FILE NO.: SCT-5001-11
CITATION: 2013 SCTC 6
DATE: 20130705

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

BEARDY'S & OKEMASIS BAND #96 AND #97

Claimant

Ron Maurice and Steve Carey, for the Claimant

– and –

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

Respondent

Lauri Miller and David J. Smith, for the Respondent

HEARD: June 12, 2013

REASONS ON APPLICATION

Honourable Harry Slade

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

Cases Cited:

R v Blais, 2003 SCC 44

R v Mohan, 1994 2 SCR 9

Samson Indian Nation & Band v Canada, 199 FTR 125

Squamish Indian Band v R, 1998 144 FTR 106

Syrek v Canada, 2009 FCA 53

Statutes and Regulations Cited:

Indian Act, (RCS, 1985, c I-5)

Specific Claims Tribunal Act (SC 2008, c 22)

Headnote:

Aboriginal Law – Specific Claim – Admissibility of Evidence - Report

This specific claim arises from events leading to, during, and after the 1885 Riel Rebellion relating to Canada's alleged withholding of treaty annuities from Beardy's and Okemasis members. The Claimant asserts a breach of Canada's legal obligation relating to Canada's withholding of of treaty annuity payments.

The Crown acknowledges that at particular times, and as a result of Beardy and Okemasis' involvement in the events relating to the Riel Rebellion, Treaty annuities were not paid to members of the Claimant Band.

The Schwartz Report, at issue in this application, provides information pertaining to the creation of the Tribunal, its reach of jurisdiction, and legal argument and opinions on the instant application before the Tribunal. The Respondent seeks to exclude this Report which the Claimant has introduced in support of its response to the jurisdictional issue before the Tribunal. The Respondent objects to the admissibility of the Report on the basis that it includes legal opinions and historical recitations and facts that would best be drawn from the existing record.

Held: The application is allowed, in part.

Aspects of the Schwartz Report dealing with the application of international and labour law are not necessary and do not meet the established test for admissibility.

However, the political and legislative histories leading to the enactment of the *Act* in the Report provides relevant context that may not be gleaned from an examination of the various documents referred to in the report if considered alone. This information is outside of the experience of the Tribunal as the trier of fact. To that extent, the content of the Schwartz report is admissible.

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I. THE CLAIM

[1] This specific claim arises from events leading to, during, and after the 1885 Riel Rebellion relating to Canada's alleged withholding of treaty annuities from Beardy's and Okemasis members. The Claimant asserts a breach of Canada's legal obligation relating to Canada's withholding of treaty annuity payments.

[2] The Crown acknowledges that at particular times, and as a result of Beardy and Okemasis' involvement in the events relating to the Riel Rebellion, Treaty annuities were not paid to members of the Claimant Band.

II. APPLICATION

A. Applicant and relief sought

[3] Canada applies for an order that an expert report prepared by Bryan P. Schwartz not be admitted in evidence on the hearing of this specific claim.

B. The Schwartz Opinion

1. Introduction

[4] Mr. Schwartz is a lawyer in private practice. His academic qualifications include a doctorate of law from Yale University in the United States. His doctoral dissertation was on constitutional reform with respect to Aboriginal Peoples. He has addressed aboriginal issues in several books and academic articles. He has appeared several times on interventions before the Supreme Court of Canada on issues involving the interpretation of historic treaties.

[5] Mr. Schwartz has been a Senior Advisor to the Assembly of First Nations on the development of Specific claims Law and Policy since 1997. He was involved in negotiations with Canada in this respect from the inception of The Joint First Nations – Canada Task Force on Specific Claims Policy, 1998, to, and including, the creation of the *Specific Claims Tribunal Act*.

[6] Mr. Schwartz's report is directed to the question of whether the Tribunal has jurisdiction to adjudicate the claim to unpaid treaty annuities withheld by the Respondent before, during and after the Riel Rebellion of 1885. Canada's application to strike the claim was filed on May 22, 2012. The following are the grounds:

i. The Specific Claims Tribunal does not have the jurisdiction to adjudicate upon this claim for the failure to pay treaty annuities.

ii. Subsection 14(1) of the Act, limits claims filed with the Tribunal to claims based on the collective losses of a First Nation, or a band, that by definition consists of a "body of Indians" that hold assets "in common."

iii. Treaty annuities are individual entitlements, and consequently the Specific Claims Tribunal has no jurisdiction to adjudicate a claim for failure to pay treaty annuities.

[7] Counsel for the Claimant tasked Mr. Schwartz on the terms of a retainer letter dated February 14, 2013:

> "The primary issue to be addressed in your report is whether a specific claim brought by a First Nation for the termination of treaty annuity payments to all members of a band is the type of claim that falls within the remedial scope of Canada's Specific Claims Policy (the "Policy") and/or the *Specific Claims Tribunal Act* (the "Act").
>
> In addition to your professional experience and expertise, we would ask that your report canvass and review any relevant extrinsic evidence from negotiations, committee hearings, round tables, consultation meetings and Hansard. We recognize, however, that this is not an exhaustive list of relevant sources, and we encourage you to exercise your discretion to canvass any other evidence which you feel is germane to the issue.
>
> We do not require your report to provide any firm conclusions as to whether the Treaty Annuities Claim falls within the scope of the Policy or Act. Rather, we ask that you set out the relevant extrinsic evidence based on your expertise, experience and research to allow the Tribunal to make a fully informed decision respecting the ultimate question of whether the Treaty Annuities Claim falls within its adjudicative jurisdiction."

[8] Under the title "Conceptual Models: Is the right to bring an annuities claim individual, collective or concurrent?" Mr. Schwartz purposes, by analogy to public international law and labour law that treaty benefits provided to individuals may, in the event of a breach, be the subject of proceedings by either the individual beneficiary or the collectivity that is the signatory to the treaty.

[9] In the following section, under the heading "Annuities and Standing to Bring Specific Claims in Historical Context" Mr. Schwartz discusses the question of standing to advance a treaty based claim as determined by a U.S. Court in an action brought by members of the Cayuga Nation. This, together with brief references to the advancement of the Cayuga Nation interests by international arbitration, and proceedings in Canada asserting a right to annuities under Treaty 19 of 1818, prefaces a discussion of provision for individual benefits under Treaties 1 and 6.

[10] Under the hearing "The History of Specific Claims Policy Statements and Statutes", Mr. Schwartz traces the development of various policy statements and statutes on Specific claims, and reflects on the light shed by this material on the *Specific Claims Tribunal Act*. References to decided cases on standing in Canada to pursue annuity claims in the courts are discussed to give context to, and to some extent in form, the actions of government in measures taken along the way up to the creation of the *Specific Claims Tribunal Act*. This is followed by a section entitled "Justice at Last" which ties the December, 2006, Senate Committee report entitled "Negotiation of Confrontation: It's Canada's Choice" to the discussions between officials of the Assembly of First Nations and Canada and the specific provisions of the fruits of that labour, namely the *Act*.

[11] Mr. Schwartz "Conclusion" stops well short of advancing an opinion of the ultimate questions to be decided by the Tribunal on Canada's application to strike.

C. General Observations

[12] The report has two major themes:

i. A legal argument, based on international law and labour law for concurrency among individual members of an Aboriginal Nation and the nation itself in the ability to take proceedings when the other party, Canada, has failed to provide benefits to which there is an individual entitlement;

ii. A chronology of historical events and actions taken jointly by Aboriginal organizations and the Government of Canada that accommodated in the creation of the Specific Claims Tribunal Act, and analysis, in that context, of legislative intention in relation to the eligibility of Specific Claims based on failure to pay treaty annuities for filing with the Tribunal.

[13] The concurrency proposition is to a limited extent woven into the second component of the report, although not in a conclusory way.

III. POSITION OF PARTIES

A. Applicant

[14] The Applicant argues:

1. that the Schwartz report is a legal opinion on the issue that the Tribunal is to decide, whether or not the Act ought to be interpreted as granting the Tribunal the jurisdiction to decide claims involving treaty annuities;

2. that the recitation and analysis in the Schwartz report of events leading to the enactment of the Act are unnecessary, as the Tribunal can draw its own conclusions from the referenced documentary record.

B. Respondent on Application

[15] The Respondent on the Application (the Claimant) argues that the Schwartz report is admissible as an expert opinion as it provides necessary information with respect to the legislative history of the *Act* and the political context in which it was drafted. This, it submits, will assist the Tribunal in drawing inferences about the intentions of parliament, section 14(1) of the *Act*, and the question whether the claim falls within or outside of the scope of the Tribunal's jurisdiction.

IV. DISCUSSION

A. Applicable Law

[16] In *R v Mohan*, 1994 2 SCR 9, [*Mohan*] at paras. 17-21, the Supreme Court set out the test for admissibility of expert evidence:

> Admission of expert evidence depends on the application of the following criteria:
>
> (a) relevance;
>
> (b) necessity in assisting the trier of fact;
>
> (c) the absence of any exclusionary rule;

(d) a properly qualified expert.

[17] In *Squamish Indian Band v R*, 1998 144 FTR 106, (FCTD) [*Mathias*], the Federal Court disallowed two expert reports, following the *Mohan* criteria. The Court said it did not require expert assistance to interpret sections of the *Indian Act* and form conclusions about the probable effect of the provisions. It further concluded that a report proffered as an expert opinion that consisted in large measure of legal argument was inadmissible in its entirety because it would not assist the Court as trier of fact.

[18] In *Samson Indian Nation & Band v. Canada*, 2001 199 FTR 125, [*Samson*], the Federal Court considered the criterion of necessity from *Mohan* and noted that *Mathias* elaborated on the criterion so that "where a question falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received."

[19] In *Syrek v Canada*, 2009 FCA 53, the Federal Court of Appeal affirmed the principle that opinion evidence on questions of law should not be admitted (at paras. 28-29).

B. Finding

[20] The Schwartz report does not come to a conclusion on the question whether the Tribunal has jurisdiction under section 14(1)(*a*) of the *Act* to adjudicate a claim based on non-payment of annuities to members of a First Nation. It does, however, conclude that it is open to the Tribunal to find it has jurisdiction, based on the author's analysis of the political and legislative history of the *Act*, and his legal analysis based on public international law and labour law. To this extent, I find that the report does not meet the test of necessity. The content would more appropriately be presented as submissions on the issue.

[21] I turn now to the question whether the portion of the Schwartz report that addresses the political and legislative history of the *Act* is admissible in evidence.

[22] On the test in *Mohan*, the evidence must be relevant.

[23] In *R v Blais*, 2003 SCC 44 [*Blais*], the Supreme Court affirmed the importance of a contextual approach to statutory interpretation:

> The starting point in this endeavour is that a statute — and this includes statutes of constitutional force — must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290.)

[24] On an application of *Mohan*, the question is whether the evidence provides information which is "likely to be outside the experience and knowledge of a judge or jury". (para. 26).

[25] The exposition of the political and legislative history leading to the enactment of the *Act* provides relevant context that may not be gleaned from an examination of the various documents referred to in the report if considered alone. This information is outside of the experience of the Tribunal as the trier of fact. To that extent, the content of the Schwartz report is admissible.

[26] To the extent that this portion of the report includes case law, it is part of the contextual analysis and is admissible.

V. ORDER

[27] The Application is allowed in part.

[28] Attachment A to these reasons is a copy of the Schwartz Report showing the admissible and inadmissible content. The respondent may introduce in evidence a revised report containing the admissible portions of the Schwartz report. This may be supplemented by additional text to the extent that it may enhance the report's overall coherence and readability.

HARRY SLADE

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Honourable Harry Slade
Specific Claims Tribunal Canada

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20130705

File No.: SCT-5001-11

OTTAWA, ONTARIO July 5, 2013

PRESENT: Honourable Harry Slade

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BEARDY'S & OKEMASIS BAND # 96 AND # 97

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant BEARDY'S & OKEMASIS BAND #96 AND #97**
As represented by Ron Maurice and Steve Carey
Maurice Law Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Lauri Miller and David J. Smith
Department of Justice

VI. ATTACHMENT ‘A’

****Attachment ‘A’ is not available in the following format.****