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CITATION: 2015 SCTC 2
DATE: 20150310

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
DOIG RIVER FIRST NATION Claimant (Respondent)	Allisun Rana and Emily Grier, for the Claimant (Respondent)
– and –	
BLUEBERRY RIVER FIRST NATIONS Claimant (Respondent)	James Tate and Ava Murphy, 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)	Brett C. Marleau and Jonathan Sarin, for the Respondent (Applicant)
	HEARD: January 27, 2015

REASONS ON APPLICATION

Honourable W.L. Whalen

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

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

Cases Cited:

Referred to: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, (1987) 14 FTR 161, [1988] 1 CNLR 73; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25*; Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2; *Fairford First Nation v Canada (Attorney General)*, (1998), [1999] 2 FC 48, [1999] 2 CNLR (60) (FCTD); *London Loan & Savings Co of Canada v Brickenden*, [1934] 2 WWR 545, 3 DLR 465, aff'g [1933] SCR 257, 3 DLR 161; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7; *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8; *R v Truscott*, [2006] OJ No 4171 (CA), 213 CCC (3d) 183; *R v Arp*, [1998] 3 SCR 339*; Smith v Goulet*, [1974] OJ No 2061 (CA), 50 DLR (3d) 321*; R v Hawkins*, [1996] 3 SCR 1043, 141 DLR (4th) 193; *R v Potvin*, [1989] 1 SCR 525, 68 CR (3d) 193.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c22, s13.

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 2, 30.

Authors Cited:

David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law Inc, 2011).

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I. GENERAL

[1] The Respondent in this Claim, Her Majesty the Queen in Right of Canada ("Applicant") brings an Application, together with the required application for leave, to admit certain documents into evidence at the hearing of the validity phase of the Claim pursuant to 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.

[2] Admission of the documents is justified on grounds of relevance. The Respondents in this Application ("Claimants") objected on the basis that the documents are not relevant, have little if any probative value and are prejudicial given the late timing of the Application.

II. CLAIM BACKGROUND

[3] The Claimants are successor Bands to the Fort St. John Beaver Band ("FSJBB"), which adhered to Treaty No. 8 in 1900, under which the Band was provided with Indian Reserve 172 ("Montney Reserve"). The Montney Reserve was not located near where the FSJBB lived and conducted its principal livelihood of hunting and trapping, so it was little used. In 1940, the Band

surrendered the mineral rights in the Montney Reserve to the Crown for lease for the Band's benefit. In 1945, the FSJBB surrendered the Montney Reserve to Canada for sale or lease for the benefit of the Band. At the same time, Canada promised to purchase new reserves for the Band from the proceeds of surrender.

[4] At the time, land was needed in British Columbia ("Province") to house veterans returning from World War Two, so the Montney Reserve, including mineral rights, was sold to the Director under the *Veteran Lands Act*. The Band approved the use of the proceeds for the purchase of replacement reserves. To that end, lands were surveyed and steps taken between 1946 and 1950 to create Indian Reserves 204, 205 and 206 ("Replacement Reserves"), which were formally transferred by the Province to Canada in July 1950. However, the Province reserved the mineral rights in the Replacement Reserves.

[5] Canada did not know that the Replacement Reserves' mineral rights remained with the Province. Believing that they belonged to the Band as part of the transfer from the Province, Canada obtained a surrender of the mineral rights in the Replacement Reserves from the FSJBB in September 1950 so that they could be leased for the use and benefit of the Band. Indeed, on the basis of the surrendered mineral rights, Canada issued exploration permits to a private mining company. In 1952, the Province advised Canada that the Province owned the mineral rights in the Replacement Reserves and that it had issued mineral permits on those lands. Canada admitted its error immediately and refunded the permit fees to the mining company.

[6] In 1965, the Claimants commenced a claim against Canada in the Federal Court, alleging that Canada had breached its fiduciary duty in relation to the surrender of the Montney Reserve, including the mineral rights: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, (1987) 14 FTR 161, [1988] 1 CNLR 73 [*Apsassin*]. The action included an alternative claim for declaratory relief for Canada's failure to obtain the mineral rights in the Replacement Reserves. This alternative claim was withdrawn before the commencement of trial, although the trial judge made comment on the Replacement Reserves mineral rights (*Apsassin*, paras 199 and 200). The case went through all levels of appeal, including the Supreme Court of Canada, where the Claimants were successful in the landmark decision of *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern*

Development, [1995] 4 SCR 344, [1996] 2 CNLR 25.

[7] In the present proceeding, the Applicant applied on April 24, 2013 to strike the Declaration of Claims on the basis that the Claimants were estopped by application of the legal principle of *res judicata* (action estoppel). Smith J. dismissed the application, holding that the present claims were separate and distinct from the ones in Apsassin, and that *res judicata* did not apply: *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2. It would appear that the *Apsassin* case and decision were canvassed extensively before Smith J. Smith J. also concluded that the *Apsassin* trial judge's comments about the Replacement Reserves' mineral rights issue were *obiter dicta* (at para 73).

[8] A final piece of background information in this Claim is the timetable established running up to the hearing of the validity phase, which is now scheduled to commence on May 20, 2015. The Tribunal directed the filing and service of certain materials according to the following timetable:

a. the Agreed Statement of Facts, Agreed Statement of Issues and Common Book of Documents by or before September 26, 2014;

b. the Claimants' written argument and list of authorities by or before December 12, 2014;

c. Canada's written argument and list of authorities by or before January 23, 2015;

d. the Claimants' written argument in reply and list of authorities by or before February 3, 2015; and,

e. the Claimants' and Canada's casebooks of authorities that might be referred to in submissions by or before February 3, 2015.

[9] The Parties were therefore in the late stages of preparation when the Applicant raised the admissibility issue. In May 2014, the Parties had also indicated that they would not be relying on *viva voce* evidence at the validity phase.

III. DOCUMENTS TENDERED FOR ADMISSION

A. Documents Proposed for Admission

[10] The Applicant seeks to admit three sets of documents on the basis of relevance, namely: the "Fort Nelson Documents," a series of letters written between Canada and the Province in 1956 and 1958 in respect of Canada's request to set apart a reserve for the Fort Nelson-Slave Band (also a Treaty No. 8 Band that was the responsibility of the same agency as the FSJBB); copies of 1948 and 1949 transfer documents from the British Columbia Indian Land Registry System, together with supporting Federal Orders in Council, setting apart Indian Reserves for three different Bands between 1948 and 1950 in the same general area as the Replacement Reserves ("ILRS Documents"); and, the transcripts of sworn commission testimony (admitted in *Apsassin*) by Joseph Andre Prudent Emile Galibois ("Galibois Transcripts"), who was present at the surrender of the Montney Reserve, and was the Indian Agent responsible for the FSJBB during the negotiation and transfers of the Montney and Replacement Reserves.

[11] The Applicant produced an index of the Fort Nelson Documents on September 22, 2014 and the Claimants communicated their objection to admission on September 25, 2014 after some correspondence as to the documents' relevance. On November 26, 2014, the Applicant advised the Claimants that it might also want to rely on the Galibois Transcripts, which it indicated had only come to its attention on September 23, 2014 with a copy being obtained on October 9, 2014. The Claimants expressed an objection to the Galibois Transcripts on December 3, 2014. The Claimants were unaware of the ILRS Documents until they received the present Application on January 9, 2015, and copies were not provided until shortly before the hearing on the Application on January 27, 2015.

B. Fort Nelson and ILRS Documents: Background and Parties' Positions

[12] The Claimants allege that the Applicant breached its fiduciary duty and/or contractual obligations to them (as successors to the FSJBB) by failing to secure the mineral rights in the Replacement Reserves, and also by failing to correct the error or to compensate the Band for the resulting loss. The Applicant takes the position that it did not breach any fiduciary or contractual duty because at the time the Province had a general policy in place of reserving mineral rights for lands transferred for Indian Reserves. As a result, the Applicant argues that its discretion or

control over such lands was limited. It had no choice.

[13] In support of this position, the Applicant submits that, taken together, the Fort Nelson and ILRS Documents evidence this policy of reserving minerals both before and after Canada acquired the land for the FSJBB. It also points out that the *Apsassin* trial judge found (at para 199) that the Province had a "general policy" of reserving mineral rights, which further supports its position. In any event, the Applicant urges the Tribunal to exercise its expanded discretion to admit evidence pursuant to section 13(1)(*b*) of the *SCTA*, even if the documents would not normally be admissible in a court of law – supposedly so that it can make its legal argument.

[14] The Claimants oppose admission of the Fort Nelson and ILRS Documents on the basis that they are irrelevant, and also because they were produced at the eleventh hour, thereby prejudicing the Claimants through possible resulting delay, increased costs, or both. According to the Claimants, the Fort Nelson and ILRS Documents are irrelevant because they deal with reserves other than the Replacement Reserves, and at other points in time, including after the negotiation and transfer of the Replacement Reserves, when circumstances may have been very different. The Claimants are not alleging that Canada breached its fiduciary duty in respect of these other reserves, so how those reserves were dealt with is not germane. The Claimants take the position that by application of logic and common sense, the documents do not pertain to the facts and allegations in the present Claim.

[15] The Claimants also argue that the Fort Nelson and ILRS Documents are irrelevant by operation of cited legal principles. Firstly, a fiduciary cannot be absolved of liability by uncertainty caused by its failure to inform itself or to consult with the First Nation. Thus a retrospective assessment of what might have taken place is of no consequence in addressing the breach that actually occurred: *Fairford First Nation v Canada (Attorney General)*, (1998), [1999] 2 FC 48, [1999] 2 CNLR (60) (FCTD) at paras 228 and 285; *London Loan & Savings Co of Canada v Brickenden*, [1934] 2 WWR 545, 3 DLR 465 at 550-551, aff'g [1933] SCR 257, 3 DLR 161; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7 at para 78. Secondly, any inability Canada may have to control the behaviour of a third party (i.e. the Province), which the Claimants deny was the case anyway, has no bearing on the application of principles of fiduciary obligation and Canada's complete discretionary control over FSJBB's

interest in acquiring the Replacement Reserves: *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8 at para 92 (by parallel argument).

[16] The Fort Nelson Documents referred to in the Application materials consist of eight letters, two written in 1956 and the other six written in 1958. The 1956 letters make reference to Provincial policy at the time precluding further alienation of lands for reserve purposes. The letters make no mention of mineral rights, but ultimately the Province seemed to recognize its prior obligation to create reserves under Treaty No. 8, provided an explanation for the delay in creating reserves for the Fort Nelson-Slave Band and established a process by which Treaty No. 8 would be honoured. The six letters written in 1958 begin with one dated April 18, 1958 from the Province to Canada acknowledging consideration of a geographic area for the Fort Nelson-Slave Band and advising that lands "which will now be conveyed or subsequently conveyed and which are held by the Crown Provincial, can be transferred to the Crown Dominion with a reservation to the Crown Provincial of all mineral rights including petroleum and natural gas." By letters dated November 5 and July 21, 1958, the Province confirmed the Attorney-General's opinion that it was within the Province's right to reserve minerals in any land grant. The remaining correspondence was from Canada to the Province, indicating that the Band would be dissatisfied if it did not receive the mineral rights, proposing possible resolution and attempting to persuade the Province to change its mind. It appears that Canada ultimately accepted the Province's position insofar as the Fort Nelson-Slave lands were concerned.

[17] The ILRS Documents detail the following four Indian Land Registry Reserve transfers from the Province to Canada, as recorded in 1948 and 1949: Canim Lake Indian Reserve No. 5 on March 22, 1948; Nan-Tl'At Indian Reserve No. 13 on August 10, 1948; Ulkatcho Indian Reserve No. 14A on December 21, 1948; and, Canim Lake Indian Reserve No. 6 on December 28, 1949. Federal Orders in Council passed between 1948 and 1950 confirmed the setting aside of the reserves for the respective Bands. The Province reserved mineral rights in all four transfers, which also predated the transfer of the Replacement Reserves on June 25, 1950.

1. Legal Analysis and Conclusion

[18] The basic rule for admissibility of evidence is well summarized at para 22 of *R v*

Truscott, [2006] OJ No 4171 (CA), 213 CCC (3d) 183:

> Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely:… Evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings.

[19] In other words, to be admitted, evidence must be relevant to a material fact in issue. As David M. Paciocco and Lee Stuesser ("Paciocco and Stuesser") explain at page 27 of *The Law of Evidence*, 6th ed (Toronto, Irwin Law Inc, 2011): *"[e]vidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence"* [emphasis in original]. Relevance and materiality are the fundamental requirements of admissibility. Of course, evidence that is otherwise relevant may still be excluded because of the application of an exclusionary rule, such as the rule against hearsay, which will be discussed in connection with the Galibois Transcripts.

[20] The Supreme Court of Canada held in *R v Arp*, [1998] SCJ No 82 at para 38, [1998] 3 SCR 339, that there must only be a tendency of relevance and materiality, i.e. the threshold is not a great one:

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue"…As a consequence, there is no minimum probative value required for evidence to be relevant. [footnote omitted]

[21] As Paciocco and Stuesser put it (at 29):

> It is important to appreciate that "[t]he threshold of relevance is not high." Relevance need not establish a material fact on its own. It is enough to pass the relevance threshold to admissibility that the evidence has a logical tendency to contribute to a finding about that material fact. [footnote omitted]

[22] These authors (at 32) also distinguish the relevance and materiality of evidence from its weight:

> It is important not to confuse the "relevance" and "weight" of evidence. While relevance describes the tendency of evidence to support logical inferences, the concept of "weight" relates to how "probative" or influential the evidence is…

> the basic rule of admissibility requires relevance and materiality, but not weight. "Once evidence is found to be relevant [to a material issue] it is generally admissible and the [trier of fact] is left to decide how much weight to give a particular item of evidence." *R. v. White*, [2011] S.C.J. No. 13 at para 54.

[23] Applying these principles, I conclude that the proposed Fort Nelson and ILRS Documents have sufficient relevance to warrant admission. Firstly, there is no question that these documents are accurate insofar as the facts they divulge in relation to the particular reserves referred to. The proposition the Applicant wishes to prove is that the Province had a general policy at the time of reserving mineral rights for lands it transferred for Indian Reserves. The Fort Nelson and ILRS Documents refer to such transfers for other Bands both before and after the transfer of the Replacement Reserves, and mineral rights were reserved in all. There is sufficient logical tendency to support the Applicant's position that if the Province were reserving mineral rights for reserve transfers before and after July 1950, it would do the same within the same time frame in respect of the Replacement Reserves. Weight and probative value are matters to be assessed at the hearing in the context of all of the other evidence admitted, and after receiving full submissions.

[24] The Claimants' legal arguments that the particular documents are irrelevant because of the effect of the legal principles summarized above are not diminished by their admission and should also be considered at the hearing with the benefit of full submissions. The Applicant advances a competing legal argument for which the Fort Nelson and ILRS Documents provide a factual basis. The competing legal arguments and their underlying evidence are best weighed at the hearing, not in the context of an application.

[25] The Claimants' complaints about the late filing of the documents are well founded. However, I do not think their admission should occasion great delay if the Claimants wish to conduct some further research or to adjust their written arguments filed according to the Tribunal's direction. There was no challenge to the Applicant's *bona fides* as to how these particular documents came to its attention, so I am not concerned that there was purposeful delay or some other mischief afoot. The Claimants' complaint was eleventh hour timing and relevance. I am satisfied that in these circumstances prejudice may be addressed through a modest adjournment (if necessary) and/or an order for costs.

C. The Galibois Transcripts

[26] The Applicant also sought to admit a copy of the transcripts of sworn commission testimony provided by Mr. Galibois on April 13, 14, 15 and 16, 1981. Mr. Galibois had been the Indian Agent for the FSJBB from September 15, 1945 until March 1961. His commission testimony was admitted into evidence at the *Apsassin* trial because he had passed away on April 22, 1985 and could not be a witness at trial.

1. The Positions of the Parties

[27] The Applicant is interested in Mr. Galibois' testimony as it pertains to the circumstances surrounding the surrender of mineral rights and issuing of mineral permits on the Replacement Reserves at a time when these issues were still part of the Apsassin claim. Noting that Mr. Galibois testified when the Claimants were still seeking declaratory relief relating to the mineral rights on the Replacement Reserves (i.e. claims similar in nature to the Claim before the Tribunal), the Applicant states its position on the admissibility of the Galibois Transcripts at paragraph 31 of its written submissions:

> The Galibois Transcripts are relevant evidence and the Respondent requests that they be determined to be admissible. They contain sworn testimony concerning the circumstances of the 1945 surrender of IR 172, the selection, negotiation, and acquisition of the replacement reserves, and the 1950 surrender of minerals and subsequent issuance of permits regarding those replacement reserves. They also provide evidence of Mr. Galibois' explanation as to why he assumed mineral rights were included in the replacement reserves. [footnote omitted]

[28] Citing *Smith v Goulet*, [1974] OJ No 2061 (CA) at para 24, 50 DLR (3d) 321 the Claimants argue that the criterion of opportunity to cross-examine the witness at the earlier proceeding has not been satisfied. Because the principal focus of *Apsassin* was the loss of mineral rights in the Montney Reserve, whereas the declaratory relief in respect of the Replacement Reserves was only an alternative claim (while it existed) that was ultimately withdrawn, the Claimants say that they did not have sufficient motive to cross-examine Mr. Galibois on the issue of the mineral rights in the Replacement Reserves. The suggestion may be that the alternative claim was half-hearted or strategic so that it did not merit serious attention. Also, because the focus of the *Apsassin* trial was mineral rights in the Montney Reserve, the material issues to which Mr. Galibois testified are not substantially the same as in the present Claim.

[29] The Claimants also refer to Smith J.'s finding (at para 69) that the focus of the *Apsassin* litigation was the loss of mineral rights in the Montney Reserve. They submit that had mineral rights in the Replacement Reserves been a central issue in *Apsassin*, one would have expected a "robust" cross-examination of the witness on that question. They refer to the *Apsassin* trial judges' observation (at para 29) that "counsel generally examined the witnesses as if they were conducting examinations for discovery" – i.e. with less vigour than at trial. The Claimants therefore reason that to allow the Galibois Transcripts into evidence in the present Claim would be very prejudicial. Also, because of the eleventh hour timing, it would be contrary to the Tribunal's objective "to secure the just, timely and cost-effective resolution of specific claims" (*Rules*, r 2).

[30] The Claimants also question the reliability of the Galibois Transcripts because they are incomplete. The videotape of Mr. Galibois' testimony was not produced. The evidentiary record and other testimony put forward in *Apsassin* were not available either. The Galibois Transcripts were brought to the Claimants' attention only a little more than two weeks before their written submissions were to be filed. The Claimants argue that this is prejudicial to them given their advanced degree of preparation at that point in time. Adjustments to their filed written materials are likely necessary. There could also be significant delay while the evidence and record in *Apsassin* is explored in response.

[31] Furthermore, the Claimants point out that the Applicant indicated, as early as July 10, 2012 (in preparation for the application to strike that resulted in Smith J.'s *res judicata* ruling of February 20, 2014), that it had acquired and disclosed all pleadings, transcripts and final submissions made at the *Apsassin* trial, which turned out not to be the case although the Claimants relied on the representation. The Claimants submit that the Applicant ought to have raised the matter at the time of the application to strike, when the evidence and findings in *Apsassin* were under close scrutiny.

2. Legal Analysis and Conclusion

[32] The legal principles discussed above for the admissibility of evidence also apply to the admissibility of the Galibois Transcripts. However, further principles come into play because the Galibois Transcripts are prior testimony offered for their truth and are therefore strictly speaking

hearsay. There is no legal dispute with respect to the law, although there may be differences in its application. Paciocco and Stuesser summarized the test well (at 138-39):

> *At common law, evidence given in a prior proceeding by a witness is admissible for its truth in a later proceeding provided*
>
> - *the witness is unavailable;*
> - *the parties, or those claiming under them, are substantially the same;*
> - *the material issues to which the evidence is relevant are substantially the same; and*
> - *the person against whom the evidence is to be used had an opportunity to cross-examine the witness at the earlier proceeding.*
>
> [emphasis in original]

[33] In *R v Hawkins*, [1996] 3 SCR 1043 at 1089, 141 DLR (4th) 193, the Court also observed that even where the proposed prior testimony meets the test, the judge has common law residual discretion to exclude it where, in his or her view, its probative value was slight, or undue prejudice might result to the objecting party or to the trial process itself.

[34] I am satisfied that the Galibois Transcripts meet the requirements for admissibility of transcripts from prior proceedings. The witness is unavailable because of death. The Claimants in this Claim are the same as in *Apsassin*. At the time Mr. Galibois' commission evidence was taken, the Claimants were seeking relief in respect of mineral rights in the Replacement Reserves. It makes no difference that it was an alternative claim. If made and until withdrawn, the alternative claim must be taken seriously. I also conclude that this is reflected in the Galibois Transcripts themselves.

[35] Although the main focus in Mr. Galibois' testimony was on events from the time of surrender of the Montney Reserve (including mineral rights) until completion of the Reserve's disposal, substantial time was spent on the assembly of the Replacement Reserves and the question of their mineral rights. Indeed, the better part of the final day was given to the issue of the Replacement Reserves' mineral rights and oil/gas exploration in the area. In my view, the Claimants had a full and adequate opportunity to cross-examine Mr. Galibois and they availed themselves of it. The question is not whether they would cross-examine differently today. Rather, it is whether an issue in question was sufficiently the same in the prior proceeding as in

the present Claim so as to give the opposing party sufficient motive to cross-examine on it. At the time Mr. Galibois was cross-examined, the question of relief for loss of the mineral rights on the Replacement Reserves was on the table, albeit as an alternative claim. On the basis of having reviewed the Galibois Transcripts, I am satisfied that the Claimants were sufficiently motivated to cross-examine on the issue, and that they did so. Even then, the question is whether they had full or adequate *opportunity* to cross-examine, not whether they exercised it (*R v Potvin*, [1989] 1 SCR 525, 68 CR (3d) 193; Paciocco and Stuesser at 139 to 141).

[36] Seven witnesses, including Mr. Galibois, gave commission evidence. I have read the 278-page Galibois Transcripts, and in my view, Mr. Galibois was questioned closely and vigorously. There were numerous objections by Mr. Galibois' counsel, most of which were respected, and of course Mr. Galibois was cross-examined for the better part of four days. It may be that other witnesses were not questioned as intensively or as long, especially where they did not speak English well or at all. In any event, I am satisfied that the Claimants had adequate opportunity to cross-examine and that in fact they exercised it. I therefore conclude that the Galibois Transcripts satisfy the test stated for the admission of prior testimony as summarized above (at para 32).

[37] Mr. Galibois' testimony was given under oath, so that important measure of reliability was also satisfied. The trial judge accepted his testimony at the trial and assessed it in his reasons, giving weight to Mr. Galibois' recollections on the details of the actual surrender of the Montney Reserve (*Apsassin*, at para 154). Mr. Galibois' commission evidence was relevant and material on the main issues under consideration in the *Apsassin* trial. However, the trial judge observed that Mr. Galibois' memory was "blurred as to some matters" that followed the surrender meeting, which is also the area of my concern, as I will discuss momentarily.

[38] While I am satisfied that the Galibois Transcripts overcome the hearsay objection by meeting the requirements of the prior testimony rule, I conclude that they do not meet the fundamental requirements of admissibility discussed and applied in respect of the Fort Nelson and ILRS Documents. They are deficient in a number of ways that I will discuss momentarily, and as a result lack relevance and materiality.

[39] The Galibois Transcripts are seriously short of being complete. Thirty-three documents were made exhibits in Mr. Galibois' testimony, and he was questioned on all of them. None of

those documentary exhibits were produced with the Galibois Transcripts with this Application. In the course of oral submissions at the hearing of the Application, Applicant's counsel observed that most of the documentary exhibits were probably part of the Common Book of Documents in the Claim. However, that was of little assistance because the suggestion was not confirmed, and the Common Book of Documents was not in the materials before the Tribunal on the Application. As a result, Mr. Galibois' testimony was disjointed on the basis of transcription alone. His testimony had also been videotaped. The *Apsassin* trial judge commented on the importance and effect of the video record (at paras 29 and 30):

> Finally, and perhaps most importantly, in the case of the witnesses who testified in the English language, it became abundantly clear that in many instances, the transcript, although faithfully reproducing the spoken words, often failed to convey to the reader the true meaning of and conclusions to be drawn from the witnesses' answers…
>
> Having read the transcripts previously, I was quite surprised to note the degree to which some of my original impressions as to the effects of the evidence were either modified or completely changed upon viewing the actual videotaped recordings.

Mr. Galibois spoke English throughout his lengthy testimony. The point is that the Galibois Transcripts alone are incomplete in several important aspects.

[40] Mr. Galibois' testimony on the creation of the Replacement Reserves, the nature and extent of oil and gas exploration in the area, and the question of the Provincial reservation of mineral rights in the Replacement Reserves was also seriously deficient. Although questioned at length on these matters, Mr. Galibois had little to no independent recollection of their details. Numerous documents were produced to him and he had virtually no recollection of any of them, or their underlying events. In fact, most of these documents seemed to have involved him directly, either having been sent to him, written by him or copied to him. He did not deny that he had written or received them, as the case might be, and he offered his interpretation of them when asked. However, I conclude that the documents best speak for themselves. It is neither helpful nor reliable to have Mr. Galibois' interpretation over thirty years later of documents or underlying facts and events he could not remember. While his recollections of the Montney surrender meeting may have been clear, those events have been well litigated, with resulting binding judicial findings of fact and law. There is no reason to revisit well-ploughed fields, or to take the chance of going down time-consuming and costly avenues that can lead nowhere in the

context of the present Claim.

[41] Mr. Galibois did remember one potentially important letter written to him on February 22, 1952 by a geologist for one of the oil or gas companies that was exploring in the area. The letter stated that the Province claimed to still hold oil rights on the Replacement Reserves. In remembering the letter, Mr. Galibois admitted to being surprised when he had originally read it and he stated that he took no action as a result. Mr. Galibois also testified that he was completely unaware of the mineral rights issue or that oil exploration was going on in the area until 1952 when a son-in-law who worked for an oil company informed him of explorations. However, according to the Agreed Statement of Facts filed by the Parties, the Province's Superintendent of Lands notified Canada by letter of January 26, 1952 that mineral rights in the Replacement Reserves had been reserved by the Province, which the federal Deputy Minister acknowledged along with the federal error to the Province's Deputy Minister of Mines by letter on the same date. Canada then also acknowledged the reservation of minerals and admitted the error to the company it had given exploration permits to and refunded fees by February 4, 1952. The letter to Mr. Galibois, a copy of which was not before the Tribunal, is not necessary to establish the fact of Canada's error, and in any event it seemed more in the nature of an enquiry about something that Mr. Galibois had no prior knowledge of. Also, the dates of the letters just referred to show that Canada was made aware before Mr. Galibois, no doubt because that was where authority rested.

[42] As Indian Agent, Mr. Galibois took direction from Ottawa, not the other way around. This seems so obvious as to merit judicial notice, although Mr. Galibois stated the same and described himself as "the intermediate between the Indians, the Department, [and] my own office… I was an intermediate in there, not to make decisions but to present cases as they came to me" (Galibois Transcripts, at 236, lines 20 to 30 and at 237, lines 1 to 3; see also 234, lines 1 to 16). Mr. Galibois was not the operating mind for departmental decisions. He reported events and undoubtedly made recommendations, but the important decisions were made at a higher level. As he stated, he expected direction from Ottawa "at all times" (Galibois Transcripts, at 234, lines 15 and 16). In my view therefore, his "assumptions" about the nature of mineral rights in the Province are of little consequence in this Claim.

[43] For all these reasons, I conclude that the Galibois Transcripts are not sufficiently relevant to warrant admission into evidence in this Claim. Even if they were relevant, which I do not find, they are of very slight or of no probative value with regard to the question of mineral rights in the Replacement Reserves. To admit the Galibois Transcripts into evidence in this Claim would initiate a responsive search of the *Apsassin* record causing delay and expense not likely to advance resolution of the Claim given that the declaratory relief in *Apsassin* was ultimately withdrawn and the trial proceeded to focus on the disposal of the Montney Reserve and its mineral rights. In reaching this conclusion, I am not weighing the evidence. I am saying that there is nothing much to weigh.

[44] While there are undoubtedly circumstances under which the Tribunal might exercise its expanded discretion under section 13(1)(*b*) of the *SCTA* to admit evidence otherwise inadmissible by ordinary operation of law, I do not see that discretion as warranted here. I cannot think of why it would be beneficial to admit evidence in this case that is neither relevant nor probative for the reasons discussed. I therefore decline to exercise discretion.

IV. SUMMARY: ORDER AND COSTS

[45] In summary then, it is confirmed that leave is granted to the Applicant to bring this Application. It may enter the Fort Nelson and ILRS Documents into evidence by placing them in the Common Book of Documents. However, the request to admit the Galibois Transcripts is denied.

[46] Because of the divided success in the Application, I am not inclined to invite submissions on costs or to make an order for costs. However, if the Claimants require an adjournment to consider the Fort Nelson or ILRS Documents, and to conduct further research as a result of their admission, the Claimants may within 15 days following the release of these Reasons address the Tribunal in that regard by scheduling a Case Management Conference, and the Tribunal will also accept submissions on costs related to any need by the Claimants to amend their filed written submissions.

W.L. WHALEN

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20150310

File No.: SCT-7007-11

OTTAWA, ONTARIO March 10, 2015

PRESENT: Honourable W.L. Whalen

BETWEEN:

DOING RIVER FIRST NATION

Claimant (Respondent)

and

BLUEBERRY RIVER FIRST NATIONS

Claimant (Respondent)

and

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

Respondent (Applicant)

COUNSEL SHEET

TO:	**Counsel for the Claimant (Respondent) DOIG RIVER FIRST NATION** As represented by Allisun Rana and Emily Grier
AND TO:	**Counsel for the Claimant (Respondent) BLUEBERRY RIVER FIRST**

	NATIONS As represented by James Tate and Ava Murphy
AND TO:	**Counsel for the Respondent (Applicant)** As represented by Brett C. Marleau and Jonathan Sarin Department of Justice