FILE NO.: SCT-2002-20
CITATION: 2026 SCTC 1
DATE: 20260220

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
TIMISKAMING FIRST NATION AND WOLF LAKE FIRST NATION Claimants (Respondents)	Adam Williamson and Laura Sharp, for the Claimants (Respondents)
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Applicant)	Stéphanie Lisa Roberts and Marie-Paule Boucher, for the Respondent (Applicant)
	HEARD: January 23, 2026

REASONS ON APPLICATION

Honourable Todd Ducharme

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

Cases Cited:

R v Mohan, 1994 SCC 80; *R v Abbey*, 2017 ONCA 640; *R v Natsis*, 2018 ONCA 425; *R v Khan*, [1990] 2 SCR 531; *Herman v Alberta (Public Trustee)*, 2005 ABQB 926; *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.

Statutes and Regulations Cited:

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, rr 3, 4, 88.

Specific Claims Tribunal Act, SC 2008, c 22, s 13.

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I. INTRODUCTION

[1] In this Claim, the Timiskaming First Nation and Wolf Lake First Nation (Claimants) allege that the Crown agreed to set apart a 100,000-acre reserve on the shores of Lake Timiskaming in 1849 via an Order in Council, and that it took steps to do so but never completed the process. This failure to fulfill a promise, the Claimants say, breaches the Crown's legal and fiduciary duties. The Respondent denies the allegation, arguing that the 1849 Order in Council does not disclose an intention to create a reserve, and says that the Crown had no obligation to create a reserve until it actually did so in 1854.

[2] On June 24, 2025, the Respondent wrote to the Specific Claims Tribunal (Tribunal) on the subject of the qualifications of Terry Tobias, put forward as an expert witness by the Claimants. The Respondent wrote that it wished to "challenge the expert qualification being sought" and "to present submissions regarding same, including the qualification of his reports on use and occupancy as expert reports." The Tribunal agreed to the Parties filing written submissions on the subject matter and to hear this matter as an Application. In oral submissions, the Respondent clarified that it was not seeking to have Tobias's reports disqualified or found inadmissible, rather it seeks an order that the reports, while admissible as "factual" or "demonstrative" evidence, are not admissible as "expert" evidence.

[3] On January 23, 2026, the Tribunal held a hearing on the Application by videoconference. For reasons that follow, I dismiss the Respondent's Application and find that Terry Tobias is a qualified expert, and his evidence constitutes expert evidence.

II. FACTS

[4] The two reports at issue, entered as exhibits during the examination and cross-examination of Terry Tobias on July 3, 2025, are entitled:

a. "Wolf Lake First Nation Current Use Mapping Project: Methods of Data Collection and Map Construction, and Summary of Transcript and Map Content," dated April 1997 (Exhibit 115—Exhibit B of Terry Tobias's affidavit); and

b. "Timiskaming First Nation Current Use Mapping Project: Methods of Data Collection and Map Construction, and Summary of Transcript and Map Content," dated March 1997,

edition of September 25, 2008 (Exhibit 116—Exhibit C of Terry Tobias's affidavit).

[5] During his *voir dire*, Tobias testified that he is a researcher of Indigenous use and occupancy, which "involves the application of a set of customized or specialized social science methods" to determine a "community's relationship to traditional resources and what they perceive as their core homeland" (Hearing Transcript, July 3, 2025, at p. 11—filed as tab 5 of the Claimants' written submissions). He further testified that he is the author of a textbook on the subject of Indigenous use and occupancy mapping, entitled *Living Proof: The Essential Data-Collection Guide for Indigenous Use-and-Occupancy Map Surveys* (at pp. 14–15). Tobias provided the Tribunal with a description of how he conducts use and occupancy surveys and creates use and occupancy maps:

> … a number of [I]ndigenous individuals, carefully selected [I]ndigenous individuals, are presented—each are presented on a face-to-face interview with a clean map, or set of maps, determined by them as to what part of the homeland they've used.
>
> And then a questionnaire is administered asking that individual if there are any places where they did any of the specific activities listed or specified in the questionnaire. If they say yes, then they're asked to mark a sample of the sites that they've used, and those sites on the map in front of them is actually—they carefully indicate where the site is. The interviewer marks it and codes it for later analysis.
>
> And so what the individual person ends up with is what's called—it's called a map biography. It's really an autobiography, an incomplete but powerful snapshot picture of their life on the land.
>
> And then in a typical survey, usually about a hundred individuals are carefully interviewed, and then all of the data from all hundred map biographies are put together on one set of maps on one map to speak for the interest of the community on that homeland. [Hearing Transcript, July 3, 2025, at pp. 13–14]

[6] In cross-examination, Respondent's counsel put to Tobias a passage from the report on the Wolf Lake First Nation that reads "[t]he report is not analytical in nature, makes no generalization concerning the content of the transcript or map, and draws no conclusion" (Hearing Transcript, July 3, 2025, at p. 102). Counsel then asked whether he confirmed "that [his] report[s] are not intended to interpret the data collected or draw conclusion[s]," to which Tobias responded, "That is true … These reports present information for the basis of other people to do analysis and draw conclusion[s]" (Hearing Transcript, July 3, 2025, at p. 103).

[7] Tobias's reports on use and occupation have been utilized and cited in the historical expert

reports of Dr. Sue Roark-Calnek and James Morrison who have testified on behalf of the Claimants, as well as in the report of Dr. Stéphanie Béreau who is expected to testify on behalf of the Respondent.

III. RESPONDENT'S POSITION

[8] The Respondent takes the position that whether or not Tobias is an expert in use and occupancy mapping, his reports are not admissible as "expert" reports because they do not contain opinion, and therefore violate Rule 88 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*SCT Rules*]. Rule 88 reads, in part:

> **Content of expert report**
>
> **88** An expert report referred to in this Part must be signed and dated by the expert and include the following information and documents:
>
> …
>
> **(e)** a summary of the **opinions** expressed in the report;
>
> **(f)** the facts and assumptions on which the expert's **opinions** are based;
>
> …
>
> **(h)** identification of any literature or other materials that the expert relied on in support of the **opinions** expressed in the report;… [emphasis added]

[9] Based on Tobias's testimony that his reports do not make interpretations or draw conclusions, the Respondent argues that his reports therefore contain no opinion and do not qualify as expert reports under Rule 88.

[10] In addition, the Respondent submits that Tobias's expert reports do not satisfy the factors in *R v Mohan*, 1994 SCC 80 [*Mohan*], as reiterated in *R v Abbey*, 2017 ONCA 640 at para. 48. These factors are split into two stages, beginning with a threshold stage:

> Expert evidence is admissible when:
>
> (1) It meets the threshold requirements of admissibility, which are:
>
> a. The evidence must be logically relevant;
>
> b. The evidence must be necessary to assist the trier of fact;
>
> c. The evidence must not be subject to any other exclusionary rule;
>
> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
>
> i. Impartial,

ii. Independent, and

iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,

b. Necessity,

c. Reliability, and

d. Absence of bias. [footnotes omitted]

[11] Briefly, at the threshold stage, the Respondent argues that the reports lack relevance to the Claim because they are focused on the use and occupancy of the area "within living memory" of their completion in 1997, and have nothing to tell the Tribunal about use and occupancy in the mid-19th century. The Respondent argues that the reports are not necessary as they contain merely data, and no conclusions—the Tribunal can use this data to come to its own conclusions, the Respondent says. The Respondent also argues that the rule against hearsay is an exclusionary rule that applies to these reports, as they are based on a series of out-of-court interviews. Finally, the Respondent argues that Tobias is not a properly qualified expert in the sense that, whatever his qualifications, the Tribunal does not need his expertise and can draw its own conclusions.

[12] At the gatekeeper stage, the Respondent argues that accepting Tobias's reports as "expert" evidence despite their lack of qualification threatens to undermine the administration of justice, and they should not be accepted as expert evidence on this basis.

[13] It is important to reiterate, however, that the Respondent does not seek to have the reports found inadmissible, only that the Tribunal refuse to admit them as expert evidence. The Respondent pointed to *R v Natsis*, 2018 ONCA 425 at para. 20, as authority for the idea that even if an expert's opinion evidence cannot be admitted, the underlying data collected can be admitted "as factual observations" whether or not the opinion evidence proposed was admitted.

[14] When asked about the difference between admitting Tobias's reports as factual evidence and expert evidence, the Respondent expressed concern that if the reports were admitted as expert

evidence they would be afforded more weight by the Tribunal than otherwise. The Respondent was unable to identify any authority for the proposition that expert evidence is more valuable or should be given more weight than other types of evidence.

IV. CLAIMANTS' POSITION

[15] The Claimants take the position that Terry Tobias's reports are properly categorized as expert reports. They say that the reports qualify as expert reports under Rule 88 of the *SCT Rules*, as well as under the *Mohan* factors. In the alternative, the Claimants argue that the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], and the *SCT Rules* allow the Tribunal the discretion to admit the reports as expert reports regardless of their compliance with Rule 88 or the *Mohan* factors.

[16] The Claimants also take the position that Tobias's use of the word "conclusion" in his reports and in cross-examination should not be treated as interchangeable with the meaning of "opinion" in Rule 88 of the *SCT Rules*. They note that Tobias's data was collected in the mid-1990s for a different federal claims process—although it has wide applicability—and that Tobias's lack of conclusions in the reports relates only to the question of whether the data is sufficient to ground that separate claim. The reports do, however, offer opinions sufficient to satisfy Rule 88:

- his development of a unique methodology to conduct use and occupancy mapping within Indigenous communities represents his opinion on the best way to conduct such an analysis; and

- the presence of the data in his reports or on his maps represents his opinion that the data is relevant and reliable, as well as his opinion that he and his team had been able to gather enough data for the maps and reports to be relevant and reliable.

They say that he utilized his expertise to conduct the research, evaluate and audit the data, plot it onto composite maps, and interpret it for the written reports.

[17] The Claimants also took the Tribunal through the finer points of Rule 88 of the *SCT Rules*. They argued that pages 1 to 29 of each report represented a summary of Tobias's opinions, even if they were not explicitly identified as such, and that this fulfils paragraph 88(e) of the *SCT Rules*. They say that he offers significant insight into his methodology and each choice he made to ensure

it was applied correctly and provided useful and relevant data, thus fulfilling the requirements of paragraph 88(f). And while he uses little literature, the Claimants submit that he certainly identifies the materials he utilized in carrying out his methodology—the band list he began with, the additions proposed by the Chief, the criteria used by Tobias and the community to determine participation—all of which fulfills the requirements of paragraph 88(h).

[18] The Claimants also say that the reports should be admitted as expert evidence because all of the *Mohan* factors are fulfilled.

[19] In terms of relevance under the *Mohan* factors, the Claimants argue that the Respondent mischaracterizes Tobias's reports by saying that they show only use and occupancy "within living memory" of the mid-1990s. They submit that the interviews conducted with living participants also asked about oral history concerning land use and occupancy, and that information is reflected in the data. Additionally, even if the data corresponded only to the time period within living memory of the 1990s, this does not mean that it is not relevant: one of the Claimants' other experts, Dr. Sue Roark-Calnek, applied an anthropological technique known as "upstreaming" which utilizes contemporary observations to theorize about the past, and the data provided by Tobias was both relevant and necessary.

[20] In terms of necessity under the *Mohan* factors, the Claimants point to Tobias's testimony that a layperson could not have conducted these studies or produced the maps, and say that this suggests he possesses expertise beyond the knowledge of the trier of fact. They also note that the Claimants' experts Dr. Sue Roark-Calnek and James Morrison, as well as the Respondent's expert Dr. Stéphanie Béreau, relied on Tobias's data, and say that Tobias's expertise is necessary for these other experts to express their opinions.

[21] The Claimants argue that the rule against hearsay ought not apply to exclude these reports. Not only are they admissible under the principled exception to the hearsay rule described in *R v Khan*, [1990] 2 SCR 531 at paras. 29–33, because they are necessary and reliable, they are also admissible under the exception to the hearsay rule for oral history, which the Claimants cite to *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para. 196, aff'd 2014 SCC 44.

[22] The Claimants say that Tobias is a properly qualified expert under the *Mohan* factors, and

point to his decades of experience conducting use and occupancy studies. Tobias testified as an expert in a case in Alberta called *Herman v Alberta (Public Trustee)*, 2005 ABQB 926, where the court remarked that it was "very impressed with the testimony and the research" he provided (at para. 53).

[23] In the alternative, if the Tribunal were to find that the reports are not expert reports under the *Mohan* factors or under Rule 88, the Claimants argue that a combination of paragraph 13(1)(b) of the *SCTA*, and Rule 3 and subrule 4(1) of the *SCT Rules*, would allow the Tribunal to exercise its discretion to admit the reports as expert reports. Paragraph 13(1)(b) reads:

> **Powers of the Tribunal**
>
> **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
>
> …
>
> **(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;…

[24] Rule 3 and subrule 4(1) read:

> **Orders**
>
> **3** The Tribunal may make any order that is necessary to secure the just, timely or cost-effective resolution of the specific claim.
>
> **Varying, dispensing with and supplementing Rules**
>
> **4 (1)** The Tribunal may vary a Rule, dispense with compliance with a Rule, or supplement a Rule, when the Tribunal considers it is necessary to do so in order to secure the just, timely or cost-effective resolution of the specific claim.

[25] The Claimants submit that the Tribunal's discretion under paragraph 13(1)(b) of the *SCTA* to admit **any** evidence even if it does not comply with the rules of evidence, together with its ability to vary or dispense with compliance with the *SCT Rules*, permits the Tribunal to choose to admit the reports as expert reports despite any non-conformity with Rule 88 or the *Mohan* factors.

[26] Finally, when asked what difference it would make if the Tribunal found that Tobias's

reports were not expert reports but admitted them as factual or demonstrative evidence, the Claimants concluded that it would ultimately make no difference to their case.

V. ANALYSIS

[27] It is somewhat difficult to discern the issue at the heart of this Application. Given that the Respondent does not object to the admission of the reports as evidence—only as expert evidence—and the Claimants do not believe that the categorization of the reports as expert evidence or factual evidence will have any effect on their case, it is disappointing that the Tribunal has been forced to consider what appears to be essentially a non-issue.

[28] Despite the seeming lack of an issue between the Parties, this Application does offer an opportunity to clarify the relationship between Rules 3, 4 and 88 of the *SCT Rules*, as well as paragraph 13(1)(b) of the *SCTA*.

[29] The *SCTA* and the *SCT Rules* do provide significant discretion to the Tribunal to admit evidence, although I am not convinced that they offer the level of discretion argued for by the Claimants. For instance, while paragraph 13(1)(b) of the *SCTA* would allow me to admit just about any evidence or information that I would like—barring a claim of privilege—it says nothing about the categorization of that evidence. And while, theoretically, Rules 3 or 4 might allow me to vary Rule 88 to the point that an expert report need not contain opinions, the impetus behind Rules 3 and 4 is ensuring the "just, timely or cost-effective resolution of the specific claim" and I do not see how that applies in this context.

[30] This rationale does not apply in this context because categorizing the reports as expert reports does not seem to matter, and therefore varying Rule 88 to do so would not promote the just, timely or cost-effective resolution of this Claim. Further, I cannot imagine a scenario in which varying Rule 88 to admit evidence **specifically** as expert evidence would promote the just, timely or cost-effective resolution of a specific claim. The Respondent has expressed concern that the Tribunal would give more weight to an expert report than otherwise but was unable to point to any authority that would require the Tribunal to do so. I am not aware of any such authority and do not agree that an expert report ought to be given more weight than any other piece of evidence simply by virtue of it being an expert report.

[31] I make no comment on the relationship between Rules 3, 4 and 88 in a future context but, in this context, there is no authority to use Rules 3 or 4 to vary Rule 88 to the point that expert evidence that does not contain opinions can be admitted as expert evidence.

[32] Much of the above is theoretical, however, as I nevertheless accept the reports as expert evidence via the normal authorities: Rule 88 and the *Mohan* factors.

[33] I agree with the Claimants that the reports, while not as clear cut as I might prefer, do fulfill the requirements of Rule 88: Tobias's reports express his opinions even if they do not express any conclusions, a summary of those opinions is provided, his facts and assumptions are provided, and the materials he relied on is provided. Further, I agree that his reports fulfill the *Mohan* factors:

- at the threshold stage, they are necessary and reliable, the principled exception to the hearsay rule applies, and Tobias is a properly qualified expert in use and occupancy studies; and

- at the gatekeeper stage, especially given the reliance on Tobias's reports by the Claimants' other experts and one of the Respondent's experts, I find that the admission of this evidence outweighs any potential risks to admitting it.

[34] If I am wrong about their categorization as expert evidence then, under the discretion provided by paragraph 13(1)(b) of the *SCTA*, I accept the reports as evidence regardless of their categorization. No matter how the reports are received into evidence, however, I will afford them only their due weight—they will not take on any additional impact by virtue of having been written by an expert.

VI. CONCLUSION

[35] The Respondent's Application is dismissed.

[36] The two reports authored by Terry Tobias and filed as evidence by the Claimants, entitled "Wolf Lake First Nation Current Use Mapping Project: Methods of Data Collection and Map Construction, and Summary of Transcript and Map Content" (Exhibit 115) and "Timiskaming First Nation Current Use Mapping Project: Methods of Data Collection and Map Construction, and Summary of Transcript and Map Content" (Exhibit 116), are accepted into evidence as expert

reports.

[37] The Parties are to bear their own costs in relation to this Application.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20260220

File No.: SCT-2002-20

OTTAWA, ONTARIO February 20, 2026

PRESENT: Honourable Todd Ducharme

BETWEEN:

TIMISKAMING FIRST NATION AND WOLF LAKE FIRST NATION

Claimants (Respondents)

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent (Applicant)

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