**FILE NO.:** SCT-2003-13 **OFFICIAL TRANSLATION**
**CITATION:** 2016 SCTC 13
**DATE:** 20160922

# SPECIFIC CLAIMS TRIBUNAL
# TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

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| **BETWEEN:** | ) | |
| | ) | |
| THE INNU OF UASHAT MAK MANI-UTENAM | ) | Jameela Jeeroburkhan and Michel Nolet, for the Claimant (Respondent) |
| | ) | |
| Claimant (Respondent) | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| HER MAJESTY THE QUEEN IN RIGHT OF CANADA<br>As represented by the Minister of Indian Affairs and Northern Development | ) | Dah Yoon Min and Stéphanie Dépeault, for the Respondent (Applicant) |
| | ) | |
| Respondent (Applicant) | ) | |
| | ) | |
| | ) | **HEARD:** September 1, 2016 |

## REASONS ON APPLICATION

**Honourable Paul Mayer**

INTERLOCUTORY DECISION RELATING TO THE RESPONDENT'S APPLICATION TO PRODUCE THE DONCASTER DOCUMENTS.

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

**Cases Cited:**

*R v Truscott*, [2006] OJ No 4171 (CA), 213 CCC (3d) 183; *Blueberry River Indian Band v Canada* (*Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6.

**Statutes and Regulations Cited:**

*Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, r 111.

**Authors Cited:**

Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed (Cowansville, Que: Yvon Blais, 2008).

Léo Ducharme & Charles-Maxime Panaccio, *L'administration de la preuve*, 4th ed (Montréal: Wilson & Lafleur, 2010).

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## I. INTRODUCTION

[1] The Innu of Uashat Mak Mani-Utenam (the "Innu") submitted a claim for compensation of losses resulting from the alleged neglect of the legal and fiduciary duties of Her Majesty the Queen in Right of Canada (the "Crown") in the context of the surrender in 1925 of the Uashat Reserve in Sept-Îles (the "1925 surrender").

[2] To demonstrate the neglect of these duties, the Innu wish to file in evidence historical documents relating to the expulsion of illegal occupants on another Aboriginal reserve, the Doncaster Reserve (the "Doncaster Documents").

[3] The Crown opposes this on the grounds that the documents are not relevant and that even if they were, they would create confusion and drag out the debate indefinitely as a result of their low probative value.

[4] A written application made pursuant to sections 30 and following of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*].

[5] The Tribunal has before it an application from the Crown seeking a refusal to admit the Doncaster Documents into evidence.

[6] At the same time, the Innu are seeking costs in the event that they are successful because they characterize the application as an abuse of process. Conversely, the Crown is of the view that there is no reason to adjust the costs for this application, alleging that it relates to an important fact in issue.

## II. FACTS

[7] The backdrop to this application is the 1925 surrender.

[8] According to the Innu, the Crown was negligent in its role as a fiduciary and in exercising some of the powers flowing from that role in its creation of the reserve in 1906.

[9] First, it allegedly breached its obligation to survey and mark the boundaries of the lots in the reserve provided for in section 20 of the *Indian Act*, RSC 1906, c 81 (the "1906 *Indian Act*").

[10] Accordingly, confusion set in rapidly and Uashat lots were sold to non-Indians. Between 1917 and 1921, [TRANSLATION] "27 of the 44 lots of the Sept-Îles Reserve were illegally sold to

non-Indians by Quebec's Department of Lands and Forests" (Declaration of Claim, February 14, 2014, at para 38). These lands, which had been set apart for the use and benefit of the Uashat Band, could not be alienated in any manner whatsoever to a non-member of the reserve. The Minister of Indian Affairs and Northern Development allegedly failed to exercise some of his powers to deal with the encroachments by the squatters—non-members of the Band living on the premises illegally—in particular its power to issue a removal warrant under section 34 of the 1906 *Indian Act*.

[11] Second, the Crown illegally planned the surrender of the Uashat Reserve in 1925. In fact, section 49 of the 1906 *Indian Act* provides that the majority of the male members of the band of the full age of 21 years must assent to the surrender. Very few men of the full age of 21 years were present at the meeting at which surrender was discussed. Not only that, but the Innu claim that they had ratified actions without their informed consent, since the Crown had not informed them of alternatives to surrender.

[12] In short, the application fits into the context of the Innu's claim for compensation by the Crown for the losses caused by the following breaches:

- having failed to protect part of the original Uashat Reserve from the trespassing of squatters between 1906 and 1925; and
- later, having authorized and executed the illegal surrender of a large part of the reserve in 1925 in response to this trespassing.

## III. ISSUES

[13] There are three issues to be addressed with respect to this application:

(a) Are the documents referred to in this application relevant to the claim?

(b) If so, should they be admitted?

(c) Should costs be awarded?

## IV. RELEVANCE OF THE DOCUMENTS

### A. Positions of the parties

[14] Before deciding the issue of relevance, the Tribunal considers it necessary to provide a brief description of the documents being presented to us in this case. A compilation of 60 documents produced by the Innu, the Doncaster Documents, demonstrate how the Crown used its discretionary power to remove non-Indians illegally occupying land on the Doncaster Reserve, located in the province of Quebec. The Doncaster Documents examine removals that took place from that reserve between 1883 and 1904. Of the 18,500 acres of the reserve, 2,800 acres were illegally occupied by non-Indians, and it was they who were removed.

[15] The Crown asks that the Tribunal refuse to admit the Doncaster Documents into evidence. In support of its position, the Crown argues that the production of these documents should be prohibited on the grounds that they are not relevant, since they deal with another reserve that has no bearing on the case before us. Here we have a specific claim involving the Uashat Reserve. According to the Crown, these documents have no logical connection to the facts in issue; that is, they in no way demonstrate its power to remove illegal occupants from the Uashat Reserve and the way in which this power had been executed previously. The handling of the Doncaster Reserve is not relevant and is alleged nowhere in the Declaration of Claim or the issues.

[16] In support of these arguments, it relies in particular on *Squamish Indian Band v R*, 139 FTR 197 at para 7, 75 ACWS (3d) 821 (FCTD), also cited as *Mathias v R*, which states that the treatment by the Crown of others subject to the same legislation is insignificant in a given context. The Crown also relies on *Cardinal v R*, [1977] 2 FC 698 (FCTD) at para 12, which specifies that the circumstances surrounding the surrender of other reserves are of no interest either. Accordingly, because the relevance rule is not met, it asks that the Tribunal refuse to accept the production of these documents.

[17] As for the Innu, they submit that the Doncaster Documents are relevant to this situation because they tend to demonstrate an element that is being denied by the Crown, namely, its power to remove illegal occupants from a reserve. They believe that they are interesting mainly because they illustrate how this power, set out in section 34 of the 1906 *Indian Act*, was

exercised in the past. In short, the Innu argue that these documents raise the issue of which powers the Crown could have used in the Uashat situation, by describing a past exercise of its power to remove illegal occupants from another reserve.

[18] In support of their position, they cite *R v Truscott*, [2006] OJ No 4171 (CA) at para 22, 213 CCC (3d) 183 [*Truscott*], of the Ontario Court of Appeal, in which the judge writes that "[e]vidence is relevant if . . . it renders the existence or absence of a material fact in issue more or less likely . . .".

[19] In this sense, the capacity to remove illegal occupants is, according to the Innu, an important fact in issue in this case, and the Doncaster Documents tend to demonstrate such a power. They note that the production of these documents is not for the purpose of judging the Crown's conduct in Doncaster. The evidence would be useful primarily to demonstrate the fact that the illegal occupants were forced to leave the Doncaster Reserve after the removal order was issued.

[20] Considering that this is a case of failure to exercise a power, the Innu are of the view that not only is it relevant to evaluate documents relating to the Uashat Reserve, but that we must also base our approach on other reserves in order to have an objective overview of the situation.

[21] In short, they argue, such evidence would be relevant to the Tribunal as an illustration of the Crown's conduct with respect to another reserve in order to define its fiduciary duties in a similar contemporary situation.

### B. Law

[22] The relevance rule is clearly stated at paragraph 22 of *Truscott*:

> 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.

[23] In other words, evidence must be considered relevant and admitted when it [TRANSLATION] "reasonably tends to demonstrate the existence of a fact in issue" (Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed (Cowansville, Que: Yvon Blais, 2008) at

p 851). Relevance is therefore a necessary but not sufficient requirement for evidence to be admissible.

### C. Analysis

[24] In this case, the issue involves the Crown's fiduciary duty to exercise its power to remove the illegal occupants from the Uashat Reserve. From this perspective, paragraph 41 of the Innu's Declaration of Claim dated February 14, 2014, reads as follows:

> [TRANSLATION]
>
> The DIA failed to exercise its powers under the *Indian Act* to rectify the illegal encroachments on reserve lands by, among other things,
>
> (a) issuing a warrant of removal under section 34 of the 1906 *Indian Act*;
>
> . . .

[25] In contrast, the Crown explains its disagreement in paragraph 41 of its Response dated July 14, 2014:

> [TRANSLATION]
>
> The Respondent DENIES paragraph 41 of the Declaration and NOTES that the legal provisions mentioned therein do not impose on the Crown any obligation to act;

[26] The Tribunal understands, from the somewhat ambiguous formulation of paragraph 41 of the Response, that the Crown is denying its obligation to act in the case of illegal encroachments on a reserve. Because the parties disagree on this point, it is therefore a logical and significant issue.

[27] Applying the legal principles set out above, the Tribunal finds that the Doncaster Documents are sufficiently relevant. It must be decided on a substantive basis whether the Respondent breached its fiduciary duties to the Innu. In this sense, the latter wish to demonstrate that the Crown had a fiduciary duty like the one described by Justice McLachlin in *Blueberry River Indian Band v Canada* (*Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 115, [1996] 2 CNLR 25:

> Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then

> the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other . . .

[28] To prove this general obligation arising from section 64 of the 1906 *Indian Act* (one of the issues), the Doncaster Documents are relevant because they illustrate how this duty, which manifested itself in the removal of illegal occupants, had been exercised in the past on another reserve. This would allow for a comparison of the Crown's conduct in other contemporary situations.

[29] The Tribunal adds that it is preferable to consider the legal arguments of each party and the evidence supporting them during the hearing rather than at this stage of the claim.

## V. ADMISSIBILITY OF THE DOCUMENTS

### A. Positions of the parties

[30] The Crown urges the Tribunal to exercise its discretion to refuse to accept the production of the Doncaster Documents even if they are considered relevant. If the Tribunal were to find that the documents were minimally relevant or had little probative value, the Crown asks that it reject them on account of the prejudice they would cause. The Crown is weighing the insufficiency of the evidence and probative value against the prejudicial effects that would result from the production of the documents. In its view, the prejudice would be so great as to justify the refusal to accept production of this evidence.

[31] For example, the Crown admits that the following prejudicial effects are among those likely to be created by the production of the Doncaster Documents:

- creating confusion;
- needlessly dragging out the debate; and
- causing harm to the Crown or to third parties, including the Indigenous peoples concerned by the Doncaster Reserve.

[32] The confusion and delays would be attributable to the Crown's need to consult an expert to complete the documents presented and determine which could be filed. In its view, a delay of several months could result because of the highly factual nature of the analysis, and the

comparison between the situation in Doncaster and that at issue here would be laborious. It would be impossible to quantify the additional expenses that would be incurred.

[33] Also according to the Crown, the harm would arise from the Tribunal's indirect judgment of the actions taken in the Doncaster case despite the fact that no claim has ever been filed on that subject. Consequently, this could be detrimental to the Crown or the First Nation should this matter ever be litigated.

[34] As for the Innu, they are instead of the view that the Doncaster Documents have significant probative value. They illustrate the Crown's conduct during a contemporary period in circumstances similar to those surrounding the Uashat Reserve. It would therefore be interesting to infer from the facts contained in those documents the conduct that the Crown should have adopted in this context.

[35] Regarding the harm that could be caused by these documents, they submit that it is merely theoretical or potential harm. No claim has been filed with respect to the Doncaster Reserve, and so the harm can only be hypothetical. Moreover, the Innu are not taking a position on any possible claim that the inhabitants of the Doncaster Reserve might file.

[36] As for the delays, the Innu are turning that argument back toward the Crown, reminding it that they sent it the Doncaster Documents more than a year ago. They therefore ask that the Crown refrain from seeking any additional time and that it not attempt to [TRANSLATION] "drag out the debate indefinitely", to use the words of another. They also wish to reiterate that there are only 60 analyzed and selected documents at issue. There has already been a significant filtering process to avoid delays in these proceedings.

### B. Law

[37] Notwithstanding the relevance of a piece of evidence, the Tribunal has the discretion to refuse to admit it if its probative value is low or if its admission would be highly prejudicial.

[38] The rule is plainly stated in the book *La preuve civile* (Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed (Cowansville, Que: Yvon Blais, 2008) at p 854):

> [TRANSLATION]
>
> Relevant evidence is sometimes inadmissible because of the application of an ineligibility rule. However, logically relevant evidence with low probative value may be excluded by the court if it is likely to cause confusion, drag out the debate indefinitely or needlessly prejudice a party. [Notes omitted.]

[39] Léo Ducharme adds the following in his book *L'administration de la preuve* (Léo Ducharme & Charles-Maxime Panaccio, *L'administration de la preuve*, 4th ed (Montréal: Wilson & Lafleur, 2010) at paras 23, 34):

> [TRANSLATION]
>
> [The Court] may, of its own initiative, refuse to admit evidence of alleged facts if they are not relevant to the debate or take any measures necessary to prevent loss of time and harassment of witnesses.

[40] It would be fair to add to these rules that the admission of evidence is at the discretion of the Tribunal under subsection 13(1)(b) of the *Specific Claims Tribunal Act*, SC 2008, c 22.

### C. Analysis

[41] The Tribunal is of the view that the legal arguments raised by the Crown to the effect that the production of the Doncaster Documents would cause significant prejudicial effects are no barrier to their admission.

[42] The evocation of possible prejudice to a potential claim by the members of the Doncaster Reserve against the Minister of Indian Affairs and Northern Development is also unfounded. With all due respect for the Crown, the Tribunal does not believe the members concerned could really complain about the removal of the squatters from Doncaster. In fact, they obtained what they wanted at the time, in that their reserve was freed from the illegal encroachments of non-Indians. A potential claim is therefore unlikely, and prejudice arising from the production of the Doncaster Documents is even less likely.

[43] The fear of confusion invoked by the Crown is unfounded. There will be no confusion because the purpose of admitting the documents is not to compare the situation of the Uashat Reserve to that of the Doncaster Reserve, but rather to show the importance of the removal power and to illustrate it through its exercise in the Doncaster case.

[44] As for additional delays, the Innu have already performed a considerable amount of research and sorted through some 300 documents to select only 60. The Tribunal hopes that any consultation the Crown undertakes of an expert to complete and evaluate the documents will take less time than it is indicating it will. The Innu note that they did not engage an expert on Doncaster in an effort to reduce the number of documents and above all to limit the scope of the debate.

[45] On account of these facts, the Tribunal is satisfied that they are acting in good faith and motivated to keep the time frame reasonable. Accordingly, the Tribunal does not believe that admitting the documents will cause any significant delay. If delays were to result, the Tribunal is persuaded that, in these circumstances, this could be remedied by granting a brief adjournment if necessary. In any event, a case management conference is certainly called for to set proper conditions and deadlines for the case as it moves forward.

[46] Accordingly, the Tribunal is of the view that the Doncaster Documents may be admitted into evidence.

## VI. COSTS

### A. Positions of the parties

[47] The Innu allege that costs should be awarded in this case because, in their view, this is an abuse of process that is harmful to the claim.

[48] According to the Innu, the issue was obvious. It is therefore appropriate to consider the conduct that has been detrimental to the resolution of the claim. They allege that the Crown did indeed have other means to avoid such a loss of time and to reduce the costs incurred by this application. For example, it could have sat down, shared its information and perspective on the documents and engaged in discussions rather than filing this application.

[49] The Crown, on the other hand, argues that no costs should be awarded. In support of its position, it points to the fact that its application was based on a legitimate issue that it was entitled to defend. The debate regarding this evidence was important, and it was not an abuse of process or unacceptable conduct.

[50] It also argues that it did not wish to extend the proceedings and that, in fact, it respected them. Indeed, following the case management conference held by teleconference on June 1, 2015, it was agreed, as recorded in the minutes, that if the parties failed to reach an agreement about the admissibility of the evidence, the Crown was to oppose it by filing a written application.

### B. Law

[51] Let us first review the rules and principles applicable to the awarding of costs in this situation. Section 111 of the *Rules* sets out the factors that must be considered by the Tribunal in relation to costs:

> 111 (1) When deciding whether award of costs under subrule 110(2), the Tribunal must consider the following factors:
>
> (a) whether a party has acted in bad faith;
>
> (b) whether a party has failed to comply with an order of the Tribunal; or
>
> (c) whether a party has refused a reasonable offer to settle.

[52] Subsection 111(2) of the *Rules* provides additional factors to be considered when the costs are being claimed by a First Nation, as is the case here.

[53] Paragraph 111(2)(a) of the *Rules* therefore requires the Tribunal to consider "whether the claimant's costs are reasonably incurred but are disproportionate to the amount of compensation awarded".

[54] Paragraph 111(2)(b) of the *Rules* provides that the Tribunal must also consider "whether the issues in relation to the specific claim are complex or contain elements that are of general public importance".

[55] The Tribunal also notes the general principles on which an order as to costs may be based:

- to indemnify successful litigants for the cost of litigation;
- to encourage settlements; and
- to discourage and sanction inappropriate behaviour by litigants.

[56] The general rule governing interim applications was clearly stated by Justice Smith in *Big Grassy (Mishkosiimiiniiziibing) First Nation Indian Band v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6 at para 13 [*Big Grassy*]:

> Save and except for cases of improper conduct or abuse of process, the Specific Claims Tribunal will adopt a no costs regime in relation to applications brought in the course of proceedings before it.

[57] At paragraph 41 of the same judgment (*Big Grassy*), Justice Smith modified his general rule to specify situations in which costs should be awarded:

> In claims or applications adjudicated by the Tribunal, circumstances of reprehensible, egregious or outrageous conduct may justify an award of costs. Abuse of process and conduct that impedes the resolution of claims may similarly attract a costs sanction. Otherwise, no costs should be ordered.

### C. Analysis

[58] On the basis of the above-stated rules and for the following reasons, the Tribunal will not award costs to the Innu.

[59] In this case, the Crown's conduct does not justify an award of costs. In every respect, this debate about the production of the Doncaster Documents was relevant and justified in the Tribunal's view. The issues were therefore appropriate in the context of the claim.

[60] In addition, the Tribunal finds that the Crown's conduct did not prejudice the resolution of the claim. In basing its arguments on the factors listed above, the Crown acted in good faith and respected the Tribunal's order. In that sense, it was correct to file its application in writing, as agreed during the case management conference held on June 1, 2015.

[61] In accordance with the general principle, costs should not be awarded in interlocutory applications unless they are justified by unacceptable conduct. In this case, there is no reason to penalize the Crown's conduct. There is therefore good reason to refuse to award costs in favour of the Innu.

## VII. DISPOSITION

**FOR THESE REASONS, THE TRIBUNAL:**

[62] **REJECTS** the Crown's interlocutory application;

[63] **WITHOUT COSTS**.

PAUL MAYER

Honourable Paul Mayer

Certified translation
Francie Gow

# SPECIFIC CLAIMS TRIBUNAL

# TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

**Date: 20160922**

**File No.: SCT-2003-13**

**OTTAWA, ONTARIO September 22, 2016**

**PRESENT: Honourable Paul Mayer**

BETWEEN:

**THE INNU OF UASHAT MAK MANI-UTENAM**

**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)**
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**AND TO:** **Counsel for the Respondent (Applicant)**
As represented by Dah Yoon Min and Stéphanie Dépeault
Department of Justice Canada