SCT File No.: SCT-5001-13

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION

CLAIMANTS

-and-

LITTLE BLACK BEAR FIRST NATION

CLAIMANT

-and-

STAR BLANKET FIRST NATION

CLAIMANT

-and-

STANDING BUFFALO FIRST NATION

CLAIMANT

-and-

PEEPEEKISIS FIRST NATION

CLAIMANT

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
(as represented by the Minister of Aboriginal Affairs and Northern Development Canada)

RESPONDENT

PEEPEEKISIS FIRST NATION RESPONSE TO STANDING BUFFALO FIRST NATION APPLICATION

I INTRODUCTION

1. This submission is filed on behalf of the Peepeekisis First Nation ("Peepeekisis").

2. The Standing Buffalo Dakota First Nation ("Standing Buffalo") has brought an application to admit the following documents:

   (a) Correspondence from Phillips & Co. to Department of Justice dated June 19, 2014;
   (b) Correspondence from Department of Justice to Phillips & Co. dated July 23, 2014;
   (c) Correspondence from Phillips & Co. to Department of Justice dated July 31, 2014; and
   (d) Correspondence from Department of Justice to Phillips & Co. dated August 1, 2014.

3. Standing Buffalo has also applied for the admission of the following transcripts from Elders Clifford Tawiyaka and Dennis Thorne:

   (a) National Energy Board Hearing Transcripts (OH-1-2007) with respect to the TransCanada Keystone Pipeline GP Ltd. hearing held on June 14, 2007;
   (b) National Energy Board Hearing Transcripts (OH-2-2007) with respect to the Enbridge Pipelines (Westspur) Inc. ACCE project hearing held on April 12, 2007; and
   (c) National Energy Board Hearing Transcripts (OH-3-2007) with respect to the Enbridge Southern Lights GP Inc. hearing held on August 21, 2007.

4. Standing Buffalo seeks to have these documents and transcripts admitted before the Specific Claims Tribunal ["Tribunal"] for the purpose of determining whether they have standing or an interest Last Mountain Reserve 80A ["IR 80A"].

II ISSUES

5. One issue to be determined is whether the documents described in paragraph 2 are subject to some form of a claim of privilege and, on that basis, should not be admitted. Peepeekisis takes no position with respect to whether the four pieces of written correspondence between the Respondent and legal counsel for Standing Buffalo are or are not protected by privilege.

6. Peepeekisis respectfully submits that the transcripts from Elders, Clifford Tawiyaka and Dennis Thorne, should not be admitted as they are not relevant to the claim by Standing Buffalo of an interest in IR 80A.

III GENERAL RULES FOR THE ADMISSIBILITY OF EVIDENCE

7. Section 13 of the *Specific Claims Tribunal Act*, SC 2008, c C-22, provides the Specific Claims Tribunal with the power to receive and accept evidence, including oral histories:

> **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.

8. Although the Tribunal has the discretion to accept evidence that might not be accepted in a court of law, the Tribunal has, in previous cases, examined the principles and approaches taken by courts in admitting evidence since, it is submitted, not all facts that a party may wish to introduce may constitute "evidence" admissible in a proceeding.

9. Both the Tribunal and Courts have referred to the text, The Law of Evidence, 6th Ed., (Toronto: Irwin Law Inc. 2011) by David M. Paciocco and Lee Stuesser, as setting out the principles that should be applied when considering the issue of admissibility (see pages 24-30).

10. The basic approach is that for evidence to be admissible it must be relevant to a material issue in the case and it must not be subject to an exclusionary rule (The Law of Evidence, p. 24).

11. When considering admissibility, both materiality and relevance are required. Materiality is about the "relationship between evidence and the matters in issue" (*Ibid* at p. 27). According to Paciocco and Stuesser, "[e]vidence is material if it relates to a primary issue that arises for decision" (*Ibid* at p. 25). To make such a determination, it is necessary to consider the elements of the claim and whether the evidence in question is directed towards any of those elements (*Ibid* at pp. 25- 26).

12. If the evidence is directed toward a material issue, it is then necessary to consider if the evidence is relevant. According to Paciocco and Stuesser, "relevance is about the relationship between evidence and the fact it is offered to prove" (*Supra* at p. 27). Relevance is only a factor when considering circumstantial evidence. Evidence which directly proves a material fact rather than requiring an inference is admissible (*Ibid.* pp. 27-28).

13. Relevance also is dependent upon the context. In this respect, context involves "the facts in issue, the position taken by the parties, and the other evidence adduced in relation to those facts" (*Ibid.* p. 29).

14. The test for relevancy is whether the evidence makes an alleged fact more likely than it would be in the absence of that evidence (*Supra* at p. 27). In other words, the question to be asked is whether the evidence assists in proving a particular fact (*Supra* at p. 27). However, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue" (*R v Arp*, [1998] 3 SCR 339 at para 38, [1998] 3 RCS 339). Rather, the "evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue'" (*Ibid* at p. 28). The result is that "there is no minimum probative value required for evidence to be relevant" (*Ibid*). The threshold of relevance is not high (Paciocco & Stuesser, *supra* at p. 29). Relevance is established when "the evidence has a logical tendency to contribute to a finding about the material fact (*Ibid* at p. 29).

15. Once evidence is found to be material and relevant, it may be inadmissible on the basis of an exclusionary rule. There are various exclusionary rules, including, but not limited to, hearsay, character evidence, opinion evidence, and privilege or where the evidence, although material and relevant, is so prejudicial that it should not be allowed.

IV ADMISSIBILITY OF ABORIGINAL EVIDENCE

16. When considering First Nation claims, Courts have adopted a flexible approach to the admission of evidence. In *Mitchell v MNR,* 2001 SCC 33, [2001] 1 SCR 911 ["*Mitchell*"], the Supreme Court of Canada explained the flexible approach that must be taken by courts when considering the admissibility of evidence in Aboriginal right claims:

> 27 Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet*, *supra*, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).
>
> 28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, *supra*; *Delgamuukw*, *supra*, at para. 82).
>
> 29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, *supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, *supra*).
>
> 30 The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, 1993 CanLII 47 (SCC), [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable

> evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

17. The Supreme Court of Canada, in *Mitchell,* more specifically provided the test for admitting oral history, as follows:

> 31 In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

18. In relation to the test for relevance/usefulness, the Supreme Court of Canada in *Lax Kw'alaams Indian Band v. Canada (AG)*, 2011 SCC 56 at para 14, [2011] 3 SCR 535, explained that"[t]he relevance of evidence is tested by reference to what is in issue" and "[t]he statement of claim... defines what is in issue".

19. In *Mitchell*, the Supreme Court of Canada explained how oral histories can meet the test for usefulness/relevance in two ways. First, the evidence may be useful and relevant if it offers "evidence of ancestral practices" and "[n]o other means of obtaining the same evidence may exist" *(Mitchell, supra* at para 32). Second, oral histories may be relevant if they "provide the aboriginal perspective on the right claimed," where "[w]ithout such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question" (*Ibid*).

20. In *Mitchell*, the Supreme Court of Canada described the test for reliability as follows:

> 33 The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

V RULES OF EVIDENCE APPLIED BY THE SPECIFIC CLAIMS TRIBUNAL

21. In *Doig River First Nation and Blueberry River First Nations*, 2015 SCTC 2 [*"Doig River First Nation"*], the Tribunal had to consider whether certain documents could be admitted into evidence. In doing so, the Tribunal considered and applied the following rules of evidence:

[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]

...

[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.

22. Although it was the Crown applying to submit the evidence in question, this particular decision indicates the legal principles which the Tribunal applies when considering the admissibility of evidence involving Aboriginal claims.

23. In *Lac La Ronge Band and Montreal Lake Cree Nation*, 2013 SCTC 02, the case mentioned by Standing Buffalo in paragraph 18 of their Written Submissions dated September 18, 2015, the Tribunal used similar legal principles when considering whether a letter was admissible pursuant to the Notice of Application to admit documents filed by Lac La Ronge Band and Montreal Lake Cree Nation.

VI ARGUMENT ON ISSUE OF ADMISSABILITY

A Background

24. In considering the Application by Standing Buffalo, the Application should be considered in the context of the claim and in the context of the statutory authority under which the Tribunal operates.

25. With regard to the claim, as the Tribunal has already ruled, the claim will be dealt with in two phases. The first phase will determine which First Nations have an interest in Last Mountain Reserve 80A. It should be noted that the Last Mountain 80A Reserve is a specific reserve consisting of a track of land surveyed by Surveyor John Neilson in 1885. Attached as Exhibit "A" to this Argument is a copy of the original Survey Plan, a document referred to in all of the Declarations of Claim.

26. With the greatest respect, the material which Standing Buffalo seeks to have admitted consists of evidence given before hearings of the National Energy Board which was directed to establishing Standing Buffalo's claim for what is described as its traditional territory. The evidence relates to establishing the traditional lands and territory of Standing Buffalo and an alleged "ally relationship." There is however, no mention of the specific reserve that forms the subject of the issue referred to the Tribunal for determination.

27. In terms of the jurisdiction of the Tribunal, subsection 15(1)(f) indicates:

> 15(1) A First Nation may not file with the Tribunal a claim that
> ...
> (f) is based on, or alleges, aboriginal rights or title;

B Submission

28. It is trite law to suggest that he party seeking to admit evidence leaves the burden of showing the basis upon which the evidence should be received.

29. The Applicant, Standing Buffalo, has established no link between the evidence which it seeks to have admitted and the issue of the specific interest of Standing Buffalo in the Last Mountain Reserve 80A.

30. A claim based upon aboriginal title or aboriginal rights is not one which can be entertained by the Tribunal.

31. A claim based on some form of ally relationship between the Crown and Standing Buffalo similarly cannot be of any assistance to Standing Buffalo in the absence of some specific linkage between the claim and the reserve that is the subject of the issue that has been referred to the Tribunal. The fact that Standing Buffalo may have been an ally of the Crown is now sufficient to establish a claim to a specific reserve within the vast territory that is claimed by Standing Buffalo to be its traditional lands.

32. On that basis, it cannot be said that the evidence is "relevant to a material issue in the case."

33. Even if the Tribunal concludes that what is offered in some fashion meets the test of materiality, Standing Buffalo has failed to meet the admittedly low standard of relevance. It has failed to explain how the evidence is relevant to a material issue which is its interest in a specific reserve that was created by Canada. Again, the fact that the specific reserve is found within its traditional territory is not, by itself, evidence of an interest in that specific reserve any more than it is the basis for Standing Buffalo to claim an interest in any of the other reserves created for First Nations that were signatories to Treaty 4.

All of which is respectfully submitted.

DATED this 13th day of October, 2015, at the City of Regina, in the Province of Saskatchewan.

T. J. Waller, Q.C., Legal Counsel for the Claimant,
Peepeekisis First Nation

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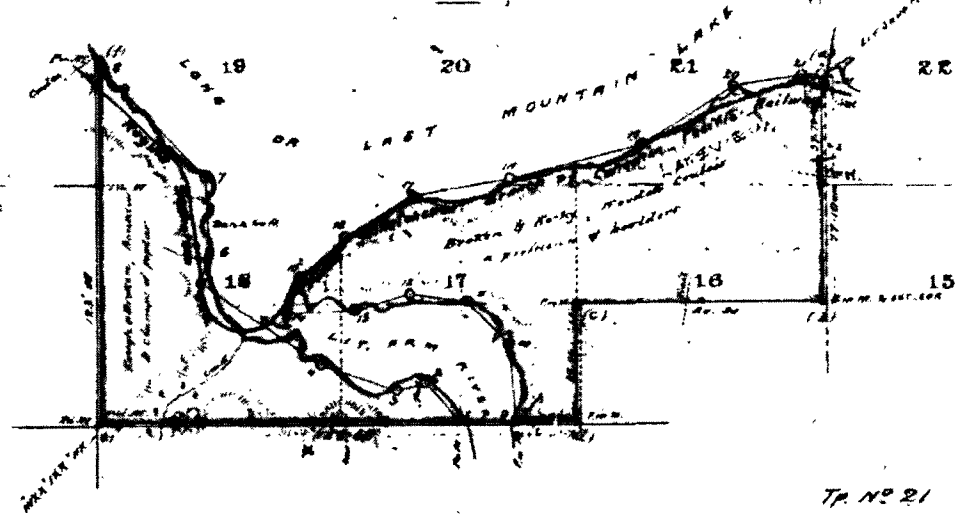
NOTE
Total area lots 101·57 ac.
area block A. 9·61 ac.
area public beach 7·20 ac.
area roads 52·62 ac.
171·80 ac.
area Rly. 6·5 ac.
Total 177·50 ac.
area I.R. 80A 1427·20 ac.
area Rof W for Rly. 48·70 ac.
area total Township 171·00 ac.
area remaining I.R. 80A. 1207·50 ac.

TREATY No 4 N.W.T.

FISHING GROUND AT
Long or Last Mountain Lake

AREA 2.23 SQ. MILES

Scale 40 Chains = 1 Inch



Sta.	Bearing	Dist.
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1 22	Beach	
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25 26	North	

Examined
2 May 1887

Tp. No 21
R XXII W. of 2nd I.M.

* According to the Field-notes the measurement should be 160.48.

Surveyed in June 1885 by
J. C. NELSON D.L.S.
in charge I.R. Surveys

Note — [illegible] the Reserve for the Depot of Qu'Appelle, Lake Stanley & Touchwood Hills Railway which portage is the shore line mean area of the Reserve as per letter of 27 March 1886. F 30979

T. 4 P. 225

T. 4