FILE NO.: SCT-5012-19
CITATION: 2021 SCTC 6
DATE: 20211223

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN: MUSKOWEKWAN FIRST NATION Claimant (Respondent) **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Applicant)	Steven Carey and Amy Barrington, for the Claimant (Respondent) Patricia Warwick, for the Respondent (Applicant) **HEARD:** October 8, 2021

REASONS ON APPLICATION

Honourable Todd Ducharme

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); *Unwin v Crothers*, 2005 CarswellOnt 2811, 76 OR (3d) 453; *Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5, [2004] 2 FCR 514; *Central Canada Potash Co et al v Saskatchewan (AG)*, [1974] 6 WWR 374, 1974 CarswellSask 94; *Mus v Kozakowski*, 2012 SKQB 255, 400 Sask R 141; *Nadeau v Canada (AG)*, 2001 SKQB 20, [2001] SJ No 8; *Waller v Independent Order of Foresters*, 1905 CarswellOnt 176, 5 OWR 421 (HC Div Ct); *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83; *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; *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

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 16.

Authors 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 — Delay – Principles of Bifurcation – Just, Timely, and Cost-Effective Resolution

The Parties came before the Specific Claims Tribunal (Tribunal) on an Application by the Respondent (Crown) to bifurcate the Claim into separate phases: validity and compensation. The Respondent argued that the validity issues are too complex to be determined at the same time as the compensation issues, and that it would be inefficient to proceed in a unified claim. The Claimant, the Muskowekwan First Nation, opposed this Application and argued that a litigant has the basic right to have all issues in dispute resolved in one trial. The Claimant further argued that because the Respondent had admitted partial liability, a compensation phase was inevitable and therefore bifurcation would not lead to a more timely, cost-effective and just resolution of this Claim.

The Tribunal recalled that issues before the Tribunal are properly considered in the context of 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.

Recently in *Red Pheasant v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3, the Tribunal revisited 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 party bringing the application to bifurcate bears the onus of showing, on a balance of probabilities, that bifurcation will so advance the Tribunal's mandate. On this Application, the Tribunal applied the newly-refined test.

After reviewing the procedural history of the Claim, and the evidence presented on the Application, the Tribunal found that the Respondent had not satisfied its onus and dismissed the Application for bifurcation.

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I. INTRODUCTION

[1] The Claimant, the Muskowekwan First Nation, is located on Treaty No. 4 territory in present-day Saskatchewan, about 45 minutes north of Fort Qu'Appelle. Two land surrenders are at issue in this Claim. The first occurred in 1910 when the Claimant surrendered 160 acres for a townsite to be built by the Grand Trunk Pacific Railway Company. In addition to money from the sale, surrender conditions included 10 percent of the purchase price being paid straight away, surveying of the surrendered portion, and a public auction to sell the land. The second impugned surrender occurred a decade later, in 1920. Again, in addition to the purchase price, there were surrender conditions, including sale by public auction. In relation to both surrenders, the Claimant has come before the Specific Claims Tribunal (Tribunal) alleging that the Respondent (Crown) breached fiduciary and honourable obligations with respect to the surrenders and sales and failed to comply with surrender conditions.

[2] In relation to the 1910 surrender, the Claimant alleges, among other things, that the Respondent breached its fiduciary duties by failing to provide sufficient information to the Muskowekwan First Nation at the time of surrender, favouring the interests of settlers and the railroad over the Muskowekwan First Nation, and failing to comply with surrender conditions in a number of ways. The Claimant says that the Respondent failed to sell all of the lots via public auction, sold some of the land under value to the Province of Saskatchewan and to the Village of Lestock, and gave away some of the land for a provincial park.

[3] In relation to the 1920 surrender, again the Claimant alleges that the Respondent breached its fiduciary duties and failed to comply with surrender conditions. Among other things, the Claimant says that the Respondent failed to adequately inform the Muskowekwan First Nation of its options other than surrender, failed to preserve subsurface rights, took additional acreage without compensation, favoured the interests of others over the Muskowekwan First Nation, leased rather than sold parcels, and unlawfully extinguished debts owed to the Muskowekwan First Nation by purchasers via the *Farmers' Creditors Arrangement Act*, enacted in 1934.

[4] The Respondent has made two admissions in this Claim: it admits it breached its fiduciary duties by selling land undervalue to the Village of Lestock, and by incorrectly applying the *Farmers' Creditors Arrangement Act* to extinguish debts owed to the Claimant. Apart from these

admissions, the Respondent denies all of the Claimant's claims.

[5] In terms of the 1910 surrender, the Respondent says that the Muskowekwan First Nation was fully informed about the surrender, having bargained with the Crown since 1906, including making counter proposals. It argues that the surrender condition regarding public auction demands only that the land be "*offered for sale*" at public auction (emphasis in original; Response to the Declaration of Claim, filed with the Tribunal on July 9, 2020, at para 36), which it was. In regard to the creation of the provincial park, this action by the Crown was a legal obligation under municipal regulations in force at the time, a condition precedent to subdivision and sale, which the Crown undertook in the interests of the Muskowekwan First Nation.

[6] Similarly, with regard to the 1920 surrender, the Respondent argues it fulfilled its duties apart from its sole admission. The Respondent says that the Claimant chose to sell rather than continue leasing the land for an unsatisfactory return and was adequately informed. The Respondent admits to leasing some portions of the surrendered land, but argues that these arrangements were discussed with the Muskowekwan First Nation and undertaken in its best interests: an economic downturn following the surrender created difficult conditions for sale, and the Respondent consistently attempted to dispose of the land for the best possible advantage of the Muskowekwan First Nation. The Respondent denies it took additional acreage, arguing it acquired only what was described in the legal land description of the surrender document. Finally, the Respondent argues that at the time of surrender, the land had no known subsurface deposits, and that the Claimant did not express any intention to withhold these rights.

[7] Like many historic claims made by First Nations in Canada, this Claim is complicated in and of itself, and further complicated by the passage of time since the alleged wrongdoing. Claims by First Nations often require a multitude of experts to prove wrongdoing, and then a similar multitude of experts to prove losses that need to be compensated. In addition, economic considerations come into play in ways they may not for non-First Nations litigants: litigation is always costly, and part of the Tribunal's mandate is to reduce these costs through efficient processes that allows the Tribunal to deliver justice without creating additional injustices by expending funds that could be put to better use elsewhere.

[8] It is for these reasons, among others, that claims before the Tribunal are often bifurcated

on consent into two phases: one to prove the validity of the claim itself, and a second to determine compensation for the proven losses. This method of proceeding often makes sense from an economic standpoint because there is no need to hire experts on compensation if validity cannot be established in the first place. Further, by bifurcating the claim and concentrating on validity, both parties can concentrate their resources and efforts on what is often a complicated question, further complicated by its historic nature.

II. THE APPLICATION

[9] The Respondent brings this Application for Bifurcation pursuant to Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119. In bringing the Application, the Respondent makes many of the arguments these Reasons refer to above, namely that: the nature of the claims made regarding the two surrenders are complex and multitudinous; that because of the multitudinous aspects, a broad range of potential outcomes are possible, making it inefficient to consider compensation in the absence of a finding on validity; a validity decision will significantly narrow the various aspects of the Claim, creating a more efficient process for compensation experts to draft their opinions; and, finally, a determination on validity may open up possibilities to settlement on compensation.

[10] The Claimant opposes bifurcation. Among other things, the Claimant argues that this Claim has been delayed for many years and bifurcation will only create further delay and increase costs. The question of the value of the land at surrender and at sale is a factor to determine both validity and compensation, it says, making the issues too interwoven to be bifurcated. With the Respondent having made two admissions in this Claim, a hearing on compensation is inevitable, the Claimant argues, so there is little efficiency to be gained by bifurcation. The Claimant rejects the idea that settlement would be encouraged by a validity finding, arguing that the procedural history of this Claim illustrates that negotiation has not been fruitful over the course of this dispute, and is unlikely to be now. Finally, the Claimant argues prejudice, saying that the Muskowekwan First Nation has already devoted significant resources to the compensation issue, and that delay caused by bifurcation may lead to a loss of evidence available via the testimony of community Elders who are advancing in age.

III. PROCEDURAL HISTORY OF THE CLAIM

[11] This Claim has a long and complicated procedural history.

[12] It was first filed with the Minister of Indian Affairs and Northern Development, now the Minister of Crown-Indigenous Relations, in September 1992. Supplemental submissions were made in August 1994, July 1996, July 1997, August 1997, and September 1999. The latter two submissions occurred after the Claim had been rejected for negotiation by the Minister in May 1997.

[13] The Muskowekwan First Nation did not stop there. The Muskowekwan First Nation asked the Indian Specific Claims Commission (Commission), an independent body that investigated specific claims rejected by the government, to hold an inquiry. The Commission agreed to hold an inquiry in December 2003.

[14] In January 2008, the Crown proposed negotiations on two discrete aspects of the Claim currently in front of the Tribunal, but these negotiations proved unsuccessful. In May 2008, the Commission held a hearing as part of its inquiry and, in November of the same year, released its findings. The Commission found that the Crown had breached pre-surrender fiduciary duties in relation to both the 1910 and 1920 surrenders at issue before the Tribunal in this Claim. One year later, in November of 2009, the Crown informed the Muskowekwan First Nation it did not agree with the Commission's findings and would not negotiate the Claim.

[15] In December 2011, the Crown offered to settle the two discrete aspects referred to above, in exchange for releasing the Crown from any further liability in relation to the 1910 and 1920 surrenders. The Muskowekwan First Nation refused in April 2012 but suggested further negotiations on a more-limited scope of release. The Crown refused to negotiate in July 2012, and the settlement offer expired in March 2013.

[16] On March 18, 2020, a Declaration of Claim was filed with the Tribunal, and a Response to the Declaration of Claim was filed July 9 of the same year.

[17] The Application for Bifurcation in this Claim was filed by the Respondent on September 16, 2021.

[18] On October 15, 2021, I dismissed the Application for Bifurcation with Reasons to follow. The following are my Reasons for so doing.

IV. GENERAL PRINCIPLES ON BIFURCATION

[19] Courts across the country have considered the issue of bifurcation, and two principles emerge from the jurisprudence. The first is that bifurcation is the exception to the general rule that all issues be heard at the same time, based on the "basic right of a litigant to have all issues in dispute resolved in one trial" (*Elcano Acceptance Ltd v Richmond, Richmond, Stambler &Mills*, 1986 CarswellOnt 618 at para 11, 55 OR (2d) 56 (CA)). The second is that bifurcation must promote efficiency and justice, not frustrate them. To those ends, the onus rests with the moving party to show "there is a clear benefit to be gained" by bifurcation, and this onus is "particularly high when the opposing party objects to the bifurcation" (*Unwin v Crothers*, 2005 CarswellOnt 2811 at para 78, 76 OR (3d) 453).

[20] The principle that bifurcation is an exception to the rule is longstanding (*Realsearch Inc v Valon Kone Brunette Ltd*, 2004 FCA 5 at para 11, [2004] 2 FCR 514 [*Realsearch Inc*]). In reversing the trial level bifurcation order in *Realsearch Inc*, the Federal Court of Appeal reached all the way to the late-Victorian era case *Piercy v Young* (1880), 15 Ch D 475, where Jessel MR observed that "[s]eparate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds" (*Realsearch Inc* at para 11, citing *Piercy v Young* (1880), 15 Ch D 475 at 479).

[21] The leading case on bifurcation in Saskatchewan is *Central Canada Potash Co et al v Saskatchewan (AG)*, [1974] 6 WWR 374, 1974 CarswellSask 94 [*Central Canada Potash*]. In *Central Canada Potash*, a mining company challenged provincial mining regulations as *ultra vires* and claimed damages for the previous application of the regulations. The plaintiff company brought a motion to sever the trial into a liability phase and a damages phase. The motion was denied at trial and appealed to the Saskatchewan Court of Appeal.

[22] In dismissing the appeal, the court commented that "the principle is accepted by all courts that a piece-meal trial of an action must be avoided" (*Central Canada Potash* at para 16). If bifurcation were to be granted, the court writes that it "should be granted only in exceptional cases, and in cases where the issues to be tried separately are simple, and that there should be some

evidence which makes it at least probable that the trial of the separate issue will put an end to the action" (*Central Canada Potash* at para 15). These principles have been built upon in subsequent jurisprudence. In *Mus v Kozakowski*, 2012 SKQB 255, 400 Sask R 141, the Court of Queen's Bench wrote, at paragraph 8, "It is clear that an application for severance should only be granted for the most compelling reasons and in cases in which it is probable that the trial of the one issue will put an end to the action." In *Nadeau v Canada (AG)*, 2001 SKQB 20, [2001] SJ No 8, the same court considered how a judge might determine whether time could be saved by bifurcation, writing at paragraph 5 that "[s]everance of the issues will result in a saving of time only if liability is not found to exist or if the quantum of damages can be agreed to following a finding of liability." The court went on to say, at the same paragraph, that while there is always a better chance of settlement following a finding of liability, "that is not a certainty and is not in itself sufficient reason to grant severance."

[23] In other provinces, concerns about the inefficiency of bifurcation are longstanding. In 1905, the Ontario High Court wrote that "[e]xperience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon" (*Waller v Independent Order of Foresters*, 1905 CarswellOnt 176 at para 6, 5 OWR 421 (HC Div Ct)). In *Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills*, 1986 CarswellOnt 618, 55 OR (2d) 56 (CA), determined in 1986, the Ontario Court of Appeal wrote at paragraph 11 that the power to bifurcate "should be exercised, in the interest of justice, only in the clearest cases."

[24] Even the Supreme Court of Canada favours avoiding the practice wherever possible. In the decision *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629, Iacobucci J, writing for a unanimous court, determined at paragraph 90 that "'litigation by installments' … should be avoided." Iacobucci J then endorsed the comments of McMurtry CJO, who cautioned in the appeal decision that bifurcation risked "multiple rounds of proceedings through various levels of court" doing "little service to the parties or to the efficient administration of justice" (*Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629 at para 90, citing *Garland v Consumers' Gas Co* (2001), 57 OR (3d) 127 at para 76, 208 DLR (4th) 494) (CA)).

[25] The Tribunal is not a court, however, and principles of bifurcation have, historically, applied differently in this arena. The next section considers the principles of bifurcation as they

apply specifically to the Tribunal.

V. BIFURCATION AT THE SPECIFIC CLAIMS TRIBUNAL

[26] In theory, the approach to bifurcation at the Tribunal is quite similar to that of the provincial and federal courts. Indeed, at the Tribunal, "[t]he rationale for bifurcating proceedings is to avoid the delay and expense of a compensation phase if it becomes unnecessary, or else to focus the scope of that phase" (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 23, [2018] 1 SCR 83, confirming *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8 at para 197).

[27] Three Tribunal decisions speak more specifically to a test on bifurcation. The first one is *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5 [*Kahkewistahaw*]. In its decision, authored by Mainville J, the Tribunal recalled that "[b]ifurcation orders are the exception to the rule that all issues should be determined in the main action" and that "[t]he onus is on the party requesting a bifurcation order" (*Kahkewistahaw* at para 21). The decision also laid out a non-exhaustive list of factors which the courts have considered as "having a bearing on the most just, expeditious and least expensive determination of the proceedings on its merits" (*Kahkewistahaw* at para 22). These factors are the following:

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

[28] Applying this test to the application, the Tribunal rejected the claimant's request for a bifurcation, and concluded that "[it] do[es] not consider it appropriate in order to secure the just, timely or cost-effective resolution of th[e] claim, to order a bifurcation of the issues" (*Kahkewistahaw* at para 35).

[29] The second decision of the Tribunal dealing with bifurcation is *Keeseekoose First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 3 [*Keeseekoose*]. Here, the Tribunal also relied on the factors set out in *Kahkewistahaw*, but this time concluded that the Respondent had made a convincing case "on a balance of probabilities that bifurcation ... will not prejudice the [c]laimant but will likely lead to a more efficient and cost-effective determination of th[e] [c]laim" (*Keeseekoose* at para 10) and granted the request to bifurcate the claim (*Keeseekoose* at para 12).

[30] Until recently, although the Tribunal in *Kahkewistahaw* insisted on the fact that bifurcation orders were the exception to the rule that all issues should be determined in the main action, Tribunal practice approached bifurcation on consent as the rule rather than the exception. Indeed, in most cases, parties regularly requested bifurcation orders of the Tribunal on a consensual basis.

[31] Despite this common practice, parties weren't willing to make bifurcation the rule. In 2015, during the five-year review of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], the Ministerial Special Representative put forward to stakeholders a suggestion to amend the *SCTA* to statutorily bifurcate validity and compensation hearings, as these had become "a relatively routine procedure" (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 59 [*Re-Engaging: Five-Year Review of the SCTA*]). At the time, the Canadian Bar Association in its submission warned against the potential misuse of bifurcation, stating that:

> Bifurcation may also be used strategically to prolong litigation. A party wishing to expend the resources of a less well-funded adversary may seek to bifurcate to increase the length of the litigation process and the potential costs.
>
> For these reasons, the decision to bifurcate a claim should remain at the discretion of the [Tribunal], if a party applies for bifurcation. The [Tribunal] can then weigh the evidence and arguments of both parties to make the appropriate decision in the circumstances. [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 14]

[32] After review with various stakeholders, the Ministerial Representative concluded:

> Normally, the very reason for bifurcation is simplification and focus; however, some participants in the Five-Year Review engagement process said that, in smaller claims, bifurcation is not ideal, as it can complicate the proceedings unnecessarily. Some also said that bifurcation is no more desirable when it comes to larger and more complex claims, as it creates a doubling of procedures (evidence, etc.), rendering the proceedings more difficult to manage. [*Re-Engaging: Five-Year Review of the SCTA* at 60]

[33] As a result, the Ministerial Representative recommended that bifurcation remain a choice of the parties rather than being prescribed in the *SCTA*, and that the Tribunal remain flexible "to conduct hearings in a manner that serves the goal of resolving claims in an efficient and cost-effective way" (*Re-Engaging: Five-Year Review of the SCTA* at 60).

[34] The general practice at the Tribunal nonetheless has continued to be to resort to bifurcating the proceedings on consent between a validity and a compensation phase. Recently, however, several claimants have refused to bifurcate on consent, arguing that in their cases, bifurcation was not generating time or cost reductions, and was not increasing chances of settlement after a final decision on validity. Tribunal statistics show clearly that claims are not moving quickly in general, and that additional delays caused by bifurcation, and the potential for multiple instances of judicial review, tend to amplify the issue of delay to the claimant's detriment. Thus, it appears that bifurcation, as a general practice at the Tribunal, was a failed experiment.

[35] It is in this context that the Tribunal issued its third decision on bifurcation in *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 [*Red Pheasant*], in which Tribunal Chairperson Chiappetta J refocused the Tribunal's approach to bifurcation.

[36] In this decision, the Tribunal highlighted, at paragraph 7, the initial purposes of bifurcation as "an exceptional procedural remedy" meant to simplify and focus claims, to save parties resources and time, and to improve Tribunal accessibility to First Nations who may rather proceed in phases for lack of the financial means to litigate both liability and compensation at the same time. The Tribunal established that bifurcation "should not be ordered because the parties prefer to have the proceeding heard in separate stages" (*Red Pheasant* at para 12) and especially not on the basis of "broad generalizations speaking to potential complexities as opposed to cogent evidence speaking directly to why bifurcation in [a specific] case will likely promote efficiencies

in costs and time" (*Red Pheasant* at para 11).

[37] Considering the disproportionate consequences of the length of the litigation process to First Nations as the less well-funded party, the Tribunal found that a contested application on bifurcation should only be granted where efficiencies are demonstrated through clear and cogent evidence. The Tribunal therefore redefined the test for bifurcation, pursuant to Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, in the following manner:

> ...the Chairperson of the Tribunal will 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. [*Red Pheasant* at para 12]

[38] The seven factors identified in *Kahkewistahaw* to determine a bifurcation application continue to apply, but now demand "compelling evidence" that bifurcation will promote justice and efficiency.

VI. ANALYSIS

[39] This revised approach to bifurcation is the approach that will be followed in this Claim.

[40] Despite the fact that, like many disputes between First Nations and the Crown, there are complex issues at play, I find that the issues of validity and compensation are interwoven in this Claim, which weighs against bifurcation.

[41] In this Claim, the Respondent has made two admissions regarding its failure to fulfill its fiduciary duties. Whereas the Saskatchewan Court of Appeal found in *Central Canada Potash* that bifurcation should be granted only where there is evidence that makes it probable a separate trial will put an end to the action entirely, here that is impossible. This, too, weighs against bifurcation.

[42] The Respondent has argued that bifurcation in this Claim could promote negotiation and settlement following the validity hearing. The promotion of negotiation to resolve claims is part of the Tribunal's mandate, and is favoured by the Supreme Court of Canada in Aboriginal law cases (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para

22, [2018] 2 SCR 765).

[43] The Respondent includes a boilerplate statement in most of its submissions expressing its own commitment to negotiation, which reads "Canada favours resolving claims made by Indigenous peoples through negotiation and settlement" (Respondent's Memorandum of Fact and Law, filed with the Tribunal on September 16, 2021, at para 1). This statement not only appears in the submissions in this Claim, but in Crown submissions in many, if not most, of the claims before the Tribunal. These broad statements are welcome when they are supported with clear evidence of efforts made to negotiate in a timely and cost-effective manner: First Nations, as the less well-funded party, suffer disproportionality from the length of the negotiation process, especially when they do not lead to a resolution of the claim. Where evidence of negotiation efforts is absent, however, these statements are just empty words. The Muskowekwan First Nation, like all First Nations in Canada, is entitled to more than empty words.

[44] This particular Claim has a lengthy procedural history. It was first filed in 1992 with the Minister of Indian Affairs and Northern Development, and rejected for negotiation in 1997. In 2003, the Indian Specific Claims Commission agreed to hold an inquiry, which determined in 2008 that the Crown had breached its fiduciary duties. The Crown was not moved by this determination and, in 2009, again refused to negotiate. The Crown made a settlement offer with significant conditions in late-2011, but again refused to negotiate and the offer lapsed in 2013. The Claim came to this Tribunal in 2020. The Crown has had nearly two decades to negotiate in order to reach a resolution but has, at every opportunity, refused to do so. It is hard to believe that dividing this Claim into two phases, then determining the first phase, will finally be the impetus for the Crown to do so. As the Canadian Bar Association warned at the five-year review of the *SCTA*, bifurcation has sometimes been used by better-funded parties to delay litigation and expend the resources of their adversaries.

[45] The Claimant raises the issue of prejudice, especially as it relates to the loss of oral history evidence as community Elders reach advanced age. Proving Aboriginal claims through oral history is an inherently difficult process, as the Supreme Court has readily acknowledged (*R v Van der Peet*, [1996] 2 SCR 507 at para 68, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 101, 153 DLR (4th) 193). It is made all the more difficult when that evidence

is lost forever with the passage of time.

VII. CONCLUSION

[46] Bifurcation is, as the Chairperson of the Tribunal, Chiappetta J, set out in paragraph 12 of *Red Pheasant*, "an extraordinary procedural order" that ought to only be granted where it will "promote the just, cost-efficient and timely resolution of the claim." Ultimately, having considered all of the arguments and authorities, I cannot help but conclude that the Respondent has failed to meet its onus to show that a "clear benefit" is gained by bifurcation in this Claim. Therefore, the Respondent's Application is dismissed, and the Claim will proceed as a unified claim before the Tribunal.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

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OTTAWA, ONTARIO December 23, 2021

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

Respondent (Applicant)

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