

Federal Court



Cour fédérale

**Date: 20160803**

**Docket: T-2579-91**

**Citation: 2016 FC 890**

**Ottawa, Ontario, August 3, 2016**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**ROGER SOUTHWIND FOR HIMSELF, AND  
ON BEHALF OF THE MEMBERS OF THE  
LAC SEUL BAND OF INDIANS**

**Plaintiffs**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF  
CANADA**

**Defendant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF  
ONTARIO**

**Third Party**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF  
MANITOBA**

**Third Party**

**ORDER AND REASONS**

[1] The trial of this action is set to commence on September 12, 2016, for 100 days. The Plaintiffs seek damages for the flooding of their reserve lands in north-western Ontario and eastern Manitoba. They claim loss of their land and the use of that land, as well as loss of hunting, fishing and harvesting rights. The flooding was caused by the building of a dam on Lac Seul in the 1920s for purposes of generating hydroelectric power.

[2] The parties have worked co-operatively through trial management conferences to reach agreement on many aspects of the conduct of the trial. The parties agreed to prepare and submit a Joint Book of Documents [JBD] and also agreed to have discussions with a view to reaching agreement on the authenticity and truth of content of the nearly 7500 documents in the JBD. The parties have been unable to reach an agreement and Canada has brought a motion asking for an Order adopting its proposed agreement.

[3] Notwithstanding that the Court has seen none of these documents, it is appropriate to issue an Order as to authenticity and admissibility of some of the documents in this action given (i) the number of documents, (ii) the duration and complexity of the trial, and (iii) the fact that most of the documents are ancient documents being more than 30 years old.

[4] The Joint Trial Chart shows that some 20 expert witnesses are expected to be called during the trial. In their expert reports, they have cited documents in the JBD that are housed in a federal or provincial archival repository [the Cited Archival Documents].

[5] Canada has proposed, and the other parties agree, that all Cited Archival Documents ought to be accepted into evidence as authentic and for the *prima facie* truth of their contents. This is a rebuttable presumption, and any party may make submissions as to the weight to be given to any specific Cited Archival Document.

[6] Another group of documents in the JBD are documents the originals of which are housed in a federal or provincial archival repository, but have not been cited by an expert. Canada proposes that these documents also be accepted as authentic. However, Canada proposes that they may only be entered into evidence through a witness or on consent of all the parties.

[7] Canada proposes that the exhibits entered and marked at trial will be the Cited Archival Documents and all other documents entered into evidence through a witness or by consent of all the parties. Following the close of evidence, the documents in the JBD that have not been entered as an exhibit shall be removed from the JBD, have no evidentiary value, and shall not be relied upon by any party.

[8] Ontario agrees with Canada's proposal.

[9] The Plaintiffs submit that all archival documents produced by the parties, whether cited by an expert or not, ought to be taken as authentic and admissible for the *prima facie* truth of their contents, and made exhibits at the commencement of trial. They submit that "all Canadian archival documents should be admissible if they relate to the subject matter of the claim" and argue that "a report does not enhance nor impact age, nature, provenance nor reliability of the

archival documents.” In short, they take that position that there is no principled basis to distinguish the treatment of the Cited Archival Documents and the other documents.

[10] Manitoba notes that there are documents in the JBD that are not housed in a government archive and it has proposed a variation on Canada’s proposal. While it agrees with Canada’s proposal regarding Cited Archival Documents, it submits that many of the other documents would be admissible either as ancient documents or business records under the *Canada Evidence Act*, RSC 1985, c C-5. It further notes that there are a number of documents on which it intends to rely that are not housed in either a federal or provincial archival repository. Specifically, it notes that there are records held by Manitoba Hydro which may not be included in federal or provincial repositories. It submits that these business records dealing with payments made to Ontario power authorities should be accepted as evidence and marked as exhibits.

[11] It further notes that there are a significant number of documents that are documents relating to the Manitoba Natural Resources Transfer Agreement [MNRTA], including letters and memoranda with respect to it prepared by Canada, Manitoba, or Ontario. There are also a number of documents related to the Lac Seul Storage Agreement [LSSA] including payments made under the LSSA and the MNRTA, documents made by Canada, Manitoba, or Ontario respecting payments over the 50 year amortization period of paragraph 8 of the MNRTA, documents created by Canada, Manitoba, or Ontario after 1980 respecting further requests for payments under paragraph 8 of the MNRTA, governmental and power authority documents related to a proposed new LSSA in the 1980s and 1990s, and correspondence between Canada

and Manitoba respecting Canada's specific claims process and its request for a standstill agreement with Manitoba with respect to claims brought by First Nations.

[12] Manitoba proposes that all of this evidence should be subject to the same terms as Cited Archival Documents. It submits that these documents are as necessary and reliable as the Cited Archival Documents and it notes that there is no living person to testify to the "vast majority" of them.

[13] I have considered and weighted all the written submissions. I am guided by a number of considerations.

[14] First, the rationale underlying the admission of historical documents rests on two principles: necessity and reliability: See *Canada (Minister of Citizenship and Immigration) v Seifert*, 2006 FC 270 [*Seifert*] at para 7 and the decisions cited therein. As regards most if not all of the documents in the JBD, they are historical and there is no-one who has knowledge of them and can testify as to their authenticity and the truth of their content. Accordingly, necessity has been made out. The question becomes whether they are reliable.

[15] All parties accept the reliability of the Cited Archival Documents. This Court in *Canada (Minister of Citizenship and Immigration) v Fast*, 2003 FC 1139 [*Fast*] at para 36 stated that documents relied on by experts are *prima facie* reliable:

So, as a general rule, it is my view that proof of the reliability of the documents is supplied by the fact that professional historians have relied upon them in coming to the conclusions which they have put before the Court. This does not preclude a challenge to

particular documents, or classes of documents. Furthermore, the question of weight is always an issue. Consequently, I am prepared to receive archival documents in evidence in proof of their contents where the reliability of the documents for that purpose is asserted, implicitly or explicitly, by a professional historian or other witness whose familiarity with the documents permits them to make such an assertion.

[16] In *Seifert*, Justice O'Reilly held that historical documents "authored by persons who were responsible for the stewardship of the Canadian government at the very highest levels – at Cabinet and at the upper echelons of the bureaucracy" should also be accepted *prima facie* to be reliable. In doing so, Justice O'Reilly observed that he had "been given no reason to suspect that the authors were mistaken or motivated by a desire to mislead."

[17] My understanding is that all or most of the documents in the JBD that are other than Cited Archival Documents were generated by persons within one of the governments involved in this action or by the Plaintiffs or persons retained by or acting on their behalf. Some may not have been at the "highest level". However, unlike in *Seifert*, I have seen none of these documents and it is premature to make a blanket ruling of the sort sought by the Plaintiffs or Manitoba. Nonetheless, if there is no agreement on the admissibility of these documents, a mechanism must be made available to have them entered under the rationale in *Seifert*, if it is warranted.

[18] I am cognisant that this and other courts have adopted a flexible approach to the rules of evidence in aboriginal cases. I accept the submission of the Plaintiffs in paragraph 21 of their memorandum:

In the context of Aboriginal rights litigation, the “ancient documents rule” is now applied in conjunction with a necessity and reliability analysis. Documents that are more than 30 years old are – in the absence of suspicious circumstances – said to “prove themselves:” citing Sopikna et al, *The Law of Evidence in Canada*, Fourth Edition, at para 18.102, and see also *Sawbridge Band v Canada*, 2004 FC 1721.

[19] For these reasons, I will render an Order as to the authenticity and admissibility of the documents in the JBD that lies between that sought by Canada and that proposed by the Plaintiffs and Manitoba. I reiterate for the benefit of all parties the proviso stated by Justice O’Reilly, at paragraph 9 of *Seifert*:

I must emphasize that, where I have ruled a document admissible as evidence of the truth of its content, this does not necessarily mean that I take a particular fact as having been proved. At this stage, I am simply deciding whether a document constitutes admissible evidence. It is only at the end of the case, based on the whole of the evidence, that I will decide the facts.

[20] Although the Order as to authenticity and admissibility will provide that many of the documents in the JBD be entered at the commencement of trial as an exhibit, a mechanism will be provided to permit a party to subsequently seek an Order admitting a document as an exhibit without the need to call a witness to speak to it, and a mechanism will also be provided to permit the Court to remove any specific document if a party successfully challenges its authenticity or admissibility.

[21] I am cognisant of the concerns Canada expressed relating to the proposal to mark every document in the JBD as an exhibit at the commencement of trial. It says that such a process

“fails to provide the trial judge with a useful and meaningful record and is unfair to the parties especially where they may be taken by surprise during closing arguments.”

[22] If a party relies on a document with no context or little relevance to the issues, it is not likely to find much favour with or be given any weight by the Trial Judge. I agree with Canada that the parties ought to provide the Trial Judge with a useful and meaningful record. It is certainly open to any party in oral submissions to submit that such a document relied on without context, where some is required, ought to be given little or no weight. However, in the end, the weight to be given any document will depend on all of the circumstances, including the nature of the document at issue.

[23] I also note Canada’s concern regarding surprise at the conclusion of trial as to documents to be relied on in oral submissions. I question whether any surprise can realistically be said to be possible. This action has been proceeding for decades, and it is difficult to accept that the use any party may make of any of the documents - especially as they relate to events that occurred last century – can take anyone by surprise.

[24] The Trial Chart provides that all parties will prepare and exchange written submissions after the close of the evidence phase of the trial. As part of that process the Court asks each party to include a list of the exhibits on which it intends to rely. There will thus be no surprise during the oral submissions.



**ORDER**

**THIS COURT ORDERS** that the admissibility and authenticity of the documents in the Joint Book of Documents of the parties shall be dealt with in the following manner:

**Joint Book of Documents:**

1. As a matter of convenience, the parties shall compile a Joint Book of Documents [JBD] comprised of all documents produced prior to the start of trial by any party in this action.
2. The documents in the JBD will be sequentially numbered in chronological order.
3. Where multiple copies of a document have been produced, the parties will make reasonable efforts to ensure that the JBD contains only the best available copy of the document.
4. An electronic version of the Joint Book will be available at trial, pursuant to the e-trial plan attached to the Order of Mr. Justice Zinn dated June 15, 2016.
5. The inadvertent inclusion of a privileged document in the JBD is not a waiver of privilege over the document, but any claim of privilege must be made before the document is entered and marked as an exhibit.

**Cited Archival Documents:**

6. For the purposes of the trial, subject to the terms of this Order, any document cited and relied on by the parties' respective experts, the original of which is housed in a federal or provincial archival repository, is authentic and admissible into evidence [Cited Archival Documents]. The parties shall agree on a list of the Cited Archival Documents and they shall be entered as exhibits in chronological order at the commencement of trial.
7. In order to compile the documents that constitute the Cited Archival Documents, the Parties shall:
  - a. exchange their lists, in an agreed upon format, of Cited Archival Documents, including reference to the experts' reliance on the documents, within seven (7) days of the date of this Order; and,
  - b. within ten (10) days thereafter, Canada will compile a list of all of the Cited Archival Documents.

**Other documents in the JBD**

8. The remaining documents in the JBD are either:
  - a. a document that is more than 30 years old which is not cited and relied on by the parties' respective experts and was not prepared for the purposes of this litigation, but which is housed in a federal or provincial archival or record repository [Non-Cited Archival Documents]; or
  - b. a document that is neither a Cited Archival Documents nor a Non-Cited Archival Documents [Remaining JBD Documents].

9. For the purposes of the trial, unless prior to trial a party raises any question as to its authenticity, each Non-Cited Archival Document will be accepted as authentic and is potentially admissible into evidence. On or before September 3, 2016, each party shall prepare and exchange with the others a list of the Non-Cited Archival Documents that it agrees should be entered as an exhibit. The parties shall agree on a list of the Non-Cited Archival Documents agreed upon by all parties in this manner and they shall be entered as exhibits in chronological order at the commencement of trial.

10. On or before September 3, 2016, each party shall prepare and exchange with the others a list of the Remaining JBD Documents that it agrees are authentic and should be entered as an exhibit. The parties shall agree on a list of the Remaining JBD Documents agreed upon by all parties in this manner and they shall be entered as exhibits in chronological order at the commencement of trial.

11. For the purposes of trial, any document in the JBD that has not been marked as an exhibit at the commencement of trial in accordance with the process described above, may subsequently be accepted and entered as an exhibit if it is identified by a witness called to testify at the trial, or upon successful motion by a party to be made prior to the close of its case, unless otherwise agreed to by the Trial Judge, to have the document entered as an exhibit, without the need to have a witness speak to it.

### **Authentic Documents**

12. Subject to the exceptions outlined in this Order, "authentic" means, to the extent applicable to any particular document, that:
  - a. the document was authored by the person or entity by whom it appears to have been authored;
  - b. the document is a true copy of the original document and was printed or signed as it purports to have been;
  - c. the document was made on or about the date it appears to have been made or was sent on or about the date it appears to have been sent and was received within a reasonable period of time after its date; and

- d. the document was received by the person or entity to whom it appears it was sent.
13. Notwithstanding the foregoing, any party may lead evidence or challenge that a document is not authentic, should the party have formed that view. A party who intends to dispute the authenticity of a document shall provide as much advance notice of its intention, including particulars of the challenge, as is reasonably possible.
14. The following exceptions shall apply to documents that are handwritten:
- a. the authenticity of handwritten notes and records must be proven by a witness unless otherwise agreed;
  - b. experts may attest as to the most likely author of a handwritten document, and this evidence may be contradicted by other evidence, including expert testimony;
  - c. where a transcription is included in the JBD, it is not agreed that the transcription is necessarily accurate in every respect, and it is open to any party to challenge the accuracy of the transcription based on the original document or on other evidence or argument; and
  - d. handwritten documents that the Court concludes are illegible shall have no evidentiary value.
15. Subject to the other terms of this Order, unless the Trial Judge rules that a document is not authentic, it may be entered as an exhibit and used at trial for the *prima facie* truth of its contents, recognizing that such evidence is rebuttable and that the evidence offered by any such document will be considered in light of evidence provided by the witnesses and other documents.
16. Notwithstanding the foregoing, any party may:
- a. lead evidence to contradict, supplement, qualify or contextualize the substance of any document, or of any part of a document; and
  - b. make any argument as to the interpretation, relevance, reliability or weight of any document.
17. Nothing in this Order shall:
- a. restrict the right of any party to tender proof of any fact by filing additional documents or through other evidence permitted by the evidentiary rules or order of the Court; or,

- b. restrict the right of any party to tender documents in any manner that might be permitted if the Order had not been made.

### **Exhibits**

18. Subject to the other terms of this Order, a separate agreement of all Parties, or the Court ordering otherwise, the following documents shall be entered and marked as exhibits at trial:
  - (a) Cited Archival Documents pursuant to paragraph 6 hereof;
  - (b) Non-Cited Archival Documents pursuant to paragraph 9 hereof;
  - (c) Remaining JBD Documents pursuant to paragraph 10 hereof;
  - (d) other JBD documents subsequently accepted as exhibits pursuant to paragraph 11 hereof;
  - (e) documents entered into evidence through a witness; and
  - (f) documents entered into evidence by way of consent of all parties.
19. Only documents entered and marked as exhibits at trial are evidence.
20. Any document that has not been entered and marked as an exhibit during the trial will:
  - a) have no evidentiary value;
  - b) shall not be relied on by any party; and,
  - c) shall be removed from the JBD at the close of the evidentiary portion of the trial.
21. This Order applies to all documents included in the JBD as of the commencement of trial. Any documents added after the commencement of trial will be subject to this agreement only if the Court Orders or all parties agree.
22. This agreement does not prevent the parties from entering into any subsequent agreement on the authenticity and/or admissibility of any other document or groups of documents.
23. Each party will prepare and exchange written submissions after the close of the evidence phase of the trial and as part of that process each party shall include a list of the exhibits on which it intends to rely.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2579-91

**STYLE OF CAUSE:** ROGER SOUTHWIND ET AL v HER MAJESTY  
THE QUEEN IN RIGHT OF CANADA

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCES OF THE PARTIES**

**ORDER AND REASONS:** ZINN J.

**DATED:** AUGUST 3, 2016

**WRITTEN REPRESENTATIONS BY:**

William J. Major  
Yana R. Sobiski  
David G. Leitch

FOR THE PLAINTIFFS

Michael Roach  
Jennifer Francis  
Sarah Sherhols

FOR THE DEFENDANT  
CANADA

Leonard Marsello  
Donna Salmon  
Vanessa Glasser  
Nikita Rathwell

FOR THE THIRD PARTY  
ONTARIO

W. Glen McFetridge  
Kirsten Wright

FOR THIRD PARTY  
MANITOBA

**SOLICITORS OF RECORD:**

Major Sobiski Moffatt LLP  
Barristers and Solicitors  
Kenora, Ontario

FOR THE PLAINTIFFS

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Ontario

FOR THE DEFENDANT  
CANADA

Ministry of the Attorney General  
Toronto, Ontario

FOR THE THIRD PARTY  
ONTARIO

Manitoba Justice  
Winnipeg, Manitoba

FOR THE THIRD PARTY  
MANITOBA