. It was deemed filed with the Minister on March 12, 2014. It was not until March 9, 2017, that the Claimant learned that the Respondent would accept the portion of the claim relating to its failure to provide agricultural benefits and instruction for negotiation. Days later, on March 15, 2017, the Claimant accepted the Respondent's offer to negotiate the claim. The Expert Valuation Report was commissioned as a joint study over a year later, in May 2018. A draft report was submitted to the Parties in November 2018, which did not contain a complete valuation estimate. A draft final report, which contained the completed valuation, was submitted to the Parties for review on January 15, 2019. The expert delivered the final report in April 2019. Almost six years after the Claimant submitted its claim to the Minister, a jointly commissioned model was in place to assess compensation owed to the Claimant for a claim wherein validity is admitted to the extent that there will be some compensation owing. Only six months later, however, negotiations were at a standstill. The Claimant's only remaining option to avoid further time and costs was to file the claim with Tribunal. The Respondent did not provide its consent in writing for the Claimant to file the claim with the Tribunal, despite repeated requests from the Claimant to do so, until February 7, 2020. Upon the filing of the Claim with the Tribunal, the Respondent has refused to continue to negotiate a settlement.

[29] As a First Nation, the Claimant has limited resources. It is attempting to resolve a claim over 140 years old. It waited over three years after filing the Claim to learn that the Minister was willing to negotiate. The Respondent has admitted that certain agricultural implements and livestock promised to the Claimant were not provided such that compensation of some value is owing. The Claimant worked with the Respondent in the preparation of the Report that was to assist in negotiating a compensation settlement. The Claimant paid its equal share for the Report. The Respondent largely controlled the process of negotiation. It used the Report with consent to assist in negotiations of similar claims but stopped all negotiations with the Claimant despite the Report because the Claimant filed its Claim with the Tribunal. The Claimant supports the model set out in the Report to assess compensation owed to the Claimant and intends to commission a nearly identical report if unable to rely on the Expert Valuation Report. In these circumstances, justice requires that the Claimant be permitted to rely on the Report at the Tribunal. To conclude

otherwise would deny the significant costs and excessive legislative delay that have been incurred to date by the Claimant in pursuing the Claim.

[30] The Respondent argues that the goals of just, timely and cost-effective resolution of specific claims in general are precisely what is being achieved by protecting settlement privilege. The very purpose of settlement privilege is to promote timely settlement because it permits parties to make admissions or communications without any prejudice. If the Tribunal orders privileged documents from specific claims negotiation tables to be used in litigation between those same parties before the Tribunal, it is submitted, both Canada and First Nations will no longer have the comfort of knowing that negotiations are protected by privilege and efforts to settle claims in the specific claims process would be hampered.

[31] It is preferable that specific claims be settled in negotiations between Canada and First Nations. This decision is not meant to impact on such important efforts. It is meant to recognize the reality that First Nations have little control over the negotiation process and limited resources to advance their claim to final resolution. The claim was submitted to the Minister eight years ago. The Claimant has already spent over $50,000 on the Report alone. It is difficult to see how the goals of just, timely and cost-effective resolution of the claims are well served by directing the Claimant to again incur costs and again incur delay to produce an almost identical report, particularly as validity has been admitted in part and the Claim will not be bifurcated into two stages.

[32] First Nations do not have the luxury of expending significant resources in both the specific claims negotiation process and the Tribunal. Expert reports are required however to both facilitate settlement at the specific claims negotiation table and to advance the claim at the Tribunal should the negotiations fail. It is a Catch-22 for First Nations. Should limited resources be expended at the negotiation table or at the Tribunal? If, as here, resources are expended during negotiations and negotiations stall shortly thereafter, there are less resources available to spend in advancing the claim at the Tribunal. If resources are not expended at the specific claim's negotiation stage, First Nations are unable to negotiate with any sophistication and face a further delay of three years, unless Canada provides its consent in writing, to advance the claim to the Tribunal. It is a difficult dilemma. One possible solution is to address the dilemma when structuring the negotiation

protocol agreement. Parties are encouraged to recognize the limited resources available to First Nations, the public interest in resolving historical claims justly with cost and time efficiencies and agree as part of a negotiation protocol agreement that any joint independent expert report commissioned is admissible at the Tribunal, subject to certain agreed-upon conditions, without prejudice to any party who wishes to denounce the report and rely upon a responding report.

[33] The Respondent argues that the Expert Valuation Report clearly contains compromises that are prejudicial to its interests. It contains an approach to compensation that the Respondent was willing to consider only for the purpose of furthering settlement discussions. The Respondent states that it is an approach on compensation that it does not consider to be supportable by law and is not relevant to the Claimant's potential rights for compensation under the Treaty. The Report is an independent assessment of the MEV of the unfulfilled Treaty promise. Before the Tribunal, the Respondent will be free to present its own expert report on compensation with a different approach if it so chooses. It will be able to attack the assumptions made in the Report through cross-examination and argument and it will be able to submit its position before the Tribunal of the Report's relevancy and supportability. There is no impairment for the Respondent to do so. In addition, it will not be bound or restricted by any of the assumptions that it was ready to make solely to advance settlement possibilities.

[34] Following Justice Abella's reasons in *Sable Offshore,* I have found that the Report is admissible at the Tribunal as an exception to settlement privilege, because the competing public interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just, timely and cost-efficient manner in the present case outweighs the public interest in encouraging settlements. For these reasons, the Expert Valuation Report would be deemed admissible in a court despite any assertion of privilege under the law of evidence. The requirements of paragraph 13(1)(b) of the *SCTA* are therefore satisfied. The Tribunal will accept the Report into evidence in support of the Claim.

[35] I recognize, however, a potential issue for the Respondent, if the Report is admitted in its original form. The Report was commissioned jointly. The Respondent was involved in the process and in part informed the approach. The Report is properly admitted as support for the Claimant's position on compensation, with the Respondent having the right to denounce the Report and rely

on a responding report. To ensure this right is unfettered, a redacted version of the Expert Valuation Report shall be admitted into evidence, removing all reference to the Respondent's involvement in commissioning or informing the Report. The Report should present only as an independent opinion of the expert as to the MEV of the agricultural benefits promised under Treaty 6. There shall be no reference to the Respondent's involvement with the Report made on the evidentiary record.

[36] The Claimant's Application to have the Expert Valuation Report admitted into evidence for consideration in the Claim is therefore allowed.

V. CONCLUSION

[37] The stated purpose of the Tribunal is to accelerate the resolution of long outstanding specific claims in order to provide justice for First Nations Claimants and certainty for government, industry and all Canadians. The just, timely and cost-effective resolution of specific claims is a commitment the Tribunal makes to all stakeholders. The Respondent's Application for bifurcation is dismissed as, on a balance of probabilities, the Respondent has failed to demonstrate that bifurcating the Claim supports this commitment.

[38] The Claimant's Application to have the Expert Valuation Report admitted into evidence for consideration in the Claim is allowed as an exception to settlement privilege given that in the present Claim the public interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just, cost-efficient and timely manner outweighs the public interest in encouraging settlement. Maintaining settlement privilege in the circumstances of the Claim defeats the Tribunal's commitment by further delaying the resolution of the Claim and causing the Claimant to expend limited resources to commission an almost identical report. A redacted version of the Expert Valuation Report shall be admitted into evidence, pursuant to the guidance provided by the Tribunal at paragraph 35 of these Reasons.

VICTORIA CHIAPPETTA

Honourable Victoria Chiappetta, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20211110

File No.: SCT-5010-19

OTTAWA, ONTARIO November 10, 2021

PRESENT: Honourable Victoria Chiappetta, Chairperson

BETWEEN:

RED PHEASANT CREE NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant RED PHEASANT CREE NATION**
As represented by Steven Carey, Amy Barrington and Susannah Walton
Maurice Law, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Patricia Warwick
Department of Justice