FILE NO.: SCT-6002-20
CITATION: 2024 SCTC 6
DATE: 20240904

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

ONION LAKE CREE NATION, COLD LAKE FIRST NATIONS, FROG LAKE FIRST NATION AND KEHEWIN CREE NATION (COLLECTIVELY THE "ONION LAKE AGENCY FIRST NATIONS")

Claimants (Applicants)

– and –

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

Respondent (Respondent)

Aron Taylor and Garrett Lafferty, for the Claimants (Applicants)

Dalal Mouallem, Matthew Chao and Emma Gozdzik, for the Respondent (Respondent)

HEARD: June 24, 2024

REASONS ON APPLICATION

Honourable Todd Ducharme

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

Cases Cited:

GE Renewable Energy Canada Inc v Canmec Industrial Inc, 2024 FC 187; *Boehringer Ingelheim (Canada) Ltd v Sandoz Canada Inc*, 2024 CanLII 5392 (FC); *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 8, 15, 16, 20, 22.

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, rr 5, 57.

Federal Courts Rules, SOR/98-106, r 75.

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I. INTRODUCTION

[1] The Claimants—Onion Lake Cree Nation, Cold Lake First Nations, Frog Lake First Nation and Kehewin Cree Nation, collectively known as the "Onion Lake Agency First Nations" (Claimants, Applicants)—seek leave to amend their Amended Declaration of Claim (Notice of Application for Leave and to Amend the Amended Declaration of Claim (Application)). The purpose of the proposed amendments, they say, is to "particularize" the prior allegations but the effect of this particularization, as will be seen, would be to significantly increase the number of claims being advanced at the same time. The Respondent, His Majesty the King in Right of Canada (Respondent, Crown), opposes parts of the Claimants' Application arguing, among other things, that it is plain and obvious they cannot succeed because some of the proposed amendments seek relief outside the jurisdiction of the Specific Claims Tribunal (Tribunal).

[2] The overall Claim at the centre of this Application concerns Indian Reserve No. 123A (I.R. 123A), which was located in Alberta. The lands that once made up the reserve are now part of the Town of Bonnyville and its surrounding area. The Claimants allege that, between 1900 and 1958, the Crown breached its statutory, fiduciary, and honourable obligations to the Claimants by failing to rectify flooding on the reserve, and by alienating the reserve to incoming settlers piece by piece until it was all gone. The Crown argues that while the Claimants had a cognizable interest in I.R. 123A arising from their regular use of the area to cut hay, the lands were never an official Indian reserve as they were not set apart for the exclusive use and benefit of the Claimants. Rather, these lands were set apart for the benefit of the Onion Lake Agency and the Department of Indian Affairs.

II. ISSUES

[3] The overall issue in this Application is whether the Claimants can amend their Amended Declaration of Claim to include multiple claims. This will require the determination of a number of sub-issues arising from the Parties' arguments. These include:

1. What is the appropriate test to amend a Declaration of Claim, and is it met in this case?

2. Must amendments of this nature be sent back to the Minister of Crown-Indigenous Relations (Minister) for assessment under the Specific Claims Policy?

3. Must the Claimants re-submit their multiple claims separately, at which point joinder can be applied for under subsection 8(2) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]?

4. Is allowing these proposed amendments contrary to the interests of justice?

[4] For the reasons set out below, the Claimants' Application is allowed: the proposed Amended Amended Declaration of Claim, submitted as Schedule A to the Application filed June 3, 2024, is accepted by the Tribunal. Accordingly, the Claimants shall file this document separately. I note that the name of the Minister in the further amended pleading is incorrect and should be corrected to remove "and Northern Affairs Canada" prior to filing.

III. NATURE OF THE PROPOSED AMENDMENTS

[5] The nature of the Claimants' proposed amendments can best be understood by comparing the prayer for relief in the Amended Declaration of Claim to that of the proposed Amended Amended Declaration of Claim. In the Amended Declaration of Claim, filed April 3, 2023, the Claimants write:

> Each Claimant seeks the following relief:
>
> (a) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it unlawfully alienated the surface interest in the IR 123A lands (17,851 acres) in favour of others to the exclusion and prejudice of the Claimants, who held beneficial interests to IR 123A;
>
> (b) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it issued letters patent to the lands comprising IR 123A, which failed to reserve the sub-surface rights and constituted an unlawful taking of an interest in land held by Canada for the exclusive use and benefit of the Claimants[;]
>
> (c) Damages and equitable compensation based on the current unimproved market value of the 17,851 acres comprising the former IR 123A plus loss of use from the date of 1901 to the date of judgment;
>
> (d) Damages and equitable compensation based on the current unimproved market value of the subsurface rights underlying the 17,851 acres formerly comprising the IR 123A lands plus loss of use from 1908 to the date of judgment;

(e) Costs to be awarded on a solicitor-client or substantial indemnity basis pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and

[(f)] Such other relief as this Honourable Tribunal deems just. [underlining and strikethroughs removed; Amended Declaration of Claim at sub-paras. 54(a)–(f)]

[6] The proposed Amended Amended Declaration of Claim reads:

Each Claimant seeks the following relief:

(a) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants when it unlawfully alienated the Claimants' surface interests in the IR 123A lands by failing to rectify the flooding of IR 123A from 1900 to 1903, which rendered the lands unusable by the Claimants;

(b) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants by alienating the Claimants' lands through a series of unilateral amendments to the borders of IR 123A and through the issuance of a series of letters patent to the lands comprising IR 123A and by transferring all remaining interests to the Province of Alberta pursuant to the 1930 *Natural Resources Transfer Agreement* and the *Alberta Natural Resources Act*, *S.C. 1930 c. 3*, each of which constitutes an unlawful taking of a surface interest in land held by Canada for the exclusive use and benefit of the Claimants, and are distinct Claims;

(c) A determination that Canada breached its statutory, fiduciary, and honourable obligations to the Claimants by failing to reserve for the Claimants the sub-surface interests to the lands upon the granting of letters patent to the Hudson's Bay Company and when the Crown transferred the sub-surface interests to the lands to the Province of Alberta, pursuant to the 1930 *Natural Resources Transfer Act*[;]

(d) Damages and equitable compensation based on the current unimproved market value of the surface rights of each taking of lands comprising the former IR 123A lands plus loss of use from the date of 1901 to the date of judgment;

(e) Damages and equitable compensation based on the current unimproved market value of the sub-surface interest of the lands comprising the IR 123A lands plus loss of use from 1908 to the date of judgment;

(f) Costs to be awarded on a solicitor-client or substantial indemnity basis pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and

(g) Such other relief as this Honourable Tribunal deems just. [underlining and strikethroughs removed; proposed Amended Amended Declaration of Claim at sub-paras. 71(a)–(g)]

IV. POSITIONS OF THE PARTIES

A. Claimants

[7] The Claimants take the position that the proposed amendments are the particularization of allegations already pleaded in the Amended Declaration of Claim. They argue that, since the Tribunal does not have its own rule or test regarding amending pleadings, rule 75 of the *Federal Courts Rules*, SOR/98-106 [*FC Rules*] is the applicable rule as indicated by Rule 5 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*SCT Rules*]. Rule 5 of the *SCT Rules* reads:

> **Matters not provided for**
>
> **5** The Tribunal may provide for any matter of practice or procedure not provided for in these Rules by analogy to the *Federal Courts Rules*.

[8] Rule 75 of the *FC Rules* reads:

> **Amendments with leave**
>
> **75 (1)** Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.
>
> **Limitation**
>
> **(2)** No amendment shall be allowed under subsection (1) during or after a hearing unless
>
> **(a)** the purpose is to make the document accord with the issues at the hearing;
>
> **(b)** a new hearing is ordered; or
>
> **(c)** the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

[9] The Claimants say that the appropriate factors to be applied where a party seeks to amend its declaration of claim are contained in two recent decisions of the Federal Court: *GE Renewable Energy Canada Inc v Canmec Industrial Inc*, 2024 FC 187 [*GE Renewable Energy*], and *Boehringer Ingelheim (Canada) Ltd v Sandoz Canada Inc*, 2024 CanLII 5392 (FC) [*Boehringer Ingelheim*]. In *GE Renewable Energy*, the Federal Court wrote:

> The general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the "real questions in controversy," provided that allowing the amendments (i) would not result in an injustice to other parties not capable of being compensated by an award of costs; and (ii) would serve the interests of justice. The onus lies on the amending party to show the amendments should be allowed.

> In assessing whether an amendment would serve the interests of justice, the Court may consider factors such as (i) the timeliness of the motion to amend; (ii) whether the proposed amendments would delay trial; (iii) whether the amending party's prior position has led another party to follow a course of action in the litigation that it would be difficult to alter; and (iv) whether the amendments will facilitate the Court's consideration of the substance of the dispute on its merits. These factors are considered together without any single factor being determinative.
>
> An amendment must also yield a sustainable pleading, and an amendment that is liable to be struck out under Rule 221 should not be permitted. Thus, where it is plain and obvious that proposed amendments do not disclose a reasonable cause of action, or the amendments represent a "radical departure" from the party's prior positions, they should not be permitted. [citations omitted; paras. 8–10]

[10] In *Boehringer Ingelheim* the Federal Court wrote:

> The "reasonable prospect of success" test … is very closely related to if not effectively the same as the "plain and obvious that there is no reasonable cause of action" test applied on motions to strike pursuant to Rule 221 of the *Rules*. The facts pleaded in the amendment are assumed to be true for the purposes of analysis unless they are manifestly incapable of being proven. The amending language to be added to the pleading ought to be read generously and the Court should accommodate any deficiencies in drafting. The use of the word "reasonable" in the applicable test does not require the Court to assess the likelihood of success. The real question is whether the proposed amendment is doomed to fail, not whether there is a reasonable likelihood that it is doomed to fail. [citations omitted; para. 14]

[11] The Claimants argue that these factors are fulfilled, and the proposed amendments should be accepted.

[12] Finally, the Claimants contend that there is no basis to assert that the allegations made in the proposed Amended Amended Declaration of Claim need to be submitted to the Minister for assessment under the Specific Claims Policy. The Claimants have consistently sought compensation for the taking of I.R. 123A, they say, and while the allegations have become more particularized via their proposed amendments to the Amended Declaration of Claim, the Minister had the opportunity to consider and negotiate this Claim, and it was only the failure of that process that created the conditions precedent to bring this Claim to the Tribunal. Forcing the Claimants to return to the beginning of the specific claims process would create at least a three-year delay to the resolution of this Claim, and would be contrary to the Tribunal's mandate to adjudicate specific claims in accordance with the law and in a just and timely manner.

B. Respondent

[13] The Respondent consents to the vast majority of the proposed amendments, but the ones it opposes are the most consequential. The unopposed proposed amendments are typically fact-based: the Crown says that these amendments either particularize what has been asserted in the Claimants' original Declaration of Claim or set out the facts that support these assertions. The opposed proposed amendments, however, are opposed on two overarching bases: the Crown says that the Tribunal lacks jurisdiction to hear these claims, and it would not be in the interests of justice to allow these proposed amendments.

[14] In terms of the jurisdictional issues, the Crown argues that not only would the total compensation sought by the Claimants exceed the statutory limit on compensation available at the Tribunal but that, because these proposed amendments were not considered by the Minister under the Specific Claims Policy, they do not fulfill the conditions precedent to be heard at the Tribunal, and must be sent back to the Minister.

[15] The statutory limit on compensation is described in paragraph 20(1)(b) of the *SCTA*, which reads:

> **Basis and limitations for decision on compensation**
>
> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(b)** shall not, despite any other provision in this subsection, award total compensation in excess of $150 million; …

[16] Also applicable, the Crown argues, is paragraph 15(4)(c) of the *SCTA*:

> **Restrictions**
>
> **(4)** A First Nation may not file a claim if
>
> …
>
> **(c)** the amount of its claim exceeds the claim limit.

[17] The Claimants, the Crown says, seek to divide what the Crown understood as a single claim into multiple claims—each of which, the Claimants say, would be subject to a separate limit on compensation. Allowing the Claimants to advance multiple claims within the same proceeding would mean that the total compensation sought would exceed the statutory limit, and thus exceed

the Tribunal's jurisdiction. The Crown also argues that, per paragraph 15(4)(c) of the *SCTA*, the Claimants cannot file a claim if they seek compensation in excess of $150 million, and that these proposed amendments should be rejected on that basis.

[18] As the Respondent points out, claims cannot come directly to the Tribunal—a claimant must fulfill a number of conditions precedent before it can file its claim with the Tribunal. These conditions precedent are contained in section 16 of the *SCTA*:

> **Filing a specific claim**
>
> **16 (1)** A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and
>
> **(a)** the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;
>
> **(b)** three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
>
> **(c)** in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or
>
> **(d)** three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

[19] Only if the process at the Specific Claims Branch fails—the Minister does not make a decision within three years, the claims are not accepted for negotiations, or negotiations are unsuccessful—could the Claimants bring these claims to the Tribunal separately, at which point the Tribunal will be in a position to decide whether the multiple claims can be joined under subsection 8(2) of the *SCTA*, and whether they should be subjected to a single claim limit under subsection 20(4) of the *SCTA*. Essentially, the Respondent argues, until this process occurs the Tribunal would not have jurisdiction over the claims being advanced in the proposed Amended Amended Declaration of Claim.

[20] The Respondent also argues that the proposed amendments are not in the interests of justice. This objection is less fleshed out than the jurisdictional issues, but appears to be making a similar point. The Respondent argues that the opposed proposed amendments are not merely the particularization of claims which appeared in prior Declarations of Claim but are, in fact, new claims which raise new legal issues. The proposed flooding claim, for example, is based upon facts

already pleaded in the original Declaration of Claim but, in the original pleading, these facts did not amount to a separate claim with a separate claim limit—instead, these facts were subsumed in the original Declaration of Claim for the taking of the lands.

[21] The Crown also says that the Claimants' arguments relating to the transfer of subsurface rights pursuant to the *Natural Resources Transfer Agreement* constitute a significant departure from the original Declaration of Claim, raise a new legal issue that was never put before the Minister, and should be dismissed on this basis. If the proposed amendments are allowed, the Crown says that the Province of Alberta's interests may be significantly affected, and therefore a Notice under section 22 of the *SCTA* should be sent to the Province of Alberta.

V. AMENDING PLEADINGS AT THE FEDERAL COURT

[22] As noted, the Claimants argue that, as the Tribunal does not have its own procedure to amend pleadings, the correct procedure is that contained in rule 75 of the *FC Rules*, which includes the factors contained in the Federal Court's jurisprudence. The Claimants contend that their proposed amendments fulfill the factors necessary to allow the amendments. The Respondent does not dispute that rule 75 applies, but disputes that the factors are fulfilled.

[23] As a threshold issue, the proposed amendments must create a "sustainable pleading" in the sense that they would not be struck under rule 221 of the *FC Rules*. Rule 221 reads:

> **Motion to strike**
>
> **221 (1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> **(a)** discloses no reasonable cause of action or defence, as the case may be,
>
> **(b)** is immaterial or redundant,
>
> **(c)** is scandalous, frivolous or vexatious,
>
> **(d)** may prejudice or delay the fair trial of the action,
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.

[24] The Court in *Boehringer Ingelheim* wrote that a court need not review the actual likelihood of success, but should only strike pleadings if they are "doomed to fail" (para. 14). The Crown says that these proposed amendments are doomed to fail on two bases: they seek to exceed the

claim limit imposed by the *SCTA*, and they have not been submitted to the Minister, thereby not fulfilling the conditions precedent in section 16 of the *SCTA*. These arguments will be considered in greater detail in subsequent sections of these Reasons but, for now, it is enough to say that the proposed amendments are not "doomed to fail": to test whether a pleading is doomed to fail, a court will assume that the facts pleaded are true and then ask, given that assumption, if the facts disclose a reasonable cause of action (*Boehringer Ingelheim* at para. 14). Here, assuming that the facts pleaded are true, the multiple claims being brought by the Claimants fit into the statutory scheme of the *SCTA* and are capable of being found as violations of the *SCTA*. The proposed amendments are sustainable on that basis.

[25] According to *GE Renewable Energy*, the test to amend a pleading at the Federal Court is permissive in the sense that, in general, "an amendment should be allowed at any stage of an action for the purpose of determining the 'real questions in controversy,'" provided such an amendment is not against the interests of justice, and does not result in prejudice to the other party that cannot be cured by costs (para. 8). In this case, I would also consider offering additional time to respond to the amended allegations capable of curing any prejudice created by amendments to a declaration of claim.

[26] The Court in *GE Renewable Energy* offers guidance on how to determine whether an amendment is against the interests of justice, putting forth (1) timeliness, (2) the potential for delay, (3) whether the applicant's prior position caused the other party to follow a course of action that would be difficult to alter, and (4) whether the amendments will facilitate a court's consideration of the "substance of the dispute on its merits" (para. 9). These factors, the Court continues, "are considered together without any single factor being determinative."

[27] The Claimants say that the proposed amendments will help to determine the real questions in controversy, as the primary purposes of these amendments are first to demonstrate the validity of the allegations that have already been made in their two prior declarations of claim and, second, to characterize the nature of the Respondent's alleged breaches which will assist the Tribunal in determining the appropriate compensation should validity be found. They also say that the proposed amendments do not go against the interests of justice because: the Application is brought in advance of written and oral arguments; they do not radically change the substance of the dispute

such that the Crown will be forced to change its course; and they allow the Tribunal to consider the actual substance of the dispute. The Claimants admit that there is the potential for delay, considering that they are proposing to put forth supplementary expert evidence in an effort to show how compensation should be assigned within the context of these multiple claims—a process that may require supplementary or new response reports from the Crown, and may necessitate a further expert evidence hearing—but they say that this delay is not "significant" in the sense that it is outweighed by the Claimants' ability to clearly state the allegations, and fulfill the truth-finding function of the Tribunal.

[28] As already noted, the Respondent opposes the opposed proposed amendments on the basis of the interests of justice, saying that these amendments represent a significant departure from the original claim. While the Crown acknowledges that many of the facts pleaded as part of the proposed amendments are present in the original Declaration of Claim, it says that the Claimants are now utilizing these facts—especially in relation to the flooding between 1900 and 1903, and the alleged transfer of subsurface rights via the *Natural Resources Transfer Agreement* in 1930—to raise new legal issues. There is no rationale for creating new legal issues out of facts previously pleaded and, besides, allowing these amendments would breach the cap on compensation. The Crown also says that these new legal issues must first be put before the Minister before they can be considered by the Tribunal, an argument that will be considered in the next section of these Reasons.

[29] I agree with the Claimants that these amendments do not go against the interests of justice. While they come rather late in the process, they are not so late that any prejudice that may arise cannot be cured by time to respond with argument or additional evidence. Further, these amendments do indeed assist the Tribunal in understanding—and therefore determining—the substance of the dispute on its merits. Finally, these amendments will not force the Crown to change its course of action: the Respondent's position has been, throughout the process of this Claim, that I.R. 123A was not an "Indian reserve" as defined by the *Indian Act* which means that, while the Crown admits that the Claimants had some kind of an interest in the property arising from regular use, it is not the type of interest that can sustain the Claim at bar. The proposed amendments do not force any alteration of that position.

[30] As such, the factors relevant to amending pleadings under rule 75 of the *FC Rules* are fulfilled.

VI. SHOULD THE PROPOSED AMENDMENTS BE SUBMITTED TO THE MINISTER?

[31] The Crown argues that the proposed amendments represent such a radical departure from the Claimants' original claim that they must be submitted to the Minister to be assessed under the specific claims policy, in keeping with section 16 of the *SCTA*. These claims, as amended, are no longer within the Tribunal's jurisdiction, the Crown says, because they have not fulfilled the conditions precedent contained in section 16.

[32] It should be noted that the Tribunal—as is typical of its process—has not seen the materials that were placed before the Minister, as these materials are protected by settlement privilege.

[33] Former Chairperson of the Tribunal, the Honourable Harry Slade, faced a very similar situation in *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12 [*Halalt*]. In *Halalt*, the First Nation sought to amend its declaration of claim to present new allegations based on the same facts already presented within its original declaration of claim. The Crown objected on many of the same bases that the Crown objects in the Claim at bar: it argued that because the proposed amendments were not submitted to the Minister as part of the specific claims process, the Tribunal did not have jurisdiction under section 16 of the *SCTA*.

[34] Slade J. wrote that, as an independent tribunal with "all the powers, rights and privileges that are vested in a superior court of record," and one with the power to make its own rules governing its practices and procedures, "there is no statutory power to limit what evidence may be introduced or foreclose the pleading of allegations of fact" (paras. 42–47, citing sections 12 and 13 of the *SCTA* at paras. 45–46). Slade J. also recognized the significant challenges to a claimant that would arise from a decision to send an amended claim back to the Minister, writing:

> If, posited by the Respondent, any allegation made by a claimant before the Tribunal that was not in the submission to the Minister deprives the Tribunal of jurisdiction, the associated delay and cost of advancing the claim would be contrary to the objects of the *SCTA*. To avoid this result the Applicant would be faced with the unenviable choice of proceeding before the Tribunal under conditions that provide no assurance of a full exposition of the issues over the

> conduct of the Respondent, relevant evidence, and applicable law, and the risk that it would be foreclosed from doing so in the future. [para. 56]

[35] Noting that the *SCTA* is both remedial and a statute "relating to Indians" in the words of *Nowegijick v The Queen*, [1983] 1 SCR 29 at p. 36, 144 DLR (3d) 193, Slade J. determined that the *SCTA* must be "given a broad and liberal interpretation, keeping in mind and giving effect to its purpose" (para. 63). He concluded, at paragraph 76, that an interpretation of section 16 of the *SCTA* that would demand an amended claim be sent back to the Minister for consideration would not only violate the principles of statutory interpretation but would be contrary to the advancement of reconciliation—a core mandate of the Tribunal. As such, he determined that the word "claim" in section 16 "means all claims that arise on the same or substantially the same facts as those relied on to establish the grounds for the claim, as presented to the Minister under the Policy and to the Tribunal under the *SCTA*" (para. 77).

[36] Slade J.'s reasoning is directly applicable to this Claim: the legal theory of the Claim has changed from one Declaration of Claim to the other, but the facts that underlie the Claim have not changed. The Claimants are still required to establish both the facts and the allegations that arise from them—which they have not yet done—and the Crown has had, and will have, the opportunity to respond both to the facts themselves and the emerging legal theory.

[37] This leads me to conclude that the Crown has not identified a sufficient reason for ministerial review, and the Tribunal has the jurisdiction to allow the proposed amendments.

VII. SEPARATE CLAIMS AND JOINDER UNDER THE *SCTA*

[38] The Respondent argues that, per the *SCTA* and the *SCT Rules*, multiple claims cannot be advanced within the context of one declaration of claim. It says that subsection 20(4) of the *SCTA* requires that two or more specific claims must be treated as a single claim if they are made by the same claimant and are based on substantially the same facts (Response to the Application at paras. 32–33). These multiple claims would then be joined, it says, by the Tribunal's Chairperson under subsection 8(2) of the *SCTA*. Once joined, the multiple claims would have to be treated as one claim in relation to the claim limit set out in paragraph 20(1)(b) of the *SCTA*.

[39] A review of the provisions of the *SCTA* will show that this interpretation is not plain and obvious. Furthermore, it is premature to speculate on the application of the *SCTA*'s compensation

provisions in the absence of a finding of validity.

[40] Subsection 8(2) of the *SCTA* reads:

> **Powers of Chairperson**
>
> **(2)** On application by a party, the Chairperson may order that
>
> **(a)** specific claims be heard together or consecutively if they have issues of law or fact in common;
>
> **(b)** a specific claim is, together with any other specific claim, subject to one claim limit under subsection 20(4); and
>
> **(c)** specific claims be decided together if decisions with respect to the claims could be irreconcilable or if the claims are subject to one claim limit.

[41] Subsection 20(4) of the *SCTA* reads:

> **One claim limit for related claims**
>
> **(4)** Two or more specific claims shall, for the purpose of paragraph (1)(b), be treated as one claim if they
>
> **(a)** are made by the same claimant and are based on the same or substantially the same facts; or
>
> **(b)** are made by different claimants, are based on the same or substantially the same facts and relate to the same assets.

[42] Paragraph 20(1)(b) of the *SCTA* reads:

> **Basis and limitations for decision on compensation**
>
> **20(1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(b)** shall not, despite any other provision in this subsection, award total compensation in excess of $150 million; …

[43] The most glaring difference between these three provisions is the discretionary nature of subsection 8(2), and the non-discretionary natures of subsection 20(4) and paragraph 20(1)(b). Subsection 8(2) says that the Chairperson *may* order the joinder of claims, or that one or more claims is subject to the same claim limit, but this is at their discretion. This implies that, at least in some contexts, one or more claims may be determined by the Tribunal at the same time and *not* be subject to the same claim limit.

[44] Subsection 20(4) is not discretionary: if two or more claims are made by the same claimant

and based on substantially the same facts, then this subsection dictates that the Tribunal *shall* order that they be treated as a single claim. I do not disagree with the Respondent's interpretation of this subsection, but it is not plain and obvious that it applies to the Claimants' proposed amendments. I have not determined the outcome of the Claimants' allegations, but they have presented a *prima facie* case that their claims are based on facts that are separate enough that it is arguable that subsection 20(4) does not apply: the alleged illegal takings concern different parts of I.R. 123A, and occurred at different times over the course of more than half a century. Further, the Claimants allege that different property rights were taken at different times, with the surface rights and the subsurface rights being alienated separately and via different Crown decisions.

[45] Paragraph 20(1)(b) is similarly not discretionary: where the Tribunal makes a decision on the issue of compensation for a valid specific claim, it *shall not* award compensation in excess of $150 Million. However, as subsection 8(2) appears to leave open the possibility that multiple claims could be advanced within the context of a single declaration of claim, it is not unambiguously clear that paragraph 20(1)(b) applies: if the context is appropriate and the Tribunal were to hear multiple claims as part of a single proceeding, the claim limit in paragraph 20(1)(b) could apply to each individual claim, not the proceeding as a whole.

[46] I am not prepared to, nor must I, determine these questions at this time: the application of the *SCTA*'s compensation provisions is dictated by the shape of a validity finding—if any—that a claimant receives from the Tribunal. For instance, in this Claim, the question of whether I.R. 123A was an Indian reserve as defined by the *Indian Act* will be at the centre of the validity finding: the Crown has admitted that the Claimants had an interest in the lands arising from regular use, but says that it was not an Indian reserve under the *Indian Act*; the Claimants say that it was an Indian reserve under the *Indian Act*, and seek compensation on that basis. Without determining that question, and others which flow from it, it is impossible to say which of the *SCTA*'s compensation provisions would apply, because it is impossible to say which—if any—of the Claimants' claims are valid.

[47] This is not the time or the place to determine validity, and therefore it is not the time or the place to determine if paragraph 20(1)(b) applies to the multiple claims within the proposed Amended Amended Declaration of Claim individually, or to the proposed Amended Amended

Declaration of Claim overall. These issues will be properly before the Tribunal at the oral submissions hearing, where both the Claimants and the Respondent will have the opportunity to argue for their interpretation of the *SCTA*'s validity provisions, and how this interpretation affects the application of the *SCTA*'s compensation provisions.

VIII. ARE THE PROPOSED AMENDMENTS CONTRARY TO THE INTERESTS OF JUSTICE?

[48] As noted, the Crown's objections to the proposed amendments based on the interests of justice are less fleshed out than its objections on jurisdictional issues—and the interests of justice issues are closely intertwined with the jurisdictional issues.

[49] The Crown argues that the opposed proposed amendments are not the particularization of already existing claims, but are new claims. As such, it argues that the proposed Amended Amended Declaration of Claim "contravenes the [*SCTA*] and would not be in the interests of justice" (Response to the Application at para. 37).

[50] Without determining the issue as it will properly be before the Tribunal as part of the oral submissions hearing, a comparison between the prayer for relief in the Amended Declaration of Claim and the proposed Amended Amended Declaration of Claim shows considerable similarities.

[51] Further, the *SCTA*'s preamble says that it is "in the interests of all Canadians that the specific claims of First Nations be addressed," and that the Tribunal itself has been "designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner." It would seem that the interests of justice, therefore, favour the efficient, just, and final determination of specific claims.

[52] Refusing to hear these amendments would not foster efficiency, nor would it foster justice, and the objection is dismissed on that basis.

IX. OBLIGATIONS OF DOCUMENT PRODUCTION

[53] The Claimants assert that part of the reason they are bringing these proposed amendments at this point in the process is based on the relatively recent discovery of more than 100 letters patent—as well as other documents—which, they say, show the exact procedures by which the Crown alienated I.R. 123A, and show that the alienation of the reserve occurred serially and over

a lengthy period of time. Each letters patent, they say, represents a separate illegal taking—and therefore a separate claim—and it is upon these letters patent that the significant expansion of the number of claims largely rests.

[54] The Claimants say that they discovered these facts in the autumn of 2023, and they complain that the Respondent did not disclose copies of these letters patent despite the fact that they were created by the Respondent and are in the Respondent's possession, power, and control.

[55] The Respondent argues that paragraph 57(a) of the *SCT Rules*, which controls the disclosure of documents at the Tribunal, demands an application for disclosure—which the Claimants did not make. Paragraph 57(a) reads:

> **Application**
>
> **57** A party may make an application for the disclosure of
>
> > **(a)** any documents or information, or category of documents or information, that are relevant to the proceedings and that are in the possession, power or control of another party; or …

[56] It should be noted that the Claimants do not seek to penalize the Respondent for any lack of disclosure, nor do they allege any wrongdoing. Instead, they appear to be making the complaint in the context of explaining the timing of their Application.

[57] I would tend to agree with the Respondent that disclosure at the Tribunal requires a claimant to make an application, per the *SCT Rules*. I also accept that there has been no bad faith on the part of the Respondent, nor has the Respondent breached any legal or equitable duty.

[58] Nevertheless, I feel it is reasonable for the Tribunal to expect more from the Crown in relation to disclosure, and for the Crown to take—in general—a more proactive approach to disclosure than is demanded by the *SCT Rules*. Per *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, the minimum of duties that inhere to the *sui generis* fiduciary relationship between the Crown and Indigenous Peoples in Canada is "loyalty, good faith, *full disclosure appropriate to the matter at hand* and acting in what [the Crown] reasonably and with diligence regards as the best interest of the beneficiary" (emphasis added; para. 94). This minimum standard applies even in the context of litigation between the fiduciary and a beneficiary.

[59] To be abundantly clear, I am not suggesting that a breach of any legal or equitable duty has

occurred in the context of this Claim. Going forward, however, I expect the Crown—in all claims that come before the Tribunal—to be more proactive in its disclosure, in the interests of both fulfilling the *sui generis* fiduciary duty, as well as in the interests of reconciliation. The truth-seeking function of the Tribunal is impaired by a lack of proactive disclosure, and justice demands that the Tribunal understand the full context of a claim.

X. CONCLUSION

[60] The sub-issues in this Application were previously stated as follows:

1. What is the appropriate test to amend a declaration of claim, and is it fulfilled in this case?

2. Must amendments of this nature be sent back to the Minister for assessment under the Specific Claims Policy?

3. Must the Claimants re-submit their multiple claims separately, at which point joinder can be applied for under subsection 8(2) of the *SCTA*?

4. Is allowing these proposed amendments contrary to the interests of justice?

[61] To answer the first question, rule 75 of the *FC Rules*—and its related jurisprudence—is the appropriate test to amend a declaration of claim at the Tribunal and, in the context of the Claimants' Application, the test is fulfilled.

[62] The remaining questions are answered in the negative.

[63] As such, the Claimants' Application is allowed. The Registry will schedule a case management conference at the Parties' earliest convenience to discuss how much time the Respondent will need to respond to the further amended allegations, the necessity of sending a Notice under section 22 of the *SCTA* to the Province of Alberta, and any other issues arising from this Application.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20240904

File No.: SCT-6002-20

OTTAWA, ONTARIO September 4, 2024

PRESENT: Honourable Todd Ducharme

BETWEEN:

ONION LAKE CREE NATION, COLD LAKE FIRST NATIONS, FROG LAKE FIRST NATION, AND KEHEWIN CREE NATION (COLLECTIVELY THE "ONION LAKE AGENCY FIRST NATIONS")

Claimants (Applicants)

and

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

Respondent (Respondent)

COUNSEL SHEET

TO: **Counsel for the Claimants (Applicants) ONION LAKE CREE NATION, COLD LAKE FIRST NATIONS, FROG LAKE FIRST NATION, AND KEHEWIN CREE NATION (COLLECTIVELY THE "ONION LAKE AGENCY FIRST NATIONS")**
As represented by Aron Taylor and Garrett Lafferty
Maurice Law Barristers & Solicitors

AND TO: **Counsel for the Respondent (Respondent)**
As represented by Dalal Mouallem, Matthew Chao and Emma Gozdzik
Department of Justice