FILE NO.: SCT-4001-12 and SCT-4001-13
CITATION: 2015 SCTC 4
DATE: 20150629

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
WAYWAYSEECAPPO FIRST NATION Claimant (Respondent)	Earl C. Stevenson and Norman Boudreau, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Applicant)	Jeff Echols, for the Respondent (Applicant)
AND BETWEEN:	
GAMBLERS FIRST NATION Claimant (Respondent)	Stephen Pillipow and Adam Touet, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Applicant)	Jeff Echols, for the Respondent (Applicant)
	HEARD: April 27-28, 2015

REASONS ON APPLICATION

Honourable W.L. Whalen

ON THE APPLICATION BY HER MAJESTY THE QUEEN IN RIGHT OF CANADA to disallow the admission of certain documents into evidence at the hearing of validity phase of the Claim.

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

Cases Cited:

R v Mohan, [1994] 2 SCR 9, 114 DLR (4th) 419; *R v Sekhon*, 2014 SCC 15, [2014] 1 SCR 272; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2013 SCTC 6; *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385; *Sawridge Band v R*, 2005 FC 1501, [2006] 1 CNLR 385

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 13, 14.
Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 30.
Indian Act, SC 1880, c 28, s 37.

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I. GENERAL

[1] The Respondent in these Claims, Her Majesty the Queen in Right of Canada ("Crown") brings an Application, together with the required Application for Leave, to disallow the admission of two expert reports at the hearing of the validity phase of the claims filed by Waywayseecappo First Nation and Gamblers First Nation, respectively (SCT-4001-12 and SCT-4001-13, together, "Claims"). The Crown submits that the reports are neither relevant to any live issue in the Claims nor necessary to assist the Tribunal in adjudicating the Claims. The Respondent First Nations in this Application ("Waywayseecappo" and "Gamblers," and, together, "Claimants") object on the basis that the reports are both relevant and necessary.

[2] The Tribunal adjudicates this dispute pursuant to sub-section 13(1)(*b*) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], and rule 30 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*], which provide respectively as follows:

Under the *SCTA*:

> **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
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> …
>
> (*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;

Under the *Rules*:

> **30.** Except for an application referred to in the Act, subrule 60(2) or Part 11, leave of the Tribunal is required before an application can be made to the Tribunal.

II. CLAIMS BACKGROUND

[3] The Claims concern the surrender of a portion of Indian Reserve 62 ("IR 62"), now Lizard Point Reserve No. 62, and the subsequent creation of Indian Reserve 63 ("IR 63") in the

1880s in western Manitoba, near modern-day Russell.

[4] IR 62 was and still is reserve land of the Waywayseecappo First Nation. It was set apart in 1877, after Waywayseecappo had adhered to Treaty 4, and originally measured almost 72 square miles. In 1881, a portion of IR 62 was surrendered to the Crown, and IR 63 was created in 1883. A group of families who originally resided on IR 62 occupied IR 63 for a few years and were led by the Gambler.

[5] The Claimants have different accounts of these events. In its Claim, Waywayseecappo alleges that in 1879 the Crown had mistakenly sold part of IR 62 to a man named Joseph Sharman ("Sharman"), who was in 1880 given the option to select alternative land. Because Sharman then set about selecting highly valuable land, in 1881 the Crown was motivated to seek a surrender of those portions of IR 62 initially sold to Sharman. Waywayseecappo claims that the surrender was taken in violation of the surrender provisions of the *Indian Act*, SC 1880, c 28 [*Indian Act*, 1880], particularly by failing to satisfy the quorum requirements of a surrender meeting and failing to obtain the consent of all eligible band members. Waywayseecappo contends that the resulting surrender was thus illegal, breaching not only the *Indian Act*, 1880, but also Treaty 4 and the Crown's consequential fiduciary obligations, thereby grounding the Claim in sub-sections 14(1)(*b*) and (*d*) of the *SCTA*.

[6] In its Claim, Gamblers alleges that the surrender was motivated by requests by the Gambler, and an agreement between the Gambler, Waywayseecappo and the Crown to exchange a part of IR 62, which the Gambler was unsatisfied with, for a new reserve for him and his followers. In this account, the Crown's liability arises out of the creation of IR 63. Gamblers alleges that the Crown breached its fiduciary duty and its agreement with Gamblers by setting aside land that was insufficient in quality and quantity – i.e. less land was set aside in IR 63 than was taken from IR 62, and that land was of insufficient quality to support the community. Its Claim is grounded in sub-sections 14(1)(*a*) and (*c*) of the *SCTA*.

[7] Waywayseecappo disputes the contention that Gamblers was a separate Band at the time IR 63 was created. It argues that both IR 62 and IR 63 were established for the use and benefit of Waywayseecappo. It is Gamblers' position that IR 63 was created for it, as a separate Band. Canada takes the position that the surrender was for the benefit of Waywayseecappo, whose

interest in IR 62 was acknowledged, and that there was no separate Gambler's Band at the time.

[8] The Crown, for its part, denies all allegations of liability, claiming that the surrender of IR 62 was legal and valid, and that it made no agreement with Gamblers and owed them no duty regarding IR 63.

[9] By consent order of December 4, 2013, the Tribunal directed that these two Claims be heard together and "determined at the same time in a single or concurrent decisions of the Tribunal."

III. DOCUMENTS TENDERED FOR ADMISSION

[10] The Crown opposes the admission of an expert report and testimony from each Claimant: Dorothy A. Lockhart of Lockhart & Associates for Waywayseecappo, and Tara J. Smock on behalf of Joan Holmes & Associates Inc. for Gamblers. The Crown argues that neither report is relevant or necessary. The Claimants do not oppose the admission of each others' expert reports.

A. The Lockhart Report

[11] Dorothy A. Lockhart's report is entitled "1880 and 1881 Waywayseecappo Band Population Study" ("Lockhart Report"). This Report states that its objective is "to identify the members of the Waywayseecappo Band at the time of [the 1881 surrender], and to identify those that were of legal age to vote at that time." In order to do so and after laying out its purpose and methodology, Section C of the Report examines the characteristics of those listed on the 1880 and 1881 annuity paylists for Waywayseecappo, on the voters list at the so-called surrender meeting, and 'absentees.' It lists data about these individuals' ages, family members, and where they received their treaty annuity payments until 1893. The information is drawn directly from paylists, census data, and "tracing sheets."

[12] In making a surrender, the *Indian Act, 1880*, section 37 required *inter alia* that a meeting or council be called specifically for the purpose of voting on the surrender, and that a majority of the men above the age of 21 who live "on or near" the reserve and are "interested" in it consent to the surrender. The provisions in full are:

> **37.** No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions : –
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> 1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General : Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question :
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> 2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or Stipendiary Magistrate, by the Superintendent-General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.

[13] In Section D, the Report determines that at least 72 males were "of eligible age" to vote regarding the surrender of IR 62 in 1881 (at page 23). It lists the band affiliations of those mentioned on the voters list, identifying seven as Waywayseecappo men; five men and two boys of Gamblers; and others as followers of the Rattlesnake and Rolling River Bands. In some instances, the analysis derives the ages of individuals in 1881 from census, genealogical or other information documented at a later time. At page 25, the Report is explicit in not addressing the issue of who was living "on or near" the reserve or who was "interested in the reserve in question," although there is some comment on where large percentages of the Waywayseecappo and Gamblers Bands were located at the end of December 1881 (at page 26):

> It is of importance to note also, that this band still mainly relied on the hunt for survival during the years in question. While statistics have not been found for 1880 (or before then), the Sessional Paper reports for the year ending December 31, 1881, indicate that of the two hundred and twenty people listed as the population of the Waywayseecappo Band that year, on December 31, 1881, one hundred and ninety of them were hunting at Riding Mountain (90.5%), that Gambler had a population of one hundred and forty, and ninety of those were at Riding Mountain hunting (64.3%), and that the Mosquito (Sakimay) Band had one hundred and thirty people, and fifty-five of those were in the Fort Walsh area hunting (43.3%). The statistics for the years following do show a slight decrease in the number away hunting, as of December 31, but there was always a large percentage of the population away at that time.

> If winter was their time to go hunting, one must wonder how long they were normally gone for that purpose. If a meeting was called in 1881 to discuss rumours heard on the reserve, were there people absent who would have been there if it had been known that there was going to be a vote to surrender a part of the reserve? [footnotes omitted]

[14] The Report also summarizes historical documents regarding how the surrender meeting came about and what happened at the meeting. It offers no analysis or additional information regarding these documents.

[15] Because the attendance list at the surrender meeting listed just 23 men, the Lockhart Report concludes in Section E that the list of voters at the 1881 surrender "does not seem to be a complete listing of those who were eligible to vote."

[16] The final Section, F, is entitled "Paylist Overviews" and demonstrates changing band affiliations from 1880-81 in table form. It first lays out the 1880 paylist for Waywayseecappo, and then documents where those individuals appeared in 1881. These tables show that in 1881 Waywayseecappo membership was much reduced, with former members then split between Waywayseecappo, Gamblers, Mosquito, Sakimay and South Quill/Rolling River in 1881.

1. Positions of the Parties

[17] The Crown argues that the sole issue to which the Lockhart Report is relevant is whether the surrender meeting for IR 62 met the quorum requirements under the *Indian Act, 1880*. The Crown argues that this is no longer in dispute because of a recent stipulation it has made that:

> The available evidence does not demonstrate that the l881 surrender of Indian Reserve 62 complied with all of the requirements of sub-section 37(1) of the *Indian Act*, S.C. 1880; specifically the attendance at the surrender meeting by a majority of the male members of the band of the full age of twenty-one years, and a vote held in the presence of the Superintendent-General or an officer duly authorized. [Crown's Memorandum of Fact and Law ("Crown MOFL"), at para 20]

[18] In oral argument, the Crown clarified that the stipulation is not an admission of the validity of Waywayseecappo's Claim, and that it will continue to argue that the surrender was legal and valid. However, by stipulating that there is no evidence to support that there was a proper quorum, the facts to support the presence or absence of a quorum (i.e. the data presented in the Lockhart Report) are no longer relevant or necessary. It therefore follows that the Tribunal

no longer needs to make a finding on this point and would not require an expert report in any event as the historical documents do not necessitate expert analysis or presentation by an expert. Counsel should be quite able to paint the picture if necessary by referring to the documents revealed to them in the Lockhart Report. Also, according to the Crown, the Lockhart Report draws no inferences, except perhaps in respect of the quorum (which is irrelevant by virtue of the stipulation) and will not assist the Tribunal in resolving the issues before it. The Crown supported its argument by quoting the final sentence of the Summary Section of the Report at page 28:

> It is left for legal counsel to determine what majority was required to attend the surrender meeting in order to effect a lawful surrender, and whether there was a majority of that number present to vote for such a proposal.

[19] The Crown also argues that the Lockhart Report is unsustainable in evidence if one applies the cost-benefit analysis in *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*]. The effect of admitting it would be to greatly expand the scope of analysis, the submissions and the treatment of the issues by the Parties and the Tribunal. It will likely trigger the need for Canada to engage an expert to review the Report and possibly to generate a report in response. There will likely also be additional issues regarding challenges to expert qualifications, and as well the need for cross-examination. This work, cost and time can be avoided through appropriate composition and use of a Common Book of Documents, an Agreed Statement of Facts and the submissions of counsel with reference to the now-available historical record. The costs of admitting the Report into evidence would therefore be high, requiring the Parties to address the Report in full, with all the attendant delays and costs.

[20] The Claimant Waywayseecappo concedes that the Report was "primarily commissioned" to determine if the requirements of the *Indian Act, 1880* were met in the surrender of IR 62 (Waywayseecappo's Memorandum of Fact and Law ("Waywayseecappo's MOFL"), at para 2). However, even if the main focus of the Report is no longer at issue, Waywayseecappo argues that the information presented in the Report is relevant and necessary because it provides context and the basis for analyzing the relationship between the communities of Waywayseecappo, Gamblers and others. Because the Crown has not articulated its argument regarding the legality of the surrender, Waywayseecappo argues that it needs to have the information in the Report available to use when that argument is presented. Finally, Waywayseecappo argues that the

documents cited in the Report, which are not discursive but rather consist mostly of lists and charts, do not speak for themselves, and require expert interpretation. Waywayseecappo also characterizes the Report as "an opinion about the relevant historical members of [Waywayseecappo] and its sister communities including the Gamblers group" and alleges that it "provides information with respect to outlining how band membership was employed by" Canada regarding these communities (Waywayseecappo's MOFL, at paras 13, 23). In other words, it provides useful information about the relationship between the Claimants at the relevant time, although Ms. Lockhart has not yet articulated an interpretation or opinion about that relationship.

[21] Although Gamblers did not object to the admission of the Lockhart Report, it did make an interesting observation. If the Tribunal comes to the conclusion that Gamblers had not separated from Waywayseecappo, then the inclusion of eligible voters from Gamblers will necessarily arise in the surrender quorum issue. Both expert Reports deal with the separate histories of the two Bands, albeit from different perspectives and based on different sources. There were also sister communities, including the Sakimay, South Quill/Rolling River and Rattlesnake Bands that must be distinguished from the data in order to focus on the Waywayseecappo and Gamblers communities. This requires expert assistance in presenting and reading the underlying data.

B. The Holmes Report

[22] The Joan Holmes report is entitled "Report on the 1892 and 1898 Surrenders of Land in Gambler Indian Reserve No. 63" ("Holmes Report"). Contrary to its title, the Report provides a detailed overview of government interactions with and the movements of the Gambler, his followers and their descendents for over a century, from the negotiation of Treaty 4 in 1874 through the creation of IR 62 and 63 in the 1880s through the various surrenders of IR 63, including the administration of these lands and Indian monies. It provides a detailed overview of the creation and surrender of IR 63, illustrates how the government characterized and administered Gamblers and to a certain extent Waywayseecappo, and indirectly tracks the movement of the Gambler and his original followers. It does so by piecing together mostly written records from government archives into a clear narrative in which the documents tell the story.

[23] The Holmes Report also deals with the at-issue surrender itself, reproducing the text of the surrender document, which indicated that ten "…Principal Men of The Silver Creek Band of Indians resident on our Reserve at Silver Creek in the Province of Manitoba and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled" signed the document. The Report included approximately 500 documents and about 30 maps as attachments.

1. Positions of the Parties

[24] The Crown argues that to the extent it concerns events outside of the surrender of IR 62 and the creation of IR 63, the Report is largely irrelevant. The Crown's submission is that the question to be determined at the validity phase is what happened in a legal sense in relation to the Waywayseecappo and Gamblers Bands at the time that IR 62 was surrendered and IR 63 was created. The Crown therefore maintains that the period of time following the creation of IR 63 cannot be determinative of or bear upon the legal analysis required to adjudicate the Claims. As the bulk of the Holmes Report deals with many years after this time period, most of it is not relevant to the issues before the Tribunal or the remedy sought. For the same reason, dealings with IR 63 over the years after its creation is not determinative of whether there was a Band at the time of the surrender and whether that Band was to receive the reserve.

[25] The Crown also argues that the Holmes Report is not necessary, as it merely recites the historical record without providing insight or context. In oral argument, the Crown characterized it as an intentionally non-analytic representation of archival historical documents. The Crown asserts that the Report's covering affidavit acknowledges as much when it describes the Report as a presentation of factual information, "written in neutral language and includes considerable quoting of the historical documents, *allowing the documents to speak for themselves*" (emphasis added). The Crown argues that the Report renders no opinions or inferences, and as such, it provides no insight or context to assist the Tribunal in understanding the archival documents referred to and quoted. Those documents remain available to the Parties and to the Tribunal. They can be included in the Common Book of Documents for counsel to use to tell their client's story and to assist the Tribunal. Counsel can tell the story just as well as the author of the Report.

[26] Finally, the Crown argues that any probative value of the Report is outweighed by the

impact on the trial process of having to address the 166-page Report. It is argued that the admission of the Holmes Report will greatly expand the scope of analysis, submissions and the treatment of the subject by the Parties and the Tribunal. It is thus likely to trigger the need for Canada to engage an expert of its own to conduct further research and generate a responding report. Waywayseecappo may also have to retain an expert to generate a response. Expert qualifications may also be in dispute. Examination and cross-examination of expert witnesses would also become necessary, thereby adding substantial time, complexity, and expense to the hearing process. On the other hand, the Holmes Report's underlying documents are available and do not require an expert to present or read them. They can be placed in the Common Book of Documents. The Tribunal does not require expert assistance in understanding facts that can be read and are readily available from the documents themselves.

[27] Gamblers argues that the initial and continued existence of the Gamblers First Nation as a Band and the creation of IR 63 for its benefit is at issue in this dispute, and that the Report on the Gamblers' history as a Band and its history and relationship with Waywayseecappo is clearly relevant to this issue. Gamblers cites portions of Waywayseecappo's Declaration of Claim that assert that Gamblers was a part of the Waywayseecappo Band and that IR 63 belongs to Waywayseecappo, and points to Issue 4 in the Agreed Statement of Issues – Validity Phase, which asks for which band "was [IR 63] surveyed and set apart?"

[28] Regarding the Report's necessity, Gamblers argues that the Report is the product of research analysis with interpretation and evaluation of archival documentation by an individual with extensive experience and understanding of research methodologies, best practices for claims research, and familiarity with government policy concerning compliance with the *Indian Act, 1880* in taking surrenders. An expert is required to analyze the historical documents for inconsistencies, and to provide a contextual framework. It is because of the expert's experience and expertise that the expert was able to present the historical record in a way that let the documents "speak for themselves."

[29] Gamblers also pointed to the expert's dealing with apparently inconsistent documents to overcome resulting confusion and to reconcile these seeming differences. This required the insight and competence of an expert who was familiar with federal government processes,

policies and history. In fact, the expert expresses an opinion in these instances.

[30] Finally, Gamblers argues that, rather than extending the adjudication process, the admission of the Holmes Report would likely limit it, by introducing the underlying documents and evidence in an organized and holistic way. Should the task of introducing the evidence be left to counsel, the process of tendering the documents for admission as evidence, determining their relevance and evaluating their meaning on a document-by-document basis would greatly increase the duration and complexity of a hearing on validity.

IV. THE LAW

[31] The Parties were not in dispute in respect of the legal principles and tests to be applied. For this reason, they need only be referred to in a summary fashion.

[32] The test applicable to the admissibility of expert evidence is laid out in *Mohan*, and *R v Sekhon*, 2014 SCC 15, [2014] 1 SCR 272: the evidence must be relevant, necessary, not subject to an exclusionary rule, and rendered by a properly qualified expert. The Crown limited its argument to the criteria of relevance and necessity, reserving its right to challenge the qualifications of both experts should the Reports be admitted. None of the Parties suggested that an exclusionary rule was at play here and I concur.

[33] Relevance is a threshold requirement for the admission of expert evidence. Logical relevance (if the evidence is "so related to a fact in issue that it tends to establish it") renders evidence *prima facie* admissible. This achieved, a cost-benefit analysis of admission must be also considered (*Mohan* at 20-1).

[34] Regarding necessity, an expert report must provide "information which is likely to be outside the experience and knowledge of a judge or jury" (*Mohan*, at 23, citing Dickson J., as he then was, in *R v Abbey*, [1982] 2 SCR 24 [Abbey], at 42); *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2013 SCTC 6 [*Beardy's*], at para 24). The subject matter of expert evidence is generally technical in nature, "such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge" (*Mohan*, at 23, citing *Kelliher (Village of) v Smith*, [1931] SCR 672, at 684). The expert's function is to provide a "ready-made inference which the judge and jury, due to the technical

nature of the facts, are unable to formulate" (*Mohan*, at 23, citing *Abbey*, at 42) (emphasis added). In *Beardy's*, this Tribunal found that an "exposition of the political and legislative history" providing historical context was outside the experience of the Tribunal as a trier of fact, and admitted portions of a report on this basis (at para 25).

[35] With respect to applying *Mohan*, Gamblers also urges the Tribunal to adopt and apply the principle stated by Dickson J. (as he then was) in *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385, at 797, cited by the Federal Court of Canada in *Sawridge Band v R*, 2005 FC 1501, [2006] 1 CNLR 385, at para 48, that where there is a question of weighing evidence, the court should err on the side of inclusion and admissibility rather than exclusion, unless a very clear ground of policy or law dictates exclusion. Gamblers submits that no such clear ground of policy or law exists here.

V. LEGAL ANALYSIS AND CONCLUSIONS

A. The Lockhart Report

[36] The Crown's key submission on the inadmissibility of the Lockhart Report relates to the Crown's recent stipulation in respect of the surrender quorum requirement. The stipulation is very carefully worded, so much so that it was difficult to understand precisely what was being stipulated and the consequence. There was considerable discussion at the oral hearing of the Application on this question. Ultimately, the Crown asserted that it wanted to remove from contention the issue of whether the surrender complied with the *Indian Act, 1880* surrender provisions. However, in the wording of the stipulation itself, the Crown simply concedes that there is *no available evidence* to support that there was compliance with those provisions. The Crown also takes the position that the absence of such evidence does not invalidate the surrender. In effect, by the wording of the stipulation, the Crown concedes that it cannot confirm that the technical quorum requirements for surrender were met. There is no evidence one way or the other, although that does not necessarily mean that the surrender was invalid, illegal or improper.

[37] However, it seems clear that Waywayseecappo's position is that there *is* evidence that the quorum process was not proper and that evidence can be adduced through the Lockhart Report by which it can be established that nowhere near a majority of male members of the Band over the age of 21 years was at the surrender meeting to participate at the vote. There is a great

difference between an absence of evidence and positive evidence that, if accepted, may prove the point. Where there is an absence of evidence, the required circumstances may or may not have occurred. But through the Lockhart Report, Waywayseecappo hopes to establish positively that the requirements were not met.

[38] The proponent of the position that the surrender was fundamentally invalid because of the indicated deficiencies bears the onus of proof. As the proponent, Waywayseecappo must establish the evidence to support its position. I conclude that a position that there is proof positive of the deficiency is very different than there being an absence of evidence one way or the other. This is the very basis of the dispute. I see no reason why Waywayseecappo should not be able to present its evidence in support of its position. It has made an allegation relevant to the question in dispute. It is entitled to prove the point if it can. The Lockhart Report appears to present information directly on the question of whether there was or could have been a quorum, and as such, it is relevant.

[39] The expert does not herself express an opinion or make other direct comment on compliance with the requirements of section 37 of the *Indian Act, 1880*. The Crown submits that the Report is deficient in this respect and that the information it presents could be provided by counsel, so that the Report offers little value to the Tribunal. I do not agree.

[40] Firstly, the effect of a lack of quorum at a surrender meeting is a legal question that I would not expect an archivist to deal with. In commenting that it was for counsel to address the quorum required and whether it had been established, Ms. Lockhart seemed aware of the distinction. This expert's task was to present researched information, which counsel could appropriately relate to the legal statutory requirement. This approach is entirely appropriate.

[41] Having reviewed the Report, I also conclude that it is based on sources of information that are well outside the experience of a Tribunal judge. The Tribunal will require assistance in understanding the various sources accessed, their reliability, the nature of the information available from these sources, and their force in corroborating or piecing together sufficiently reliable data. The Report deals with variations in the spelling of names and conflicting dates of birth for individuals. It is also clear from the Report that there are complexities in interpreting the various sources, and that this may require the assistance of someone with experience and

knowledge about those sources and how they were constructed and used.

[42] I cannot see how counsel could begin to present the information contained in this Report. The information has been compiled in many instances from multiple tables, reports, lists and other materials. If counsel had to present each table, list, report, etc. and then derive the information from that material, I cannot see how he or she could be more efficient than an expert, who has a close working understanding of the sources and is accustomed to dealing with them. Besides, if counsel provided that information, he or she would in effect be testifying because the Crown is not conceding the accuracy or reliability of the information, and opposes it being adduced in report form. It is improper for counsel to testify and be an advocate at the same time. Furthermore, I do not see how counsel could answer questions that the Tribunal may have about the various sources themselves, if such questions should arise. Counsel could not be expected to have that expertise, and might well face challenges on that basis from opposing counsel.

[43] For these reasons, I conclude that Waywayseecappo is entitled to allege that there is reliable proof that the quorum requirements were *not* met (rather than accept that there was no evidence one way or the other). On its face, it seems reasonable to do so by defining the Band's composition at the relevant time and comparing it with the names of those who were in fact recorded as being present at the surrender meeting. From this perspective, I conclude that the Lockhart Report is both relevant and necessary.

[44] No doubt, if the Lockhart Report is admitted into evidence at the validity hearing, time will be required to establish the expert's qualifications and to define her area of expertise. If qualified, the expert will require time to explain the basis of her research, its significance and reliability. The expert clearly reaches certain conclusions (i.e. opinions) on the number of members in the Waywayseecappo Band at the time of surrender, and their ages. There is even some opinion as to where much of the Band was located geographically at the relevant time. Counsel will obviously use this information to make submissions on whether a majority of the Band was present in view of the other information available from the surrender meeting. Cross-examination will require time, and the Crown and Gamblers may even have to undertake their own research to check the Lockhart Report, or respond to it. However, that is the nature of

litigation, especially where significant compensation may be at stake for a claimant. No one argued that the allegation of insufficient quorum was improper, that the Report was frivolous or that its underlying information was somehow improper or inadequate to the task undertaken by its author.

[45] From a cost-benefit perspective, I am not persuaded that there is any better way of presenting and interpreting the material underlying the Report. I am satisfied that it is specialized information from sources unknown to the Tribunal. Finding, analyzing and presenting the material required considerable expertise. Having the tables, lists, reports and other sources identified would not be sufficient to expedite its presentation and analysis by counsel, even if counsel was able to do it, which I have concluded is not advantageous or appropriate.

[46] The Report provides analysis not only of the Waywayseecappo Band but also of the other Bands mentioned, including Gamblers. It is possible that the raw data underlying the Report may also be the basis for developing information as to the relationship between these groups. At this point, the Report expresses no opinion in that respect. In any event, an explicit opinion would have to be developed, produced and presented if that was a direction in which Waywayseecappo or any of the other Parties wanted to go. We are not at that stage yet, so I draw no conclusion in that regard.

B. The Holmes Report

[47] When one considers the Crown's perspective in this proceeding, its position on the admissibility of the Holmes Report is in many respects understandable and reasonable. In the standard case, where it is a question of dispute between one First Nation claimant and the Crown, the "facts" are gleaned from archived documents that are put into a Common Book of Documents and summarized to the extent possible in an Agreed Statement of Facts. Although the documents are usually researched and delivered by an expert archivist, perhaps with interpretive advice to whoever obtained the research, it is not usually necessary to have the documents presented or commented upon by the expert. Counsel are able to identify the area of disagreement and extrapolate submissions from the common body of documents that support their position. Otherwise, they can agree to a history supported on the whole by the larger body of documents produced and express it in an Agreed Statement of Facts.

[48] However, that is not the dynamic here. The complication in this case is that there are two First Nation Claimants, whose positions are at odds. In fact, each of the three Parties is in some major disagreement with the other, as earlier described. Most importantly, the two First Nations are in basic disagreement as to the underlying purpose and nature of the surrender. Waywayseecappo says that the surrender was prompted by some ulterior Crown motive at a time when Gamblers was part of the Waywayseecappo Band and was not a Band on its own. The Crown seems to agree with this position. On the other hand, Gamblers maintains that the surrender was by agreement with Waywayseecappo and the Crown as a means of obtaining a reserve for its own separate Band, and that it was a Band at the time.

[49] Gamblers commissioned the Holmes Report, which it proposes to adduce in support of its position. Because Gamblers asserts its separate Band status at the time IR 63 was created and alleges an underlying purpose for the surrender of IR 62 contrary to the position of Waywayseecappo and the Crown, it bears the burden of proving its assertions on a civil standard. There is no question but that IR 62 was held for the benefit of Waywayseecappo at the time of the surrender. However, Gamblers' allegation was that the surrender was by agreement in order to establish a reserve for its separate Band.

[50] While it is true that the documents underlying the Report may be organized, presented and interpreted by Gamblers' counsel using the Holmes Report as a road map, I accept that it is not that simple. In conducting its research, the expert selected, ordered, analyzed and interpreted 500 documents and 30 maps to tell the story of the Gambler community and the historical dealings in respect of IR 62 and IR 63. This is no small feat and is one that is, I am sure, well outside the experience of the Tribunal or counsel. The very ordering of the documents and the author's emphasis of certain parts of those documents requires special expertise. In Beardy's (at 10), this Tribunal determined that information by way of an expert report in the form of political and legislative history was outside the experience and knowledge of a judge and therefore admissible as expert evidence. *Prima facie* the Holmes Report would seem to fall under this rubric.

[51] The Crown's principal argument is that the Report deals with events that had occurred well beyond the time of the dealings immediately surrounding the surrender meeting in February

1881 and the subsequent orders-in-council approving the surrender and that eventually created IR 63. Indeed, the Crown estimated that 89% of the Report deals with periods of time and historical documentary records that did not relate to the interactions of Waywayseecappo, Gamblers and the Crown at the time of the subject surrender. The Crown argued that because this 89% of the Report did not deal with the critical time period and events of the surrender, it was therefore, and to that extent, irrelevant to the events in dispute and thus also unnecessary to the Tribunal's enquiry. Interactions between the Claimants in the years before and after the critical time period of the subject surrender were irrelevant.

[52] While the dispute does indeed ultimately focus on the events and related interactions of the surrender, it is more complicated than whether there was compliance with the technical and equitable requirements of the surrender. As discussed, there is considerable dispute as to the purpose of the surrender, whether it was for the benefit of Gamblers, whether Gamblers was a separate Band, or whether it was part of the Waywayseecappo Band. I am satisfied that a review of the Claimant communities and the federal government's administration of them over the span of years is relevant to determining the government's understanding and intentions in respect of the subject lands, and also whether or not the communities were separate entities.

[53] An examination of Gamblers' movements and dealings with IR 63 is also relevant to the matter at hand. It is reasonable to review Gamblers' movements before and after the surrender as a means of assessing its relationship with Waywayseecappo and in particular whether it operated as a separate community acknowledged by Waywayseecappo. The nature and consistency of the relationship in the years before and after the surrender may be an effective way to shed light on the character of the relationship, how they regarded each other and therefore the question of separate status. Did they act as though they were separate Bands over the years or from some identifiable point in time? Similarly, the way in which the government administered the two communities and reserves, including who lived where, who was involved in subsequent surrenders of parts of IR 63, and who received the proceeds of sales of parts of IR 63 may also be illuminative of each group's status and the purpose of the 1881 surrender that resulted in the creation of IR 63.

[54] For these reasons, I conclude that the nature and range of the Holmes Report is relevant

to the enquiry of why IR 63 was created. The Report may therefore be critical to Gamblers in meeting its burden of proof on questions of Band status and the purpose of the surrender. No alternative method has been suggested, and as the Crown's stipulation above admits, there are gaps in the evidence of the actual surrender process. I am therefore satisfied that the Holmes Report meets the requisite degree of relevance and necessity to be admitted into evidence at the validity hearing of the Claims.

[55] The Crown also submitted that the Report did not pass the cost-benefit test in *Mohan*, arguing that the expert herself admitted that the report was written in "neutral language" and that the "documents…speak for themselves" and do not require expert analysis. Permitting an expert to testify on the basis of the Report would, as in the case of the Lockhart Report, complicate and add cost to the proceeding by requiring the other Parties to retain experts to do further research and to respond. It would be sufficient and more efficient that counsel present the documents identified by the expert and refer to them in relating this Claimant's position.

[56] As in the case of the Lockhart Report, I am not convinced that counsel could present the "story" offered up by the Holmes documents as efficiently as the author of the Report, who is also more familiar with government policies and record keeping practices over the relevant time period. There is also the problem that counsel might find himself or herself in the position of having to give evidence and express an opinion on it.

[57] Finally, none of the other Parties have agreed with the "story" purportedly told by the Holmes Report and its underlying documents, or that the particular documents selected and their order are determinative. In my view, the Report's author's reference to "neutral language" is acknowledgement that an expert's role is not one of advocacy. The reference to allowing the documents "to speak for themselves" is a reference to the author's method of reporting. After reading the Report, I conclude that the author's method was to state a course of events or circumstances, then refer to a particular part of a document in support of the proposition, statement or conclusion just articulated. The author presents her own point of view of the "story" then justifies it by reference to one or more documents. The author is not just paraphrasing documents. She is presenting a studied analysis that in its telling is an opinion.

[58] I am not therefore convinced that the Holmes Report falls short on the cost-benefit test.

It may be that the other Parties will have to conduct research and present responding reports (although that remains to be seen). The admission of the Holmes Report and the presentation of its author as an expert witness at the validity hearing (if she is qualified) will require time. However, it is a fair manner of proceeding if Gamblers is to be afforded the opportunity of proving its allegations of purpose and status. I see no alternative.

[59] If in the end, the Report and the witness' testimony are of limited or no consequence, the Tribunal will assign appropriate evidentiary weight, and may deal with serious shortcomings through the awarding of costs. For these reasons and at this stage in the proceedings, I am satisfied that the Holmes Report meets the tests of relevancy, necessity and cost-benefit.

VI. ORDER

[60] In summary, leave is granted to the Crown to bring this Application and the Claimants may enter the Lockhart and Holmes Reports into evidence. Whether and on what topics the authors of the Lockhart or Holmes Reports may testify before the Tribunal will be subject to their respective qualification as experts.

W.L. WHALEN

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20150629

File No.: SCT-4001-12 and SCT-4001-13

OTTAWA, ONTARIO June, 29 2015

PRESENT: Honourable W.L. Whalen

BETWEEN:

WAYWAYSEECAPPO FIRST NATION

Claimant (Respondent)

and

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

Respondent (Applicant)

AND BETWEEN:

GAMBLERS FIRST NATION

Claimant (Respondent)

and

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

Respondent (Applicant)

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