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CITATION: 2024 SCTC 7
DATE: 20240916

OFFICIAL TRANSLATION

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
THE INNU OF UASHAT MAK MANI-UTENAM Claimant	Jameela Jeeroburkhan and Joëlle Perron-Thibodeau, for the Claimant
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Josianne Philippe and Stéphanie Dépeault, for the Respondent
	HEARD: November 29, 2023

REASONS ON APPLICATION

Honourable Danie Roy

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

Cases Cited:

The Innu of Uashat mak Mani-Utenam v Her Majesty the Queen in right of Canada, 2020 SCTC 3; *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11; *Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2022 SCTC 2; *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12; *Att. Gen. of Can. v Inuit Tapirisat et al.*, [1980] 2 SCR 735, 115 DLR (3d) 1; *Operation Dismantle v R*, [1985] 1 SCR 441, 18 DLR (4th) 481; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, 74 DLR (4th) 321; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2; *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8; *ʔAkisq̓nuk First Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 1; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2018 SCTC 5; *Lac La Ronge Band and Montreal Lake Cree Nation v His Majesty the King in Right of Canada*, 2023 SCTC 4; *Metlakatla Indian Band v His Majesty the King in Right of Canada*, 2022 SCTC 6; *Ellard v Millar*, [1930] SCR 319; *Jean-Paul Beaudry ltée c 4013964 Canada inc.*, 2013 QCCA 792; *Srougi c Lufthansa German Airlines*, [2003] RJQ 1757 (CA), 2003 CarswellQue 1531; *Doyon c Régie des marchés agricoles et alimentaires du Québec*, 2007 QCCA 542; *Bryant c Benjamin*, 2023 QCCA 1021.

Statutes and Regulations Cited:

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, rr 3, 5, 10.

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 17, 35.

Federal Courts Rules, SOR 98/106, r 221.

Civil Code of Québec, CQLR c CCQ-1991, arts 2848, 2866.

Authors Cited:

Léo Ducharme, *Précis de la preuve*, 6th ed (Montréal: Wilson & Lafleur, 2005).

Headnote:

Amendment — Amended Declaration of Claim — Strike — Bifurcated Proceedings — Bifurcation Order — Loss — Compensable Loss — Compensation — Res Judicata — Final Disposition — Reasons Underlying Final Disposition

A final decision on the validity of the claim was issued on February 21, 2020. In that decision, and in accordance with the bifurcation order, the Tribunal ruled that the Respondent had committed breaches that had resulted in losses that could be compensated by the Tribunal, but it did not address the issue of the assessment of the losses.

On March 31, 2023, the Claimant filed an Amended Declaration of Claim, detailing the losses resulting from the established breaches, in addition to detailing the compensation sought. The amendments include a claim for compensation for lots that were neither included in the 1906 reserve, nor surrendered in 1925, nor acquired in exchange at the time of the 1925 surrender, but on which some Innu had houses and with respect to which the possibility of purchase and addition to the reserve ended with the surrender-exchange of 1925.

The Respondent filed an application to strike part of the Amended Declaration of Claim and to have the associated evidence declared inadmissible, claiming that certain amendments were contrary to the bifurcation order, the previous pleadings, the final decision and the principle of *res judicata*.

At the root of the dispute before the Tribunal was a disagreement between the parties over the meaning to be given to the wording of the bifurcation order. In the Claimant's view, the validity stage served to determine the breaches attributable to the Respondent and did not require an exhaustive demonstration of losses, beyond establishing that the breaches in question were likely to have caused losses to the Claimant. In the Respondent's view, the validity stage served to establish the breaches attributable to the Respondent and any resulting losses, while the second stage of the litigation served only to quantify them. Thus, in the Respondent's view, losses not

declared by the Tribunal in its final disposition cannot be compensated by the Tribunal at the compensation stage, on the basis of the principle of *res judicata*.

The Tribunal held that the amendments to the Declaration of Claim were contrary to neither the bifurcation order nor the previous pleadings. The Tribunal also held that it was neither plain nor obvious that the principle of *res judicata* applied to the issue of the losses so as to bar the Claimant from presenting arguments on losses at the compensation stage. On the contrary, the Tribunal is of the view that if the doctrine of *res judicata* were applicable, it would be applicable to both the final disposition and the underlying reasons. Because the Tribunal, in its final decision on validity, decided that there had been a breach relating to the failure to repurchase certain lots on which houses belonging to the Innu were located, the associated losses must obviously be determined when calculating the losses at the second stage of the litigation. This is also consistent with the remedial role and mandate of the Tribunal, which aims to provide a full and fair hearing to the First Nations who come before it, enabling them to obtain justice in an effective, efficient and timely manner.

TABLE OF CONTENTS

I. OVERVIEW **6**

II. PARTIES' POSITIONS **7**

A. Respondent's position 7

B. Claimant's position 8

III. STATEMENT OF RELEVANT FACTS **10**

IV. ISSUES **15**

V. LEGAL FRAMEWORK **15**

A. The purpose of the *SCTA*'s remedial nature 15

B. Principles applicable to the striking out of allegations in a declaration of claim to the Tribunal 16

VI. ANALYSIS **18**

A. Are the amendments to the Declaration of Claim contrary to the bifurcation order? 18

1. The bifurcation orders before the Tribunal 18

2. Do the amendments to the Declaration of Claim constitute a departure from the bifurcation order in this case? 21

B. Are the amendments to the Declaration of Claim contrary to the previous pleadings? ... 24

1. The amendments to the Declaration of Claim following the publication of the Final Decision on validity 24

2. Do the amendments to the Declaration of Claim constitute a departure from the arguments presented by the Claimant in their previous pleadings? 25

C. Are the amendments to the Declaration of Claim contrary to the Final Decision? 27

1. The issue of the scope of the dispute in the Final Decision 27

2. The absence of a declaration of losses in the disposition of the Final Decision 28

3. Conclusion on the doctrine of *res judicata* and the Final Decision 35

VII. CONCLUSION **35**

I. OVERVIEW

[1] On February 14, 2014, the Claimant filed a Declaration of Claim with the Tribunal. On July 14, 2014, the Respondent filed its Response.

[2] By way of a bifurcation order issued by the Tribunal on October 30, 2014, the claim was bifurcated into two stages, an initial validity stage to be followed by a compensation stage, as permitted by Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Tribunal Rules*].

[3] On February 21, 2020, the Tribunal issued its decision on the validity of the claim ("Final Decision"). Having expressly excluded the issue of the creation of the reserve in 1906, the Final Decision ruled on the Federal Crown's breaches of its fiduciary duties in administering and overseeing the lands of the Uashat reserve from the time of its creation in 1906 until the surrender of most of the reserve lots in 1925.

[4] In its Final Decision, the Tribunal held that there had been breaches resulting in [TRANSLATION] "losses for which the Tribunal may order compensation", in accordance with the bifurcation order, but it did not address the issue of losses, leaving the matter to be determined at the second stage.

[5] On March 31, 2023, the Claimant filed an Amended Declaration of Claim. Among other things, the Claimant added a section ("G") to paragraphs 54(a) to 54(aaa), detailing the losses suffered and their compensation, and amended some of the conclusions sought in paragraph 98 to better reflect the detail of the compensation claimed.

[6] In the new section "G", subsection [TRANSLATION] "iii. Other Lost Lots", the Claimant claims losses of land and use in connection with lots 1, 2, 3, 4 and 7, Range 1, of the village of Sept-Îles, plus the value of the associated losses of land and use arising therefrom.

[7] The Respondent has no objections to the Amended Declaration of Claim except with respect to subsection [TRANSLATION] "iii. Other Lost Lots".

[8] On October 23, 2023, the Respondent filed a notice of application to strike (the "Application to Strike") paragraphs 54(aa) to 54(yy) and subparagraphs 98(ii)(d), (e) and (f) of the

conclusions of the Amended Declaration of Claim, and to declare the associated evidence inadmissible. The Respondent objects to any paragraph in the Amended Declaration of Claim that claims compensation for the loss of lots that were not part of the reserve in 1906 or at the time of the 1925 surrender, which the Claimant calls the [TRANSLATION] “Other Lost Lots” and the Respondent calls the [TRANSLATION] “New Lots”.

II. PARTIES' POSITIONS

A. Respondent's position

[9] The Respondent argues that the amendments to the Declaration of Claim are contrary to the authority of *res judicata* and the bifurcation order; that the amendments constitute a departure from the previous pleadings and are extraneous to the present claim; and that the evidence underlying them is inadmissible because it is contrary to the authority of *res judicata*.

[10] The Respondent is of the view that the bifurcation order is clear. Under the latter, the Tribunal was called upon to determine at the first stage whether there were breaches and compensable losses and to determine only the amount (quantum) of the losses at the second stage.

[11] It also argues that the conclusions of the Final Decision clearly identify the Crown's breaches of its fiduciary duty and expressly state which losses are compensable in connection with these breaches. The Respondent argues that the findings of that decision are definitive as to the determination of the Respondent's breaches and the losses to be compensated. The list of losses to be compensated would therefore be limited to the lots of the 1906 reserve that were sold illegally and those surrendered in 1925, since the Tribunal did not declare any losses for lots situated off the reserve.

[12] The Respondent submits that the lots at issue are [TRANSLATION] “New Lots”, which constitute a new cause of action, and with respect to which the Claimant cannot claim losses in light of the authority of *res judicata* and the bifurcation order. It submits that the [TRANSLATION] “Other Lost Lots” referred to in the amendments to the Declaration of Claim are not lots from the 1906 reserve, lots sold from that reserve, lots surrendered in 1925 or lots acquired in exchange during the 1925 surrender, and that no loss was claimed for these lots during the first stage, which is why the Tribunal did not include them in the list of lots to be compensated in the disposition of

the Final Decision. Thus, these claims are "new", extraneous to the present claim, and should have been litigated by the parties and decided by the Tribunal in the first stage.

[13] According to the Respondent, the issues relating to the acquisition, whether by purchase or otherwise, of the [TRANSLATION] "New Lots" to make a reserve or to be added to the existing reserve are clearly excluded from this claim, both by the Respondent and by the Final Decision itself.

[14] Finally, the Respondent argues that the Claimant has reserved their rights with regard to the reserve creation process, and that it therefore remains possible for the Claimant to seek compensation for losses associated with the loss of the new lots in the context of the reserve creation process claim.

B. Claimant's position

[15] The Claimant is asking the Tribunal to dismiss the Respondent's partial strike application dated October 23, 2023, on the basis that it is wrong in law and in fact.

[16] They argue that neither the bifurcation order of October 30, 2014, nor the Final Decision of February 21, 2020, nor the Tribunal's case law prevents them from claiming at the compensation stage compensation for all of the losses arising from the breaches identified in the Final Decision on the validity of the claim.

[17] On the contrary, they point out that they sought an amendment to the wording of the bifurcation order precisely to enable them to focus their attention at the validity stage on determining the Respondent's breaches rather than the losses. In their view, the purpose of the compensation stage is precisely to determine all of the losses in order to properly calculate the compensation owed to the First Nation. They took pains in their various previous pleadings to confirm this interpretation, and to use terms like "*comprennent*" and "*notamment*" [meaning "include" and "including" in English] when listing the losses arising from the alleged breaches, terms that were repeated by the Tribunal in the disposition of the Final Decision.

[18] They assert that they were not required to plead all of their losses at the validity stage and that the losses covered by the amendments to their Declaration of Claim flow causally from the

reasons of the Final Decision on validity. The amendments do not contradict the Final Decision on validity and are not based on a new cause of action, but will enable the Claimant to receive full and fair compensation for the breaches identified in the Final Decision on validity.

[19] According to the Claimant, the failure to have purchased at the time of the 1925 surrender-exchange the lots that the Innu of Uashat mak Mani-Utenam (the "Innu" or the "Innu of Uashat") were already occupying and where their houses had long been located is an issue that is neither "new" nor extraneous to this claim. On the contrary, this is an issue that the Tribunal specifically considered and on which it provided a clear ruling. On this point, the Tribunal determined that the non-consensual relocation of the houses of the Innu of lot 5, Range 1, and the lack of information about alternatives to the relocation, constituted breaches that contributed to the vitiation of the consent of the Innu and to the unlawfulness of the surrender. The Tribunal was also of the view that had the Crown been acting in the best interests of the Innu, it would have purchased the lots that they were occupying at the time of the relocation to add them to the reserve.

[20] The Claimant argues that the losses alleged in paragraphs 54(aa) to 54(yy) for which compensation is claimed are not contrary to the authority of *res judicata* because no aspect of the disposition or the Final Decision itself is being called into question.

[21] Rather, they point out that the Tribunal's comments about the lots that the Innu wrongly occupied relate directly to the issues, namely, the breaches committed by the Respondent in its administration of the 1906 reserve and the 1925 surrender, which resulted in compensable losses. These are not peripheral comments. The Tribunal's conclusions are inextricably linked to the disposition; accordingly, they also benefit from the authority of *res judicata*.

[22] Finally, the Claimant notes that section 35 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], militates in favour of full compensation for the specific claims, which does not exclude losses that are causally linked to the breaches identified by the Tribunal at the first stage of the litigation.

[23] If the Tribunal decides to allow this Application, the Claimant asks that the Tribunal protect their right of recourse with respect to the [TRANSLATION] "Other Lost Lots" and their loss during the relocation and the surrender at the heart of this claim, because they are of the view that, contrary

to the Respondent's submissions, this right of recourse is not currently protected.

III. STATEMENT OF RELEVANT FACTS

[24] To better understand the issues at stake and the lots at issue, it is worth doing a brief review of the creation process of the 1906 reserve and its administration from then until the 1925 surrender-exchange.

[25] Near the end of the 19th century, the arrival of a growing number of settlers in the Bay of Sept-Îles area prompted the Innu of Uashat to request the creation of a reserve to protect the land they had long occupied around the chapel and Hudson's Bay Company trading post, and on which their houses were built.

[26] This request was reiterated three times before a reserve was finally created in 1906, following a tripartite agreement between the Department of Indian Affairs ("DIA"), the Reverend Father Boyer of the Sept-Îles Mission and the Quebec Department of Forests and Lands (*Innu of Uashat mak Mani-Utenam v Her Majesty the Queen in Right of Canada*, 2020 SCTC 3 at para. 173 [*Uashat 2020*]).

[27] It was made up of lot 5-2, Range 1, and lots 25–35, 52–62, 111–121, 138–148 and 492, Range 2, of the village of Sept-Îles. Despite the requests from the Innu to include lots 1, 2, 3, 4 and 5, Range 1, where most of their houses were built, the only lot from Range 1 to be included in the reserve was lot 5-2, as the other lots belonged to third parties (*Uashat 2020* at paras. 109, 173, 187–88).

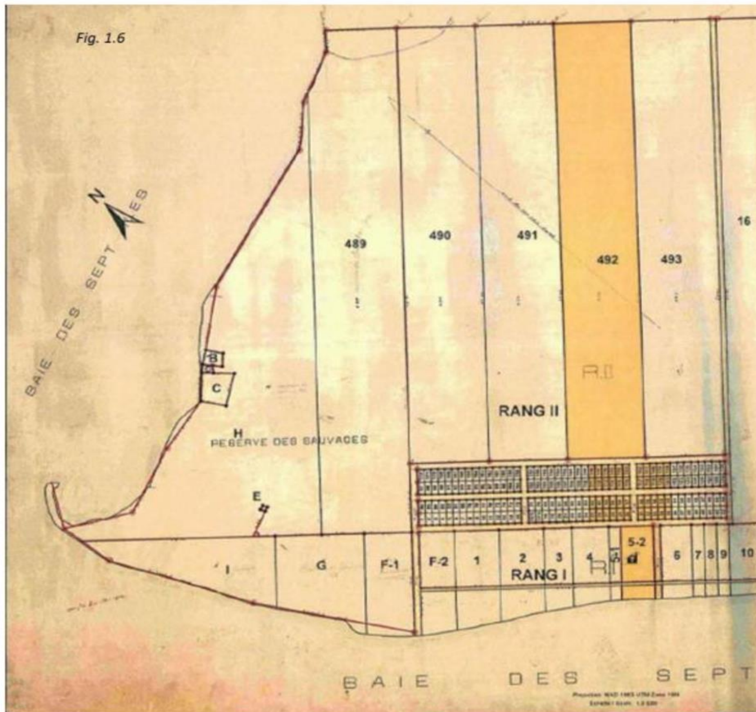
[28] The agreement already provided for 14 Innu-owned houses to be moved onto the reserve at the DIA's expense, since they were located on lots held by Euro-Canadian settlers (*Uashat 2020* at para. 179). A budget to do so was proposed and subsequently approved (*Uashat 2020* at paras. 178–80).

[29] At that stage, the option to purchase the lots near the chapel belonging to Euro-Canadian settlers, while possible, was rejected by the DIA's accountant, who considered it unnecessary since he "[thought] it poor policy to purchase land from white people for Indians" and "recommend[ed] that it might be allowed to rest for the present" (*Uashat 2020* at paras. 150–56).

[30] Figure 1.6 below shows the 1906 reserve, as highlighted in orange (Respondent's Corrected Compendium, Tab 10):

ANNEXE III

Figure 1.6 apparaissant au paragraphe 174 du Jugement, carte qui représente la réserve de 1906



[31] The Respondent took a long time to conduct a separate survey for the new reserve, failed to clearly mark the reserve boundaries on the land and took no steps to repurchase lot 5-1, Range 1, next to the chapel, on which some of the houses of the Innu were located (commonly referred to as the "Ross lot"), or to relocate their houses as planned. The result of this was confusion among the Innu and Euro-Canadian populations as to the location and boundaries of the 1906 reserve (*Uashat 2020* at paras. 220–27, 471).

[32] Without going into all the details, it is worth recalling what the Final Decision established on this issue:

> The fact is that, four years after the Uashat Reserve was created, a number of key issues remained unresolved, such as the purchase of the Ross Lot, the issue of moving the Innu houses located off the reserve onto the reserve, and the work to survey and mark the boundaries of the new reserve. None of the $1,500 budget had been spent.

> . . .
>
> Over time, some confusion appears to have arisen as to the size and location of the reserve.
>
> . . .
>
> In fact, according to the experts heard by the Tribunal, there appears to have been confusion among the Innu and the Euro-Canadians as to the location and boundaries of the reserve created in 1906 . . . . [*Uashat 2020* at paras. 220, 223, 227.]

[33] As of 1914, the municipal council of Sept-Îles attempted to collect property taxes from the Innu and from the Respondent (*Uashat 2020* at paras. 229–30).

[34] As of 1917, the Province of Quebec began selling lots within the reserve to Euro-Canadian settlers, and these sales continued until 1921. In total, 27 lots from Range 2 on the reserve were sold to third parties by the Province of Quebec (*Uashat 2020* at paras. 279–81, 287–89, 507–08, 513).

[35] Finally, several Innu continued to occupy lots in Range 1, which were not part of the 1906 reserve. Elder Blandine Jourdain's oral history evidence also indicates that, prior to the relocation of their houses, the Innu believed that these were located on the reserve and were greatly surprised upon returning to the village to discover that they had been moved (*Uashat 2020* at paras. 353–54).

[36] In 1924, the Respondent devised a plan to solve the problems of the 1906 reserve relating to land. It proposed a surrender-exchange under which the lots of Range 2 of the 1906 reserve, namely, lots 25 to 35, 52 to 62, 111 to 121, 138 to 148 and 492, were to be surrendered (88.8 acres of land) in exchange for lots I, G and F-1, Range 1, and lots H and 489, Range 2 (255.5 acres of land).

[37] The lots offered in exchange in the context of the surrender-exchange were the same ones that had initially been rejected by the Innu during the reserve creation process for being too close to the shore and too far from their houses, the Hudson's Bay Company trading post and their church (*Uashat 2020* at paras. 106–12, 129–41).

[38] The surrender-exchange plan also included the relocation of the Innu houses situated off

the reserve on lot 5, Range 1, and on lot 4 belonging to the Hudson's Bay Company, and it did not pursue the option of purchasing some of the lots on which Innu houses were located, except in the case of the Ross lot (*Uashat 2020* at paras. 325, 327–28).

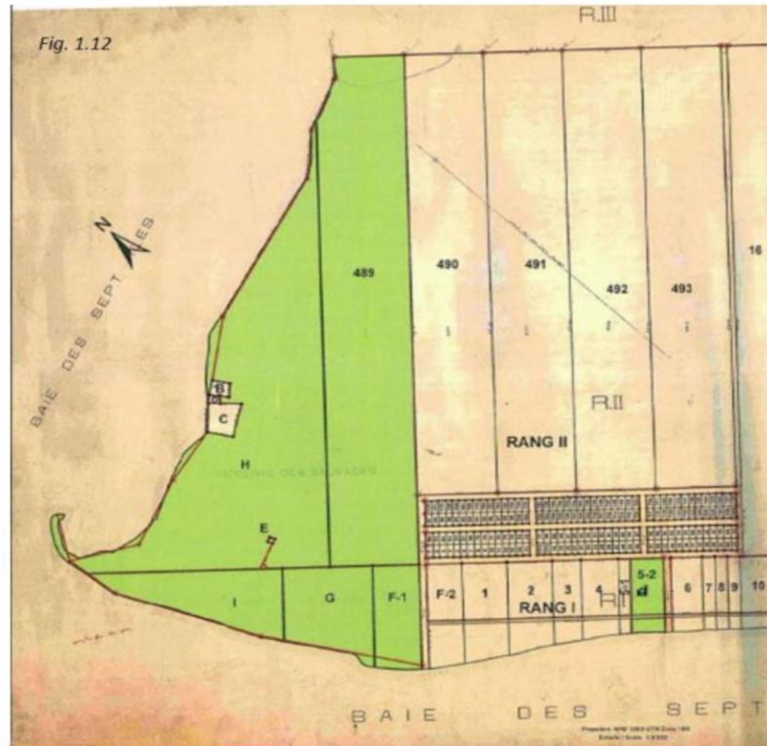
[39] By 1923, Inspector Émile Jean had noted that some of the lots containing Innu houses could be purchased at a reasonable price. In 1922, the Hudson's Bay Company even offered to sell the DIA part of lot 4 for an affordable price, namely, about $20 per house, which would have cost less than relocating them. Moving the 15 Innu houses on the reserve cost $1,750, or approximately $115 per house (*Uashat 2020* at paras. 530–31).

[40] In November 1924, while most of the Innu were away on their hunting grounds, the Respondent proceeded to move the houses located off the reserve onto lot 5, Range 1, 15 houses in total (*Uashat 2020* at paras. 347–48, 551).

[41] In July 1925, when the Respondent sought approval from the Claimant for the surrender-exchange, all of the Claimant's houses were already on lot 5, Range 1. The Innu were faced with a *fait accompli* (*Uashat 2020* at para. 600).

[42] Figure 1.12 below shows the 1925 reserve after the surrender-exchange (Respondent's Corrected Compendium, Tab 11):

Figure 1.12 apparaissant au paragraphe 368 du Jugement, carte qui représente la réserve de 1925.



[43] In its Final Decision on validity, the Tribunal held that the Innu had been inadequately informed and had not been "in a position to make an informed decision regarding the appropriateness of a surrender" (*Uashat 2020* at para. 628). The Tribunal concluded that Agent Louis-Napoléon Michaud did not, in submitting the surrender-exchange to the Innu for their approval, inform them of the following, among other things:

> i. the nullity of the sales [of 27 lots in Range 2 of the Innu reserve] and the potential recourses available to have them cancelled;
>
> ii. the possibility of purchasing a part of Lot 4, on which four Innu houses were situated, at a price of $20 per house; and
>
> iii. the possibility of purchasing part of Lot 6, as proposed by Inspector Jean in 1923. [*Uashat 2020* at para. 627.]

[44] The Tribunal held that the non-consensual relocation of the Innu houses contributed to, among other things, vitiating the consent of the Innu, and therefore to the unlawfulness of the surrender (*Uashat 2020* at paras. 600, 626–28, 694–95).

[45] The Tribunal also determined that had the Respondent acted in the best interests of the

Innu, it would have purchased the lots they were occupying at the time of the relocation to add them to the reserve rather than relocating the Innu without their consent. Purchasing the lots would have been a solution to the land problems in Uashat consistent with the Respondent's fiduciary duty (*Uashat 2020* at paras. 530–33, 627–28, 695–96).

[46] It is for lots 1, 2, 3 and 7, Range 1, of the village, occupied by the Innu at the time of the non-consensual relocation, the lots that could have been purchased but that were lost and/or appropriated, that the Claimant is now seeking compensation. The Claimant is also seeking compensation for the loss of the use of lot 4, Range 1, from the date of surrender until its purchase by the Respondent in 1945 for use by the Innu.

IV. ISSUES

[47] The Respondent is requesting that part of the Amended Declaration of Claim be struck out, namely, the amendments under subsection [TRANSLATION] "iii. Other Lost Lots", and is also requesting a declaration that the related evidence is inadmissible.

[48] The issues before the Tribunal are as follows:

A. Are the amendments to the Declaration of Claim contrary to the bifurcation order?

B. Are the amendments to the Declaration of Claim contrary to the previous pleadings?

C. Are the amendments to the Declaration of Claim contrary to the Final Decision?

V. LEGAL FRAMEWORK

A. The purpose of the *SCTA*'s remedial nature

[49] The Tribunal "was established and designed to respond to [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" (*Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 at para. 2 [*Red Pheasant*]). It must allow First Nations to "be given a full and fair hearing appropriate to the *SCTA*'s mandate of resolution and reconciliation" (*Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014

SCTC 11 at para. 44). Efficiency and reconciliation are at the centre of its mandate (*Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2022 SCTC 2). The Tribunal's "entire reason for being is to justly, timely and cost-effectively accelerate the resolution of specific claims" (*Red Pheasant* at para. 2).

[50] The Tribunal has confirmed on numerous occasions that "[w]ith such clearly remedial objectives, the *SCTA* is to be given a broad and liberal interpretation, keeping in mind and giving effect to its purpose" (*Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12 at para. 63, citing *Clarke v Clarke*, [1990] 2 SCR 795 at para. 10, 73 DLR (4th) 1.

B. Principles applicable to the striking out of allegations in a declaration of claim to the Tribunal

[51] The Respondent is seeking, under paragraph 17(c) of the *SCTA*, paragraphs 221(1)(a), (e) and (f) of the *Federal Courts Rules*, SOR/98-106, and articles 2848 and 2866 of the *Civil Code of Québec*, CQLR c CCQ-1991, the striking out of paragraphs 54(aa) to 54(yy) and subparagraphs 98(ii)(d), (e) and (f) of the conclusions of the Amended Declaration of Claim dated March 31, 2023, as well as a declaration of the inadmissibility of the related evidence.

[52] Paragraph 17(c) of the *SCTA* provides for the possibility of having a claim be struck out in whole or in part on the ground that it is frivolous, vexatious or premature:

> **17** On application by a party to a specific claim, the Tribunal may, at any time, order that the claim be struck out in whole or in part, with or without leave to amend, on the ground that it
>
> . . .
>
> **(c)** is frivolous, vexatious or premature;
>
> . . .

[53] As set out in Rule 5 of the *Tribunal Rules*, the *Federal Courts Rules* are suppletive and may supplement those of the Tribunal:

> **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*.

[54] Paragraphs (a), (e) and (f) of subsection 221(1) of the *Federal Courts Rules* provide the following grounds for striking out a pleading in whole or in part:

> **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,
>
> . . .
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court, ...

[55] The burden is on the Respondent, and it is high. The Respondent must demonstrate that the amendments to the Declaration of Claim currently being contested are frivolous because they are contrary to the principle of *res judicata*, that they constitute a departure from the previous pleadings or that they are otherwise an abuse of procedure. If the Respondent succeeds, the Tribunal will have to order that they be struck out.

[56] In *AG of Canada v Inuit Tapirisat et al.*, [1980] 2 SCR 735 at p. 740, 115 DLR (3d) 1, the Supreme Court of Canada clarified the test applicable to an application to have an allegation struck out, stating that "[o]n a motion such as this <u>a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that 'the case is beyond doubt'</u>: *Ross v. Scottish Union and National Insurance Co.*" (emphasis added).

[57] In *Operation Dismantle v R*, [1985] 1 SCR 441 at pp. 486–87, 18 DLR (4th) 481 [*Operation Dismantle*], the Supreme Court of Canada reiterated the need for the Court to ask itself whether it is "plain and obvious that the action cannot succeed".

[58] The Supreme Court of Canada confirmed this interpretation a decade later in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at p. 977, 74 DLR (4th) 321 [*Hunt*], in which it established, with respect to applications to strike, that:

> <u>The power to strike out proceedings should be exercised with great care and reluctance</u>. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. <u>But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained</u>. [Emphasis added; citing *Rex ex rel. Tolfree v Clark*, [1943] OR 501 (CA) at p. 515.]

[59] In *Hunt*, the Court therefore concluded that the test was the following:

> . . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? . . . Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . . [Emphasis added; p. 980.]

[60] It is this same "plain and obvious" test that the Tribunal applies when it hears applications such as this one to strike out a declaration of claim in whole or in part on the basis of the doctrine of *res judicata*:

> The standard of proof on an application to strike a claim or action is whether it is plain and obvious that *res judicata* applies (*Chapman v Canada (Minister of Indian and Northern Affairs*), 2003 BCCA 665 at paras 23–25; *Lehndorff Management v LRS Development Enterprises* (1980), 109 DLR (3d) 729 (BC CA) at para 22, Lambert JA concurring). [Emphasis added; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2 at para. 43.

VI. ANALYSIS

A. Are the amendments to the Declaration of Claim contrary to the bifurcation order?

1. The bifurcation orders before the Tribunal

[61] The *Tribunal Rules* authorize the Tribunal to bifurcate the hearing into separate stages:

> **3** The Tribunal may make any order that is necessary to secure the just, timely or cost-effective resolution of the specific claim.
>
> . . .
>
> **10** If validity of the specific claim and any compensation arising from it are both at issue, the Chairperson may order that the hearing of those matters proceed in separate stages.

[62] In *Red Pheasant*, and while warning of the potential disadvantages of bifurcating a hearing, the Tribunal nevertheless recognized the advantages of this approach, explaining that it makes it possible to simplify the proceedings before the Tribunal, to focus the parties' attention on one issue, to save financial resources or better allocate them in accordance with funding cycles and to create conditions conducive to negotiating certain parts of a claim (*Red Pheasant* at paras. 7–8). Since its creation, it has been the practice of the Tribunal to bifurcate hearings because of the

above-mentioned advantages.

[63] When the parties choose to bifurcate the proceedings, it is generally separated into two stages. The purpose of the first stage—the validity stage—is to determine the breaches attributable to the Respondent, while the purpose of the second stage is to establish compensation for the resulting losses. This is what is set out in general terms in sections 14 and 20 of the *SCTA*.

[64] The Tribunal clarified in *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8 at para. 197 [*Lac La Ronge and Montreal Lake*], that the issue of the existence of the breach is independent of the existence of the loss, i.e., the Tribunal can determine the breaches attributable to the respondent at the validity stage without dealing with the losses arising therefrom: "It is possible to have one or more breaches of fiduciary obligation without a loss having been incurred. Loss is not a precondition to proof of a breach of fiduciary duty." There is therefore no need to establish that the breaches identified at the validity stage actually caused a loss; that debate may well take place entirely at the compensation stage.

[65] In *ʔAkisq̓nuk First Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 1 at paras. 195–97, citing for support *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, by the Supreme Court of Canada, and *Canada v Kitselas First Nation*, 2014 FCA 150, by the Federal Court of Appeal, the Tribunal did, however, note that it is at the compensation stage that questions of causation, contingencies and contribution relating to the extent of the loss flowing from the breach, in accordance with section 20 of the *SCTA*, are considered:

> Support for the approach taken by the Tribunal in directing questions of causation, contingencies and contribution to the compensation hearing is found in the decisions of the Supreme Court of Canada in *Williams Lake SCC* and the Federal Court of Appeal in *Kitselas FCA*. In *Williams Lake SCC*, the Supreme Court of Canada noted that under the *SCTA*, questions of causation or damages are addressed in the compensation phase:
>
>> The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result: . . . . [citations omitted] The extent of the loss, if any, flowing from a breach of fiduciary duty engages questions of causation. Equity addresses such questions under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established . . . [citations omitted] Correspondingly, the [Specific Claims Tribunal] Act assigns

> matters of causation and apportionment of fault to the compensation phase. [para. 48]
>
> This approach was taken by the Tribunal in *Kitselas*, with apparent approval by the Federal Court of Appeal. The Federal Court of Appeal noted at paragraph 67 that "the potential contribution of British Columbia (if any) to the breach" of fiduciary duty by Canada was "a matter to be dealt with at the compensation stage of the hearing" (*Kitselas FCA*).
>
> Accordingly, these questions bearing on assessment of loss are for the compensation phase, after full argument from the Parties. [Emphasis added.]

[66] These caveats aside, when the parties, as in this case, agree to jointly request that a hearing be bifurcated, the Tribunal will generally respect their wishes. In *Lac La Ronge and Montreal Lake* at para. 197, the Tribunal noted that where a hearing is bifurcated, the proceedings must be governed by the bifurcation order: "The Tribunal and the Parties agreed that loss was not a question for consideration in the first hearing phase and that was how the Parties prepared and proceeded."

[67] The wording of the bifurcation order is negotiated between the parties and varies from one claim to the next. A review of several bifurcation orders submitted to the Tribunal as well as final decisions on validity and compensation reveals that the issue of losses is not dealt with consistently at a particular stage—it varies from claim to claim, and generally according to the agreement of the parties and the wording of the bifurcation order.

[68] Some parties will opt for a less traditional division. In *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2018 SCTC 5, the parties bifurcated the compensation stage in two so as to deal first with the types of compensable losses arising from the breach and second with the quantum of the compensation owed. The parties in *Lac La Ronge Band and Montreal Lake Cree Nation v His Majesty the King in Right of Canada*, 2023 SCTC 4, also bifurcated the compensation stage into two substages: one to determine the volume of timber on the reserve just prior to the invalid surrender, and the other to establish the compensation to be paid.

[69] In *Metlakatla Indian Band v His Majesty the King in Right of Canada*, 2022 SCTC 6 at para. 4, the parties chose to bifurcate the proceedings as follows: "Stage 1 of the proceeding would deal with the validity of the Claim and the market value of the Claimant's reserve lands at the time they were taken; Stage 2 would provide determinations regarding bringing forward historical loss

values, loss of use values, and the total amount of compensation."

[70] In this claim, the Tribunal and the parties agreed on the language of the bifurcation order, and it was on that basis that the parties prepared and proceeded. However, the parties no longer agree on the meaning of the bifurcation order.

[71] The current disagreement between the parties serves as an important future warning to pay close attention to the drafting of bifurcation orders and to ensure that it is very clearly stated at which stage the parties wish for the Tribunal to deal with the issue of losses.

2. Do the amendments to the Declaration of Claim constitute a departure from the bifurcation order in this case?

[72] A bifurcation order was issued by the Tribunal on October 30, 2014, under Rule 10 of the *Tribunal Rules*. The order in question is worded as follows:

> [TRANSLATION]
>
> At the first stage, the Tribunal will determine the validity of the claim, which includes determining whether or not there have been one or more breaches by the Respondent that may have caused losses to the Claimant in accordance with section 14 of the *Specific Claims Tribunal Act*.
>
> The second stage will not begin until the Tribunal has rendered its decision on the validity of the claim or until the parties have exhausted or waived their rights, if any, to seek judicial review of this decision from the Federal Court of Appeal or to appeal from the Court of Appeal judgment to the Supreme Court of Canada.
>
> At the second stage, if applicable, the Tribunal will determine the quantum of the compensation to be awarded to the Claimant in the context of this Claim. [Emphasis added; paras. 2–4; see also the Respondent's Compendium, Tab 3.]

[73] The Respondent argues that the bifurcation order is clear and that the amendments to the Declaration of Claim proposed by the Claimant contravene it. The Claimant pleads the opposite.

[74] In the Tribunal's view, it appears from the wording of the order that the drafting of the bifurcation order was clumsy with regard to the issue of losses. At paragraph 2, the order provides that the purpose of the first stage—the validity stage—is to determine [TRANSLATION] "whether or not the Respondent has committed one or more breaches likely to have caused losses to the Claimant under section 14 of the [*SCTA*]" (emphasis added). This wording seems to indicate that this stage focuses on whether or not breaches occurred from which potential losses might have

arisen rather than performing an exhaustive treatment of the resulting losses. It also refers to section 14 of the *SCTA*, while the issue of losses stems from section 20.

[75] However, at paragraph 4, the Tribunal is asked to determine [TRANSLATION] "the amount of compensation owed to the Claimant", which might appear to exclude the determination of the losses at this stage of the proceedings (emphasis added). However, considering that the calculation of the precise quantum of the compensation owed to the First Nation is based on the details of the losses, it can also be understood that the issue of the details of the losses is an implied step.

[76] The exchanges that followed between the parties are relevant to the interpretation of the bifurcation order and the Final Decision on validity, which is necessary to the analysis of the issue before this Tribunal.

[77] In an email dated October 10, 2014, in which the parties agreed on the wording of the bifurcation order, the Claimant contacted the Respondent by email, asking it to modify the language of paragraph 2 regarding the first stage of the proceedings.

[78] In their email, the Claimant raised their concerns about the wording, noting their view that the determination that should take place at the first stage before the Tribunal was whether or not there were breaches under section 14 of the *SCTA*:

> [TRANSLATION]
> We do not feel that the existence of "compensable losses" should be a determinative factor in establishing the validity of a specific claim. The key factor in establishing the validity of a specific claim is whether or not your client has committed one or more breaches under section 14 of the *Specific Claims Tribunal Act*. We concede that these breaches are likely to have caused losses to the Claimant, but it is not necessary to establish that there has been a loss to establish a breach of fiduciary duty.
>
> . . .
>
> We would prefer that the order reflect this understanding . . . . [Emphasis added; Claimant's Response, Tab 2B.]

[79] The same day, the Respondent replied to this email acquiescing to the changes proposed by the Claimant and to the logic on which the amendments were based, and an [TRANSLATION] "amended draft bifurcation order" including the amendment proposed by the Claimant was submitted to the Tribunal on October 10, 2014 (Claimant's Response, Tabs 2C and 2D).

[80] At paragraph 2 of their Memorandum of Fact and Law, the Claimant took pains to reiterate their interpretation of the bifurcation order:

> [TRANSLATION]
> This claim has been bifurcated into two stages. The first, at issue here, relates to the validity of the claim <u>and is concerned with the Claimant's losses only to the extent necessary to establish their existence</u>. [Emphasis added; Respondent's Corrected Compendium, Tab 4.]

[81] They also clarified their position on this issue of losses at paragraphs 618 and 619 in section [TRANSLATION] "C. The losses of the Innu of Uashat mak Mani-Utenam", placed just before the section of orders requested from the Tribunal:

> [TRANSLATION]
> In a bifurcated claim such as this one, <u>the claimant does not have to prove in detail the losses arising from the respondent's breaches of its legal and fiduciary obligations</u>.
>
> However, the claimant submits that <u>each of the respondent's breaches is likely to have resulted in a loss</u>. [Emphasis added.]

[82] What the email shows is that the Claimant was clear and consistent. At the validity stage, the Claimant believed that they merely had to demonstrate that there were losses likely to have arisen from the established breach. Their previous pleadings reflect and are consistent with their position, and the Respondent has never argued that it was interpreting them differently.

[83] Despite acquiescing to the amendment of the bifurcation order sought by the Claimant, the Respondent does not seem to have understood that the Claimant did not intend to debate the losses during the first stage of the proceedings. At paragraphs 663 and 664 of its Memorandum of Fact and Law, the Respondent repeats the terminology used in the bifurcation order, and appears to read it differently than the Claimant (Respondent's Corrected Compendium, Tab 5). It therefore appears that the parties did not really agree on the interpretation to be given to the wording of the bifurcation order as negotiated.

[84] It appears that the Tribunal adopted the same approach as the Claimant, though the language used matches that of the bifurcation order and is therefore confusing. Indeed, at the outset of the Final Decision, the Tribunal reiterated the scope of its mandate at the validity stage, without mentioning losses:

> . . . the Specific Claims Tribunal (the "Tribunal") must deal with allegations by the Innu of Uashat that Canada neglected its legal obligations and fiduciary duties in relation to administering and overseeing the Uashat Reserve from its creation in 1906 to its surrender in 1925, in terms of encroachments and the sale of reserve lots by the Province of Quebec ("Quebec"). [Emphasis added; *Uashat 2020* at para. 2.]

[85] At paragraph 6, however, the Tribunal uses the wording of the order, now referring to "compensable" losses, and uses the word "assess" in reference to the losses, which seems to indicate that the second stage relates to the determination of the amount:

> Lastly, if the Tribunal finds that Canada breached its fiduciary duties, it must determine whether the breaches resulted in losses for the Innu of Uashat for which the Tribunal may order compensation. However, since the proceeding has been bifurcated, there is no need at this stage to assess the losses incurred, if any. [Emphasis added; *Uashat 2020* at para. 6.]

[86] Yet, at the end of the Final Decision, on the issue of losses, the Tribunal wrote that "it is true that the existence of the lands provided in exchange is not relevant at this stage of the proceedings because the details of the losses will be debated in the second stage" (emphasis added; *Uashat 2020* at para. 649). Here the Tribunal appears to state instead that the losses will be established during the second stage—the compensation stage.

[87] It is therefore impossible for the Tribunal to hold, as the Respondent requests, that the amendments to the Declaration of Claim are contrary to the bifurcation order, since the bifurcation order itself is unclear in both its wording and its interpretation by the parties and by the Tribunal.

B. Are the amendments to the Declaration of Claim contrary to the previous pleadings?

1. The amendments to the Declaration of Claim following the publication of the Final Decision on validity

[88] Amending proceedings after a final decision on validity may initially seem unusual, and even appear to be evidence in itself that a party is trying to amend its proceedings contrary to the authority of *res judicata*.

[89] It should be noted here that parties sometimes proceed in this way before the Tribunal in bifurcated claims in order to spread out the losses for which claimants are seeking compensation, in preparation for the compensation hearing. Indeed, losses and/or compensation claims do not

generally have to be substantiated at the validity stage and usually will only be substantiated after its conclusion.

[90] The very purpose of bifurcating proceedings is to enable parties to focus their full attention on the issues relating to the validity stage, and thus avoid preparing too hastily for the compensation stage of the claim (*Red Pheasant* at paras. 7–8).

[91] One of the reasons that claimants do this is to quickly clarify their positions to the opposing party so as to potentially enter into negotiations or to narrow the issues to be debated during this second stage of the claim. The positions are then further substantiated in their Memoranda of Fact and Law in preparation for the hearing.

[92] This does not contradict the rules governing the conduct of proceedings before the Tribunal; on the contrary, this approach is consistent with the Tribunal's mandate to resolve specific claims in a just, timely and cost-effective manner.

[93] In light of these circumstances, one must not assume that the mere fact of amending a declaration of claim following publication of a decision on validity necessarily constitutes a violation of the presumption of *res judicata*.

2. Do the amendments to the Declaration of Claim constitute a departure from the arguments presented by the Claimant in their previous pleadings?

[94] The Respondent argues that throughout the proceedings, the Claimant had claimed only losses for the reserve lots that were sold between 1917 and 1922 and for the reserve lots that were surrendered in 1925, but that no losses had been claimed for the lots situated off the 1906 reserve. The Respondent also states that more than two years after the publication of the Final Decision, the Claimant amended their Declaration of Claim to claim new losses of land and use of land in relation to lots 1, 2, 3, 4 and 7, Range 1, of the village of Sept-Îles.

[95] The Tribunal cannot accept this interpretation for two reasons.

[96] First, the Claimant has consistently argued that the off-reserve lots on which the Innu houses were located should have been repurchased rather than relocated. This argument appeared in the Claimant's Memorandum at paragraphs 578 to 588, 594 and 595 (Respondent's Corrected

Compendium, Tab 4), and it also appeared more than once in this Tribunal's Final Decision (*Uashat 2020* at paras. 533, 695–96). The Respondent itself devoted a section of its Memorandum to the issue of the conservation of Innu houses and their relocation and prepared arguments against the Claimant's assertions (Respondent's Corrected Compendium, Tab 5 at paras. 336–437). While it is true that the losses specifically related to the failure to repurchase lots were not mentioned by the Claimant in their previous pleadings, it does not follow from this that they are "new losses" taking the Respondent by surprise; after all, they are losses that arise directly from the breaches argued by the Claimant in the Final Decision on validity, and the Tribunal recognized them in that decision. Moreover, the Respondent will have ample opportunity to prepare and respond to the issue of losses at the compensation stage.

[97] On the other hand, it has been shown above that the Claimant thought they only had to detail the losses at the compensation stage and that at the validity stage, they focused on establishing that the breaches were "likely to have resulted in a loss". This appears to be the reason why the losses are never listed exhaustively.

[98] As such, it is worth noting again that that section [TRANSLATION] "C. Losses of the Innu of Uashat mak Mani-Utenam" in the Claimant's Memorandum does not detail the losses claimed by the Claimant, instead emphasizing that each of the Respondent's breaches is likely to have caused a loss:

> [TRANSLATION]
> In the case of a bifurcated claim such as this one, the claimant does not have to prove in detail the losses arising from the respondent's breaches of its legal and fiduciary obligations.
>
> However, the Claimant submits that each of the respondent's breaches is likely to have resulted in a loss.

[99] This statement is consistent with the interpretation proposed by the Claimant to the Respondent in their email of October 10, 2014, in which they proposed an amendment to the wording of the bifurcation order—which was ultimately adopted by the parties and the Tribunal.

[100] The Claimant has applied this interpretation of the bifurcation order and the issue of losses consistently throughout the proceedings at the validity stage.

[101] Thus, the Tribunal is of the view that the amendments to the Declaration of Claim do not

constitute a departure from the previous pleadings, so striking them out is not warranted on this basis.

C. Are the amendments to the Declaration of Claim contrary to the Final Decision?

1. The issue of the scope of the dispute in the Final Decision

[102] The Respondent argues that the reserve creation process was expressly excluded by the Tribunal from the scope of its decision and that the issue of repurchasing the off-reserve lots is directly related to the reserve creation process and not to the surrender-exchange.

[103] The Tribunal cannot accept this argument by the Respondent, as it could not accept the same argument when the Respondent made it in the context of the validity decision (Respondent's Corrected Compendium, Tab 5 at paras. 336–437).

[104] It is true that the issue of the process by which the 1906 reserve was created was expressly excluded from the validity debates. In the Final Decision on validity, the Tribunal clearly established the scope of its mandate as follows:

> . . . the Specific Claims Tribunal (the "Tribunal") must deal with allegations by the Innu of Uashat that Canada neglected its legal obligations and fiduciary duties in relation to administering and overseeing the Uashat Reserve from its creation in 1906 to its surrender in 1925, in terms of encroachments and the sale of reserve lots by the Province of Quebec ("Quebec").
>
> . . .
>
> Although the parties have described in detail the work leading to the creation of the Uashat Reserve, it should be noted from the outset that this dispute does not deal with that process specifically. [Emphasis added; *Uashat 2020* at paras. 2, 31.]

[105] This dispute, as has often been repeated by the Tribunal as well as the parties, involves only the federal Crown's breaches in the administration and oversight of the 1906 reserve until the surrender of the majority of the reserve lands in 1925.

[106] However, the issues of repurchasing the off-reserve lots on which the Innu houses were situated, and the resulting harm, are not exclusively related to the reserve creation process, but also to the surrender-exchange. The issue of the failure to include the off-reserve lots on which the Innu houses were situated in the 1906 reserve is a potential issue that the Claimant could raise if they

wanted to in the context of a potential claim focused on the reserve creation process. In this claim, however, the breach that the Tribunal identified in the Final Decision on validity was the failure to purchase the off-reserve lots on which the Innu houses were situated at the time of the 1925 surrender-exchange, at the time this option was presented to the Respondent and when there was confusion regarding what land was included in the reserve. This is a distinct breach, directly related to the issue at stake at the validity stage, which has already been debated.

[107] Given paragraph 35(a) of the *SCTA*, which releases each respondent "from any cause of action, claim or liability . . . arising out of the same or substantially the same facts on which the claim is based", the issue of the Respondent's failure to repurchase the lots at the time of the surrender-exchange cannot be debated again and compensated in the context of litigation on the issue of the reserve creation process in 1906.

[108] The amendments to the Declaration of Claim are therefore not contrary to the portions of the Final Decision relating to its own scope.

2. The absence of a declaration of losses in the disposition of the Final Decision

[109] The Respondent then argues that the list of compensable losses should be limited to the lots of the 1906 reserve that were sold unlawfully and the reserve lots that were surrendered in 1925 because in its Final Decision, the Tribunal did not declare any losses for lots located off the reserve. The Respondent states that the conclusions of that decision definitively established both the Respondent's breaches and the compensable losses.

[110] It is true that in its final disposition, the Tribunal did not declare any losses relating to the off-reserve lots on which the Innu houses were situated.

[111] The conclusions were as follows:

> **ALLOWS** the Declaration of Claim of the Innu of Uashat mak Mani-Utenam at the validity stage;
>
> **DECLARES** that Canada breached its duties to the Innu of Uashat mak Mani-Utenam, thereby causing them losses that qualify for compensation under the *SCTA*;
>
> **DECLARES** that these breaches <u>include</u> the following:

> a. having failed to take the necessary steps to prevent encroachments on the claimant's reserve as created in 1906;
>
> b. having failed to take the necessary steps to stop the encroachments on the claimant's reserve as created in 1906; and
>
> c. having authorized an illegal surrender in 1925.
>
> **DECLARES** that these losses <u>include</u> the following:
>
> a. the current unimproved market value of the surrendered lands; and
>
> b. equitable damages to compensate the Innu of Uashat mak Mani-Utenam for their losses, <u>including</u>:
>
> > i. compensation for the loss of use of the lots of Range 2 that were part of the 1906 reserve and sold illegally, between the year of sale and 1925; and
> >
> > ii. compensation equivalent to the loss of use of and revenues from the lands surrendered between 1925 and the date of this decision.
>
> **WITH COSTS**. [Emphasis added; *Uashat 2020* at paras. 700–04.]

[112] Given everything that precedes, is the lack of a declaration of the losses associated with the off-reserve lots in the disposition of the Final Decision sufficient to prevent the Claimant from seeking compensation for such losses at this stage on the grounds that the authority of *res judicata* is applicable?

[113] The *Civil Code of Québec* establishes the following at article 2848:

> **2848.** The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.
>
> However, a judgment deciding a class action has the authority of *res judicata* with respect to the parties and the members of the group who have not excluded themselves therefrom.

[114] *Res judicata* therefore applies only where there is a triple identity: identity of parties, cause and object (Léo Ducharme, *Précis de la preuve*, 6th ed (Montréal: Wilson & Lafleur, 2005) at para. 603 ("*Précis de la Preuve*")).

[115] The main effect of *res judicata* is [TRANSLATION] “to prevent one of the parties to the judgment from calling into question what has previously been decided and recognized”, and the rationale for this rule [TRANSLATION] “is anchored in public social policy to ensure the security and stability of relations in society”, and “[t]he converse would be anarchy, with the possibility of endless trials and contradictory judgments” (*Précis de la preuve* at para. 603, citing *Roberge v Bolduc*, [1991] 1 SCR 374 at pp. 401 et seq).

[116] In this case, a claim bifurcated into two stages before the Tribunal, the Final Decision on validity, indeed constitutes a definitive decision, to which the presumption of *res judicata* applies.

[117] Everything that a judgment [TRANSLATION] “implicitly decides enjoys the benefit of the authority of *res judicata* [note omitted], as does everything that is expressly decided” (*Précis de la preuve* at para. 609).

[118] Thus, the authority of *res judicata* does not only apply to the disposition of a decision, but [TRANSLATION] “also extends to the reasons when they are so closely related to the disposition that, without them, the latter would be incomplete” (*Précis de la preuve* at para. 611).

[119] Reasons that are intimately linked to the disposition, also called the *ratio decidendi*, constitute the heart of the decision, and the conclusions cannot be read without reference to them.

[120] This has been well-established case law since the Supreme Court of Canada’s decision in *Ellard v Millar*, [1930] SCR 319 at p. 326. As the Quebec Court of Appeal explained in *Jean-Paul Beaudry ltée c 4013964 Canada inc.*, 2013 QCCA 792 at para. 37:

> [TRANSLATION]
> The effect of *res judicata* extends not only to the disposition of the decision but also to the reasons—this is recognized in the case law—to the extent indicated, for example, in *Contrôle technique appliqué ltée c. Québec (Procureur général)* [note omitted]. In that case, the Court was considering article 1241 *C.C.L.C.*, the precursor to article 2848 *C.C.Q.*, but its teachings remain relevant:
>
> > [TRANSLATION]
> > However, it is important to understand the scope of this rule. This presumption of truth is not only limited to the formal disposition of the decision; it extends to the essential reasons that are intimately linked to it. It includes even implicit conclusions that are a necessary consequence of the disposition of this

> decision [*Ellard v Millar*, [1930] S.C.R. 319, at p. 326, Rinfret J]:
>
> > *Res judicata* will result from the implied decision which is the necessary consequence of the express *dispositif* in the judgment.
> >
> > Note also, on this subject, this comment by Paré JA [*EDD v IP*, [1988] RDJ 592 (CA) at p. 593; see also: *Vachon c Frenette-Vachon*, [1978] CA 515 at p. 516 …]:
>
> [TRANSLATION]
> It is true that the authority of *res judicata* applies only to the disposition of a judgment, but this does not mean that we must limit ourselves to that part of the writing that follows the sacramental phrase, "For these reasons". On the contrary, the reasons are considered on the same footing as the disposition when they form an integral part of it and are necessary to support it. [Emphasis added.]

[121] In the same case, the Quebec Court of Appeal, at paragraph 45, also made the following statement:

> [TRANSLATION]
> First of all, we must take care not to characterize as *obiter* any reasons not reflected in an express conclusion of the disposition. In *Verdun (Ville de) c. Burton* [note omitted], Zerbisias J.A. (dissenting, but not on this point, with which Baudouin J.A. agrees [note omitted]) explains as follows:
>
> > [TRANSLATION]
> > I find logical the conclusion of Décary J.A. of the Federal Court of Appeal in *Dumont Vins & Spiritueux Inc. v. Celliers du Monde Inc.*, [1992] 2 F.C. 634 (F.C.A.), at p. 643:
> >
> > > [T]he time is past, if indeed it ever existed, when the language of a disposition is minutely scrutinized regardless of the underlying reasons and the relief sought in the action, and everything not echoed in the conclusion was necessarily regarded as an *obiter dictum* [citation omitted].
> >
> > I take from this case law that the disposition of a judgment does not have to be extremely precise to include, by inference, conclusions that may have the force of *res judicata*. [Note omitted.] [Emphasis added.]

[122] As noted above, these principles are settled case law (see *Srougi c Lufthansa German Airlines*, [2003] RJQ 1757 (CA) at para. 44, 2003 CarswellQue 1531; *Doyon c Régie des marchés agricoles et alimentaires du Québec*, 2007 QCCA 542 at para. 38; and *Bryant c Benjamin*, 2023

QCCA 1021 at para. 70).

[123] This overview of case law shows that a judgment's findings can have the same force as its disposition, which can compensate for the failure to mention certain findings in the final disposition.

[124] Thus, in the Final Decision in this claim, there are numerous references to this issue of the loss of the lots on which the Innu houses were situated. The issue was indeed analyzed by the Tribunal, which held that Canada had breached its fiduciary duty because it should have repurchased those lots in the context of the 1925 surrender-exchange, and this analysis appears in more than one place in the Final Decision.

[125] The summary of the Final Decision reads in part as follows:

> The federal Crown's breaches of its fiduciary duties have resulted in compensable losses to the Innu of Uashat. The surrender denied them centrally located lots that they had sought repeatedly since 1880. Replacing these lands with the old proposed reserve of 1903 does not remedy the Crown's fiduciary breach. [Emphasis added; *Uashat 2020* at p. 8.]

[126] In section "V. Did Canada breach its duties of administration and oversight of the reserve after it was created in 1906?", where the issue was whether Canada had acted diligently following the sale of the reserve lots by the Province of Quebec, the Tribunal found the following:

> The Tribunal finds that Canada breached its fiduciary duty when it failed to take into account the Innu's best interests: the purchase of the lots they occupied and on which their houses had been situated for a long time. It also failed to take into consideration its powers to rectify the illegal and invalid sales. [Emphasis added; *Uashat 2020* at para. 533.]

[127] Further, in section "VII. Did Canada's breaches result in compensable loss for the Innu of Uashat?", the Tribunal provides an overview of the established losses, mentioning the loss of 44 lots in Range 2 and lot 492 at the time of the surrender, the loss of use of certain lots in Range 2 between 1917 and 1925, without adequate compensation, and the loss of "lots that were centrally situated in the heart of Sept-Îles, near the chapel and the Hudson's Bay Company store, which they had sought repeatedly since 1880" and states that "[i]t is also important to note the importance the Innu placed on having access to water and the coast of the Bay of Sept-Îles" (*Uashat 2020* at paras. 647–51).

[128] The Tribunal continues along this line, insisting that the historical documentation shows that as of 1901, 37 Innu houses had already been installed close to the reserve lots, and that the Innu wanted a reserve on the land that they had always occupied, while the lots on the reserve proposed in 1903 (and offered as exchange land at the time of the 1925 surrender) relegated them far from everything they needed (*Uashat 2020* at paras. 653–60). The Tribunal therefore found that "the reserve provided in exchange in 1925 was no nearer to their houses and no more adequate, hospitable or accessible than it had been twenty years earlier when the Innu refused it in 1903" (*Uashat 2020* at para. 660).

[129] In section "VIII. What share of liability is borne by Canada for the loss suffered by the Innu of Uashat?", the Tribunal held as follows:

> It is also unlikely that all of the information had been fully disclosed to the Innu when their consent to the surrender was requested, meaning that their decision to proceed with the surrender cannot be characterized as "informed". This lack of information regarding, among other things, the other remedies available under the *Indian Act* and the opportunity to purchase certain lots is attributable to Canada's breaches.
>
> The directness of the link between these breaches and the losses suffered by the Innu is indisputable: the 1925 surrender, the final act in the saga of the 1906 reserve, is the event that crystallized the loss of the centrally situated lands near the chapel, which the Innu had occupied for several generations. [Emphasis added; *Uashat 2020* at paras. 695–96].

[130] These reasons are directly related to the issues that the Tribunal was called upon to decide at the validity stage and are inextricably linked to the disposition of the Final Decision.

[131] The Tribunal held that the failure to acquire the lots on which the Innu houses were situated was a breach and held that this breach resulted in losses: "the 1925 surrender . . . is the event that crystallized the loss of the centrally situated lands near the chapel, which the Innu had occupied for several generations".

[132] The Tribunal is therefore of the view that the failure to have included in its disposition a clear reference to the losses associated with the lots on which the Innu houses were situated that were not repurchased at the time of the 1925 surrender is insufficient to support the Respondent's argument. On the contrary, the final disposition may be supplemented by the various sections of the Final Decision that confirm the existence of losses in connection with the Innu houses on the

off-reserve lots. These form part of the "heart of the decision". The authority of *res judicata* therefore applies as much to these reasons as to the wording of the disposition of the Final Decision.

[133] The Respondent itself admits that [TRANSLATION] "[i]t is true that the Tribunal, in its Reasons for Decision, finds that the purchase of certain lots could have been an alternative to the surrender of almost all of the reserve and that the lack of information affected the consent of the Innu" (Respondent's Application at para. 62). It argues, however, that [TRANSLATION] "this finding is not essential to the understanding of the disposition because the invalidity of the surrender is not based on it alone", since [TRANSLATION] "even without that finding, the surrender remains invalid just as the consent of the Innu remains vitiated due to the non-compliance with the rules set out in section 49 of the *Indian Act*, the lack of an interpreter and the lack of information regarding how the meeting was conducted" (Respondent's Application at paras. 62–63). In the Tribunal's view, this approach is erroneous. Several reasons may underlie a single finding, and a reason does not lose its *res judicata* nature merely by not being the sole basis for the finding in the disposition.

[134] Moreover, the use of non-exhaustive terms such as "include" and "including" in relation to the issue of the losses implies that this list is not exhaustive and that it is therefore possible to add to it.

[135] At the application hearing, the Respondent pointed out in reply that this argument was not persuasive because the term "include" is also used in the disposition of the Final Decision in relation to the breaches identified and that the disposition at the validity stage cannot have a non-exhaustive list of breaches, as the issue of breaches had to be resolved definitely. The Respondent therefore submits that the terms "include" and "including" must be interpreted in the same way when used in the same disposition, and not indicate an exhaustive list in one case and a non-exhaustive list in the other case.

[136] If the use of these terms were the only clue before the Tribunal as to the Tribunal's intent in the Final Decision, the Respondent's interpretation could be accepted. The interpretation of a given word in a decision should be consistent with the disposition, but also with the decision as a whole. However, it is possible, as in this case, for an error to creep in, and a reading of the Final

Decision and the reasons underlying its disposition help to clarify its interpretation.

3. Conclusion on the doctrine of *res judicata* and the Final Decision

[137] The law on striking out portions of pleadings requires a party, in order to succeed, to demonstrate that it is "plain and obvious that the action cannot succeed" (*Operation Dismantle* at pp. 486–87, citing *Dowson v Government of Canada* (1981), 37 NR 127 (FCA) at p. 138). In this case, to have the amendments to the Declaration of Claim struck out as requested, the Respondent had to demonstrate that it was "plain and obvious" that the issue of the loss of the off-reserve lots was frivolous and could not succeed because of the application of the doctrine of *res judicata*.

[138] However, it is neither plain nor obvious from a reading of the Final Decision on validity that *res judicata* applies to the issue of the loss of the off-reserve lots. On the contrary, if the doctrine of *res judicata* applies, it applies as much to the final disposition as to the underlying reasons. This doctrine cannot therefore be used to prohibit the Claimant from submitting their arguments with respect to the issue of the loss of the off-reserve lots, as these breaches were part of the Final Decision on validity.

[139] A party must clear a high bar to have a pleading struck out, in whole or in part, on the basis of the principle of *res judicata*. This heavy burden has not been met in this case.

[140] The amendments to the Declaration of Claim are therefore contrary to neither the Final Decision nor the authority of *res judicata*, and the Application to Strike must fail.

VII. CONCLUSION

[141] It is for all the reasons above that the Application to Strike and for a declaration that the associated evidence is inadmissible presented by the Respondent is dismissed.

[142] The amendments to the Declaration of Claim are not contrary to the bifurcation order, the previous pleadings or the Final Decision, and the doctrine of *res judicata* does not apply here to justify having them struck out.

[143] In its Final Decision on validity, the Tribunal found that the failure to purchase the lots on which the Innu houses were situated during the surrender-exchange constituted a breach resulting in losses, although these losses were not detailed in the disposition of the Final Decision. The

disposition of the Final Decision specifically identifies certain losses, but does not do so exhaustively, as indicated by the use of the words “include” and “including”. The Claimant will be entitled to claim the related losses at the compensation stage, even if they have not been mentioned or detailed in the disposition of the Final Decision.

[144] At the compensation stage, the parties will be able to present their arguments on the losses associated with the loss of land and its use in connection with lots 1, 2, 3, 4 and 7, Range 1, of the village of Sept-Îles.

DANIE ROY

Honourable Danie Roy

Certified true translation
Johanna Kratz

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20240916

File No.: SCT-2003-13

OTTAWA, ONTARIO, September 16, 2024

PRESENT: Honourable Danie Roy

BETWEEN:

THE INNU OF UASHAT MAK MANI-UTENAM

Claimant

and

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

Respondent

COUNSEL SHEET

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