Federal Court Cour fédérale

Date: 20151009

Docket: T-238-80

Citation: 2015 FC 1159

Ottawa, Ontario, October 9, 2015

PRESENT: The Honorable Mr. Justice Zinn

BETWEEN:

**JIM SHOT BOTH SIDES AND ROY FOX,
CHARLES FOX, STEVEN FOX,
THERESA FOX, LESTER TAILFEATHERS,
GILBERT EAGLE BEAR,
PHILLIP MISTAKEN CHIEF,
PETE STANDING ALONE,
ROSE YELLOW FEET,
RUFUS GOODSTRIKER, AND
LESLIE HEALY,
COUNCILLORS OF THE BLOOD BAND,
FOR THEMSELVES AND ON BEHALF OF
THE INDIANS OF BLOOD BAND RESERVE
NUMBER 148; AND THE BLOOD RESERVE
NUMBER 148**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The Plaintiffs [the Blood Tribe] and the Defendant [Canada] each brought complementary motions regarding procedural aspects of the trial of this action. The motions were heard together; this Order and Reasons deal with both.

[2] In this action, the Blood Tribe claims that the land provided to it by Canada is less than that agreed upon under the provisions of Treaty 7.

[3] The Blood Tribe, pursuant to a Direction issued by the case management judge dated September 12, 2014, seeks an Order confirming that this action will be heard in three phases. Both parties and the Court are agreeable to this manner of proceeding.

[4] In Phase I, the Court will receive evidence of the oral traditions of the Blood Tribe and the oral history evidence of Elders of the Blood Tribe. It is agreed that this evidence will be heard at the Blood Tribe Reserve located near Standoff, Alberta. A site visit has been undertaken by the trial judge with the parties and their counsel to confirm that adequate facilities are available to hear and record this evidence. The agreement to have the Elder testimony heard earlier than the remainder of the trial evidence was made because the Elders proposed to be called as witnesses are aging and some might not be available or able to testify later. The parties and the Court agreed that this manner of proceeding was preferable to the taking of Commission evidence. It was further agreed that, given the lengthy gap between the receipt of the Elders' testimony and the receipt of the rest of the evidence, the Court would entertain submissions on the admissibility of the Elders' evidence immediately following their testimony. A ruling on

admissibility may be delayed until the conclusion of Phase II if the trial judge is of the view that the interests of justice are better served by such a delay.

[5] In Phase II, to be held not more than two years later, unless otherwise ordered by the trial judge, the Court will receive the evidence of Canada and any rebuttal evidence of the Blood Tribe. Following Phase II, the Court will render judgment on the claim, save and except for issues related to remedy if the Blood Tribe is successful. Phase III, if necessary, will deal with remedy.

[6] The Blood Tribe also seeks an order that, notwithstanding the commencement and completion of Phase I of the trial, the parties shall be entitled, subject to any direction of the case management or trial judge, to:

a. Conduct further discovery of officers and employees of the party opposite in accordance with the *Federal Courts Rules* prior to the commencement of Phase II of the trial;

b. Serve Notices of Intention to elicit expert evidence prior to Phase II of the trial; and

c. Serve such Notices as permitted under the *Evidence Act* (Canada or Alberta) up to but not after 7 days prior to the opening of Phase II of the trial.

[7] Canada does not oppose such an Order and the Court is satisfied that the interests of justice are best served by issuing it.

[8] The Blood Tribe also sought an Order that Phase I might include a site visit to the places at or near the Blood Tribe Reserve that the Blood Tribe expects to be the subject of the Elder evidence. This was not opposed by Canada. The Court is agreeable to such a site visit provided that it will not yield evidence forming the basis of any inferences to be drawn by the trial judge but will be restricted to providing the trial judge and counsel with a better understanding of the evidence to be given by the Elders. If such a site visit is to occur, the Blood Tribe is to inform the Court and Canada at least 6 weeks prior to the commencement of Phase I; otherwise, no site visit will be undertaken. Any site visit is to be arranged by the Blood Tribe, at its expense, and shall include all counsel, their advisors, the trial judge, and court staff, and it shall take place on the first day of Phase I.

[9] Canada, in its cross-motion, sought an Order of the Court setting out a protocol for the hearing of the Phase I evidence. Both parties provided a proposed protocol for this part of the trial. The issue of contention between the parties that was argued at length was Canada's request that the Blood Tribe provide "will say" statements for the Elder evidence, prior to the start of Phase I of the trial.

[10] Canada's proposed protocol with respect to the will say statements is as follows:

> 1. **<u>WILL SAY STATEMENTS</u>**:
>
> a. By a deadline to be set by the case management Justice, the Plaintiffs shall provide to the Defendant a will say statement for each Elder to be called as a witness.
>
> b. The will say statements shall contain sufficient details to allow for challenges based on relevancy and otherwise, and for effective preparation of cross-examination. The content of the will says shall include, but not be limited to, a detailed, specific and comprehensive description of:

i. The language that will be used by each Elder;

ii. How the Elder's oral history is preserved, who is entitled to relate the oral history and how this entitlement is assessed, the community practice with respect to safeguarding the integrity of its oral history (to the extent that this information is not provided in another expert report/statement);

iii. The personal, family, community and professional background of the Elder sufficient to fully ascertain the witness' status as an Elder in the community and the witnesses [*sic*] authority to recount the oral history (to the extent that this information is not provided in another expert report/statement);

iv. Any other background of the Elder relevant to the testimony that he or she will provide;

v. How and when the Elder came to know the evidence;

vi. Who relayed the evidence to the Elder, the relationship of the Elder to that person, that person's general reputation, and whether that person witnessed the event or was told of it; and

vii. What the witness will say.

c. The will say statements will not form part of the evidence at trial but the Defendant will be able to use the will say statements in evidence as a prior statement of the Elder witness.

[11] The Blood Tribe opposed providing will say statements for the Elders. They submit that the "evidence about the tradition of the Blood Tribe, their culture and connection to the use of their lands, will assist the Court to understand what lands the Blood Tribe leaders understood as part of their home territory." The general nature of that evidence from the Elders was outlined by counsel at the hearing in the following terms:

> So the Court will hear evidence of the Blood Tribe tradition of treaty making and peace making. The Court will hear evidence of how they protected their territory and, in particular, the concept of exclusive right to their territory and sharing their territory with

> others. The Court will hear evidence about decision-making within the Blood Tribe. The Court will hear evidence about the events surrounding the entering of Treaty 7 by the Blood Tribe and the other First Nations, including evidence regarding what took place from the Blood Tribe perspective, the language barrier and the problem with interpreters. The Court will hear evidence of what Chief Red Crow meant following the Treaty 7 negotiations when he said he was returning to his home. You'll hear evidence about the surveying of the reserve and about the location of survey markers. The Court will hear evidence about the movement of Blood Tribe members around the time of the treaty and other evidence relative -- relevant to payless and the population of the Blood Tribe. The Court will hear evidence of what lands were traditionally used by the Blood Tribe as their home or their wintering grounds. The Court will hear evidence of what these lands meant to the members of the Blood Tribe and how they used these lands. The Court will hear evidence of relevant subsequent events when, example, the Mormons come to occupy a portion of the territory near Cardston. And evidence of the removal of Blood Tribe members from lands that -- between Waterton and the Valley Rivers.
>
> So those, I give by way of examples of the kinds of evidence that you will hear.

[12] The Blood Tribe firstly submits that requiring will say statements "creates an entirely new process that is not part of a civil trial conducted in accordance with the law of evidence and the rules of court." The Blood Tribe acknowledges that this Court and others have required that expert and "professional" witnesses such as police officers provide will say statements, but they point out that the Elders are not called as experts nor are they experienced witnesses. Moreover, they point out that they are men and women in their 70s and 80s. Counsel asks, "Why would you hand a whole bunch of arrows to the other side to skewer some Elders" when such is not required in other civil cases.

[13] Counsel is incorrect in suggesting that this action is like other civil cases – it is not. First, in other civil actions the evidence of the Elders would not be admitted or, if admitted, would be given little weight, as it is hearsay. In this action, as in other aboriginal litigation, the evidence is *prima facie* admissible because the Blood Tribe does not have a tradition of written history; it has an oral tradition. Second, unlike the usual civil action, there has been no examination for discovery of the plaintiffs' representative(s) and thus Canada has had no opportunity to ask questions to learn what evidence the Blood Tribe proposes to offer through its Elders to support the claim. Third, I reject the suggestion that these witnesses are at risk of being "skewered" because they are elderly and Canada may be able to raise questions as to their credibility if their evidence differs from their will say statements. Canada has agreed that its cross-examination will be respectful. If the evidence given on direct examination differs in some material manner from that provided in a witness' will say statement, then that difference may have to be addressed by the witness, or by counsel in submissions. There is nothing unusual or contrary to the norm in that respect.

[14] The Blood Tribe also submits that "the very nature of the evidence does not lend itself to a will say statement." I am not persuaded. The Federal Court's Aboriginal Litigation Practice Guidelines, developed after extensive consultation with all stakeholders, specifically envisages that there is to be disclosure prior to an Elder testifying. Specifically, it provides as follows in this regard:

> The party calling an Elder to testify should provide information about the Elder and the basis of his or her knowledge about the subject matter of the testimony. Given the differing dynamics and logistical issues that may be associated with having an Elder testify, this disclosure need not necessarily coincide with document disclosure as long as it is timely.

> The disclosure should also provide information about the Aboriginal community's practices or protocols for requesting Elder testimony. Elders often refrain from describing themselves as elders and the party calling an Elder may have a community member to introduce the Elder and confirm his or her status as an Elder.
>
> The disclosure should also summarize the proposed evidence, keeping in mind both that Aboriginal respect for Elders may involve not directing an Elder's words and that an Elder unfamiliar with court proceedings may respond on unexpected topics.
>
> Where issues arise between parties over the adequacy of the disclosure, the parties should seek assistance through case management or trial management for a direction or ruling on the disclosure to be provided and its timing.
>
> [emphasis added]

[15] Lastly, the Blood Tribe submits that the Court has no jurisdiction to order that a party provide will say statements. I agree with Canada that this Court has jurisdiction to make the Order requested, and indeed, it has done so previously in aboriginal matters. Justice Russell in *Sawbridge Band v Canada*, [2007] FC 657 at para 38 explains that will say statements "were designed as a procedural tool to ensure fairness, efficiency, preparedness, and to prevent ambush at trial." While not specifically provided for in the *Federal Courts Rules*, a judge has authority to order a party to produce will say statements by virtue of all or any of Rules 3, 53, 265, 270, and 385 which generally provide that a judge may make any order respecting the conduct of the action that assists in the just and timely disposition of it. In my view, if there are no will say statements provided for the Elders' evidence, on the facts as outlined above, the action will not proceed in a just and expeditious manner because the Crown will be ambushed and not be in a position to effectively test the Elders' evidence in the manner provided for in the Aboriginal Litigation Practice Guidelines and generally accepted Canadian trial procedure.

[16] For these reasons, I am prepared to order that the Blood Tribe prepare and deliver will say statements to Canada respecting the Elders' testimony.

[17] I also think it advisable that the Court set out a detailed protocol respecting the conduct of this trial, and particularly Phase I. The parties were provided with a draft of the Court's proposed protocol for Phase I and provided many comments that have been incorporated in the Order.

ORDER

THIS COURT ORDERS that:

1. This trial will be held in three phases as follows:

    Phase 1 – Evidence of Blood Tribe Elders and related expert and lay evidence of the Blood Tribe [Phase I Evidence];

    Phase 2 – Any further evidence of the Blood Tribe and the evidence of Canada including Canada's expert evidence, and the Blood Tribe's rebuttal evidence [Phase II Evidence];

    Phase 3 – Evidence regarding remedy [Phase III Evidence].

2. Phase I of the trial will take place before this Court at the Blood Tribe's Multipurpose Building, in the City of Standoff, Alberta, on Monday, May 2, 2016, at 9:30 in the forenoon for a duration not exceeding twenty (20) days to receive the Phase I Evidence. The courtroom shall be configured as shown on the diagram attached as Appendix A. Counsel and Court officials shall not wear formal court attire but shall be dressed in business casual. The trial judge shall be robed. Security staff shall wear clothing that properly identifies them. Counsel shall remain seated when examining or cross-examining an Elder. They shall stand only when addressing the Court.

3. The Blood Tribe may conduct a traditional ceremony at the Phase I trial venue immediately prior to the opening of Phase I by the Court.

4. The trial will continue before this Court at 635 – 8th Avenue South West, 3rd floor, in the City of Calgary, Alberta, following the completion of Phase I, on Monday, May 30, 2016, at 9:30 in the forenoon (or earlier at the direction of the trial judge),_for a duration of three (3) days to hear the parties' submissions as to admissibility of the Phase I Evidence. It is recognized that further evidence relevant to some of those arguments may be presented in Phase II of this trial, necessitating further argument on admissibility at that time.

5. Subject to any further Order of the trial judge, Phase II of the trial will commence before this Court at 635 – 8th Avenue South West, 3rd floor, in the City of Calgary, Alberta, on Monday, May 7, 2018, at 9:30 in the forenoon, for a duration of twenty (20) days.

6. Subject to paragraph 11, each party shall disclose to the other all documents, records, maps, drawings, photographs and the like that are intended to be referenced during Phase I [Phase I Documents] as soon as they are identified. Within thirty (30) days prior to trial, the parties shall prepare a Joint Book of Documents for use at Phase I containing the Phase I Documents. The admissibility of any document at Phase I that has not been identified and produced in accordance with this provision shall be at the discretion of the trial judge.

7. The Blood Tribe shall present evidence at Phase I as to how its oral history is preserved, who is entitled to relate the oral history, how this entitlement is assessed, and the community practice with respect to safeguarding the integrity of its oral history. To the extent that such evidence is not contained in an expert report

previously provided to Canada or ascertained through examination for discovery prior to Phase I, the Blood Tribe shall provide Canada with a will say statement of the witness or witnesses (containing the detail recited below) called to provide this evidence.

8. No motion to exclude from the hearing an Elder who will be called as a witness at Phase I shall be made or entertained until after the evidence respecting the oral history traditions of the Blood Tribe has been concluded.

9. Before the Elders testify, they shall be introduced by Annabel Crop Eared Wolf, or another witness agreed upon by the parties, who shall present biographical and genealogical evidence concerning each Elder who will be called to testify. This witness shall also testify as to the basis on which Elders are recognized by the Blood Tribe. If there has been no previous examination for discovery conducted regarding this evidence then the Blood Tribe shall provide Canada with a will say statement for this witness at least ninety (90) days prior to trial. This witness will be subject to cross-examination by Canada.

10. All examinations of Elders, including direct examination and cross-examination, will be conducted respectfully and will be subject to the *Federal Courts Act*, RSC 1985, c F-7, the *Federal Courts Rules*, and any other legislation applicable to trial procedure in the Federal Court.

11. The Blood Tribe shall provide Canada with a will say statement for each Elder it proposes to call at Phase I. The Blood Tribe has identified and made known to

Canada four (4) such Elders. Within sixty (60) days of the date of this Order, or such greater period as the parties may agree or the Court order, the Blood Tribe shall provide Canada with a will say statement for each of these four Elders. A will say statement for each of the remaining four Elders the Blood Tribe proposes to call shall be delivered to Canada no later than December 31, 2015. Canada shall have ninety (90) days after the delivery of an Elder's will say statement to identify and disclose to the Blood Tribe the document(s) it wishes to put to that Elder.

12. The will say statement shall contain sufficient detail to allow for challenges to the proposed evidence by Canada on the basis of relevancy, and for effective preparation of cross-examination. The content of each Elder's will say statement shall include a detailed description of:

    a. The language that will be used by the Elder;
    b. The personal, family, community and professional background of the Elder sufficient to fully ascertain the witness' status as an Elder in the community and his or her authority to recount the oral history;
    c. Any background of the Elder relevant to the testimony that he or she will provide;
    d. How and when the Elder came to know the evidence;
    e. Who relayed the evidence to the Elder, the relationship of the Elder to that person, that person's general reputation, and whether that person witnessed the event in question or was told of it; and
    f. What the Elder will say.

13. The will say statements will not form part of the evidence at trial but Canada will be able to use a will say statement as a prior statement of an Elder witness should the oral evidence offered at trial be materially different than or inconsistent with that set out in the will say statement.

14. An interpreter and word speller to interpret Blackfoot into English and English into Blackfoot as required, shall be agreed upon by the parties. If the parties cannot agree on an interpreter or word speller at least ninety (90) days prior to the commencement of Phase I, then one will be appointed by the Court (following receipt of submissions from the parties). The interpreter and word speller shall be impartial and independent to the satisfaction of the parties and the Court and need not be the same person. Should interpretation be required, then the Court shall provide equipment for simultaneous interpretation.

15. Canada shall not interrupt an Elder while he or she is speaking, except if an immediate objection is required related to privilege or if there are serious interpretation issues.

16. Any delay or deferral of an objection by Canada will be without prejudice to its right to raise the objection later in Phase I.

17. Canada may object to a question posed by counsel before the Elder begins his or her testimony in answer, if in its opinion the objection is so serious that it must be raised immediately. Any failure by Canada to raise an objection to a question during the testimony of an Elder does not prejudice the right of Canada to later object to the

question (and response) during the latter part of Phase I, which is to commence on May 30, 2016.

18. Canada may raise an objection, which in its submission should not wait until Monday May 30, 2016, after the conclusion of the testimony given by one Elder and before the testimony of the next Elder or during breaks in an Elder's testimony.

19. Canada and the Blood Tribe may present argument related to the admissibility of the Elder evidence taken in Phase I, beginning on Monday, May 30, 2016 at 9:30 in the forenoon for a duration of three (3) days.

20. A ruling on admissibility will be delayed until the conclusion of Phase II if the trial judge is of the view that the interests of justice are best served by such a delay.

21. No decisions as to the weight to be given to any part of the evidence heard in Phase I shall be given until the conclusion of Phase II of the trial.

22. A Court Reporter shall be present at all times during Phase I and shall prepare a certified transcript of the Phase I proceedings. Court reporting shall be completed with real-time technology.

23. Phase I shall be recorded by video and audio by a person or persons agreed to by the parties or, failing agreement, appointed by the Court. They shall be made in accordance with the Federal Court Media Guidelines, and the video shall give a direct frontal close-up of the witness' face. The recordings are the property of the

Court and a certified true copy of the video and audio recording of the Phase I proceedings shall be marked as a trial exhibit.

24. Notwithstanding the commencement and completion of Phase I of the trial, the parties shall be entitled, subject to any direction of the case management or trial judge, to:

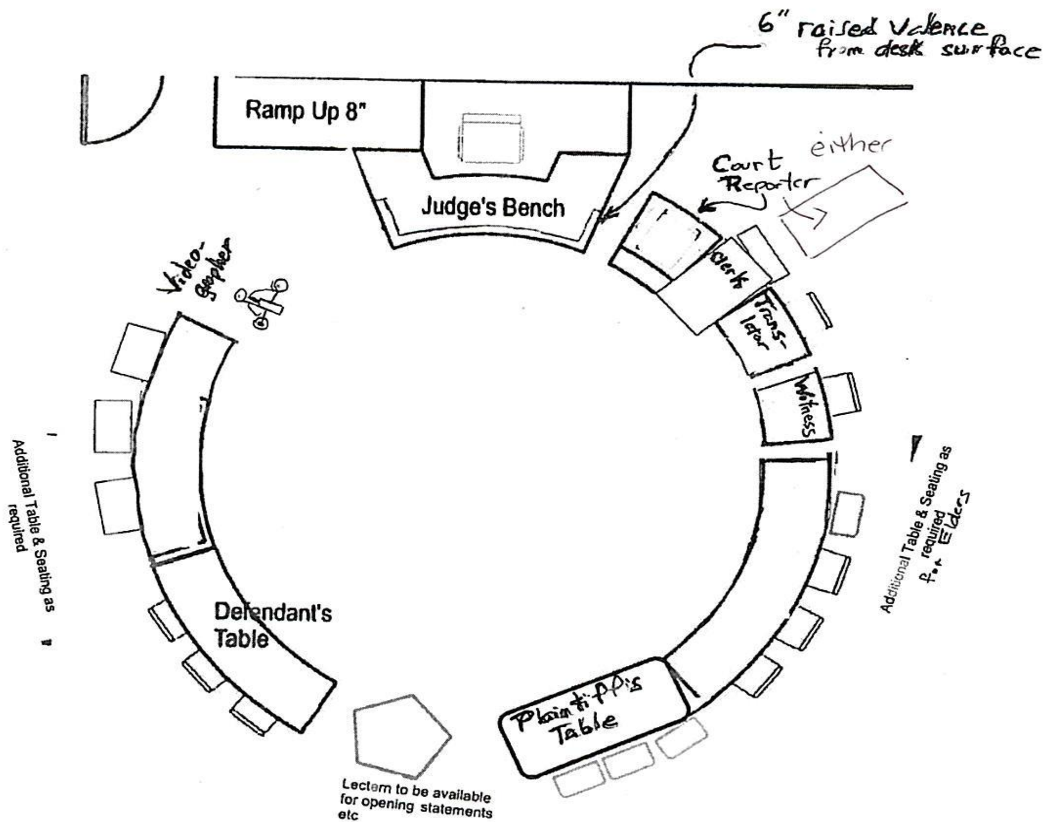
    a. Conduct further discovery of officers and employees of the party opposite in accordance with the *Federal Courts Rules* prior to the commencement of Phase II of the trial;
    b. Serve Notices of Intention to elicit expert evidence prior to Phase II of the trial; and
    c. Serve such Notices as permitted under the *Evidence Act* (Canada or Alberta) up to but not after 7 days prior to the opening of Phase II of the trial.

25. Other than issues arising from this Order, which shall be dealt with by the trial judge, the case management judge will continue to manage this action under the *Federal Courts Rules* and will decide all pre-trial matters, unless in his view, the matter would best be directed to the trial judge.

26. Each party shall bear its own costs of these motions.

"Russel W. Zinn"
Judge

Appendix "A"
Diagram of Courtroom Configuration



FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-238-80
STYLE OF CAUSE:	JIM SHOT BOTH SIDES ET AL v HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JULY 7, 2015
ORDER AND REASONS:	ZINN J.
DATED:	OCTOBER 9, 2015

APPEARANCES:

Gary Befus Gilbert Eagle Bear	FOR THE PLAINTIFFS
Marianne Panenka Damon Park	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Walsh LLP Barristers and Solicitors Calgary, Alberta	FOR THE PLAINTIFFS
William F. Pentney Deputy Attorney General of Canada Department of Justice Canada Prairie Region Edmonton, Alberta	FOR THE DEFENDANT