

SPECIFIC CLAIMS TRIBUNAL		
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Ottawa, ON		72

SCT File No. SCT-7006-11

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

HUU-AY-AHT FIRST NATIONS

Claimant

AND:

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

Respondent

APPLICATION TO EXCLUDE POWERPOINT PRESENTATIONS

PART 1 – FACTS

1. Canada’s expert report is dated November 12, 2016 and was filed with the Tribunal on January 12, 2016.
2. At the January 8, 2016 pre-hearing conference, Canada proposed to use a PowerPoint presentation (“Presentation”) in aid of the direct testimony of Canada’s experts.
3. On January 19, 2016, Canada provided the claimant with two proposed Presentations – the Kirzner Presentation and the Booth Presentation.
4. By letter dated January 21, 2016, counsel for the Claimants advised that we could not agree to the use of the Presentations because they went beyond Canada’s expert report. In particular, the proposed Presentations included diagrams, tables and examples not included in their expert report and information and excerpts of documentary evidence ostensibly from other proceedings. We asked that all materials outside the four corners of Canada’s expert report be removed from the Presentation.

Reference: Affidavit #2 of Jill Hamilton, **Exhibit “A”**

5. On January 28, 2016 Canada provided updated Presentations, correcting a typo in the Kirzner Presentation and removing one diagram from the Kirzner Presentation. The Booth

Presentation remained unchanged from the version provided on January 19, 2016. Canada provided no basis for retaining the remainder of the materials and information in the Presentations. The most recent proposed version of the Presentations consists of 76 slides and contain significant amounts of information, diagrams and references not included in Canada's expert report.

Reference: Affidavit #2 of Jill Hamilton, **Exhibits "B" and "C"**

6. There are four proposed slides that are of heightened concern to the Claimants because they consist explicitly of evidence and citations that are not contained in Canada's expert report, and include specific reference to materials presented in testimony of another ongoing case:

(a) Kirzner Presentation

- (i) Slide 29 – refers to rates of return purportedly calculated for other Bands, for which there is no evidence in this case.

Reference: Affidavit #2 of Jill Hamilton, **Exhibit "D"**

(b) Booth Presentation

- (i) Slide 26 – graph and citation not in Canada's expert report;
- (ii) Slide 34 – chart and data not in Canada's expert report, slide explicitly states "Documentary evidence provided in Alderville testimony"; and
- (iii) Slide 35 - chart and data not in Canada's expert report, slide explicitly states "Documentary evidence provided in Alderville testimony".

Reference: Affidavit #2 of Jill Hamilton, **Exhibit "E"**

PART 2 – LAW

A. TRIBUNAL RULES

7. In accordance with the Tribunal's Rules, a Respondent's expert report must be served at least 60 days in advance of the day on which a hearing begins.

Reference: *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 (the “Tribunal Rules”), Rule 86

8. Rule 88 addresses the required content of expert reports, which includes “the identification of any literature or other materials that the expert relied on in support of the opinions expressed in the report”.

Reference: Tribunal Rules, Rule 88(h)

9. Rule 93(2) of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 limits an expert’s testimony as follows:

Expert’s testimony

93 (1) A party who wishes to enter an expert’s report into evidence at the hearing must call the expert as a witness unless the expert was examined before the hearing under Part 9.

Limit

(2) The expert’s testimony cannot consist of reading his or her report into evidence; however, the expert may provide a concise summary of the report’s key points. (emphasis added)

10. The Tribunal is empowered to “make any order that is necessary to secure the just, timely or cost-effective resolution of the specific claim”.

Reference: Tribunal Rules, Rule 3

11. The Claimants are not aware of any cases of the Specific Claims Tribunal discussing Rules 86, 88 or 93 regarding experts. The Federal Court Rules and caselaw applying them are discussed below in accordance with Tribunal Rule 5.

B. FEDERAL COURT RULES

12. Under the Federal Court Rules, leave of the Court is required to tender any evidence in chief of an expert other than by reading into evidence all or part of, or explaining the content of an expert’s “affidavit or statement” that has been read into evidence.

Reference: Federal Court Rules, Rule 280(1), (1.1)

13. In accordance with Rule 52.2(a), an expert’s affidavit or statement “shall set out in full the proposed evidence of the expert”

Reference: Federal Court Rules, Rule 52.2(1)(a) (emphasis added)

C. CASELAW

14. With reference to the Federal Court Rules governing expert testimony, former Chief Justice Richard for the Federal Court of Appeal stated in *Elders Grain Co. v. Ralph Misner (Ship)*:

[55]When a party intends to call an expert witness, rule 279 requires that the expert's evidence must first have been reduced to a written statement and served on all other parties at least 60 days before the trial.

[56]Rule 281 requires that rebuttal expert evidence must also be reduced to a written statement and served on all parties at least 30 days before trial.

[57]Consequently, no expert testimony is admissible, be it in chief or in rebuttal, unless it has been reduced to writing and served on all parties in accordance with rule 279 or 281, except with leave of the Court.

Reference: *Elders Grain Co. v. Ralph Misner (Ship)*, 2005 FCA 139, paras. 55 to 57.

15. A party is not permitted to supplement an expert's affidavit or statement with verbal testimony, without proper written notice of the evidence that will be adduced. In dismissing an appeal, former Chief Justice Jaccett for the Federal Court of Appeal stated:

I wish to add that a perusal of some of the affidavits of experts filed in this case leads me to believe that Rule 482 is being followed by some counsel, if at all, in the letter rather than the spirit². Indeed, in my view, the result is much less satisfactory than in the old days of voluntary exchange of valuation reports. I strongly suggest that, when an expert's affidavit does not contain a sufficiently detailed statement of the expert's reasoning so that the Court could, in the absence of attack, adopt that reasoning as its own and decide the question that is the subject of his evidence on the basis of it, the party should not be allowed to supplement it by verbal testimony until a supplementary affidavit is filed containing such reasoning and the other side and the Court have had an opportunity to consider it. (If that involves adjournments, costs thrown away should be assessed against the party at fault.)

Reference: *Karam v. National Capital Commn.*, [1978] 1 FC 403 (CA), leave to SCC refused [1977] 2 SCR viii (emphasis added)

16. Some of the “numerous reasons” that an expert report must be served within the timeframe required by the applicable rules, were summarized by the BC Supreme Court as follows:

There are numerous reasons for this requirement, notably to enable the parties to properly prepare for trial, to allow a party to obtain a responding report if required, and to prepare for the just, orderly and fair presentation of evidence before the court.

Reference: *Redmond v. Krider*, 2014 BCSC 2585, para. 16

17. In *Redmond*, Justice Maisonville found that the applicable Rules of practice and procedure were a complete code with respect to the service and receipt of expert reports and expert opinion.

Reference: *Redmond v. Krider*, 2014 BCSC 2585, paras. 1, 31

PART 3 SUBMISSIONS

18. The Presentations proposed by Canada contain significant amounts of information and material not included in Canada's November 12, 2016 expert report and as such cannot serve to provide a "concise summary of the report's key points" as required by the Tribunal Rules. Rather, the proposed Presentations include materials and information that purport to supplement the expert evidence that was previously served on the Claimants and filed by Canada.

19. The Claimants objections to the Presentations have been known to Canada since January 21, 2016, but Canada has taken no meaningful steps to remove the problematic information and materials from the proposed Presentations, and has provided no basis on which Canada is entitled to present supplementary materials to the Tribunal in direct examination.

20. Four slides of heightened concern in the proposed Presentation explicitly include information, references and evidence that are wholly outside the expert report, including documentary evidence presented in another case and information in respect of "other Bands" for which no evidence in this proceeding has been submitted.

21. If the information and materials in the proposed Presentations are important to or necessary to understand the evidence of Canada's experts, the experts had a duty, in accordance with Rule 88, to include or refer to the materials in Canada's expert report that was delivered on November 12, 2015. The information and materials of concern to the Claimants are not included or referred to in Canada's expert report.

22. Canada's proposed use of Presentations as an aid to the direct testimony of Canada's expert witnesses is contrary to the Tribunal Rules and the caselaw.

23. Permitting Canada to use the proposed Presentations would be unjust because the Claimant has not received notice of the evidence that Canada intends to lead, and as a result has not been able to properly prepare for trial, or obtain evidence and expert advice in answer to Canada's proposed evidence.

24. The Claimants seek:

- (a) an order prohibiting Canada from using its proposed Presentations at the hearing of this proceeding in whole, or in the alternative, in part; and
- (b) such other order as this Tribunal considers just.

RESPECTFULLY SUBMITTED this 2 day of February, 2016



Counsel for the Claimant
Huu-ay-aht First Nations