

**FILE NO.:** SCT-2006-11  
**CITATION:** 2015 SCTC 1  
**DATE:** 20150216

**OFFICIAL TRANSLATION**

**SPECIFIC CLAIMS TRIBUNAL**  
**TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**BETWEEN:**

ATIKAMEKW D'OPITCIWAN FIRST  
NATION

Claimant

– and –

HER MAJESTY THE QUEEN IN RIGHT  
OF CANADA

As represented by the Minister of Indian  
Affairs and Northern Development

Respondent

Paul Dionne, for the Claimant

Éric Gingras and Dah Yoon Min, for the  
Respondent

**HEARD:** February 9, 2015

**REASONS FOR DECISION**

**Honourable Johanne Mainville**

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

[1] The Claimant is seeking the rejection of several excerpts from the expert report of surveyor Éric Groulx (“Mr. Groulx”) entitled [TRANSLATION] “Expert geomatics and surveying report: Report on the nature of the mandate of surveyor W.R. White and the source of the error noted on his plan” (“Supplementary Report”) filed before the Tribunal on December 19, 2014.

#### **A. BACKGROUND**

[2] The Claimant filed four declarations of specific claim before the Tribunal. These Claims concern (1) the flooding of land occupied by the Atikamekw following the impoundment of the Gouin reservoir in 1918; (2) the delay in establishing the Opitciwan Indian Reserve; (3) the floods caused by the raising of the crest of the Gouin dam in 1942 and in 1955–56; and (4) the size of the reserve that was established. The objection concerning the admissibility of the Supplementary Report filed before the Tribunal is of particular relevance to the last Claim.

[3] In its Declaration of Claim, the Claimant is seeking compensation for the damage and inconvenience suffered by the Atikamekw of Opitciwan as a result of the insufficient area they obtained.

[4] The relief sought in its Further Amended Declaration of Claim includes the following:

[TRANSLATION]

(a) compensation for the value of the difference

(i) between the area of 60 acres per family calculated in the final survey and the area of 2,290 acres they did receive, or

(ii) in the alternative, between 3,000 acres and the area of 2,290 acres they received;

...

[5] On November 15, 2013, the Respondent sent the Claimant the counter expert opinion of Mr. Groulx, whom the Tribunal recognized as an expert surveyor. In his report, Mr. Groulx states that the calculated area on the plan of surveyor Walter Russel White (“Mr. White”) is not 2,290 acres as the plan indicates, but 2,760 acres. During his testimony on January 22, 23 and 24, 2014, Mr. Groulx confirmed this fact and was cross-examined on it.

[6] For the Claimant, this new fact, disclosed in Mr. Groulx’s testimony, confirms that,

during the initial survey, the Respondent's employee intended to survey for the Atikamekw of Opitciwan an area greater than the 2,290 acres that the federal and provincial governments later took into account when establishing the Opitciwan Indian Reserve.

[7] On May 22, 2014, at the close of evidence, the Claimant stated its intention to amend its Further Amended Declaration of Claim in order to reconcile the facts, the legal basis for the Claim and the conclusions with the relevant facts disclosed in, among other things, Mr. Groulx's testimony.

[8] Subsequently, in accordance with the schedule set by the Tribunal, the Claimant filed an Application for Leave to amend the Further Amended Declaration of Claim SCT-2006-11 in order to add paragraphs 43a, 99a and 105(a)(iii), which read as follows:

[TRANSLATION]

43a. It would appear that Survey Plan No. 1458 prepared by Mr. White has an area of approximately 2,760 acres.

...

99a. In the further alternative, the DIA also breached its duty of care and due diligence by failing to use the actual area in Mr. White's plan as the basis for discussions with the Ministère des Terres et Forêts du Québec [Quebec department of land and forests] on the area of the Opitciwan Indian Reserve.

...

105. For all these reasons, the Claimant ATIKAMEKW D'OPITCIWAN FIRST NATION claims:

(a) compensation for the value of the difference

...

(iii) in the further alternative, between the area of 2,760 acres actually surveyed in 1914 and the area of 2,290 acres received;

[9] The Respondent challenged the Application. First, it asked that the proposed amendments be rejected. In the alternative, the Respondent asked the Tribunal to order that the inquiry be reopened and to allow the Parties to agree on a new schedule, particularly so that supplementary expert reports could be submitted.

[10] On October 10, 2014, the Tribunal allowed the Claimant's Application for Leave to Amend, ordered that the inquiry be reopened and allowed the Respondent's expert witness to produce a Supplementary Report on the nature of Mr. White's mandate and the source of the error noted by Mr. Groulx.

[11] On December 19, 2014, the Respondent filed Mr. Groulx's Supplementary Report, which has given rise to the Claimant's objection. More specifically, the Claimant asks that the title of the Report, major parts of the introduction and the conclusion, and all of Chapter 4 be struck from the Report. The Claimant sets out its request in detail in a letter to the Tribunal dated January 7, 2015.

[12] The Claimant argues that Mr. Groulx exceeded the mandate conferred on him by the Tribunal, that he revisits and sometimes contradicts his original testimony, that he attempts to embellish this testimony and that Chapter 4 of the Supplementary Report is not within the expert witness's area of expertise as it is an argument.

[13] The Respondent challenges this request. It submits that Mr. Groulx complied with the Tribunal's mandate, that his Supplementary Report deals solely with the new theory of the source raised by the Claimant in its amendments and that his analysis does not constitute an argument. Citing case law, the Respondent notes that an expert witness's role is to inform the Tribunal and to help it assess evidence on technical and scientific matters. To do so, expert witnesses may base their opinions on theoretical knowledge but also on their experience and on facts they have observed and that have been legally proved, which is what Mr. Groulx did.

[14] The Respondent also argues that the Tribunal must exercise caution before rejecting an expert report without hearing the expert witness. The fact that the Tribunal has recognized Mr. Groulx as an expert witness makes both his report and his opinion admissible in evidence, and when he testifies, the Tribunal will be able to assess their probative value and relevance in light of the record as a whole.

## **B. ANALYSIS**

[15] This is not a case where, at the beginning of the hearing or prior to it, one party requests that the opposing party's expert report be found inadmissible. In the present matter, the Parties

had the opportunity to produce all the evidence they intended to present, including their expert reports, as well as the report of Mr. Groulx, who testified for three days.

[16] At issue is a Supplementary Report authorized by the Tribunal as part of the reopening of the inquiry, the terms of which were clarified and established in the decision dated October 10, 2014.

[17] This decision dated October 10 must be read in its context.

[18] In this respect, at paragraph 25 of its [TRANSLATION] “Written Submissions on the Application for Leave to Amend the Further Amended Declaration of Claim,” the Respondent argues as follows:

[TRANSLATION]

More concretely, allowing the amendments would force the Parties to consider the nature of Mr. White’s mandate and, necessarily, the source of the error noted by expert witness Groulx, that is, why the plan’s calculated area is 2,760 acres when the area shown on the plan is 2,290 acres (see the Affidavit of Éric Groulx);

[Emphasis added]

[19] In Mr. Groulx’s affidavit signed on September 25, 2014, to which the Respondent refers, the following can be read:

[TRANSLATION]

4. In both my report and my testimony, I stated that, based on my calculations, the area we estimated based on the documents in our possession was 2,760 acres instead of the 2,290 acres indicated on the plan;
5. With this in mind, the Claimant suggests that Mr. White intended to survey for the Atikamekw of Opitciwan an area greater than the 2,290 acres and therefore proposes amending paragraphs 43a, 99a, and 105(a)(iii) of the Further Amended Declaration of Claim . . . ;
6. However, my expert report neither concerns nor fully discusses this new argument;
7. At most, my expert report presents the following hypotheses on page 19: [TRANSLATION] “We cannot explain with certainty why there is a discrepancy between the area shown on Mr. White’s plan and the area

that we calculated. Could the survey tools and methods used at the time explain this? This hypothesis is plausible. Today, area calculations are done with specialized surveying software, while at that time, everything was done manually, leaving room for more human errors. It is therefore possible that there may be an error in the calculation of the area in Mr. White's plan."

8. It is common knowledge in surveying that when a plan is submitted to the Canada Lands Survey Records, certain verifications are made before it is accepted. That being said, the inspectors do not systematically recalculate areas, nor do they repeat the surveyor's work.
9. If Mr. White erred, it is highly likely that no one would notice it before a new survey. This seems to have happened here: no one was interested in the plan until now;
10. Surveying errors (or discrepancies) were relatively common at the time;
11. At this stage, without further study, it is hard to explain the reason for this error in area, which, in any event, was not the purpose of my expert report;
12. To identify the source of this inconsistency, or to validate or inform the argument made by the Claimant, further study is required, and various hypotheses and scenarios would have to be looked at;
13. There are many possible sources of error: for example, there may have been an error in chaining, an error in representing the shoreline, a drafting error or even a miscalibration or misuse of the planimeter;
14. In short, various scenarios would have to be explored before proposing an explanation such as the one suggested by the Claimant in the proposed amendment;

[Emphasis added]

[20] In the decision dated October 10, 2014, the Tribunal wrote as follows:

[34] The Tribunal will therefore allow the amendments and reopen the inquiry to allow the Respondent to present its evidence. The additional evidence shall be limited to the nature of Mr. White's mandate and the source of the error raised by expert witness Groulx. Mr. Groulx will therefore be allowed to add to his expert report for this purpose only. The Claimant may, if it so wishes, introduce a second opinion in response to the supplementary expert report of expert witness Groulx.

...

[38] The amendments stem from the evidence introduced by the Respondent. This concerns a specific and very focused fact that the Respondent has known of for more than a year and a half. Considering the nature and basis of the Claim,

the Respondent must have known that the Claimant would raise this fact. As for the Claimant, it has known of this fact since receiving the Report of expert witness Groulx, or at least since reading it.

[39] To date, the evidence submitted to the Tribunal shows that exhaustive research has been done in this Claim to locate documentation on issues related to the area of the reserve and Mr. White's plan. This research was done so that the Claim could be filed and the Minister could review it. Accordingly, repeating that work or searching for documents that do not exist is out of the question. Moreover, the Respondent's expert witnesses have already testified on the issue of Mr. White's mandate. Again, repeating research that has already been completed or revisiting an element about which expert witnesses have already testified is out of the question. A review of Mr. White's mandate will have to be confined to the very narrow framework of the error raised by expert witness Groulx.

[Emphasis added]

[21] The Respondent's Written Submissions, Mr. Groulx's affidavit and the decision dated October 10, 2014, all show that the Tribunal's authorization was limited to something very specific, that is, identifying the source of the error. Mr. Groulx did not state that he had to analyze Mr. White's survey mandate. All his statements concern the identification of the error.

[22] In its decision, the Tribunal authorized Mr. Groulx to explain the source of the error, which, according to paragraph 13 of his affidavit, is technical in nature, and to review the nature of Mr. White's mandate within the very narrow framework of this error.

[23] It is therefore clear from the decision dated October 10, 2014, that Mr. White's mandate necessarily had to be reviewed within the very narrow framework of the technical error Mr. White may have committed.

[24] So, what exactly did Mr. Groulx do?

[25] Mr. Groulx's Supplementary Report is divided into five chapters:

[TRANSLATION]

1. Introduction
2. Identification of the source of the surveying error
3. Mandate of surveyor Walter Russel White, O.L.S., D.L.S.
4. Hypotheses on the surveying mandate of W.R. While, D.L.S.

## 5. Conclusions

[26] In Chapter 2 of the Supplementary Report, entitled [TRANSLATION] “Identification of the source of the surveying error”, Mr. Groulx analyzes the following factors as possible sources of the technical error:

[TRANSLATION]

1. Notebook analysis
2. Calculation of the area using a planimeter
3. Calculation of the area by section
4. Chaining error
5. Accuracy at the time

[27] Following his analysis of these various possible error sources, he concludes as follows:

[TRANSLATION]

After all the analyses we performed to attempt to explain the technical error Mr. White may have made, we were unable to identify or explain it. Did he misuse his instruments, miscalculate or make a typographical error? Unfortunately, this mystery remains unsolved.

[28] In Chapter 3 of his Supplementary Report, after recognizing that he is unable to identify a technical error with respect to Mr. White’s plan, Mr. Groulx reviews Mr. White’s mandate. First, he states that he will verify whether other sources of information were available to explain the survey instructions Mr. White received. Ultimately, this part of the Supplementary Report is consistent with the decision since Mr. Groulx undertook additional research in order to find the survey instructions, i.e. the mandate, which could have made it possible to identify the source of the error.

[29] Second, he states that he will present some hypotheses regarding Mr. White’s mandate based on what is known.

[30] He concludes Chapter 3 as follows:

[TRANSLATION]



Our various searchers for additional clues to explain Mr. White's mandate have proven futile. We were unable to find any traces or documents explaining Mr. White's mandate and the discrepancy between the area indicated on his plan and the area we measured using our software, based on the same plan. Additional research could be performed. However, the results are likely to be the same. Our analysis of Mr. White's mandate should therefore be performed based on the documents we are already aware of.

[31] Being unable to establish a technical error or to explain the mandate received by Mr. White in relation to the error that, according to Mr. Groulx's affidavit, he may have committed, Mr. Groulx presents hypotheses he intends to analyze in light of the historical documents adduced into evidence by the Parties. This is the focus of Chapter 4 of his Supplementary Report.

[32] It is useful to set out the hypotheses submitted by Mr. Groulx in order to better define the issue, as follows:

[TRANSLATION]

1. *Was Mr. White instructed to survey an area of approximately 5,120 acres (8 square miles) as originally requested?*
2. *Was Mr. White instructed to survey an area of approximately 3,000 acres, the area proposed when the federal government wished to purchase land from the provincial government?*
3. *Was Mr. White instructed to survey a territory of approximately 2,310 acres, an area based on a ratio of 60 acres per family as proposed by Wilson in 1912? [In his Supplementary Report, Mr. Groulx accepts this as being the most plausible hypothesis and concludes that, based on his interpretation of the historical documents, this would result in an area of 2,310 acres. One of the major issues in the dispute between the Parties concerns the number of families and people affected by this measure. The Claimant disagrees with the figure proposed by the Respondent, and the Parties' counsel will have to explain this point in their arguments with the help of the documents entered in evidence.]*
4. *Could Mr. White have taken future flooding into account and established an area greater than 2,290 acres in anticipation of this flooding?*
5. *Was Mr. White given carte blanche in establishing a territory for the members of the Obiduan Band?*

[33] To address these hypotheses, which have nothing to do with the possible technical errors he referred to in his affidavit, Mr. Groulx performs an analysis based on his interpretation of the documents entered in evidence.

[34] At page 21, he concludes as follows:

[TRANSLATION]

Based on the analysis of the record and the documents, we are inclined to believe that Mr. White's mandate was to survey the territory occupied by the Obiduan Band, a territory that was large enough to protect the interests of the Atikamekw. It was found that about 2,310 acres was a suitable area for fulfilling these conditions. Mr. White was informed of this, and he carried out his survey and produced a plan according to these parameters. The village and houses are located within the surveyed territory, and the registered plan indicates an area of 2,290 acres.

[35] Mr. Groulx adds as follows:

[TRANSLATION]

In this analysis, we express no opinion on the legitimacy of an area of 2,290 acres. Was this area correctly surveyed or not? It is not up to us to comment on this. Our mandate as expert surveyors is confined to attempting to explain Mr. White's mandate.

[36] The Respondent argues that, according to the case law, expert witnesses can base their opinions on their experience and on the facts they have observed or that have been legally proved.

[37] The Tribunal does not question this principle. However, in the present matter, the decision dated October 10, 2014, authorizes the Respondent to produce a Supplementary Report on a specific, very narrow point, namely, identifying the source of a technical error Mr. White may have committed and analyzing Mr. White's mandate with respect to this error.

[38] Instead of confining himself to this narrow framework, Mr. Groulx analyzes the documents entered in evidence by the other witnesses and draws a conclusion on their basis regarding what he is [TRANSLATION] "inclined to believe" on the nature of the survey mandate received by Mr. White. However, the Tribunal never authorized Mr. Groulx to submit a Supplementary Report for this purpose, or to supplement his expert opinion on the scope of Mr. White's plan, or to revisit the elements developed in his November 2013 report, on which both he and other expert witnesses testified.

[39] Moreover, Chapter 4 of Mr. Groulx's Supplementary Report is an argument more than

anything else. No particular technical knowledge is required to understand what he proposes in it. The Tribunal does not see how these hypotheses are meant to enlighten it. They could easily be made by counsel during oral argument, at which point the Tribunal will be able to analyze their probative value.

[40] That being said, the contents of the Supplementary Report establish that Mr. Groulx exceeded the mandate authorized by the Tribunal and that he is seeking to embellish the Respondent's evidence.

[41] Consequently, the Tribunal sustains the Claimant's objection and finds inadmissible the parts of Mr. Groulx's Supplementary Report mentioned in the Claimant's letter dated January 7, 2015.

**FOR THESE REASONS, THE TRIBUNAL:**

**SUSTAINS** the Claimant's objection regarding the inadmissibility of several parts of the Supplementary Report of surveyor Éric Groulx entitled [TRANSLATION] "Expert geomatics and surveying report: Report on the nature of the mandate of surveyor W.R. White and the source of the error noted on his plan" dated December 2014;

**FINDS** inadmissible and **STRIKES** the following parts from the Supplementary Report of surveyor Éric Groulx entitled [TRANSLATION] "Expert geomatics and surveying report: Report on the nature of the mandate of surveyor W.R. White and the source of the error noted on his plan" dated December 2014:

**Report title**

- The title should reflect that the [TRANSLATION] "nature of the mandate" of Mr. White is subordinate to the [TRANSLATION] "source of the error" made by Mr. White.

**Table of contents**

- Items 1.4.1 and 4 and Appendix B of the table of contents exceed the mandate authorized by the Tribunal.

## **Introduction**

- The last sentence of the fifth paragraph under sub-heading 1.1 of the introduction exceeds the mandate authorized by the Tribunal. It does not explain the context in which the expert witness had to carry out his duty.
- Items 3 and 4 of the sixth paragraph under sub-heading 1.1 exceed the mandate authorized by the Tribunal. Indeed, the Tribunal did not mandate the expert witness to give his opinion on Mr. White's survey mandate or on the scope of the plan related to Mr. White's mandate.
- Under sub-heading 1.3, the mandate authorized by the Tribunal is interpreted too broadly. The mandate authorized by the Tribunal was to explain the survey error, if necessary by looking at Mr. White's mandate. The expert witness's description of this mandate exceeds this.
- Under sub-heading 1.4, the entire content of paragraph 1.4.1. exceeds the mandate authorized by the Tribunal. At paragraph 39 of its Reasons for Decision, the Tribunal stated that repeating research that had already been completed or revisiting an element about which expert witnesses had already testified was out of the question. This, however, is what the expert witness did.
- Under sub-heading 1.5, the last four sentences of the first paragraph exceed the mandate authorized by the Tribunal since the expert witness sets out an analysis of Mr. White's mandate unrelated to the identification of the source of Mr. White's error.

## **Chapter 3**

- The fourth paragraph of Chapter 3 exceeds the mandate authorized by the Tribunal as it revisits elements on which the expert witnesses have already testified (the reasons or lack of reasons for Quebec conceding territory for the creation of a reserve at Lake Obiduan). Furthermore, these elements are arguments and, consequently, do not fall within Mr. Groulx's area of expertise.

- Under sub-heading 3.2, the last sentence in the shaded box and the entire last paragraph exceed the mandate authorized by the Tribunal as they set out an analysis of Mr. White's mandate unrelated to the identification of the source of Mr. White's error.

#### **Chapter 4**

- Chapter 4 in its entirety exceeds the mandate authorized by the Tribunal as in it the expert witness presents hypotheses on the nature of Mr. White's mandate. The contents of Chapter 4 are also based on arguments and do not fall within Mr. Groulx's area of expertise.

#### **Conclusion**

- Except for the first sentence, the first paragraph of the conclusion exceeds the mandate authorized by the Tribunal as it revisits elements on which the expert witnesses have already testified, elements which, moreover, are matters for oral argument.
- There is a typographical error in the second-to-last line of the last paragraph: the total area should read **2,760** acres, and not 2,270.
- The last sentence of the third paragraph exceeds the mandate authorized by the Tribunal as it is an overly broad interpretation of this mandate, for the reasons set out above.
- In the fourth paragraph, the words "et le dernier étant l'analyse d'hypothèses pouvant expliquer sur quelles bases le mandat de Mr. White était fondé" exceed the mandate authorized by the Tribunal, for the reasons set out above.
- The last three paragraphs of the conclusion summarize Chapter 4 and exceed the mandate authorized by the Tribunal, for the reasons set out above with respect to Chapter 4.

## **Appendix B**

- Appendix B is a [TRANSLATION] “[p]lan showing the various boundaries established in the second expert report produced by the Surveyor General Branch” of the Government of Canada. There is no clear link between this plan and the mandate or with the admissible portions of the expert report.

JOHANNE MAINVILLE

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Honourable Johanne Mainville

Certified translation  
Johanna Kratz

**SPECIFIC CLAIMS TRIBUNAL  
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**Date: 20150216**

**File No.: SCT-2006-11**

**OTTAWA, ONTARIO, February 16, 2015**

**PRESENT: Honourable Johanne Mainville**

**BETWEEN:**

**ATIKAMEKW D'OPITCIWAN FIRST NATION**

**Claimant**

**and**

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

**Respondent**

**COUNSEL SHEET**

**TO: Counsel for the Claimant ATIKAMEKW D'OPITCIWAN FIRST NATION**  
As represented by Paul Dionne

**AND TO: Counsel for the Respondent**  
As represented by Éric Gingras and Dah Yoon Min