FILE NO.: SCT-5002-11
CITATION: 2013 SCTC 02
DATE: 20130604

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION Claimants	David Knoll, for the Claimants
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Sean Sass and Lauri Miller, for the Respondent
	HEARD: May 14, 2013

REASONS FOR DECISION

Honourable Johanne Mainville

I. INTRODUCTION

[1] The Claimants filed a *Notice of Application to admit documents* ("Application") seeking that three documents be admitted into evidence for the hearing of their claim.

[2] The documents at issue are the following:

- an email dated November 17, 2010 from Rita Dagenais, legal counsel, DIAND Legal Services Unit, Specific Claims Branch, to David Knoll, legal counsel for the Claimants;

- an email dated September 15, 2011 from Perry Robinson, legal counsel for the government of Canada, to David Knoll, legal counsel for the Claimants; and

- a letter dated June 14, 2011 from Patrick Borbey, Senior Assistant Deputy Minister, Government of Canada, to Chief Edward Henderson, Montreal Lake Cree Nation.

[3] In their Application, the Claimants seek the following remedies:

(...)

- That the letter from Rita Dagenais and email correspondence from Perry Robinson be admitted for Hearing purposes on the grounds (*sic*) that the issue these documents address goes to the question of a claim's validity and does not deal with negotiation matters protected by settlement privilege.

- That the letter from the (*sic*) Senior Assistant Deputy Minister to Chief Henderson, be admitted for Hearing purposes on the grounds (*sic*) that it is relevant for determining the question of Canada's position on whether a claim is valid based on a finding that Canada breached a fiduciary obligation by permitting the unlawful occupation of reserve land without proper authorization, which is a similar legal issue considered in the claim before the Tribunal;

- That with the admission of these documents the Tribunal consider ruling on the validity of the claim before it based on Canada's finding, initially on this claim, but subsequently in the Montreal Lake claim, that Canada was in breach of its fiduciary

duty by permitting the use and occupation of reserve land without lawful authority; more particularly, in breach for cutting timber on Little Red reserve without lawful authority;

- In the alternative, that the Tribunal take these documents into consideration when deciding the merits of the claim.

[4] The Respondent challenges the Application on grounds of settlement privilege and relevancy.

[5] The parties submitted written arguments, and an oral hearing was held by videoconference on May 14, 2013.

[6] In support of their Application, the Claimants filed an affidavit signed by their counsel, Mr. Knoll. At the beginning of the hearing, counsels for the parties submitted that, in order to avoid postponing the hearing of the Application, Mr. Knoll would withdraw his affidavit and a new affidavit with the same content would be filed by a representative of the Claimants. The Tribunal granted the request. Mr. Knoll's affidavit was withdrawn, and a new affidavit was signed on May 15, 2013 by Tom McKenzie, negotiator for the Claimants, served to the Respondent the same day and filed with the Registry on May 16, 2013.

[7] In his affidavit, Mr. McKenzie refers to four documents filed by the Claimants with their Reply:

- a letter dated December 15, 2006 from Michel Roy, Assistant Deputy Minister - Indian and Northern Affairs Canada, to Chief Tammy Cook-Searson;

- a resolution dated February 14, 2007 from the Lac La Ronge Indian Band Council regarding the letter of Michel Roy;

- a resolution dated March 20, 2007 from the Montreal Lake Cree Nation Council regarding the letter of Michel Roy; and

- a letter dated September 17, 2007, from David Knoll to Shelley Pickowicz, Portfolio Manager - Indian and Northern Affairs Canada.

[8] During the hearing, the Respondent asserted that these documents were also confidential and subject to settlement privilege. However, the Respondent agreed that the documents would be filed and could be considered by the Tribunal for the sole purpose of determining the Application. The same approach will be applied to the document entitled *Negotiation Protocol concerning the Lac La Ronge Indian Band and Montreal Lake Cree Nation with respect to Little Red Reserve 106A Alleged Timber Surrender and Sale Specific Claim* ("Negotiation Protocol") filed by the Respondent and to which Michelle Adkins, Director of Negotiations for the Specific Claims Branch of the Department of Aboriginal Affairs and Northern Development, refers to in her affidavit.

[9] For the reasons set out below, I dismiss the Application. I conclude that Ms. Dagenais and Mr. Robinson's letters are protected by settlement privilege and that Mr. Borbey's letter is irrelevant for the determination of the claim.

II. BACKGROUND AND CONTEXT

[10] On August 28, 2003, the Claimants jointly submitted a specific claim to the Specific Claims Branch - Indian and Northern Affairs Canada alleging that:

- the surrender in 1904 of the spruce timber on Little Red Reserve No.106A did not comply with the surrender provisions of the *Indian Act*;
- timber was unlawfully taken in trespass;
- there was mismanagement of the sale proceeds; and
- the sale proceeds were used to acquire supplies which should have been provided under Treaty No. 6.

[11] On December 15, 2006, Michel Roy, Assistant Deputy Minister - Indian and Northern Affairs Canada, notified the Claimants that their claim was accepted for negotiation because the Claimants had established that Canada has an outstanding lawful obligation owing to them as a result of its failure to comply with the surrender provisions of the 1886 *Indian Act* in respect of the 1904 surrender of timber on Little Red River Reserve No. 106A. Mr. Roy also informed the Claimants that Canada was ready to enter into negotiations respecting compensation for the loss

the Claimants incurred and the damages they suffered.

[12] Although Canada did not reach a finding on the other allegations raised in the Claimants' claim, it informed the Claimants that, in the event that a final settlement was reached, it would require a full, final and formal release on all aspects of the claim, with the exception of the assertion that sale proceeds were used to acquire supplies which should have been provided under Treaty No. 6. This last claim aspect was to be dealt with through a separate specific claim submission.

[13] Mr. Roy's letter is marked "without prejudice" on its first page and the last paragraph reads as follows:

> Finally, I wish to advise you that this letter is written on a "without prejudice" and should not be considered as an admission of fact or liability by the Crown. Technical defences such as limitation periods, strict rules of evidence or the law of laches, have not been considered in the review of your claim. However, in the event this claim becomes the subject of litigation, the government reserves the right to plead these and all other defences available to it. Please be advised, as well, that our government files are subject to the *Access to information Act and the Privacy Act*.

[14] Following the receipt of this letter, the parties exchanged correspondence about the scope of the Crown's liability. In this regard, Tom McKenzie states in his affidavit that *"prior to the commencement of negotiations, not during the negotiations, the Parties understood that there were other allegations that would be addressed"*. He refers to the resolutions of the Montreal Lake Cree Nation Council and the Lac La Ronge Indian Band Council, and Mr. Knoll's letter dated September 2007.

[15] The Lac La Ronge Indian Band Council's resolution reads as follows:

> **WHEREAS** the Lac la Ronge and Montreal Lake First Nations submitted a claim in May of 2003 alleging that the 1904 surrender of timber on Little Red Reserve 106A resulted in a breach by Canada of its lawfull obligations under Canada's *Specific Claims Policy*; and
>
> **WHEREAS** the First Nations alleged that the breach was the result of failure by Canada to comply with surrender provisions of the Indian Act, a breach of their fiduciary obligations in proceeding with the surrender contrary to provisions of the Indian Act and failure to properly administer the timber proceeds; and

> **WHEREAS** on December 15, 2006 Canada corresponded with the First Nations accepting the claim for negotiation on the basis that the Montreal Lake and the Lac La Ronge First Nations have established that Canada has a lawful obligation within the meaning of the *Specific Claims Policy*, with respect to 1904 Timber Surrender and Sale specific claims; and
>
> **WHEREAS** more particularly, Canada recognized they had an outstanding obligation owing to the First Nations "as a result of Canada's failure to comply with the surrender provision of the 1886 Indian Act, resulting in the illegal sale of timber from Indian reserve No 106A"; and
>
> **WHEREAS** the (*sic*) Canada referenced in their correspondence other allegations raised in the claim that were not addressed by Justice but required that any settlement required a "full, final and formal release on all aspects of the 1904 Timber Surrender and Sale specific claim", with the exception of the allegation that the "sale proceeds deposited into the First Nations' trust accounts were used to purchase supplies that should have been provided as benefits under Treaty 6"; and
>
> **WHEREAS** Canada requires a Band Council Resolution agreeing to enter into negotiations on the basis of the December 15, 2006 letter; and
>
> **NOW THEREFORE BE IT RESOLVED THAT:** the Lac La Ronge Indian Band is prepared to enter into negotiations on the basis stated in the letter from Canada dated December 15, 2006 which will result in a full and final settlement of the 1904 Timber Surrender and Sale specific claim based on the allegations raised.

[16] The Montreal Lake Cree Nation Council's resolution is to the same effect.

[17] In his letter dated September 17, 2007 to Indian and Northern Affairs Canada, Mr. Knoll writes the following:

> Re Clarification of BCR
>
> Further to our discussion on August 22, 2007 concerning the scope of the Band Council Resolutions from the Montreal Lake Cree First Nation, dated March 20, 2007, and the Lac La Ronge Indian Band, dated February 14, 2007, accepting the basis on which the negotiations will proceed. This is to clarify that the full and final settlement referred to in the Resolutions concerned all the allegations raised in the claim submission, with the exception that any settlement or release would not deal with the allegation mentioned in the claim, and referenced in Canada's acceptance letter dated December 15, 2006, with respect to the assertion that the settlement proceeds were wrongly used to provide supplies that should have been provided as benefits under Treaty 6. This allegation will be dealt with as a separate claim through supplementary submission.
>
> I trust this is satisfactory.

Yours truly.

[18] On January 23, 2008, the Claimants and Canada signed the Negotiation Protocol, which notably sets out the following:

> **1. GENERAL PRINCIPLES**
>
> 1.01 The Parties shall be guided by the following general principles in these negotiations:
>
> (a) All negotiations shall be conducted on a "without prejudice" basis without any admission of facts or liability and with a view to achieving the settlement of the First Nations' claim without the necessity of litigation. All information arising from or communications made in the course of negotiations shall be considered privileged and confidential.
>
> No information arising from or communication made in the course of negotiations may be tendered as evidence in any court or quasi-judicial proceeding or otherwise used outside of the negotiation process, unless:
>
> i. privilege or confidentiality is expressly waived by all of the Parties;
>
> ii. the information to be used originated from the party who wishes to use it outside of the negotiation process; or
>
> iii. the information to be used was generally known and accessible to the public.
>
> The parties acknowledge and agree that such admissions, information, and/or communications may, in any event, be subject to access to information and /or privacy legislation;
>
> (...)
>
> **3. NEGOTIATION PROCESS**
>
> The negotiation will proceed on the following protocol:
>
> (...)
>
> 3.04 Negotiation meetings:
>
> (a) may not be electronically recorded by any Party in the interest of fostering free and open "without prejudice" discussions unless mutually agreed to by the Parties;
>
> (b) (…)

(c) will be conducted on a "without prejudice" basis.

(...)

3.09 The Parties agree that nothing in this protocol is to be interpreted as legally binding or enforceable between the Parties and the Parties agree not to sue one another based on any obligation created or evidenced by this protocol or negotiation process except that all Parties shall be entitled to rely upon section 1.01(a) of this protocol in any action, claim, or proceeding of any kind, both before and after the termination of the Negotiation Protocol.

(...)

4. COMMUNICATION PLAN

(…)

4.02 The Parties acknowledge and agree that notwithstanding paragraph 1.01(a), they may advise the general public from time to time with respect to the general status of negotiations and the nature of the claim accepted for negotiation, but not information arising from or communications made in the course of negotiations except as otherwise provided for in this Negotiations (*sic*) Protocol.

(…).

[19] On November 17, 2010, during the course of negotiations, Ms. Dagenais forwarded electronically to Mr. Knoll a letter in response to his legal memos concerning the Claimants' allegations with regard to trespass and non-compliance with the *Indian Act* and the Timber Regulations. The object of her letter concerned the compensation methodology. Ms. Dagenais also wrote that the Crown breached its fiduciary duty by failing to impose and collect fines and that Canada should therefore compensate the First Nations for this breach.

[20] Almost a year later, also during the course of negotiations, Mr. Robinson provided electronically to Mr. Knoll a letter dated September 15, 2011, which gave the *"basis of Canada's legal position in regard to the payment of compensation for Canada's 'failure' to enforce the penalty provisions as found in s. 26 of the 1886 Indian Act as amended in 1890"*.

[21] In his letter, Mr. Robinson stated that the claim was accepted on the basis that there was no statutory compliance with the surrender provisions of the *Indian Act*, and that negotiations have proceeded on the basis that the First Nations will be compensated for the loss incurred and the damages they have suffered as a result of the unlawful surrender of timber interests in 1904.

He further explained the legal reasons why Canada was not liable for any compensation resulting from a failure to prosecute a lumber company.

[22] In disagreement with Canada's position, again during the course of negotiations, the Claimants produced Mr. Borbey's letter dated June 14, 2011. This document concerns another claim filed by the Montreal Lake Cree Nation that Canada accepted for negotiation. The claim disclosed an outstanding lawful obligation under the *Specific Claims Policy* for failure to remove individual trespassers and for allowing unlawful occupancy prior to a permit being issued, contrary to the provisions of the *Indian Act*.

[23] Finally, the Claimants and Canada were unable to agree on the compensation issue and negotiations failed.

III. POSITION OF THE PARTIES

[24] The Claimants submit the following:

- In 2007, all parties agreed to proceed with negotiations on the basis of the December 15, 2006 letter from Mr. Roy, with the understanding that any settlement would, at some point, address all allegations raised, except those related to the sale proceeds used to acquire supplies which should have been provided under Treaty No. 6.

- The documents in issue concern Canada's legal position with respect to liability and claim validity under the *Specific Claims Policy*, a matter that is not negotiable. Consequently, the three documents are not subject to the Negotiation Protocol or protected by settlement privilege.

- Mr. Borbey's document is Canada's validation letter regarding an unlawful trespass claim filed by the Montreal Lake Cree Nation. The facts in that claim and the present claim are different, but the Montreal Lake Cree Nation is the claimant in both claims, and the legal principles and arguments are the same. While the legal position taken by Canada under the *Specific Claims Policy* is not a judicial precedent, it is a precedent which may be taken into consideration under the Policy.

[25] For its part, the Respondent argues that the three documents are not admissible in

evidence because:

- The Claimants and Canada contemplated litigation at the time of the preparation of the three documents;
- The parties agreed not to disclose the documents in issue or any documents or communications produced during the course of settlement negotiations under the Negotiation Protocol signed by the parties;
- The documents in issue were created and produced for the purpose of furthering settlement discussions within the settlement negotiations framework;
- There is no exception to settlement privilege applicable to the present Application and there is no evidence of any waiver of privilege by Canada;
- The Negotiation Protocol governs the use and admissibility of Ms. Dagenais and Mr. Robinson's letters; and
- Mr. Borbey's document is also a communication produced during the course of settlement negotiations within the specific claims process. However, it was produced in relation to a separate specific claim and, therefore, it is not relevant for the determination of the present claim, in addition to being subject to settlement privilege.

[26] The Respondent also asserts that Canada has not taken any inconsistent position, because, as stated in the December 2006 letter, Canada was seeking a full, final and formal release on all aspects of the 1904 Timber Surrender and Sale specific claim, and Ms. Dagenais and Mr. Robinson's materials were produced in furtherance of this settlement.

IV. ISSUES

[27] The issues to address may be set out as follows:

a. Are the documents subject to settlement privilege?

b. If the documents are subject to settlement privilege, has the privilege been waived?

c. If the documents are not subject to settlement privilege, are they relevant to the determination of the merits of the claim?

V. ANALYSIS

[28] Subsection 13 (b) of the *Specific Claim Tribunal Act*, SC 2008, c 22 ("*SCT Act*") provides:

> **13.** (1) The Tribunal has, with respect to the (…) production and inspection of documents, (…) all the powers, rights and privileges that are vested in a superior court of record and may
>
> **(...)**
>
> (b) receive and accept any evidence (..), 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 law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence.
> **(...).**

[29] Thus, under section 13(1) b of the *SCT Act*, evidence may be admissible if it is not subject to privilege under the law of evidence. Where the Tribunal finds that the evidence is not subject to privilege, it may receive and accept that evidence whether or not that evidence or information would be admissible in a court of law. In exercising this discretion, the Tribunal may consider, but is not bound by, the rules of admissibility applicable in a court of law.

A. Are the documents subject to settlement privilege?

[30] It is settled law that settlement privilege exists to protect *bona fide* attempts to reach a settlement and to encourage parties to negotiate in a free and frank manner so that settlements will be more likely and costly litigation may be avoided: *Bellatrix Exploration Ltd v Penn West Petroleum Ltd.*, 2013 ABCA 10, 542 AR 83 [*Bellatrix*]; *Ross River Dena Council v Canada (AG)*, 2009 YKSC 4, [2009] 2 CNLR 334 [*Ross River*], aff'd 2009 YKCA 8, [2009] 3 CNLR 361; *Hansraj v Ao*, 2002 ABQB 385, 4 Alta LR (4^{th}) 124, varied on other grounds 2004 ABCA 223, 34 Alta LR (4^{th}) 199; *Middlekamp v Fraser Real Estate Board* (1992), 71 BCLR (2d) 276 (CA); *Myers v Dunphy*, 2005 NLTD 166, 251 Nfld & PEIR 157, aff'd 2007 NLCA 1, 262 Nfld & PEIR 173; Alan Bryant, Sidney Lederman & Michelle Fuerst, eds, *Sopinka, Lederman & Bryant: the Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada, 2009) at 1030 [*Bryant et al, "Law of Evidence"*].

[31] In *Globe and Mail v. Canada (AG)*, 2010 SCC 41, [2010] 2 SCR 592, LeBel J. on behalf of the Supreme Court of Canada, stated at para. 80 and 81:

> 80. (...) the common law has long recognized that, in order to encourage parties to resolve their disputes through settlement negotiations, those negotiations must remain confidential. Indeed the privilege dates back to at least the 1790s (...):
> (...)
> This approach has translated into a rule of evidence, whereby the contents and substance of settlement negotiations are, should a dispute ultimately proceed to trial, inadmissible (*Histed v. Law Society of Manitoba*, 2005 MBCA 106, 195 Man. R. (2d) 224, at para. 44; *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93, 198 D.L.R. (4th) 633). (...)
> [81] Maintaining the confidentiality of settlement negotiations is a public policy goal of the utmost importance, (...). However, it must be noted that these confidentiality undertakings bind only the parties to settlement negotiations and their agents. (...).

[32] The following criteria for settlement privilege set out by the case law are summarized as follows in *Bryant et al, "Law of Evidence", supra* para 30 at 1033:

> • A litigious dispute must be in existence or in contemplation;
>
> • The communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed;
>
> • The purpose of communication must be to attempt to effect a settlement.

[33] In *Bellatrix*, supra, the Alberta Court of Appeal held:

> **29.** As with most forms of privilege, there are exceptions to the rule. Some are universally accepted, while others are more controversial. Among the generally recognized exceptions are the following:
>
> (a) to prevent double recovery: *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 BCAC 54;
>
> (b) where the communications are unlawful, containing for example, threats or fraud;
>
> (c) to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement: *Comrie v. Comrie*, 2001 SKCA 33, 203 Sask R 164;
>
> (d) it is possible that the settlement posture of the parties can be relevant to costs. That is clearly the case with offers made under the Rules of Court, but also with respect to informal offers: *Mahe v. Boulianne*, 2010 ABCA 74 at paras 8 -10, 21 Alta LR (5th) 277; *Calderbank v. Claderbank*, [1975] 3 All ER 333 (CA).

[34] In the present case, it is not disputed that the onus for establishing the privilege is on the party asserting settlement privilege, which in this case is the Respondent.

[35] That being said, before determining whether the documents come within the tripartite test, preliminary comments are required.

[36] I do not accept the Claimant's argument that Ms. Dagenais and Mr. Robinson's letters at issue are not subject to the Negotiation Protocol because they concern Crown liability or claim validity for a breach under the *Specific Claims Policy*.

[37] On January 28, 2008, the parties entered into a Negotiation Protocol with the express intention that information arising from or communications made in the course of negotiations would be considered privileged and confidential.

[38] The Negotiation Protocol is very clear. Not only did the parties agree that the negotiations would be conducted on a without prejudice basis and without any admission of facts or liability, but they also agreed that no information arising from or communications made in the course of negotiations would be tendered as evidence in any court or quasi-judicial proceedings.

[39] It is clear from the evidentiary record that Ms. Dagenais and Mr. Robinson's letters were provided to the Claimants during the course of negotiations. They were produced in 2010 and 2011 while negotiations were still active. At that time, negotiations were subject to the Negotiation Protocol signed by the parties.

[40] Although Ms. Dagenais and Mr. Robinson's letters deal in part with Canada's legal position with respect to the claim, that matter was raised in the context of the on-going negotiations on the methodology and calculation of the compensation.

[41] I must now decide if the three documents fall within the ambit of settlement privilege.

1. A litigious dispute must be in existence or in contemplation

[42] It is established by case law that a litigious dispute must be in existence or at least contemplated for the settlement privilege to be recognized. It is not necessary that proceedings have commenced; a reasonable prospect of litigation will suffice (*Bryant et al, "Law of*

Evidence", supra para 30 at 1033 to 1036). Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both parties, would find it unlikely that the dispute will be resolved without it: *Ross River*, *supra* para 30 at para 42-43.

[43] The Crown submits that the Negotiation Protocol is evidence that the parties contemplated the prospect of litigation prior to and during the course of settlement negotiations. The Crown adds that the *Specific Claims Policy*, *SCT Act* and *SCT Rules of Procedure* all contemplate an adversarial process to resolve specific claims. The Crown submits that the Tribunal process can be considered to be a litigious process which is contemplated if settlement negotiations are unsuccessful.

[44] The Claimants rely notably on *Ross River*, *supra* para 30, and assert that the documents were not prepared in contemplation of litigation.

[45] In *Ross River, ibid*, analysing the impact of Canada's adoption of policy in regard to comprehensive land claim, Gower J. stated the following:

> **40.** In my view, it would be somewhat naive to suggest that the potential for litigation as an alternative to negotiation of the comprehensive land claims was not within the contemplations of the parties in 1982. Indeed, one of the central reasons giving rise to the federal government's land claims policy in 1973 was the Nisga'a litigation in the Calder case.
>
> **41.** However, the more meaningful question is whether the mere possibility of litigation, at that time, is sufficient to satisfy the first of the three criteria for establishing settlement privilege (...).

[46] Gower J. found that in the specific context of the comprehensive land claim by the Kaksa Dena Council in 1982, there was insufficient evidence tendered by Canada to establish that the dispute or potential dispute between the parties had truly become litigious at the time the expert report at issue was prepared and completed, or that it was then unlikely that the dispute would be resolved without litigation. For these reasons, Gower J. concluded that settlement privilege did not apply to the expert report at issue before him.

[47] The facts in this case are very different than those in *Ross River, ibid*. *Ross River* concerned an expert report and there was no mention in the decision that the parties were bound

by any negotiation protocol. Gower J. concluded that the expert report was not part of any settlement proposal.

[48] Although in this case there was no active litigation at the time the communications at issue were made, the evidentiary record establishes that the dispute between the parties was litigious or, at least, contemplated. The Negotiation Protocol in itself is evidence.

[49] I am satisfied that the first requirement of the test has been met.

2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed

[50] The second requirement of the test has also been met in regard to the letters from Ms. Dagenais and Mr. Robinson. These two communications were made with the express intention that they would not be disclosed to a court or during quasi-judicial proceedings in the event that negotiations failed. The Negotiation Protocol speaks for itself.

[51] However, Mr. Borbey's letter concerns another claim that is not subject to the Negotiation Protocol signed by the parties. This communication was not created for the purpose of furthering settlement discussions nor was it made with the express or implied intention that it would not be disclosed in the event that negotiations failed in this claim. Consequently, that letter does not meet the second requirement of the test.

3. The purpose of the communication must be to attempt to effect a settlement

[52] For the reasons explained above, the evidentiary record before me is in my view quite clear. Ms. Dagenais and Mr Robinson's letters were truly produced in furtherance of settlement. The third element of the test has been met in regard to these two letters.

B. If the documents are subject to settlement privilege, has the privilege been waived?

[53] In the present case, the Claimants have not provided any elements to establish that an exception to the settlement privilege should apply.

[54] Finally, there is no evidence of waiver of settlement privilege by Canada.

[55] I conclude that the Respondent has established settlement privilege over the letters from Ms. Dagenais and Mr. Robinson, but not over Mr. Borbey's letter.

C. Is Mr. Borbey's letter relevant to the determination of the merits of the claim, and if not, should it nevertheless be received and accepted?

[56] In *The Law of Evidence*, 6th ed, (Toronto: Irwin Law, 2011) at 24, the authors D. Paciocco and L. Struesser explain the relevancy of evidence as follows:

> Information can be admitted as evidence only where it is relevant to a material issue in the case.

[57] They add:

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. (*Ibid* at 27)

[58] The authors Bryant et al. (*Law of Evidence, supra* para 30 at 53), state:

> **2.38** A fact will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue.

[59] Referring to the Supreme Court of Canada's decision in *R v Morris*, [1983] 2 SCR 190, the authors wrote:

> **2.49** (...) Although McIntyre J. agreed that the probative value of this evidence was low, it was an error for the judge to confuse relevance with weight. (...) Without relevance the evidence can have no weight.» (*Bryant et al, "Law of Evidence", supra* para 30 at 56-57)

[60] What is the situation in this case?

[61] I find that Mr. Borbey's letter is irrelevant and, consequently, not admissible into evidence. Mr. Borbey's letter was produced in relation to another separate specific claim where the facts are different than those applicable to this claim.

[62] Despite this conclusion, should I exercise my discretion and receive and accept this document even though it does not meet the standard of relevance for admissibility in a court of law?

[63] It is not clear that the Tribunal's discretion to accept evidence that would not otherwise be admissible in a court of law extends to irrelevant evidence. However, I do not need to decide this issue since I would not exercise my discretion to accept the document even if I could.

[64] The letter should not be admitted into evidence because it will open a debate on another claim which is not before the Tribunal. This might oblige the Respondent as well as the Claimants to file additional evidence concerning the merits of this other claim. Engaging a debate on another claim will entail additional delays and increase costs for both parties.

[65] There is therefore no reason in this case for me to exercise my discretion and admit this document into evidence even though it does not meet the standard of relevance, since doing so will be counter-productive to the purposes of the *SCT Act*.

VI. FINDING

[66] I conclude that Ms. Dagenais and Mr. Robinson's letters are subject to settlement privilege and that Mr. Borbey's letter is irrelevant for the determination of this claim. Therefore the three documents will not be received and accepted into evidence.

[67] For these reasons, the Application is dismissed.

JOHANNE MAINVILLE

Honourable Johanne Mainville
Specific Claims Tribunal Canada

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20130604

File No.: SCT-5002-11

OTTAWA, ONTARIO June 4, 2013

PRESENT: Honourable Johanne Mainville

BETWEEN:

LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION

Claimants

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 Claimants LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION** As represented by David Knoll Knoll & Co. Law Corp.
AND TO:	**Counsel for the Respondent** As represented by Sean Sass and Lauri Miller Department of Justice