FILE NO.: SCT-7006-12
CITATION: 2016 SCTC 2
DATE: 20160204

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
AKISQ'NUK FIRST NATION	)	
	)	Darwin Hanna and Adam Munnings, for the Claimant
	)	
Claimant	)	
	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Christa Hook and Deborah McIntosh, for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** via Written Submissions

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Calder v British Columbia (AG), [1973] SCR 313, 34 DLR (3d) 145; *R v Sioui*, [1990] 1 SCR 1025, 70 DLR (4th) 427; *R v Bartleman* (1984), 12 DLR (4th) 73, 13 CCC (3d) 488 (BCCA); *Montana Band v Canada*, [1994] 1 FC 425; *Cronk v Canadian General Insurance Company* (1995), 128 DLR (4th) 147, 25 OR (3d) 505 (ONCA); *R v Haines*, [1981] 1 CNLR 87; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6.

Statutes and Regulations Cited:

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

Headnote

Aboriginal Law – Specific Claims – Judicial Notice

The Tribunal gave notice to the Parties that consideration had been given to taking judicial notice of the contents of several published historical treatises on the subject of reserve creation in the colony and, after confederation, in the Province of British Columbia.

In aboriginal claims involving historical matters, the law affords the Tribunal flexibility in taking judicial notice and judicial knowledge. The Tribunal's enabling legislation provides considerable evidentiary flexibility, permitting the Tribunal's consideration of "other information" it sees fit. The Tribunal provided the Parties with an opportunity to dispute the accuracy or reliability of the treatises. Neither the Crown nor the Claimant did so.

Held: The Crown's opposition is dismissed. The Tribunal has taken judicial notice of the treatise.

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I. BACKGROUND

[1] The Claim is based on acts and omissions dating from the 1870s through the 1920s. Certain historical documents have been admitted into evidence, but little in the way of general historical context has been offered. Such context is necessary to understand the significance of documents that have been provided and the overall political and social context of the time. Events and interactions do not occur in a vacuum.

[2] On July 8, 2015, the Tribunal issued a Memorandum to Counsel advising the Parties that it had consulted portions of three historical treatises that had not been submitted in the record for this Claim in order to obtain necessary historical context for this Claim, and that it may consider those treatises and historical documents footnoted in them under the doctrine of judicial notice and knowledge.

[3] A Case Management Conference ("CMC") was convened on July 29, 2015, to discuss the matter. The Tribunal reiterated that it would rely on the treatises for historical context, and referenced a particular document cited in a footnote which it may rely on specifically. That document was subsequently circulated to the Parties. The Tribunal also clearly stated that it would not rely on author opinions or conclusions in rendering its decision.

[4] The Crown voiced its objection, and the Claimant its general acquiescence. A briefing schedule was set for Parties to make submissions. The Tribunal directed that the Parties may offer other authoritative materials for the Tribunal to consider. The Endorsement of the Tribunal formalizing decisions made at the CMC was issued on August 5, 2015.

[5] The Crown filed its written submissions on September 3, 2015. The Claimant filed its response on September 21, 2015. The Crown declined its right of reply by letter dated October 1, 2015. The Parties advised the Tribunal by letter on August 18, 2015 that they agreed that the matter may proceed on the basis of written submissions only.

II. THE TREATISES

[6] The treatises at issue are:

1) Robert E Cail, *Land, Man, and the Law, The Disposal of Crown Lands in British Columbia, 1871 - 1913* (The University of British Columbia, 1974), Chapters 11-13 ("Cail").

2) Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002), at 241-261 ("Harris").

3) E Brian Titley, *A Narrow Vision, Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (University of British Columbia Press, Vancouver 1986), Chapter 8 ("Titley").

[7] The document footnoted in Harris and circulated to the Parties is the Report of the Special Joint Committee on the Claims of the Allied Tribes of B.C. from 1926-27 ("1927 Report"). The Committee received evidence on the "Indian Land Question", including testimony from Duncan Campbell Scott, the federal official who did not challenge the decision to disallow the allotment of the additional 2,960 acres.

[8] Cail chronicles colonial land policy leading up to 1871, when Article 13 of the *Terms of Union* provided for the continuation by the Dominion of a policy "as liberal", through to the McKenna-McBride Commission.

[9] Harris covers much of the same ground as Cail, and carries through to the conveyance of reserved land to the Dominion in 1938.

[10] Titley covers much of the same ground as Cail and Harris, though with a particular focus on the role of Scott, the Deputy Superintendent of Indian Affairs from 1913 to 1932. The chapter at issue is entitled "Land Claims in British Columbia", and traces the interactions between the federal and provincial governments alongside the organization and politics of the First Nations in B.C. throughout the reserve creation process, from 1871 to 1938. It provides particular detail on those interactions in which Scott was heavily involved, including the federal-provincial agreement to review the findings of the McKenna-McBride Commission, the Scott-Cathcart Agreement, and the Nisgaa's long-running efforts at having aboriginal title recognized. It also offers a more detailed description of the parliamentary committee proceedings documented in the 1927 Report than Cail or Harris, focusing on Scott's role and testimony. As with those treatises,

Titley extensively sources information from firsthand records. There is limited reliance on secondary sources where opinions and conclusions are stated, they are clearly distinguishable from the presentation of factual information.

[11] The studied extracts from the treatises are scholarly narratives of fact. The source information for each are documents from public archives.

III. POSITIONS OF THE PARTIES

A. Respondent's position

[12] The Crown is primarily concerned with the Tribunal's lack of particularity in identifying which facts it will judicially notice. It considers only discrete facts capable of judicial notice, and characterizes the treatises are "one hundred twenty-two pages of social science research" which is comprised of both author opinion and "hundreds of facts, the accuracy, notoriety, indisputability and demonstrability of which is variable" (Respondent's Memorandum of Fact and Law, at paras 24, 26). Without specificity as to which facts the Tribunal will notice, the Crown finds it "impossible to determine whether the facts contained within these materials meet the common law test for judicial notice", either individually or collectively (at paras 25, 61). Not even the relaxed standards applied in aboriginal litigation and in specialized administrative tribunals can save them.

[13] The Crown does not dispute the accuracy or reliability of any part or all of the cited texts. It could very well be that each individual fact in the cited texts does meet its test. The Crown simply asserts that it is entitled to more detail before judicial notice may be taken of any of the context revealed on review of the historical facts provided in the treatises. It is a procedural objection, raising procedural fairness by implication.

[14] The Crown also contends that the treatises cannot be used as evidence before the Tribunal, despite the flexibility regarding the admission of evidence provided by sub-section 13(1)(*b*) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]. In the Crown's view, sub-section 13(1)(*b*) of the *SCTA* must be interpreted to mean that only Parties or a Tribunal-appointed expert may adduce evidence. When it introduces the evidence itself, the Tribunal must

specify what question of fact the evidence will support and give the Parties an opportunity to respond. It is now simply too late for the Tribunal to do so.

B. Claimant's position

[15] In Akisq'nuk's view, different types of facts attract different tests for judicial notice. Facts used for background or context and which are not at the centre of the dispute at issue require less proof than those which could have a conclusive or demonstrative role in a decision. Akisq'nuk also argues that the law recognizes the importance of historical context and the ability of judges to undertake historical research to enable them to take judicial notice of historical facts. This is particularly the case for historical information in aboriginal litigation.

[16] Under these circumstances, Akisq'nuk argues that not only is it appropriate, it is highly important for the Tribunal to take notice of the treatises for historical context. The texts are reliable and authoritative, a contention not disputed by the Crown, and historical context is essential to the fair and expeditious resolution of the Claim. The Tribunal has indicated that it will not rely on the authors' opinions, and has offered counsel an opportunity to respond to and challenge its reliance on the documents. Procedural fairness and the four corners of the law have thus been satisfied, and judicial notice is appropriate.

IV. LEGAL STANDARD & ANALYSIS

[17] It is well established that courts may take judicial notice of historical facts and rely on their own historical knowledge and research (see e.g. *Calder v British Columbia (AG),* [1973] SCR 313 at para 83, 34 DLR (3d) 145). Lamer J. made the point most amply in *R v Sioui*, [1990] 1 SCR 1025 at para 60, 70 DLR (4th) 427:

> I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris J.A. said in White and Bob (at p. 629):
>
> > The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B), [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and

> researches, Read v. Bishop of Lincoln, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.
>
> The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

[18] Of course, this rule is limited to facts that are beyond reasonable dispute (see e.g. *R v Bartleman* (1984), 12 DLR (4th) 73 at paras 12-13, 13 CCC (3d) 488 (BCCA)). It is not questioned that a court has the capacity to discern argument and opinion from objective fact in scholarly writing (*id*; see also *Montana Band v Canada*, [1994] 1 FC 425).

[19] As it made clear at the CMC on this matter, the Tribunal has no intention of relying on author opinion in its use of the treatises. Its use will be entirely consistent with that stated in *Montana Band v Canada*, [1994] 1 FC 425, namely:

> The treatises should be used essentially to assist the Court to take judicial notice of objectifiable events: their interpretation is for the Court with respect to the intentions and purposes of those events or actions. Further, it will be for the Court to assess the reliability and weight of any such references and to adjudicate on possible contradictions among the authors. No treatise can, of course, be considered conclusive on any particular fact. [at para 10]

[20] There is some authority for the proposition that courts should disclose sources of a contentious or unproven nature, such as social science studies or unpublished writings (e.g. *Cronk v Canadian General Insurance Company* (1995), 128 DLR (4th) 147, 25 OR (3d) 505 (ONCA); *R v Haines*, [1981] 1 CNLR 87).

[21] That is not the case here. Moreover, the Crown was given the opportunity to contest the reliability of the treatises, or to present alternative sources for the Tribunal's consideration. It declined to do so.

V. THE *SPECIFIC CLAIMS TRIBUNAL ACT*

[22] Further to sub-section 13(1)*(b)* the *SCTA*, the Tribunal may rely on evidence and "other information":

> **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;

[23] The Preamble of the *SCTA* acknowledges the distinctive task of the Tribunal:

> 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;

[24] In *Canada v Kitselas First Nation*, 2014 FCA 150 at para 26, [2014] 4 CNLR 6, the purpose and subject matter before the Tribunal was considered:

> The purpose of the *SCT Act* is to establish the Specific Claims Tribunal, comprised of a roster of superior court judges from across Canada, to decide issues of validity and compensation relating to the specific claims of First Nations identified in the legislation. The specific claims that are contemplated are principally those old historic claims that are generally precluded from adjudication before the superior courts in light of the passage of time...[emphasis added]

[25] Much has been written by students and scholars of history about events in Canada's past that affected Indigenous interests. Where, as in the present matter, treatises and scholarly articles narrate provable facts by reference to historical documents, they may be relied on as if proven in evidence, and for the same purposes. This is not limited to understanding of context; they may, when considered together with documentary and other evidence, be assessed for reliability and weight in the process of arriving at findings of fact.

[26] For example, there are two documents in evidence that are central to the claim of the Akisq'nuk that the Crown breached its fiduciary duty by failing to secure a 1915 addition of 2,960 acres to IR 3, its previously allotted reserve. The addition was ordered by the McKenna-McBride Commission, which had been established by an agreement between the Province and the Dominion in 1912. (McKenna-McBride Agreement, in evidence). Both Parties intended that

land allotted by the Commission would be transferred from the Province to the Dominion and held in trust for the Claimant. However, another agreement entered in 1920 (Ditchburn-Clark, in evidence) provided for a review of the Commission's allotments. The 1915 addition was supported by Ditchburn, but disallowed by the Province's representative, Clark. The context, revealed fully by the treatises, was the conflict that lasted from 1871 to 1920, and beyond, over land the Province would transfer to the Dominion to fulfil its obligation under the *Terms of Union*, Article 13. Tracing the source of the conflict requires examination of pre-confederation colonial policy, 1850-1871.

[27] Another example: The Claimant argues that the Crown had the duty to refer the Ditchburn-Clark disagreement to the Secretary of State for the Colonies for a decision, a remedy provided by Article 13. On the face of it, this argument has merit. The Respondent argues that if such a duty existed (which is denied), the Crown had a greater duty to bring an end to the five decades of wrangling over the quantity of land to be transferred by accepting the disallowance of the addition and confirming that the issue over the quantity of land had been resolved. The merits of the Respondent's answer cannot, however, be determined based on the limited evidence. The Harris treatise fills in the evidentiary gap by reference to primary sources, the historical record.

[28] Procedural fairness was, in my opinion, adequately addressed by notice to the Parties and an opportunity to make submissions. The ultimate decision on this question may be for others to make.

VI. DISPOSITION

[29] The Crown objection to consideration by the Tribunal of the extracts from the Treatises is dismissed.

HARRY SLADE

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Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160204

File No.: SCT-7006-12

OTTAWA, ONTARIO February 4, 2016

PRESENT: Honourable Harry Slade

BETWEEN:

AKISQ'NUK FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant AKISQ'NUK FIRST NATION**
As represented by Darwin Hanna and Adam Munnings
Callison & Hanna, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Christa Hook and Deborah McIntosh
Department of Justice