

Date: 20070724

Docket: T-66-86

Citation: 2007 FC 768

Ottawa, Ontario, this 24th day of July, 2007

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAWRIDGE BAND

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

**CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA**

Interveners

Docket: T-66-86-B

BETWEEN:

TSUU T'INA FIRST NATION

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

**CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA**

Interveners

REASONS FOR ORDER AND ORDER

THE MOTION

[1] The Crown has brought a motion in writing pursuant to Rule 369 of the *Federal Court Rules, 1998*.

[2] The motion is for an order seeking advice and directions as follows:

- a) Leave to have the von Gernet Sur-Rebuttal Report entered as an exhibit at the trial of these actions, and to have Dr. von Gernet testify in respect thereto; and
- b) Advice and directions as to whether the Court prefers to have the von Gernet Sur-Rebuttal Report entered as an exhibit and have Dr. von Gernet testify in respect thereto:
 1. as part of the Crown's case, when Dr. von Gernet testifies in respect of the von Gernet Primary Report; or
 2. in sur-rebuttal, following the calling of Dr. Miller and the entering of the Miller Rebuttal Report;

- c) A direction that no further service of the von Gernet Sur-Rebuttal Report is required as a pre-condition to its being entered as an exhibit at trial of these conjoined actions; and
- d) Such further and other relief as this Honourable Court deems just.

POSITION OF PARTIES

[3] The Crown says a sur-rebuttal report is required in this case because, in preparing his primary report, Dr. von Gernet could not have anticipated the attacks upon his erudition and scholarship that are contained in Dr. Miller's rebuttal report, and the proposed sur-rebuttal report meets the criteria for a proper sur-reply set out in *Eli Lilly Canada v. Apotex Inc.*, [2006] F.C.J. No. 1210 at para. 24, and does not contravene the prohibitions set out in *Halford v. Seed Hawk Inc.*, [2003] F.C.J. No. 237 at paras 15-16.

[4] The Plaintiffs do not address the Crown's assertion that Dr. Miller's rebuttal report attacks the credibility of Dr. von Gernet's academic calibre and criticizes his methodologies and research in ways not addressed in Dr. von Gernet's primary report, and in ways that could not have been anticipated in the primary report.

[5] The Plaintiffs say, however, that it will be sufficient "to permit the primary expert to comment on the rebuttal report during examination in chief" because this is the approach that was taken regarding the Plaintiffs' expert (Professor Moore) in the first trial of these actions.

[6] In addition, the Plaintiffs say that the Crown's motion is, in any event, "premature, because the Court should consider all the circumstances and evidence regarding Dr. von Gernet's testimony once he is called by the Crown, so that the Court can properly determine at that time whether Dr. von Gernet should be allowed to provide any sur-rebuttal evidence."

REASONS

[7] I have read the materials and the written submissions of the parties.

[8] The Court has already allowed the Crown to file a primary report and the Plaintiffs to file a rebuttal report on the understanding that the Court was making no findings regarding admissibility, or issues such as relevance, necessity, exclusionary rules or qualifications, all of which are left for future determination by the Court after hearing counsel. Allowing the Crown to enter the sur-rebuttal report would, as the Crown concedes, be subject to the same qualifications.

[9] As the Crown says, "it goes without saying that the admissibility of the Sur-Rebuttal Report hinges on the admissibility of both Dr. von Gernet's Primary Report and Dr. Bruce Miller's Rebuttal Report."

[10] So I see no prejudice or unfairness to the Plaintiffs if the Crown is permitted to enter the sur-rebuttal report subject to the same qualifications.

[11] The real issue is the timing of when Dr. von Gernet should speak to his sur-rebuttal report, assuming it is admissible.

[12] Because the primary report and the rebuttal report are both subject to admissibility arguments and findings, the logic would suggest that sur-rebuttal will not even become an issue until such time as the Court has addressed admissibility for both the primary report and the rebuttal report. And this in turn would suggest that the need for sur-rebuttal may not arise unless and until the Court hears from Dr. Miller anything that might give rise to sur-rebuttal in accordance with the usual criteria.

[13] In other words, the Court is of the view that the spirit and intent of what has already been established for the primary and rebuttal report dictates the logic and fairness of what should occur with the sur-rebuttal report. The limited nature of the sur-rebuttal means that it would only come into play if Dr. Miller's attacks on Dr. von Gernet's qualifications and scholarship are established and are found to be admissible, and the Court will not know this unless and until Dr. Miller testifies.

ORDER

FOR THE REASONS GIVEN, THIS COURT ORDERS that

1. Subject to paragraph 4 below the Crown is granted leave to serve and file the Sur-Rebuttal Report and to have Dr. von Gernet testify in respect thereto;
2. No further service of the Sur-Rebuttal Report of Dr. von Gernet is required;
3. Any testimony that Dr. von Gernet may provide with regards to the Sur-Rebuttal Report shall follow the calling of Dr. Miller and the entering of the Miller Rebuttal Report and shall be dependant upon Dr. Miller's testimony;
4. The Court makes no finding at this time regarding the admissibility of Dr. von Gernet's Sur-Rebuttal Report, and issues such as relevance, necessity, exclusionary rules and qualification are left for future decision by the Court after hearing counsel.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-66-86-A

STYLE OF CAUSE: SAWRIDGE BAND v. HER MAJESTY THE QUEEN ET AL

T-66-86-B

TSUU T'INA FIRST NATION (formerly the Sarcee Indian Band) v. HER MAJESTY THE QUEEN ET AL

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING:

REASONS FOR ORDER: RUSSELL J.

DATED:

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