FILE NO.: SCT-7001-13
CITATION: 2014 SCTC 12
DATE: 20141212

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
HALALT FIRST NATION	)	
	)	Jenny Biem, for the Claimant (Applicant)
	)	
Claimant (Applicant)	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Naomi Wright and Deborah McIntosh, for the Respondent (Respondent)
	)	
	)	
Respondent (Respondent)	)	
	)	
	)	
	)	
	)	**HEARD:** September 10, 2014

REASONS ON APPLICATION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Referred to: *Squamish Indian Band v Canadian Pacific Ltd*, 2002 BCCA 478, 217 DLR (4th) 83; *Squamish Indian Band v Canadian Pacific Ltd*, 2003 BCCA 283, 226 DLR (4th) 681; *Osoyoos Indian Band v Her Majesty the Queen in Right of Canada*, 2012 SCTC 3; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11; *Clarke v Clarke*, [1990] 2 SCR 795, (1990) 73 DLR (4th) 1; *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *R v Van der Peet*, [1996] 2 SCR 507; *Manitoba Metis Federation v Canada*, 2013 SCC 14, [2013] 1 SCR 623; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Canada v Kitselas First Nation*, 2014 FCA 150, 460 NR 185.

Statutes and Regulations Cited

Specific Claims Tribunal Act, SC 2008, c 22, Preamble, ss 12, 13, 14, 16, 21, 34, 35.

Headnote

Aboriginal Law – Specific Claims – Specific Claims Tribunal Act – Amendment of Claim – Tribunal Jurisdiction – Tribunal Powers – Government Policy – Statutory Interpretation – Meaning of "Claim" – Reconciliation – Timeliness – Finality

This specific claim arises out of the expropriation of a portion of the reserve land of the Halalt First Nation for railway purposes. The Claimant First Nation seeks to amend its Declaration of Claim to add the allegation that the Respondent Crown breached an obligation to obtain and return to reserve status a portion of the expropriated land once it was abandoned by the railway. The Crown opposes on the basis that the amendment would place before the Tribunal a claim that had not been previously presented to the Minister of Aboriginal Affairs ("Minister") under the *Specific Claims Policy and Process Guide* ("Policy"), and which is thus outside of the Tribunal's jurisdiction.

The *Specific Claims Tribunal Act*, SC 2008, c 22 ("*SCTA*") is the sole source of the Tribunal's powers. In the absence of statutory authority, the government cannot establish a policy that limits the jurisdiction of the Tribunal or the exercise of the Tribunal's statutory powers. Under the *SCTA*, the Tribunal has the power to receive evidence relevant to proof of an allegation of fact. This power is not limited to hearing only allegations of fact first submitted to the Minister under the Policy.

Principles of statutory interpretation require that the provisions of the *SCTA* be interpreted holistically and harmoniously. As remedial legislation "related to Indians", the *SCTA* is to be given a broad and liberal interpretation, keeping in mind and giving effect to its purpose. The objects of the *SCTA* relevant here are the timeliness, justness and finality of specific claims resolution in the advancement of reconciliation.

In light of these principles, the meaning of the term "claim" must be consistent in both section 16(1) and section 35(*a*) of the *SCTA*, meaning all claims that arise on the same or substantially the same facts as those relied on to establish the ground for the claim as presented to the Minister under the Policy and to the Tribunal. The proposed amendment contains a particular of the general allegation in the claim of a breach of fiduciary duty, and arises on the same facts.

Held: The proposed amendment is allowed.

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I. THE CLAIM, AND CONTEXT FOR THE APPLICATION

A. Applicant and Relief Sought

[1] The Halalt First Nation ("Claimant" or "Applicant") seeks an order permitting the amendment of the Declaration of Claim ("Declaration"). The proposed amendment at issue is:

> This claim is further based upon the Crown's breach of its fiduciary obligation to obtain the Crofton Spur Land and hold it in trust for Halalt upon the 1987 abandonment of the Crofton Spur.

[2] The Crown ("Respondent") opposes the Application on the basis that the amendment would place before the Tribunal a claim that had not previously been presented to the Minister of Aboriginal Affairs ("Minister") under the *Specific Claims Policy and Process Guide* ("Policy"). This, it is argued, results in the Tribunal having no jurisdiction to hear the claim.

B. The Grounds for the Claim

[3] The Claim, as set out in the Declaration, is founded upon acts and omissions of the Crown in relation to the expropriation of land within a reserve for railway right-of-way purposes in 1885 (the "Mainline") and 1912 (the "Crofton Spur"). It is alleged that the takings did not comply with the applicable provisions of the "expropriating legislation, and were therefore void *ab initio*"; and that, if the takings were valid, the compensation paid was inadequate. This brings the Claim within these grounds under the Policy and s 14(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22 ("*SCTA*"):

> (*b*) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> (*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> (*d*) an illegal lease or disposition by the Crown of reserve lands;

> (*e*) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority;…

C. Procedural History

[4] The Claim was presented to the Minister in October 1998 ("1998 SCB Claim"). After a review by the Specific Claims Branch ("SCB") the Claimant was advised on June 29, 2011, that the Claim was accepted for negotiation in part. The Minister was prepared to negotiate, on a without-prejudice basis, the question of the adequacy of compensation paid at the time of the takings.

[5] The Claimant chose not to enter a negotiation of only a part of the Claim. The Declaration was filed with the Tribunal on May 6, 2013. The Crown filed a Response on July 3, 2013.

[6] A hearing of the Claimant's *viva voce* evidence commenced in the Claimant community on June 23, 2014.

[7] In the course of the hearing, Counsel for the Claimant sought to introduce evidence that the railway had formally abandoned the Crofton Spur in or about 1987. Counsel for the Crown objected on the ground that the evidence is irrelevant to the Claim as pled in the Declaration. The evidence was heard on a *voir dire*, with submissions on admissibility to be scheduled at a later date.

[8] There are decisions holding that land taken for a railway right-of-way is, upon the cessation of railway use, to be restored to reserve land status: *Squamish Indian Band v Canadian Pacific Ltd*, 2002 BCCA 478, 217 DLR (4th) 83*; Squamish Indian Band v Canadian Pacific Ltd,* 2003 BCCA 283, 226 DLR (4th) 681; *Osoyoos Indian Band v Her Majesty the Queen in Right of Canada*, 2012 SCTC 3. If the 1998 SCB Claim grounds Crown liability for failure to restore the land to reserve status on abandonment of the lines of rail, the evidence of abandonment would be relevant.

[9] Notably, the decisions giving rise to Crown duties regarding abandoned railway rights-of-way on reserve lands were largely issued after the Claimant had filed its 1998 SCB Claim and before it received a response in 2011. It was unrepresented during this time.

[10] As presiding Tribunal member I took the admittedly unusual step of raising with Counsel a matter related to the issue over admissibility of evidence of abandonment, namely the potential, should the Claim proceed as presently framed by the Declaration, for the extinguishment by operation of the *SCTA*, s 35(*a*), of all claims that may arise out of the taking of land for the Mainline and Crofton Spur. This could include any claim based on a failure to recover the land upon cessation of use for railway purposes.

[11] Counsel for both Parties acknowledged the importance of this question in the matter at hand.

[12] The Claimant was granted leave to apply for an order to amend the Declaration. The proposed amendment at issue is this:

> This claim is further based upon the Crown's breach of its fiduciary obligation to obtain the Crofton Spur Land and hold it in trust for Halalt upon the 1987 abandonment of the Crofton Spur.

[13] No amendment was sought in relation to the taking of land for the Mainline.

II. POSITION OF PARTIES

A. Respondent (Crown) on Application

[14] The Crown says the Applicant cannot succeed on the amendments as:

1. The facts and allegations raised in the proposed amendments were not contained in the Applicant's 1998 SCB Claim submitted to the Minister;

2. The proposed amendments are outside the jurisdiction of the Tribunal pursuant to section 16(1) of the *SCTA;*

3. Section 35(*a*) of the *SCTA* cannot be used as a basis to expand the jurisdiction of the Tribunal; and

4. It is not otherwise in the interest of justice to allow the proposed amendments, as it would undermine the Policy and deprive the Minister of the right to consider all claims in the first instance.

B. Respondent (Crown) on Effect of Section 35(*a*)

[15] In oral submissions, Counsel argued that finality by the operation of s 35(*a*) would, even if the amendment was disallowed, apply to bar the claim raised by the proposed amendment if the matter proceeds to a decision on the merits. Section 35(*a*) provides:

> **35.** If the Tribunal decides that a specific claim is invalid or awards compensation for a specific claim,
>
> (*a*) each respondent is released from any cause of action, claim or liability to the claimant and any of its members of any kind, direct or indirect, arising out of the same or substantially the same facts on which the claim is based;…

[16] With admirable candour, Counsel stated that the position of the Crown in any proceeding following the disposition of the Claim by the Tribunal would be that all claims that may arise as a consequence of the takings would be barred by s 35(*a*) as the fact of the takings would be in evidence in any future claim based on abandonment or cessation of use for railway purposes of the lines of rail traversing the Claimant's reserve lands.

[17] Counsel proposed a means by which to have all issues arising out of the takings be resolved, namely to adjourn the Claim as set out in the Declaration and the present Application *sine die* pending:

1. The presentation by the Applicant of a new claim based on the abandonment of the Crofton Spur to the Minister under the Policy;

2. If the new claim is not accepted for negotiation, or if accepted and not resolved after three years, the Claim would proceed before the Tribunal including the proposed amendment.

C. Applicant (Halalt) on Application

[18] The Applicant does not, for the purposes of this Application only, contest Canada's position that the proposed amendment raises a claim on substantially the same facts as the Claim as pled in the Declaration. On the contrary, the Applicant agrees. On this basis, the Applicant contends that the proposed amendment comes within and particularizes a claim on grounds previously considered and rejected by the Minister.

[19] The Applicant also argues that on a proper construction of the *SCTA*, the term "claim" in s 16(1) means any claim asserting breach of fiduciary duty that may arise as a consequence of the takings for railway rights-of-way as pled in the Declaration.

III. ISSUES

[20] The issues are as follows:

1. Issue #1: Does the proposed amendment introduce a claim not previously presented to the Minister on the basis that the term "claim" in s 16(1) encompasses only the allegations, grounds, and evidence set out in the material presented to the Minister in the process administered by the SCB?

2. Issue #2: Does the term "claim" in s 16(1) encompass all grounds for Crown liability that rely on substantially the same facts.

IV. ISSUE #1: THE 1998 SCB CLAIM, AND 2008 TRANSITIONAL PROVISIONS OF THE *SPECIFIC CLAIMS TRIBUNAL ACT*

A. The Claim Presented to the Minister

[21] The 1998 SCB Claim is in evidence. Under the heading "Introduction" this is said:

> The Halalt First Nation (the "Band") submits this claim. The claim arises in respect of the failure of Her Majesty the Queen in Right of Canada (the "Federal Government") to comply with its fiduciary duties to the Band. In particular, the Band advances claims with respect to land taken from the Band's reserves for the E & N Railway. The Band claims that the taking of reserve lands was done without jurisdiction, in a manner which did not comply with mandatory legislation, and without proper compensation.

[22] The 1998 SCB Claim sets out particulars of the 1885 and 1912 takings, including a federal Order in Council, PC1963-1411, which says, in part:

> Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the Indian Act, is pleased hereby.
>
> b. Pursuant to section 35 of the said Act, to consent to the Esquimalt and Nanaimo Railway Company exercising its aforesaid statutory powers in relation

> to the lands described in schedule "B" hereto, and to authorize the issue of Letter Patent granting the said lands to the said Company accordingly."

[23] The basis for the 1998 SCB Claim is Crown approval of the taking of reserve lands of the Applicant for railway right-of-way purposes.

[24] The 1998 SCB Claim asserts the Crown's "general fiduciary duty" to the Applicant in relation to reserve lands:

> 47. The Federal Government, its ministers, agents and employees were at all material times under a general fiduciary obligation with respect to the direction and control of the Band's affairs. The manner in which the Crown exercises its discretion in dealing with land on behalf of Indians is regulated by this fiduciary duty. A breach of this fiduciary duty gives rise to legal and equitable remedies. *Guerin v. the Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.)

[25] The 1998 SCB Claim asserts the following breaches of fiduciary duty, as grounds cognizable under s 14(1)(*b*) and (c) of the *SCTA*:

- Canada breached its fiduciary obligations and its duty to strictly comply with expropriating legislation in 1885 and 1912;
- The 1885 and 1912 expropriation are void *ab initio* as a result of Canada failing to comply with expropriating legislation;
- PC1963-1411 is void;
- PC1963-1411 constitutes equitable fraud and a breach of Canada's fiduciary obligations to Halalt; and
- Canada had a duty to correct a breach of its fiduciary duty in 1945.

[26] The 1998 SCB Claim seeks this relief:

> a. A constructive trust over all of the land taken;
> b. damages for trespass, negligence and breach of fiduciary duty;
> c. damages for injurious affection; and
> d. such further and other relief as may be appropriate.

[27] The proposed amendment does not rely on Crown duties derived from a transaction unrelated to the takings. The Applicant seeks, by alleging a fact not specifically raised in the 1998 SCB Claim, namely abandonment of the Crofton Spur, the application of the law on Crown fiduciary duties.

B. Specific Claims Policy, 2009; Transition in Conformity with the *Specific Claims Tribunal Act*

[28] The Crown argues that evidence of abandonment cannot be introduced before the Tribunal as to do so would be contrary to the Policy issued in 2009. The Policy's transitional provisions concerning the introduction of the *SCTA* created a three year window within which the Minister could, after the *SCTA* came into force in October 2008, review claims filed prior to the *SCTA* coming into force but not yet accepted by the Minister for negotiation or rejected. These would not, under the *SCTA*, become eligible for filing with the Tribunal until rejected or October 2011, whichever occurred first.

[29] Claims previously filed could be supplemented, presumably because many had been filed with the SCB long ago, often over a decade past. However, the opportunity to supplement such claims was subject to the following:

> The claim filed with the Minister is the same claim that may ultimately be filed with the Tribunal by the First Nation, consequently, no new allegation, grounds or evidence can be added to the claim once the First Nation has been notified that its claim has been filed with the Minister. [emphasis added; the Policy]

[30] On November 24, 2008 the Director General ("DG") of the SCB wrote to the Applicant:

> In order to ensure that claims submitted prior to the coming into force of the *Specific Claims Tribunal Act* conform to the legislation, the Halalt First Nation will have six months from the date of this notice to provide the Minister with additional documents, information and arguments that were not in the original claim submission. The objective is to ensure that Halalt First Nation has the opportunity to file as complete and thorough a claim as possible. The submission of additional documents, information and arguments is not intended to alter or expand the allegations of the claim. New allegations, grounds or evidence will be considered a new claim and will be assessed as a new claim submission. [emphasis added]

[31] Except in the case of a rejection, a claim may not be filed with the Tribunal until three years have passed after it was filed with the Minister (*SCTA*, s 16(1)(*b*)).

[32] The consequence of the Policy is that anything provided by a claimant to supplement a previously filed claim would put the claimant back in the queue at the door of the SCB, and result in a wait of up to three years before the claim became eligible for filing with the Tribunal. The Applicant did not submit additional material. On July 13, 2009 the DG wrote:

> In a letter dated November 24, 2008, the Halalt First Nation was advised that these claims had been filed with the Minister of Indian Affairs and Northern Development as of October 16, 2008. Also in that letter, the Halalt Fist Nation was offered the opportunity, within six months, to submit additional documents, information and arguments in support of the above noted three claims. As more than six months have passed and no new documents, information or arguments have been received, the claims will be assessed as filed on October 16, 2008. No additional documents, information or arguments can be added to the claims without restarting the assessment phase of the specific claims process. You will receive further notification in respect to whether the claims will be accepted for negotiation. [emphasis added]

V. DISCUSSION

A. The Policy: No "New Allegations, Grounds or Evidence"

[33] One might ask why the SCB would create a policy permitting supplemental information in respect of a previously filed claim. The answer lies in the relationship between s 16(1) and s 16(2)(*a*) of the *SCTA*.

[34] Section 16(1) of the *SCTA* provides:

> **16**. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister...

[35] The term "claim" in s 16(1) is not defined in the *SCTA*.

[36] Section 16(2) provides:

> (2) For the purpose of subsection (1), the Minister shall

> (*a*) establish a reasonable minimum standard to be followed in relation to the kind of information required for any claim to be filed with the Minister, as well as a reasonable form and manner for presenting the information;…

[37] Section 16(3) provides:

> (3) A claim is to be filed with the Minister only if the information in it meets the minimum standard referred to in paragraph (2)(*a*) and is presented in the form and manner established under that paragraph.

[38] The "Minimum Standard" was published after the *SCTA* came into force. As required by s 16(3) it sets out the "kind of information" required for a claim to be considered by the Minister. It seems that the purpose of the Ministerial review of previously filed claims was to assess their compliance with the new minimum standard after first giving claimants the opportunity to present supplementary material.

[39] This is the Minimum Standard, taken from the SCB webpage:

> **Minimum Standard for Kind of Information**
>
> 1. Claim Document
>
> The claim document must include:
>
> - a list of allegations based on one or more of the grounds related to the validity of the claim, as set out in the Specific Claims Policy;
> - legal arguments supporting each allegation;
> - a statement of the facts supporting the allegations;
> - a statement that compensation is being claimed; and,
> - a list of authorities with citations, including treaties, statutes, case law and law journal articles, that support the allegations (copies not required).
>
> 2. Historical Report
>
> An historical report, including references to supporting documents, outlining the factual circumstances surrounding the allegations, must be provided.
>
> 3. Supporting Documents

> Complete copies of primary documents and relevant excerpts of secondary documents relied upon to support the allegations included in the claim document and referred to in the historical report are also necessary.

[40] The July 13, 2009 letter to the Applicant from the DG closed the opportunity to provide further material. It had clearly met the minimum standard, as the 1998 SCB Claim was accepted in part.

B. Ministerial Powers and Legal Status of the Policy Directive

[41] The SCB may, as the agent of the Minister, establish internal policies governing the assessment of claims. However, in the absence of statutory authority, neither it nor the Minister can establish a policy that limits the jurisdiction of the Tribunal or the exercise of the Tribunal's statutory powers.

[42] The Policy relied on by the Respondent on this Application is not part of the minimum standard that the Minister is empowered by the *SCTA* to establish. Here, there is no statutory power to limit what evidence may be introduced or foreclose the pleading of allegations of fact.

C. Tribunal Powers

[43] The *SCTA* is the source of the Tribunal's powers.

[44] The *SCTA*, in its original form, contemplates and provides for a court-like process with the attributes of courts that ensure adjudicative independence, transparency and procedural fairness. The Tribunal has sole authority over its process. It may determine the permitted content of documents initiating and responding to claims and the introduction of evidence.

[45] The Tribunal is empowered by the *SCTA*, s 12 to make rules governing its practice and procedures:

> **12.** (1) A committee of no more than six Tribunal members, appointed by the Chairperson, may make general rules for carrying out the work of the Tribunal and the management of its internal affairs, as well as rules governing its practice and procedures, including rules governing

(*a*) the giving of notice;

(*b*) the presentation of the positions of the parties with respect to issues before the Tribunal and of matters of fact or law on which the parties rely in support of their positions;

(*c*) the summoning of witnesses;

(*d*) the production and service of documents;

(*e*) applications;

(*f*) discovery proceedings;

(*g*) the taking and preservation of evidence before the start of a hearing;

(*h*) case management, including pre-hearing conferences and the use of mediation;

(*i*) the introduction of evidence;

(*j*) the imposition of time limits; and

(*k*) costs. [emphasis added]

[46] The Tribunal has specified powers and the general powers of a superior court of record for "... the due exercise of its jurisdiction":

13. (1) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record and may

(*a*) determine any questions of law or fact in relation to any matter within its jurisdiction under this Act;

(*b*) receive and accept any evidence, including oral history, and other information, whether on oath or by affidavit or otherwise, that it sees fit, whether or not that evidence or information is or would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence;

(*c*) take into consideration cultural diversity in developing and applying its rules of practice and procedure; and

(*d*) award costs in accordance with its rules of practice and procedure.

[47] The 2009 Policy could not deprive the Tribunal of its power to receive evidence relevant to proof of an allegation of fact. Nor could it limit allegations of fact to those set out in a claim presented to the Minister in the SCB process.

D. Conclusion, Issue #1

[48] The Policy does not limit the jurisdiction of the Tribunal to consideration of only the grounds, allegations and evidence set out in the 1998 SCB Claim.

E. Allegations of Fact: The Jurisdiction of the Tribunal

[49] The remaining question is whether the Tribunal has jurisdiction to determine the validity of a claim where the claimant has alleged a fact that was not set out specifically in the claim submission as presented to the Minister. This turns on the construction of the term "claim" in s 16(1).

VI. ISSUE #2: SECTION 16(1), THE TERM "CLAIM"

A. The Term "Claim" in Section 14(1) and Section 16(1)

[50] Section 14(1) provides for the filing of claims on several grounds:

> **14**. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds...

[51] Section 16(1) provides:

> **16**. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister...

B. Claim, and Section 35(*a*)

[52] In s 35(*a*) the term "claim" includes any claim (i.e. any other claim) based on substantially the same facts relied on to establish the claim (i.e. the claim filed under s 14(1)):

> **35**. If the Tribunal decides that a specific claim is invalid or awards compensation for a specific claim,

> (*a*) each respondent is released from any cause of action, claim or liability to the claimant and any of its members of any kind, direct or indirect, arising out of the same or substantially the same facts on which the claim is based;...

C. Construction of the Term "Claim"

[53] The Respondent argues that the meaning of "claim" under s 16(1) cannot be boot-strapped by the finality provisions of s 35(*a*) to include any claim that rests on substantially the same facts as in the claim decided by the Tribunal.

[54] The Applicant argues that principles of statutory interpretation require that s 16(1) be interpreted in the context of the *SCTA* as a whole and in harmony with the other provisions of the *SCTA* and its overall objects and purposes. This, the Applicant says, calls for consistency in the meaning of the term "claim" as found in s 16(1) and as found in s 35(*a*).

[55] The logic of the Applicant's position is demonstrated by the practical consequences of this decision. If the Applicant may not amend its Claim as requested and s 35(*a*) is read independently of s 16(1), the Applicant may be foreclosed from pursuing the subject matter of the amendment separately – a result the Respondent has candidly admitted it would seek.

[56] 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.

[57] It is noted that in the SCB process a claimant cannot demand disclosure of documents considered in the SCB's assessment of the claim, the historical review commissioned by the SCB, or the legal analysis relied on in support of a recommendation to the Minister to accept or reject the claim. If the claim before the Tribunal includes all claims based on substantially the same facts, all information available to the decision maker is in the record.

[58] The Respondent argues that allowing the amendment sought by the Applicant would deprive the Minister of an opportunity to negotiate the Claim as supplemented by the new allegation. This is simply not so, as the Minister could choose to negotiate a settlement while the Claim is before the Tribunal. At the first case management conference the Applicant, in compliance with the *Specific Claims Tribunal Rules of Practice and Procedure*, reported positively on its willingness to engage in mediated negotiations.

D. The *Specific Claims Tribunal Act* is Remedial

[59] The context surrounding the enactment of the *SCTA*, and its preamble, reveal the ill it is intended to cure.

[60] The specific claims resolution process – including the portion of it governed by the *SCTA* – is by its nature remedial, seeking to address historic grievances of First Nations against the Crown.

[61] The *SCTA* was designed to remedy this already-remedial process. It established the Tribunal to reduce chronic delays and backlogs in claims resolution, and to provide fairness and impartiality to claimants and the Crown. The government policy establishing the *SCTA*, Justice at Last, explicitly acknowledged these goals: "[Tribunal] interventions will bring greater fairness to the [specific claims] process while accelerating the settlement of outstanding claims."

[62] The preamble to the *SCTA* reflects its remedial nature, as discussed by my colleague Whalen J. in his decision of November 3, 2014, *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11. It recognizes the goals of reconciliation and the development and self-sufficiency of First Nations through the resolution of the historic grievances that are specific claims. It also explicitly references the need to adjudicate such claims "in a just and timely manner," acknowledging the inordinate delays that in part motivated the passage of the *SCTA*.

E. Broad and Liberal Interpretation

[63] With such clearly remedial objectives, the *SCTA* is to be given a broad and liberal interpretation, keeping in mind and giving effect to its purpose (*Clarke v Clarke* [1990] 2

SCR 795, (1990) 73 DLR (4th) 1, at para 10). Such an interpretation is also warranted by the nature of the *SCTA* as a statute "relating to Indians" (*Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193.

F. The Objects of the *Specific Claims Tribunal Act*

1. Reconciliation

[64] The Crown challenge to the proposed amendment for want of jurisdiction calls for consideration of the objects of the *SCTA* as intended by Parliament.

[65] The *SCTA* is an instrument by which Crown acts and omissions, if contrary to the performance of the Crown's "legal obligations" (*SCTA*, s 14(1)(*a*-*c*)), may be reconciled between First Nations and the Crown. The preamble states:

> ...it is in the interests of all Canadians that the specific claims of First Nations be addressed;
>
> resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations;
>
> there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner;…[emphasis added]

2. Reconciliation and Indigenous Interests

[66] The statutory objective of reconciliation was recognized at the Constitutional level in decisions of the Supreme Court of Canada on the effect of s 35(1) of the *Constitution Act*, 1982:

> ... what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. (*R v Van der Peet*, [1996] 2 SCR 507, at para 31) [emphasis added]

[67] Constitutionally-protected interests are not the only indigenous interests now recognized and protected in law. The principle of the Honour of the Crown provides general guidance on the standards to be met when dealing with First Nation interests. These standards may in some circumstances become fiduciary duties, enforceable in the courts (*Manitoba Metis Federation v Canada*, 2013 SCC 14, [2013] 1 SCR 623; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3). Such duties may have Constitutional underpinnings (*Canada v Kitselas First Nation*, 2014 FCA 150, 460 NR 185 ar para 34 [*Kitselas*]).

[68] Existing section 35(1) rights have their origins at contact, on the assertion of foreign sovereignty (title) and on the entry of treaties. Other recognized interests include those that arise out of the creation and administration of reserves and other assets.

[69] First Nation interests are reflected in the grounds on which a First Nation may take a claim to the Tribunal. As noted above, the grounds for the Claim are based on s 14(1) of the *SCTA* including:

> (*b*) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> (*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

[70] The Tribunal applies fiduciary law as it pertains to First Nation interests:

> Certain administrative law decision-makers interpret the legal rules that courts apply, yet reviewing courts sometime nevertheless defer to them. For example, a labour arbitrator acting under a collective agreement and interpreting the general law of issue estoppel is entitled to deference: *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 [2011] 3 S.C.R. 616. In *Dunsmuir* at paragraph 54, the Supreme Court held that deference may "be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule

> in relation to a specific statutory context." But here, as I have already noted, the Specific Claims Tribunal is to employ the exact same fiduciary law that courts use, without importing policy considerations or specialized appreciation into the mix. [emphasis added; *Kitselas*, at para 31]

3. Reconciliation and Finality

[71] Finality is one the objects of the *SCTA*. There is no appeal from a Tribunal decision. Section 34(1) provides for judicial review only. Section 34(2) provides that decisions are otherwise "...final and conclusive...in all proceedings in any court or tribunal arising out of the same or substantially the same facts...." After a decision of the Tribunal, s 35(*a*) provides for a release of 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...." Where compensation is awarded by the Tribunal for an unlawful disposition of land, s 21 provides that "...all of the claimant's interests in and rights to the land are released...."

[72] These "finality" provisions of the *SCTA* advance reconciliation and thus are in the interests of all Canadians.

G. Discussion

[73] The return of a claim to the SCB process due to a fresh allegation related to the foundation of the claim, in the present matter the takings for railway purposes, would be contrary to the timeliness objective.

[74] Likewise, it would be contrary to the object of a just resolution. The Applicant would return to a process in which it already engaged, for over a decade, regarding the same parcel of land. The challenges inherent in that process are well known and well publicized. It would be unjust to impose the burden on the Applicant of engaging in the SCB process for a second time, especially now that an alternative avenue for resolution has been created.

[75] Moreover, the object of finality would not be achieved. A full exposition of evidence of acts and omissions of the Crown, the First Nation and possibly others is needed in order to avoid future claims in which reliance is placed on some of the same facts. For example, if the legal consequence of the cessation of railway use is not before the Tribunal in the present matter, a separate claim may rely on the fact of the 1885 and 1912 takings.

[76] In sum, in addition to violating the principles of statutory interpretation, the position advanced by the Crown is contrary to the advancement of reconciliation.

H. Conclusion, Issue #2

[77] The s 16(1) term "claim" 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*.

VII. THE HALALT CLAIM

A. Grounds for Claim as Presented to the Minister

[78] The substance of the Claim is the taking of reserve land of the Halalt First Nation for railway purposes. It is said that the takings were unlawful due to non-compliance with the governing statutes. There is a general allegation of breach of fiduciary duty. One such breach is particularized, the failure to secure adequate compensation. These bring the Claim within the grounds provided for in both the Policy and s 14(1)(*b*)(*c*) and (*e*) of the *SCTA*:

> **14**. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> ...
>
> (*b*) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation - pertaining to Indians or lands reserved for Indians - of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> (*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> ...
>
> (*e*) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; ...

[79] Section 15 does not, on the face of it, apply. Section 16(1) permits a claim to be filed with the Tribunal "...only if [it] has been previously filed with the Minister...." As "claim"

includes all claims on substantially the same facts, the present Claim has been filed with the Minister, and rejected.

[80] The proposed amendment alleges another breach of fiduciary duty that is inextricably bound up with the foundation of the claim before the Minister, namely the takings for the Mainline and Crofton Spur.

B. New Allegation of Fact

[81] The proposed amendment is:

> This claim is further based upon the Crown's breach of its fiduciary obligation to obtain the Crofton Spur Land and hold it in trust for Halalt upon the 1987 abandonment of the Crofton Spur.

[82] This is a particular of the general allegation in the Claim of a breach of fiduciary duty. The Crown does not contend that allowing the amendment will prejudice its defence.

VIII. DISPOSITION

[83] The proposed amendment and the uncontested amendments as sought are allowed.

[84] The Respondent has leave to file an Amended Response.

IX. NEW EVIDENCE

[85] The Tribunal process requires pleadings, in particular a Declaration of Claim from the Claimant and a Response from the Respondent. As in the courts, facts are pled, not evidence. The Parties may adduce evidence at the hearing of the Claim to establish the facts pled as amended.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20141212

File No.: SCT-7001-13

OTTAWA, ONTARIO December 12, 2014

PRESENT: Honourable Harry Slade

BETWEEN:

HALALT FIRST NATION

Claimant (Applicant)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent (Respondent)

COUNSEL SHEET

TO: **Counsel for the Claimant (Applicant) HALALT FIRST NATION**
As represented by Jenny Biem

AND TO: **Counsel for the Respondent (Respondent)**
As represented by Naomi Wright and Deborah McIntosh