FILE NO.: SCT-7007-13
CITATION: 2018 SCTC 1
DATE: 20180109

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
ʔAQ'AM Claimant (Respondent)	Darwin Hanna and Caroline Roberts, 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)	James M. Mackenzie, Whitney Watson and Richelle Rae, 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:

R v Mohan, [1994] 2 SCR 9, 114 DLR (4th) 419; *R v Lavallee*, [1990] 1 SCR 852; *Mazur v Lucas*, 2010 BCCA 473, 325 DLR (4th) 385; *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330; *R v Marquard*, [1993] 4 SCR 223, 108 DLR (4th) 47; *Ross River Dena Council v Canada (AG)*, 2011 YKSC 87; *R v J.-L.J.*, 2000 SCC 51, [2000] 2 SCR 600.

Statutes and Regulations Cited:

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

Authors Cited:

John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992).

Headnote:

Aboriginal Law – Specific Claim – Admissibility of Evidence – Report

The ʔaq̓am First Nation (Claimant), formerly known as the St. Mary's Indian Band, asserts that the Crown breached fiduciary duties by failing to set aside land (known as the Mission Farm Lands), adjacent to land that was established as reserve lands under the provisions of the *Indian Act*. The reserves are known as Kootenay Indian Reserve No.1 and St. Mary's Indian Reserve No. 1A.

The Respondent denies the validity of the Claim.

The Respondent seeks an order that an Expert Report authored by Ryan Blaak is found to be inadmissible in evidence on the grounds that it is unnecessary because it contains conclusions on questions of law, and is irrelevant and unreliable based on its use of secondary sources. The

Respondent also claims that Mr. Blaak provides analysis beyond the scope of his expertise as a historian.

Held: The Application is allowed, in part.

The Blaak Report is relevant to the Claim as it provides necessary explanations for the Tribunal to understand the historical context relating to the pre-emption of the Mission Farm Lands, the history of the pre-emption process in British Columbia, and the history of the reserve creation process.

As a qualified historian, Mr. Blaak is permitted to comment on social science disciplines related to the historical matter at hand.

Portions of the Blaak Report contain legal interpretation, argument or conclusion and are to that extent inadmissible.

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I. THE CLAIM

[1] This specific claim asserts that the Crown breached fiduciary duties by failing to establish land adjacent to land that was established as reserve lands under the provisions of the *Indian Act*. The reserves are known as Kootenay Indian Reserve No.1 and St. Mary's Indian Reserve No. 1A.

[2] The adjacent land is described as:

> …Lots 1, 2, 3, and 1063, consisting of 627.75 acres, otherwise known as the St. Eugene Mission Residential School Farm Lands, ("Mission Farm Lands"). [Further Further Amended Declaration of Claim at para 3]

[3] The history of the Mission Farm Lands, set out below, is taken from the facts pled in the Further Further Amended Declaration of Claim. As certain of the allegations of fact may be in dispute, their recitation does not represent findings of fact in the disposition of the Claim.

[4] Lot 1, comprising 160 acres, was pre-empted by a settler, John Shaw, in 1868. On May 19, 1875, Shaw transferred his interest to Reverend Foquet, a Catholic Missionary. This became the site of the "St. Eugene Mission".

[5] Between 1877 and 1896, the Mission acquired additional land through pre-emptions of Lot 2 (280 acres), Lot 3 (72 acres), and a Crown Grant for Lot 1063 (208 acres). This land was transferred to the Order of the Oblates of the Catholic Church in 1897.

[6] The land occupied by the Mission included Lots 494 and 1758, owned by the Sisters of Providence, and additional land, Lot 11558.

[7] In 1898, the federal government acquired 33 and 1/3 acres of Lot 1 on which it constructed an Indian Residential School. The school was operated by the Oblates until it closed in 1970.

[8] The Mission Farm Lands and Lot 11558 were utilized for farming purposes in support of the operation of the school. Students worked on the farm under the direction of the Oblates.

[9] In 1925, Canada purchased 26.96 acres of Lot 1, on which there were "Indian houses", and in 1951, established the land as reserve for the Claimant and five other bands in the area.

[10] In 1974, Canada set apart 320.71 acres of land, which included several parcels from the lands described above, as a reserve for the Claimant and four other bands in the general area.

[11] In 1976, the Order of the Oblates of Mary Immaculate sold the remaining Mission Farm Lands to Ernest Pighin.

II. APPLICATION

A. The Issue

[12] The Tribunal has before it an Application from the Respondent (Applicant) challenging the admissibility of an expert report that the Claimant, ʔaq̓am, seeks to introduce in evidence (Respondent on the Application).

[13] Mr. Ryan Blaak was tasked by the Claimant to offer expert evidence in the field of history to assist the Tribunal in understanding:

- the pre-emption history of the Mission Farm Lands which consist of District Lots 1, 2, 3, and 1063 (the Mission Farm Lands);
- the reserve creation history in the 19th century for ʔaq̓am within the historical context of reserve creation in British Columbia; and,
- whether ʔaq̓am habitually used and occupied the Mission Farm Lands prior to and during the reserve creation process for ʔaq̓am.

[14] Mr. Blaak produced a report entitled *History of the St. Eugene Mission Farm Lands – September 22, 2016* (Blaak Report).

[15] The Respondent has raised admissibility issues with all four criteria set out in *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*]. The Respondent seeks an Order that:

a. the Blaak Report is not admissible as expert evidence in this proceeding; and,

b. in the alternative, an Order pursuant to paragraph 13(1)(b) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] striking the following from the Blaak Report:

i. any analysis and conclusions beyond Mr. Blaak's scope of expertise, including opinions on archaeology, case law, or the adequacy of the pre-emption land descriptions and land survey process;

ii. any conclusions of fact or law or both;

iii. any conclusions on the issues to be decided by the Tribunal;

iv. any conclusions based on unreliable non-expert hearsay sources; and,

v. any conclusions based on the adoption of analysis and conclusions from secondary sources where Mr. Blaak has not independently researched the historical documents underlying those conclusions as set out in the proposed redacted red-lined Blaak Report attached to the Notice of Application as Appendix A and as otherwise redacted by the Tribunal.

B. Positions of the Parties

[16] In support of its Application, the Respondent has three main arguments:

1. Mr. Blaak is providing analysis beyond the scope of his expertise as a historian. The Respondent alleges that Mr. Blaak's academic background and experience are insufficient to qualify him to adopt expert opinions relating to anthropology, ethnography, oral history, archaeology, surveying, cartography or case law.

2. Secondary sources to support the Blaak Report are non-expert hearsay and substantial paraphrasing from certain sources causes the prejudicial effects of the Blaak Report to outweigh the probative value. The Respondent reproached Mr. Blaak's use of secondary sources that fail to cite primary sources, namely the use of the Claimant's websites, the Wayne Choquette report entitled *The Heritage Resource Base of the St. Eugene Mission Site, Southeastern British Columbia* (Choquette Report) and Naomi Miller's 2002 book entitled *Fort Steele: Gold Rush to Boom Town* (Miller Book). The Crown argues that these secondary sources are unreliable.

3. The Blaak Report is unnecessary because it usurps the role of the Tribunal in opining on questions of law. To support its position, during cross-examination the Respondent addresses Mr. Blaak's use of two legal concepts: "cognizable interest" and "habitual use and occupation" (*Voir Dire* Transcript, May 26, 2017, at 86–94).

[17] The Claimant maintains that Mr. Blaak's expertise qualifies him to adopt all opinions found in the Blaak Report. The Claimant submits that historical analysis is multidisciplinary by nature, with sources of relevant scholarship; namely anthropology, archaeology, cartography, and ethnography. All come from disciplines which overlap with and are incidental to the expert's field.

[18] The Claimant argues that the secondary sources in the Blaak Report are reliable. It relies on *Hartmann v McKerness*, 2011 BCSC 927, to argue that experts do not have to prove into evidence the literature on which the expert relies. It submits that the use of the Miller Book is reliable due to the author's extensive experience as a historian. It further asserts that secondary sources that constitute hearsay are admissible but that their admitted facts go to weight (*R v Lavallee*, [1990] 1 SCR 852 [*Lavallee*]; *Mazur v Lucas*, 2010 BCCA 473, 325 DLR (4th) 385). The Claimant argues that the Blaak Report only minimally relies on suspect secondary sources therefore having a minimal impact on the overall weight of the expert's opinions.

[19] The Claimant admits that expert evidence which opines on questions of law is not admissible as the judge must decide on legal issues. It says, however, that Mr. Blaak relies on case law only to narrow the scope of his historical research and to establish parameters for "habitual use and occupation" or "cognizable interest" thereby justifying the use of case law in his analysis. The Claimant argues that even if the Tribunal finds that the Blaak Report does indeed proffer opinions on issues of law, it is not fatal to the necessity requirement of the Report.

III. ANALYSIS

A. The Admissibility Test

[20] The inquiry for determining admissibility of expert opinion evidence is a two-step process that was first proposed in *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330 [*Abbey*]. The two-part test in *Abbey* is explained by Doherty J.A. as follows (at para 76):

> First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence: see Mohan; R. v. D. (D.), [2000] 2 S.C.R. 275, [2000] S.C.J. No. 44; J. (J.); R. v. Trochym, [2007] 1 S.C.R. 239, [2007] S.C.J. No. 6; K. (A.); Ranger; R. v. Osmar (2007), 84 O.R. (3d) 321, [2007] O.J. No. 244 (C.A.), leave to appeal to S.C.C. refused (2007), 85 O.R. (3d) xviii, [2007] S.C.C.A. No. 157.

[21] Initially, the Claimant must establish the threshold requirements for admissibility based on the four criteria set out in *Mohan* at page 20. The Claimant has the evidential and legal burden to satisfy the *Mohan* threshold admissibility test and show that each criterion has been met.

[22] Both Parties agree that admission of expert evidence depends on the application of the following *Mohan* criteria:

a. relevance;

b. necessity in assisting the trier of fact;

c. the absence of any exclusionary rule; and,

d. a properly qualified expert.

[23] If the evidence fails to meet these threshold requirements, it should be excluded. At the second discretionary "gatekeep[ing]" step, the Tribunal must determine if the probative value of the evidence outweighs its prejudicial effect. The gatekeeper inquiry requires an exercise of judicial discretion (*Abbey* at para 79).

B. Qualifying the Expert

[24] On May 26, 2017, Mr. Blaak was examined and cross-examined on his affidavit introducing the Blaak Report. Both Parties agreed that examination and cross-examination of Mr. Blaak's affidavit should be taken as *voir dire* testimony. The Tribunal agreed and considered

voir dire in assessing Mr. Blaak's qualifications as an expert witness. Accordingly, the *Mohan* analysis begins by examining whether Mr. Blaak is qualified to give expert testimony and adopt the opinions captured in the Blaak Report. Should the Tribunal fail to qualify Mr. Blaak as an expert based on his *voir dire* testimony, remaining admissibility issues is moot.

[25] In *Mohan*, the Supreme Court of Canada noted that evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify (at 25).

[26] Writing for the majority in *R v Marquard*, [1993] 4 SCR 223 at 243, 108 DLR (4th) 47, McLachlin J., as she then was, quoted with approval from John Sopinka, Sidney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at pages 536 and 537:

> The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[27] Mr. Blaak's affidavit describes him as an expert in history with a focus on Aboriginal land issues, particularly specific claims research relating to Indian Reserves in British Columbia. Mr. Blaak has never been qualified as an expert by a court or tribunal to give expert evidence on Aboriginal land issues (*Voir Dire* Transcript, May 26, 2017, at 21–22).

[28] Based on his curriculum vitae, Mr. Blaak earned a Bachelor of Arts majoring in history in 2002 from Trinity Western University and a Master's Degree in history from the University of British Columbia in 2003. During cross-examination, Mr. Blaak admits that his education did not include courses in anthropology, ethnography, archaeology, cartography or anything on pre-emption policy in British Columbia; however, he testifies that his Master's courses did delve into Aboriginal issues (*Voir Dire* Transcript, May 26, 2017, at 21). He acknowledges that his Master's thesis focused on late 20th century women's movement and Canadian identity and had no reference to Aboriginal land issues (*Voir Dire* Transcript, May 26, 2017, at 17). He also acknowledged that he never authored nor co-authored peer-reviewed publications (*Voir Dire*

Transcript, May 26, 2017, at 48).

[29] Considered alone, Mr. Blaak's education does not establish expert knowledge on the pre-emption of the Mission Farm Lands, the historical context of reserve creation in British Columbia or the historical use of the Mission Farm Lands by ʔaq̓am. It does establish him as an academic in the social sciences and thus trained in research and tools of analysis that cross the several disciplines.

[30] Mr. Blaak's affidavit reveals over a decade of experience working on issues related to the history of the Indian Residential Schools and specific claim research projects. The latter include the analysis of cartographic and ethnographic documents and Aboriginal oral traditions (curriculum vitae at 1–2). During cross-examination, he reiterated having over a decade's experience as a historical researcher (*Voir Dire* Transcript, May 26, 2017, at 38). Mr. Blaak testified to working on approximately 80 to 100 specific claim historic reports for over fifty First Nations in British Columbia (*Voir Dire* Transcript, May 26, 2017, at 31; Affidavit #1 of Ryan Blaak at para 11).

[31] Mr. Blaak worked on many specific claims regarding the pre-emption process in British Columbia (*Voir Dire* Transcript, May 26, 2017, at 34-35 Affidavit #1 of Ryan Blaak at para 12). At paragraph 13 of his affidavit, he provides detailed experience researching the Indian Reserve process in British Columbia.

[32] During redirect, Mr. Blaak explained his work reviewing documents related to mapping for Indian Residential Schools (*Voir Dire* Transcript, May 26, 2017, at 98). He explains that every specific claim project he worked on required assessing maps and surveys to glean into what could be understood in terms of the issues examined:

> Q Okay. Did any of these reports include mapping information that you researched?
>
> A So I would say basically every report that I work on with specific claims we encounter -- I deal with maps, whether it's maps, sketches, whether it's going back to the minutes of decision where we have the original sketches that might have accompanied someone like Peter O'Reilly's minutes of decision, to later surveys that were done at the behest of O'Reilly, to the official record/maps that Natural Resources Canada has available on Indian reserves in Canada, and going all the way to looking at larger surveys that might have

> been done by the colony or province thereafter by individuals like Joseph Trutch, for instance. These are the types of things -- there's a lot of examples here of the types of claims I worked on: roads, transmission lines, constantly looking at survey plans/maps and those types of things and assessing them to see what could be understood from them in terms of the issues that were examined. [*Voir Dire* Transcript, May 26, 2017, at 105–06]

[33] Regarding archeological evidence, Mr. Blaak testified that he has experience examining archeological evidence and gives examples from other reports (*Voir Dire* Transcript, May 26, 2017, at 106–07). He admits to having no fieldwork experience in archaeology (*Voir Dire* Transcript, May 26, 2017, at 38).

[34] On redirect, Mr. Blaak testified to having relied, on numerous occasions, on ethnographic/anthropologic evidence in preparing reports and in order to understand historic developments:

> Q Yes. In respect to these reports did you ever include anthropological sources?
>
> A Yes, I have absolutely included that type of information, anthropological/ethnographic sources on numerous occasions. There's issues where I've been looking at trapline rights, for instance, where I had to look at ethnography/anthropology to understand some of the groups that are involved, especially in northern BC where things are a little hazy in terms of understanding. [*Voir Dire* Transcript, May 26, 2017, at 106]

[35] He further asserts experience referencing oral history:

> Q Right. Okay. And can you recall whether any oral history was referenced in any of these reports that you had undertaken?
>
> A. Yes, I have at times been provided with or encountered oral history that I have taken into account as I've written my specific claims reports. [*Voir Dire* Transcript, May 26, 2017, at 104]

[36] During cross-examination, Mr. Blaak admits to having no formal education or trained experience on how to conduct oral history (*Voir Dire* Transcript, May 26, 2017, at 36).

[37] The use of oral history, anthropological, archaeological, ethnographic, and cartographic evidence is required for historians to place historical events and occurrences into context. In that sense, historians must critically evaluate sources from related disciplines to glean into the past. I do not accept the Respondent's argument against the use of documents or sources from other, interrelated, social science disciplines.

[38] I agree with the Claimant's contention at paragraph 26 of its Memorandum of Fact and Law that "[t]he claim that as a historian, Mr. Blaak is not qualified to adopt or interpret sources which include archaeological findings creates a false dichotomy between the two disciplines when the reality is that they are closely related". I find that Mr. Blaak, as a qualified historian is, based on his experience, permitted to comment on social science disciplines related to the historical matter at hand.

[39] In the *voir dire*, Mr. Blaak testified in a candid and credible manner, providing nuanced answers where necessary and remaining impartial throughout. He testified to his extensive practical experience as a historical researcher in the areas where he adopts expert opinion. As a historian, Mr. Blaak described his experience interpreting documents from relating social sciences. Based on his vast and detailed experience in specific claims research, the Tribunal is prepared to accept Mr. Blaak as an expert witness in the field of history. Within this expertise, he is permitted to adopt opinions in the areas canvassed by the Claimant. Qualification of Mr. Blaak as an expert does not mean that his Report is immune from admissibility scrutiny under the other *Mohan* criteria.

C. Relevance

[40] The Respondent uses *Mohan* to define the relevancy criterion. In *Mohan*, threshold admissibility on relevance requires both logical relevance (does the evidence tend to prove the proposition for which it is advanced) and legal relevance (does the opinion evidence have probative value in establishing the existence or non-existence of a material fact at issue).

[41] The jurisprudence has evolved since *Mohan*. At the initial threshold admissibility test, only logical relevance is addressed. Logical relevance has a low threshold for admissibility, erring on the side of inclusion of evidence (*Abbey* at paras 82–84).

[42] In its Memorandum of Fact and Law, the Crown does not object to the logical relevancy of the Blaak Report, the arguments go to legal relevancy. The Crown contends that Mr. Blaak relies too heavily on two secondary sources: Robert Cail's book, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Cail) and Cole Harris's book, *Making Native Space* (Harris).

[43] At the threshold admissibility step, Mr. Blaak's Report is logically relevant as the topics he addresses – the pre-emption history of the Mission Farm Lands, the historical use of the Mission Farm Lands by ʔaq̓am, and the reserve creation history in British Columbia – are related to the factual claims made by the Claimant and therefore meet the preconditions on admissibility.

[44] Regarding the Crown's argument on legal relevancy, the Tribunal found that much of the Blaak Report is based on primary documents that would be admissible in evidence. Referenced citations to Cail and Harris make up less than one-fifth of the 417 footnotes cited in the Report. Moreover, Cail and Harris writings are widely accepted as authoritative. As Mr. Blaak also relies in large measure on other primary and secondary sources, the Crown's objection based on legal relevancy cannot succeed.

D. Necessity

[45] In *Mohan*, Sopinka J. held that opinion evidence must be necessary in the sense that it provides information outside of the knowledge of the trier of fact; necessity must not, however, be applied too strictly (at 23).

[46] The Blaak Report provides necessary explanations for the Tribunal to understand the historical context relating to the pre-emption of the Mission Farm Lands, the history of the pre-emption process in British Columbia, and the history of the reserve creation process. In *Ross River Dena Council v Canada (AG)*, 2011 YKSC 87 [*Ross River*], the Court cites a passage from Vickers J., in *Tsilhqot'in Nation v British Columbia*, 2004 BCSC 1237, [2004] 4 CNLR 365, stating the unique necessity of historical expertise in Aboriginal litigation (at para 37). In a similar manner, the adjudication of specific claims requires professional assistance to interpret the historical record which does not speak for itself.

[47] Adjudicating specific claims in accordance with law is a "distinctive task":

> …there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner… [*SCTA*, Preamble]

[48] The task is distinctive as it calls for the adjudication of claims that arise in times long past and in the context of a fiduciary relationship that has existed between Canada and Indigenous

Peoples since the *Royal Proclamation*, 1763. Claims that allege a particular breach of treaty or failure to establish a parcel of land as a reserve, call for an understanding of the historical context in which the impugned action occurred. It is the context that informs the existence of Crown duties and the Crown duties applicable in the matter at hand.

[49] The context for the present understanding of Crown duties is found in the history of Indigenous occupation of land and government policies and actions affecting Indigenous interests. This is revealed in the Tribunal decisions in *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1, *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3, *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3, and *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3.

[50] Judges need the benefit of historical research, analysis, and opinions on matters of fact from persons who have studied Indigenous culture, legal systems, territories, Crown perspectives and actions, and Crown-Indigenous relations. This, together with Indigenous histories and perspectives, along with the documentary record, is the material based on which facts may be found.

[51] To that end, the Blaak Report is largely necessary because it allows the Tribunal to understand the historical context in which the Crown allegedly breached its fiduciary duties.

[52] Under the necessity criterion, the Crown argues that Mr. Blaak proffers legal opinion that usurps the functions of the Tribunal and is therefore unnecessary. The Crown is arguing that Mr. Blaak draws inadmissible legal conclusions in his Report. Both Parties agree that the judge must decide on legal issues and expert evidence which opines on questions of law is inadmissible (*Syrek v R*, 2009 FCA 53 at paras 28–29, 307 DLR (4th) 636; *Squamish Indian Band v R* (1998), 144 FTR 106 at para 9 (FCTD)).

[53] To distinguish this case from the applicable jurisprudence, the Claimant argues that case law was used by Mr. Blaak only to establish a historical framework; legal concepts such as "use and occupation" and "cognizable interest" helped to narrow the scope of the research.

[54] During cross-examination, the Crown has a lengthy debate on this issue where Mr. Blaak

argues that legal concepts (implying "cognizable interest" and "habitual use and occupation") are embedded in history:

> Q So you're not qualified to offer an opinion with respect to legal concepts and case law; is that fair?
>
> A That's a challenging question to answer. It's so embedded in history and the things that I encounter on a daily basis in my work that I feel like my professional experience has certainly given me enough experience to make -- to put forth ideas about legal issues, certainly. And just my basic understanding of the issues as well. [*Voir Dire* Transcript, May 26, 2017, at 84]

[55] In support of this view, the Claimant relies on the legal propositions in *Ross River*, citing an Ontario Court of Appeal decision, *R v Graat* (1980), 116 DLR (3d) 143 at 14, 30 OR (2d) 247 (ONCA), that gives judicial discretion on the admissibility of expert evidence on "ultimate issue[s]" (at paras 49–50; ʔaq̓am's Memorandum of Fact and Law at para 71).

[56] In *Ross River*, the Court found that even though an expert made several statements of fact and law, these were made to establish the historical, legal, and political context of the time and therefore admissible (at para 61). *Ross River* is factually distinguishable on the basis that the expert in that case had a PhD from Cambridge University in Law, was a member of the Cambridge Faculty of Law, and was specifically asked to address the legal understanding of an 1870 Order (at paras 4, 53).

[57] Some sections of the Blaak Report do advance legal argument. Mr. Blaak's added legal opinions do not provide special knowledge of assistance to the Tribunal in findings of fact. Based on the jurisprudence cited by the Parties, sections proffering legal opinion are held inadmissible. The Report annexed shows passages for redaction, in red strikethrough, the sections of the Report that contain inadmissible legal argument or conclusions. These passages are found on the following pages: 5, 87, 89–92, 107, and 110.

E. Applicable Exclusionary Rule

[58] Because there is an acceptable hearsay component to every expert opinion, Mr. Blaak's opinions may be derived from secondary sources not before the Tribunal. In *Lavallee*, the Supreme Court of Canada found an expert could rely on hearsay information or data so long as there was other evidence forming part of the factual premises for the opinion (at 893). Writing

for the majority, Wilson J. states the following proposition on hearsay evidence used by experts (at 897):

> Where the factual basis of an expert's opinion is a *mélange* of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.

[59] In dissent from the majority in *Lavallee*, Sopinka J. agreed that where you have a mix of admissible or inadmissible evidence, the question goes to weight (at 900).

[60] In *Mazur v Lucas*, 2010 BCCA 473, 325 DLR (4th) 385, the British Columbia Court of Appeal states that an expert may rely on a variety of sources including hearsay but that the weight of the expert opinion will depend on the reliability of the hearsay (at para 40). Regarding the admissibility of hearsay evidence, Garson J. writes that:

> The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[61] The consensus in these authorities is that hearsay is admissible, but its weight will depend on its reliability. With respect to reliability, in *R v J.-L.J.*, 2000 SCC 51, [2000] 2 SCR 600, the Supreme Court of Canada states precautions need to be made to exclude "junk science" and preserve and protect the role of the trier of fact (at para 25).

[62] There are four main secondary sources used in the Blaak Report: Cail, Harris, the Choquette Report, and the Miller Book. The affidavit and *voir dire* testimony show that both Cail and Harris are authoritative sources that satisfy the test for threshold reliability. Moreover, the Crown is not objecting to the trustworthiness of Cail and Harris, but rather to the extent of their use i.e. relevance.

[63] Paragraphs 29 and 30 of Mr. Blaak's affidavit explain the reliability of the Cail and Harris sources and, in cross-examination, the Crown acknowledges that Harris and Cail draw heavily from verifiable primary sources (*Voir Dire* Transcript, May 26, 2017, at 73, 79).

[64] During cross-examination, the Crown probed the witness on the use of the Miller Book

and the Choquette Report. The question for the Tribunal is whether these two sources meet the threshold of reliability.

[65] In the *voir dire* testimony, Mr. Blaak admits that the Choquette archeological report references no primary sources and has no footnotes:

> Q And Mr. Choquette's report does not contain any footnotes or references, does it?
>
> A No, it does not.
>
> Q And you would agree with me that without footnotes you don't know what primary source documents Mr. Choquette considered in the formulation of his opinion. Would that be fair?
>
> A No, he doesn't make mention of which sources he used. [*Voir Dire* Transcript, May 26, 2017, at 58]

[66] In cross-examination, he also admits that Naomi Miller's book has no footnotes and that she is not an authoritative historical source:

> Q And you'll agree with me that Ms. Miller's book does not contain any footnotes or references, does it?
>
> A It does not, no.
>
> Q And you would agree with me that without footnotes, you don't know what primary source documents Ms. Miller considered in relation to the opinions that she expressed in her book; is that right?
>
> A Yes, that is not known for -- based on no footnotes.
>
> Q And Ms. Miller's book is not a peer-reviewed academic publication on the use and occupation of Mission farm lands, is it?
>
> A Not as far as I'm aware.
>
> …
>
> Q So, just to be clear, is it your evidence that Ms. Miller's unreferenced book is an authoritative historical source on the use and occupation of the Mission farm lands?
>
> A I don't believe I ever said her source was authoritative.
>
> Q No. I'm asking you if that's your evidence.
>
> A Okay. I don't necessarily consider authoritative, but I consider it to be a work of a very, very experienced historian in local history. [*Voir Dire* Transcript, May 26, 2017, at 67, 71–72]

[67] The Choquette and Miller sources seem dubious at best, they are not peer-reviewed, lack

footnotes, and have no appearance of general acceptance in the scientific community. The Choquette Report came from Claimant's counsel and was not independently sourced (*Voir Dire* Transcript, May 26, 2017, at 60). Regarding the Miller Book, if Mr. Blaak does not adopt Ms. Miller's writing as authoritative, the Tribunal can hardly be expected to rely on it. Also, the Miller source is only referenced once on page 103 of the Blaak Report and in a corroborative manner, therefore it is both unreliable and unnecessary. The Choquette Report and Miller Book do not meet the threshold of reliability.

[68] The same considerations apply when analysing the limited use Mr. Blaak makes of the Claimant's non-academic websites. The guarantees of academic trustworthiness of these websites do not satisfy threshold reliability.

[69] The Crown argues that the prejudicial effect of the secondary sources used in the Blaak Report outweighs their probative value and therefore the entire Report should be inadmissible.

[70] The Claimant argues that the use of the sources goes to weight. The authorities cited in this analysis favour the Claimant's argument: the Blaak Report is based in small measure on suspect information and in large measure admitted facts or facts sought to be proved, the matter is purely one of weight and the Report is therefore admissible.

[71] Portions of the annexed Report, underlined in green, are sections of the Report from sources of questionable reliability. Where specific sources of hearsay are not proven by other admissible evidence, the weight attributed to these sources by the Tribunal may be limited.

F. Cost-Benefit Analysis

[72] Parliament intended that the Tribunal have a broad discretion in the admission of relevant information. Information may be considered as evidence whether or not admissible in a court of law:

> **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;… [*SCTA*]

[73] The Tribunal has wide discretion in deciding what information it will consider in determining the validity of claims and, if found valid, information relevant to the assessment of compensation. Except for expert opinions which are biased on their face, lack factual information in support of opinion, or contain legal argument, the default will generally be admissibility.

[74] In proceedings before the Tribunal the second "gatekeeper" stage of the admissibility analysis requires ample room for judicial discretion in weighing prejudicial effects and probative value.

[75] In *R v J.-L.J.*, 2000 SCC 51, [2002] 2 SCR 600, Binnie J. concludes that "[t]he Mohan analysis necessarily reposes a good deal of confidence in the trial judge's ability to discharge the gatekeeper function (Malbœuf, supra)" (at para 61). In its Memorandum of Fact and Law, the Claimant cites *Ross River* on the difference between the potential for prejudicial effects in a jury trial and judge-alone proceedings (at para 47). Specific claims litigation is before a single member, a Superior Court judge. Tribunal members are less likely to be influenced by prejudicial factors than a jury.

[76] In its Application, the Respondent claims prejudicial effects outweigh probative value in the three following ways:

- Mr. Blaak's reliance on Cail and Harris throughout the Report undermines its legal relevance and is prejudicial;
- the unnecessary legal opinion is prejudicial and outweighs the probative value of the Report; and,
- the use of certain secondary sources constitutes unreliable hearsay with prejudicial effects that outweigh probative value.

[77] The first objection fails; the Blaak Report relies on both primary and secondary sources. Cail and Harris are authoritative sources. The grounds advanced for the second objection does not establish prejudice to a degree that would render the entirety of the Blaak Report inadmissible, the Tribunal has redacted (in red strikethrough) any legal interpretation, argument or conclusion. The third argument has merit, but the correct judicial response is not to withdraw the evidence but rather to address its weight.

IV. ORDER

[78] The Application is allowed in part.

[79] Appendix A to these Reasons is a copy of the Blaak Report showing in red strikethrough the inadmissible content. The Claimant may introduce in evidence a revised report containing the admissible portions of the Blaak Report. This may be supplemented by additional text to the limited extent that it may, after redactions, enhance the report's overall coherence and readability.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20180109

File No.: SCT-7007-13

OTTAWA, ONTARIO January 9, 2018

PRESENT: Honourable Harry Slade, Chairperson

BETWEEN:

ʔAQ'AM

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) ʔAQ'AM**

As represented by Darwin Hanna and Caroline Roberts
Callison & Hanna, Barristers & Solicitors

AND TO: **Counsel for the Respondent (Applicant)**
As represented by James M. Mackenzie, Whitney Watson and Richelle Rae
Department of Justice

APPENDIX A

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