FILE NO.: SCT-4001-14
CITATION: 2017 SCTC 2
DATE: 20170621

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

SAGKEENG FIRST NATION

Claimant (Respondent)

Candice S. Metallic and Ryan M. Lake, 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)

Lauri M. Miller, for the Respondent (Applicant)

HEARD: via written submissions

REASONS ON APPLICATION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Sawridge Band v Canada, 2005 FC 1501, [2006] 1 CNLR 385; *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385; *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419; *R v Abbey*, [1982] 2 SCR 24, 138 DLR (3d) 202; *Squamish Indian Band v Canada* (1998), 144 FTR 106 (FCTD); *Samson Indian Nation and Band v Canada*, 199 FTR 125 (FCTD), [2001] 2 CNLR 353.

Headnote:

Aboriginal Law – Specific Claim – Admissibility of Evidence – Report

The Sagkeeng First Nation (Claimant), formerly the Fort Alexander Band No. 262, claims that it did not receive all of the reserve land to which it was entitled under Treaty 1. The Claimant says that, despite an oral promise by the Crown to exclude lots privately held by the members of the Fort Alexander Band No. 262 from the calculation of the Band's entitlement to reserve land, they were included as part of the acreage calculation.

The Claimant also bases its Claim on the alleged failure of the Crown to account for all recognized members of the Band in making the acreage calculation of 160 acres for each family of five.

The Respondent accepts that the Crown made this oral promise. The Respondent contests the Claimant's calculations regarding the population of the First Nation at the Date of First Survey and the Adjusted Date of First Survey and the number of acres that were to be set aside for the reserve.

The Respondent seeks an order that an Expert Report authored by Paul Chartrand be found inadmissible in evidence on the ground that it contains legal and political argument. Mr. Chartrand's qualifications are not challenged on the Application.

Held: The Application is allowed, in part.

The Chartrand Report is relevant to the Claim, as it addresses the question of whether "Half-Breed" private land holders were members of the Fort Alexander Band No. 262.

The Chartrand Report is necessary for adjudication of the Claim as it provides relevant information and opinion and historical context for the Tribunal.

Portions of the Chartrand Report contain legal argument or political statements and are to that extent inadmissible.

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I. ISSUES RAISED IN THE SAGKEENG FIRST NATION CLAIM

[1] The Sagkeeng First Nation (Claimant), formerly the Fort Alexander Band No. 262, claims that the Crown made an oral promise to exclude lots privately held by the members of the Band from the calculation of the Band's entitlement to reserve land under Treaty 1. The Claimant says that these lots should have been deducted from the calculation of the reserve land allocation, but were not.

[2] The Respondent acknowledges that the Crown made this oral promise.

[3] An issue that arises in the context of the quantum of private land holdings to be deducted from Fort Alexander's reserve land allocation is the status of the so called "Half-Breed" settlers with private land holdings in what became the Fort Alexander reserve.

[4] The Claimant also alleges that Canada's recording of the population of the Band at the Date of First Survey and the Adjusted Date of First Survey (the dates said to be those on which the number of members were to be counted) was not accurate. It claims that the Fort Alexander Band No. 262 had an entitlement population of 574 members comprised of 475 Band members at the Date of First Survey plus 99 members who were eligible to be included. The Respondent contests this count and says there were 508 members as of the Adjusted Date of First Survey.

II. APPLICATION ON ADMISSIBILITY OF THE REPORT

[5] The Respondent (Applicant) seeks an Order:

- granting leave for the Application;
- that the Expert Report authored by Paul Chartrand is not admissible in evidence; or alternatively,
- that the Report be revised before being introduced in evidence to remove any content found inadmissible.

[6] The Respondent argues that the Report, or parts of it, are legal and political argument. The Respondent also contends that the Chartrand Report does not assist the Tribunal in

determining the matter before it and it is therefore inadmissible.

[7] The Respondent's objection to the Report is stated generally. It is not a paragraph by paragraph exposition of grounds for inadmissibility.

[8] The Claimant argues that the Report provides necessary political and legal historical context that will aid the Tribunal in arriving at a thorough understanding of the issues raised by the Claim.

[9] The Claimant argues that the Report is entirely admissible as it provides specialized knowledge and information regarding the socio-political relations among "Indians," "Half-Breeds" and Métis and related Crown policies in the time frame relevant to the Claim.

[10] In the alternative, the Claimant requests that the Tribunal identify any inadmissible parts of the Report.

[11] Mr. Chartrand emphasizes that he employs the term "Half-Breed" due to its usage at the time of a survey prepared in 1874 to describe persons of mixed Indigenous and European ancestry. He explains that the term reflected the European attitude of superiority that prevailed in the 19th century and that the term would, except in the context of professional discourse on historical matters, be offensive if used today.

[12] The first part of the Report addresses, among others, these questions:

- Whether any of the persons designated by Canada as "Half-Breeds" at the time of the first survey of the Fort Alexander Band's reserve were members of the Treaty community that became the Fort Alexander Band No. 262.

- Whether a person considered a "Half-Breed" would, in the culture of the people of the Band, be considered a member.

- Whether Canada deferred to the practice of the Band in regard to membership.

- Whether, given the location of the Band and the date at which its members were counted, there was a differentiation between "Half-Breed" and "Indian" that applied in relation to the calculation of the acreage of reserves.

[13] The first part of the Report, from paragraphs 1 to 101, addresses the matter of the oral promise in its historical context. It is plainly relevant to the issues in the Claim and, with the exceptions discussed below, admissible.

[14] The second part of the Report, paragraphs 102–150, focuses more on the purposes and intention behind government policy towards the so-called "Half-Breeds" and in particular actions taken to set aside lands for "Half-Breeds" and Métis.

[15] Paragraphs 151–167 of the Report contain the Conclusions.

III. APPLICABLE LAW

A. Inclusion of Evidence

[16] In *Sawridge Band v Canada*, 2005 FC 1501 at para 48, [2006] 1 CNLR 385, the Federal Court Trial Division (FCTD) referred to an "inclusionary policy" in the principles of the law of evidence, suggesting that if an error is to be made in the admission of evidence it should be made on the side of inclusion. The FCTD quoted from *R v Corbett*, [1988] 1 SCR 670 at para 50, 41 CCC (3d) 385, as follows:

> I agree with my colleague, La Forest J., that basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight, or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

B. Test for Admissibility of Evidence: *Mohan*

[17] The test for admissibility of evidence is set out in the Supreme Court of Canada decision

R v Mohan, [1994] 2 SCR 9 at para 17, 114 DLR (4th) 419 [*Mohan*]:

> 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.

[18] The application of criteria (a) and (b) are discussed below.

1. Relevance

[19] In the *Mohan* decision, the Supreme Court of Canada described relevance as follows (at para 18):

> Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[20] The bulk of the Report is relevant to the Claim, as it is related to the issue of whether "Half-Breed" private land holders were members of the Fort Alexander Band No. 262.

2. Necessity

[21] In *Mohan*, the Supreme Court of Canada quoted from *R v Abbey*, [1982] 2 SCR 24 at 42, 138 DLR (3d) 202, as follows:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" [citation omitted]

[22] The Report describes the ethnic diversity of groups present in the region at the material time and thus provides historical context on matters beyond the knowledge of the Tribunal. However, the relevance of the discussion of the Métis and the distinction between "Half-Breeds" and Métis is not entirely clear as the issues that arise on the pleadings do not raise the question whether Métis had or should have been counted for purposes of the calculation of reserve acreage. The admissibility of this material is discussed below.

a) Legal Argument

[23] Legal argument in an expert report may be found inadmissible as it does not assist the Court as trier of fact.

[24] In *Squamish Indian Band v Canada* (1998), 144 FTR 106 at para 9, the FCTD held that a report authored by a distinguished counsel was inadmissible as it consisted in large measure of legal argument and would not assist the Court as trier of fact.

b) Political Statements

[25] Political statements do not generally assist the trier of fact.

[26] In *Samson Indian Nation and Band v Canada*, 199 FTR 125 at para 22, [2001] 2 CNLR 353, the FCTD held that a report prepared by the Research Director of the Native Law Centre of Canada at the College of Law, University of Saskatchewan (the Henderson Report), was generally political in nature and better suited to a forum other than a court of law. Part of the

Henderson Report summarized the Report of the Royal Commission on Aboriginal Peoples on Treaties, and was not necessary. The matters contended in the report in issue were more in the domain of argument by counsel. Therefore the report was inadmissible.

IV. ANALYSIS

[27] Under the heading "Executive Summary" at paragraphs 1–4, Mr. Chartrand discusses the composition of Indigenous communities at the time Treaty 1 was entered. I understand paragraphs 5 and 6 as speaking of the Indigenous norms and laws pertaining to the membership of Indigenous groups, and thus the conclusions set out are of fact and admissible.

[28] The last sentences of paragraphs 7 and 8 and the whole of paragraph 9 state legal conclusions and are inadmissible.

[29] The last sentence in paragraph 45 and paragraph 47 draw legal conclusions and are inadmissible.

[30] Paragraph 48 is political in nature and is inadmissible.

[31] The last sentence of paragraph 50 draws a legal conclusion and is inadmissible.

[32] Paragraphs 51–100 explain the historical development of the existence of the Métis as a distinctive People, and the factors that establish their being distinct from others of mixed ancestry known in times past as "Half-Breeds." While the question of the inclusion or exclusion of Métis as members of the Band is not pled, the fact of the presence in the region of two distinct groups, each having some non-Indigenous ancestry, could have a bearing on the identification of those persons to be counted in determining the acreage of the reserve provided for by the Treaty. The contents of these paragraphs are, except as noted below, admissible.

[33] The exception is the use of the term "unconscionable" in paragraph 57. Whether Crown actions can be considered thus has no relevance to the issues in this proceeding and in any case is argumentative. The term is inadmissible.

[34] The last sentence in paragraph 101 is a matter for legal argument and is inadmissible.

[35] Paragraphs 102–118 discuss Canada's policies, legislation and practices pertaining to "Half-Breeds." While some portions may arguably draw legal conclusions, they are essentially assertions of fact based on the historical record and are admissible.

[36] The term "racist" in paragraph 116 is redundant as the point is made without the need for the term. It is inadmissible.

[37] Under the heading "Recognition of Indian Title," Mr. Chartrand discusses, at paragraphs 119–126, Canada's policies and objectives concerning land interests of "Indians" and "Half-Breeds." This is followed from paragraphs 127 to 129 by an explanation of the delay until 1876 of the issuance of scrip to Métis. All are admissible. Then follows, in paragraphs 130 to 142, a discussion concerning the issuance of scrip to persons, including those of mixed blood known as "Half-Breeds" which was authorized by Order-in-Council dated March 23, 1876.

[38] The relevance of much of the Chartrand Report between paragraphs 130 and 142 to the central remaining issue in this proceeding is not obvious. Taken as a whole, it relates to the question over interests in land of, respectively, Métis and "Half Breeds." It is not possible to fully address the question of admissibility in the absence of focussed argument by the Applicant. The correct course is to err in favour of admissibility of the Report excepting those parts specifically found inadmissible.

[39] The term "reserve-hating" in paragraph 132 is conclusory of its subject's character, which is not in issue. It is therefore irrelevant and inadmissible.

[40] Paragraph 142 asserts a conclusion, but of fact not law, and is admissible.

[41] Paragraphs 143–150 speak directly to the geographical extent of the application of the *Manitoba Act* and the entitlement of "Half-Breeds" at Fort Alexander to scrip in 1871 when Treaty 1 was signed and in 1874 when the Harris survey of the Treaty reserve was completed. Although paragraph 150 states a conclusion, it is an inference of fact based on the facts set out previously and, together with the others, is admissible.

[42] The conclusions set out in paragraphs 151–167 rely on the historical evidence and enactments cited by the author. They relate to the central issue. With the exception of paragraphs

156 and 167, which are better left to argument, they are admissible.

[43] The Report is attached as an appendix to these Reasons. The portions ruled inadmissible in the Report are in strikethrough.

V. ORDER

[44] The Application is allowed in part.

HARRY SLADE

Honourable Harry Slade, Chairperson

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OTTAWA, ONTARIO June 21, 2017

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and

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As represented by the Minister of Indian Affairs and Northern Development

Respondent (Applicant)

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APPENDIX

****The appendix is not available in this format.****